CITATION

These digests will be cited thus:

[1970] H.C.D

Follow by the page number and,

In brackets, the case number.

1st January, 1971.

Editors Note

Dear Friends,

We have pleasure in acknowledging your support to the Tanzania High Court Digest, a monthly/be-monthly publication of the Faculty of Law, University of Dar es Salaam now entering its fifth year of publication. The Digest presents, in edited form, all cases of legal significance decided in the High Court of Tanzania. A special feature of the Digest is the cumulative index published annually.

Due to the large number o criminal cases digested, if has been found convenient to have two separate indexes: General Index and Criminal Index. The General 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 General Index is based on that developed for and used by the Law Reports in East Africa. The Criminal Index uses an original classification system, which hopefully represents an improvement on other current systems. In both Indexes, as in the Name Index, cases are referred to by year ad number, as in: 1970/123. It should be noted that the final number is case number, not the page number.

Volume 1V 1970 Digest is the product of the combined work of many people, including most staff members of the Faculty of Law. However, the contributions of the outgoing editors should be mentioned in particular; Brian Slattery, Issa Shivji and Abdul Borafia. We wish them well in their academic promotions and pursuits.

As we enter the fifth year of publication were take this opportunity to welcome to the Editorial Board Prof. Justice P.L.U. Cross as one of our Editors. The Editorial Board for the year beginning 1971 is composed of (the Editors): Lal Patel (Chairman), Prof. P.L.U. Cross, Fred Ssemppebwa, and Harold Nsekela.

Assuring you of our best attention at all times with your support and cooperation.

Editors

Tanzania High Court Digest.

1.

TANZANIA
HIGH COURT DIGEST

Faculty of Law,
University of Dar es Salaam,
P. O. Box 35093,
Dar es Salaam.

Index

The index has two divisions: a) Civil, which includes all non-criminal and non-penal topics; and b0 Criminal, which includes all criminal and penal topics. Cases are referred to by the special numbers assigned to them rather than by the page numbers.

Method of Digesting

We reproduce, whenever possible, edited versions of the case selected rather than mere summaries. This is done especially in reporting the holdings of cases, where quotation marks indicate that the actual words of the court are being used.

Citation of Digests

Digests should be cited as follows: [1969] H.C.D. n. 27. The final number indicates the case number not the page number.

Identification of Cases

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

"Ali s/o Hamisi v. R., (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 is 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 will be used:

Criminal Appeals	….. Crim. App.
Criminal Revisions	..... Crim. Rev.
Miscellaneous Criminal Causes	….. Misc. Crim. Cause.
Criminal Sessions	….. Crim. Sass.
Criminal Cases	….. Crim. Case.
Civil Appeals	….. Civ. App.
Miscellaneous Civil Causes	….. Misc. Civ. Cause.
Civil Cases	….. Civ. Case
Matrimonial Confirmations	….. Matr. Conf.

Other abbreviations may be added as the need arises. New abbreviations, and changes in the old ones, will be explained in the prefatory comments in this issue.

(4) Case Number – this is the number assigned to the case by the High Court in the series indicated by parts (2) and (3) 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. 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 es Salaam registry, decided on 19 January, 1967 by Mr. Justice Saidi.

Inspection Notes. Inspection Notes contain information and counsel useful to magistrates and advocates alike, and are therefore included in this Digest. The cases involved assigned no High Court number. The citation here therefore includes the number assigned by the court whose decision was considered by the High Court, the name of the court, and the city in which that decision was rendered. The date given is that of the issuance of the Note by the High Court.

NAME INDEX

A

ABBASBHAI GULAMHUSEIN AND OTHERS V.R. 1970/47

ABDULLAH V. R.	1970/301
ABDALIA EL-KUNEITY V. ABRIYA	1970/263
ALBDALIA HAJI V. TANZANIA ELECTRIC SUPPLY CO. LTD.	1970/129
ABDULLAH HASSANI V. R.	1970/279
ABED MOHAMED V. NASSOR SULEMAN	1970/4
ALBEL RWEBOGOR V. RAPHAEL MUKAJA	1970/100
ADIJA JUMA V. R.	1970/37
AHMEDV.R.	1970/342
AHSMED OMAR IN THE MATTEROF	1970/191
ALEXANDER MABELE V. R.	1970/33
QALFRED S/O JACOB V. REPUBLIC	1970/207
ALI MOHAMED HIZAM V. R.	1970/200
ALIAS KISENGE V. R.	1970/163
ALIBHAI V. FIDAHUSSEIN AND CO. LTD. AND OTHERS,	1970/329
AMINA D/O SEFUR V. R.	1970/64
AMIR NATHOO V. R.	1970/51
AMIRALID MEGHJI – THE DEBTOR BANKRUPTCY CAUSE	1970/230
AMIRI HEMED V. R.	1970/168
AMON V.R.	1970/251
AMSI MARANGI AND ANOTHER V. R.	1970/56
ADNREA OTIENO V. R.	1970/139
ANGELO MUNYAGI V. R	1970/60
ANTHONY AND ANOTHER V. R.	1970/339
ANYAMBILILE V. R.	1970/285
ARELL & HOCKEN A. V. R.	1970/159
ASAGWILE MWAMAKULA V. R.	1970/ 155
ATHUMANI ALLY NYABAYI V. R.	1970/214
ATTILLO V. MBOWE	1970/3
AUGUSTINO S/O MTEGA V. R.	1970/208

B

BAKARI V. KALUMUNA 1970/229
BAKARI ABDU V. R. 1970/44
BARKA SAIDI SALUMU V. MOHAMEDI SAUDI 1970/95
BARTHOLOMEO ALBERT V. MUTAGOBWA 1970/102
BASAMAZA V. R. 1970/336
BENJAMIN KISOLEKA V. BI ELIZABETH JOSPHAT 1970/103
BERNARD V. ASHA 1970/124
BERNARD BOYIKAFUNDI V.
TAMAYAMALI MGANIDAS 1970/ 11
BERNARD S/O BERNARD KESSY V. R. 1970/89
BERRIL & CO. LTD. V. LAKHANI AND OTHERS. 1970/264
BREIDA V. NOWASO V. R. 1970/226
BUKENDE FUFULA V. NSWANZI FUFULA 1970/107
BURA &OTHERS V. BASIMWA 1970/94
BWABWA V. ITABU 1970/189

C

CASMIRI JOHN AND ANOTHER V. R. 1970/66
CHACHA V. R.
1970/282
CHAMTIGITI V. R. 1970/ 343
CHARLES ISABOKE V. R. 1970/197
CHARLES OOMOSO V. FRANCIS MACNDE 1970/101
CHIBOLYANI V. MILOWARA 1970/327
CHIMALA STORES V. ZAMBIA TANZANIA
ROAD SERVICES LTD. 1970/ 232
THE COMMERCIAL BANK OF AFRICA V. THE
COMMISSIONER OF INCOME TAX 1970/193
COMMISSIONER GENERAL OF INCOME TAX V.
DIAMOND COROPORATION TANZANIA LTD. 1970/254
THE COMMISSIONER GENERAL OF INCOME TAX V.

DR. NOOR ALLI VELIANI 1970/ 239

D

DAMLANI GREVAS V. R. 1970/217
DUMLANO V. R. 1970/39
DAR ES SALAAM MOTOR TRANSPORT CO. LTD. V.
MEHTA & OTHERS 1970/190
DAUDI S/O OTHIAMBO V. R. 1970/221

DEUSHANKER V. R. 1970/293
DHANJI V. MACHANI 1970/15
DHIRANI V. R. 1970/ 287
DOURADO V. DAURADO 1970/316
DUNCAN V. ZANFRA 1970/262

E

EDWIN MARO V. R. 1970/ 73
ELIA MWAITENDA V. KAJETI MWAISELA 1970/6
ELIAH S/O MWAFURA V.R. 1970/69
EMANUEL RWEJUNA V. R. 1970/ 167
EMPIRE ELECTRONICS LIMITED V. LANE
PRINTING WORKS LTD. 1970/ 131
EMPIRE THEATRES LTD. V. TANZANIA
EXHIBITORS LTD. 1970/325
ERNEST LUKALI V. R. 1970/ 196

F

FAROOK V. JERAJ 1970/23
FELALON (FATHER) V. KALINGA 1970/259
FITA S/O MIHAYO V. R. 1970/ 58

FRANCIS S/O MTUNGUJA V.R. 1970/181
FREDI S/O NYAMU V. JOSEPHINA D/O GABRIEL 1970/126

G.

GABRIEL V. R. 1970/299
GAMAHA V. LWAVU 1970/257
GEORGES JAYO V. MOHAMED HAMISI 1970/266
GEORGE VINCENT AND ANOTHER V. YUSUFALI
CHAKERA AND OTHERS. 1970/256
GILIBA JARMO V. R. 1970/138
GODFREY NAFTALI V.R 1970/.63
GRIFFITHS V. KADIR & SALIMU 1970/ 14
GULAMALI BHALOO V.R. 1970/172
GUPTA & COMPANY V. ECTA (KENYA) LTD. 1970/265

H

HADIJA D/O OMARI V. R. 1970/158
HAINING WILLIAM V. R. HIGH COURT 1970/171
HAINING WILLIAM V. R. COURT OF APPEAL 1970/302
HALFANI S/O HAMISI V. R. 1970/140
HAMAD WENDO V. MWANGOYE AND COMPANY LTD. 1970/ 128
HAMADI JUMA V. R. 1970/30
HAMISI ALLY V. R. 1970/40
HAMIS HASSAN AND NOTHER V. R. 1970/ 71
HAMISI RAJABU V. MASUDI SIMBA 1970/8
HAMISI SHAHA V. R. 1970/157
HANNING WILLIAM V. R. HIGH COURT 1970/ 171
HANNING WILLIAM V. R. COURT OF APPEAL 1970/ 302
HARJI GOVIND & OTHERS V. R. 1970/292

HASARA SINDATO V. R. 1970/156
HASSAN V. R. 1970/146
HASSANI AMRANI V. R. 1970/55
HERSON S/O MAGORI V. R. 1970/148
HIRJI A.P. & CO. V. PANJWANI A. N. 1970/269
HIRJI M.M. V. R. 1970/202
HOLO V. NDOMA 1970/123
HUSSEIN KABONA AND ANOTHER V. R. 1970/48

I

IBRAHIM KARUME V. R. 1970/165
IBRAHIM KAZI V. EMMANUEL LAURIAN AND
RAYMOND LAURIAN 1970/130
INATION ASMANI AND ANOTHER V.R. 1970/ 180
ISOTE V. ISOTA 1970/328

J

JABIRI V. BAKARI 1970/330
JACKSON GAMALIEL V.R. 1970/83
JACOB V.R. 1970/249
JACOB S/O KAYOMBO V. R. 1970/220

V.

JAFFARI MSAFIRI V. JOHN MASHENGE 1970/111
JAFFERALI AND ANOTHER V. BORRISAW AND ANOTHER 1970/324
JAKI AND OTHERS V. R. 1970/291
JALEMELA V. SHIT1970/319
JAMAL MANJI AND CO V. R. 1970/338
JAYANTLAL HEMRAJ V. R. 1970/150
JAYANTILAL HEMRAJ V. R. 1970/272
JEHANGIR EMPORIUM V. TEEMA GARMENTS 1970/184

JOEL HOJA V. R. 1970/78
JOSEPH CHAPALA V.R. 1970/49
JOSEPH ROGENAH V.R. 1970/76
JOHN V.R. 1970/248
JOHN MATHIAS V. R. 1970/152
JOHN MSWAMI AND OTHERS V. R. 1970/ 59
JOHN NYELU V. MAGANGA NALIMI 1970/29
JOHN SWAGILA V. RUBIGISA NYANDA 1970/113
JOHN YAMO & ANOTHER V. OBIYO ACHIENG & ANOTHER 1970/10
JONATHAN MWANIKI V. R. 1970/177
JOSEPH HAWKSWORTH & ANOTHER V. R. 1970/271
JOSEPH KASHAMAKULA V. R. 1970/ 201
JOSEPH KUSEKWA 1970/198
JOSEPH S/O MICHAEL V. R. 1970/ 166
JOSEPH S/O MUTAYOBA V MAREALLE 1970/137
JUMA ALLY & TWO OTHERS V. R. 1970/205
JUMA MOHAMED V. R. 1970/154
JUMANNE HASSANI KALUWONA V. R. 1970/ 36
JUMANNE MOHAMED V. R. 1970/ 79
JUMANNE S/O RAMADHANI AND ANOTHER V. R. 1970/75
JUMBE V. R. 1970/300
JUTUBA S/O LUYEMANO V. R. 1970/199

K

KADERALI V. ICELAND MILD BAR 1970/234

V1.

KADUSHI BULOLO V. R. 1970/52
KANJI AND OTHERS V. CHRISTIE 1970/18
KANTI PRINTING WORKS V. NJOMBE DISTRICT COUNCIL 1970/120
KANTI PRINTING WORKS V. TANGA DISTRICT COUNCIL 1970/ 135

KANTI PRINTING WORKS V. TANGA DISTRICT COUNCIL 1970/253
KARIMBHAI JARIWALLA V. BABUBHAI VADHAMA &
THE EMPIRE THEATRE LTD. 1970/13
KARIMJEE PROPERTIES LTD. V. KAKI AND CAMERAPPRIX 1970/235
KARMALI AND ANOTHER V. CONSTANTAIDES 1970/ 331
KASIAN YANDA V. R. 1970/219
KASSAM V. GHALIB 1970/ 186
KASSAM V. R. 1970/ 334
KAYAND V. R. 1970/147
KEMORI MAKIMA V. SABAYI RIOBA 1970/118
KHETRAM V. THE NEW INDIA ASSURANCE CO. LTD. 1970/136
KIBODYA V. R. 1970/288
KIILU NGOLA AND ANOTHER V. R. 1970/ 86
KIMBUNGA V. R. 1970/243
KIMWERI V. YUSUFU ATHUMANI 1970/119
KINYOZI V. BANDAWE 1970/311
KISIWANI SISAL ESTATE V. R. 1970/ 162
KITINA GWAU V. MUKHUU GWAU 1970/114
KITUNDU SISAL ESTATE AND OTHERS V.
SHINGO MSHUTI AND OTHERS 1970/242
KUNDASARI V. R. 1970/273
KYAPA V. AMBOKILE 1970/98

L

LADISLAS V. R. 1970/350
LAND DEVELOPMENT CO. OF TANZANIA LTD. V. JINAH 1970/7
LAND REGISTRATION ORDINANCE – IN THE MATTER OF 1970/26
LAWRENCE AMULI V. R. 1970/72
LAWRENT V.R. 1970/347
LEKASIO V. LEKASIO 1970/238
LEHMAN’S (E.A.) LTD V. LEHMAN’S AND CO.LTD. 1970/315

LEMANDA S/O OBEI V. R. 1970/85
LEONARD DAVID CHAMBA V. R. 1970/67
LEXICON ODUNTU V. R. 1970/ 32
LIKARAMBITO V. NAMANACHO 1970/322
LUCAS V. R. 1970/298
LUKANFUBILA S/O KAHEMA 1970/175
LYIMO V. ABDULLAH 1970/185

M

MACHUMILANE V. BUSHAMBALI1970/187
MAGIGE AND ANOTHER V. R. 1970/303
MAKAMBILA V. R. 1970/ 283
MANASSE V. R. 1970/286
MANDILA S/O MWANJA V. R. 1970/ 179
MANISIUS ODEMBA V. RUSABEL AILA 1970/125
MANUBHAI PATEL V. R. 1970/142
MANYARA ESTATE LTD. AND OTHERS V. THE NATIONAL DEVELOPMENT CREDIT AGENCY 1970/267
MANYARA ESTATE LTD. AND OTHERS V. THE NATIONAL DEVELOPMENT CREDIT AGENCY 1970/268
MANYARA ESTATE LTD. AND OTHERS V. THE NATIONAL DEVELOPMENT CREDIT AGENCY 1970/314
MAPANDA V. THE MANAGER, EAST AFRICAN AIRWAYS 1970/24
MARY GARATAKLE V. SERINI MROSO 1970/104
MASAME V. REPUBLIC 1970/247
MASUDI HASSANI V. R. 1970/161
MATHEW V. EMIL 1970/255
MATHURSDAS KARA V. R 1970/. 295
MAULIDI V. R. 1970/346

MAYANGA V. R.	1970/284
MAYUNDA V. R.	1970/245
MAZIKU WILLIAM V. R.	1970/ 174
MBARWOHI V. MBARWOHI	1970/ 183
MBEGU S/O SAIDI V. R	1970/.216
MBERESERO V. R.	1970/250

V111.

MBESWA S/O CHILOYA V. R.	1970/210
MBOWE V ATTILIO	1970/318
MDEWA V.R.	1970/310
MERAJ MIHAGACHERI V. R.	1970/ 77
MHINA ATHUMANI V. R.	1970/151
MICHAEL KOMBERE V. KONE PAROSOI	1970/115
MICHAEL MHUTO V. R.	1970/212
MICHAEL NOAH V. R.	1970/ 81
MIKIDADI ABDULLAH V. R.	1970/225
MILINGA V. R.	1970/305
MJIGE V. E. A. RAILWAYS & HABBOURS & OTHERS	1970/182
MKANGA V. KITOBERO	1970/92
MKIRAMWENI V. R.	1970/345
MKUMBA V. MUSSA	1970/ 312
MLANGE V. KIPIPA	1970/195
MOHAMED V. R.	1970/ 307
MOHAMED DEWJI V. THE COMMISSIONER OF INCOME TAX	1970/1
MOHAMED HAMISI V. CAR AND GENERAL (T) LTD.	1970/ 261
MOHAMED S/O NDOWE AND OTHERS V. R.	1970/ 211
MOHAMED S/O RAMADHANI V. R.	1970/50
MOKONGORO BIBI V. ISSA	1970/192
MOPUYAN S/O OLENDOTOO AND OTHERS V. R.	1970/74
MOSES S/O MASIMBA V. R.	1970/61

MOTIKA V. R. 1970/340
MOTOKOV V. AUTO GARAGE LTD. AND OTHERS 1970/133
MPAGAMA S/O CHALO V. R. 1970/70
MPATE JAMADINI V. R. 1970/87
MSANGA J.A.K. V. R. 1970/ 173
MSIGITI V. TUNGULI 1970/317
MTAKI V. MIRAMBO 1970/188
MTATIRO CHACHA V. LUCAS OCHOLA 1970/5
MTENGIE MARK AND OTHERS V. R. 1970/45
MTONDOO V. JANMOHAMED 1970/326
MTUNDUCHILE AND OTHERS V. R. 1970/304
MTUSE ITUMO V. MUNG'AA MKULA 1970/17

M

MULLER V. R. 1970/276
MUSA AND NGOZI V. R. 1970/ 278
MUSA YUSUFU V. R. 1970/308
MUSAJI V. BHAGWANJI A 1970/122
MUSTAFA ABDALLAH V. R. 1970/54
MUSTAFA MSUMI V. R. 1970/178
MWAITEBELE K. A. S. V. R. 1970/294
MWAMUSIKU V. KANYIBI 1970/240
MWINYILE V. CHILOMATE 1970/313
MWIZALUBI MATISHO V. R. 1970/296
MZIZIMA TRANSPORTERS V. ALIMOHAMED OSMAN 1970/260

N

NAWONEIWA DEMANGWA & OTHERS V. MAWETA 1970/27
NAZIR AND ZULFIKER V. R. 1970/277
NDELAONJAMA V. R. 1970/ 349

NDEREKEBA AND MBOGO V. R. 1970/280
NDUKE V. MATHAYO 1970/ 96
NEMBURUSI D/O PHILIP V. IDDI S/O RAJABU 1970/117
NILILA NSABI V. DOSA SHIJA 1970/108
NIZAR YUSUF GIGA V. R. 1970/ 82
NJAU V. R. 1970/333
NYAKHO V. R. 1970/344
NYANI V. R. 1970/246

O

OLIPA D/O SELEMANI V. R. 1970/164
OLOTHO V. R 1970/ 204
OMARI ISUMALI V. R. 1970/341
OMARI S/O MASUNGURU AND OTHERS V. R. 1970/213
OMARI YAKUBU V. R. 1970/ 46
ONORATO DELLA SANTA & OTHERS V. PEERA 1970/21
ONORATO DELLA SANTA & OTHERS V. PEERA 1970/22
ONYANGO OKELO V. R. 1970/170
OOMOSO CHARLES V. FRANCIS MACNDE 1970/101
OSMAN V. R. 1970/297

X

OSWALD BRUNO KANGA V. R. 1970/153

P

PARDHAN V. TALTOR 1970/42
PASKARI KAPANDA V. R. 1970/41
PAULO IFUNYA V. EDWARD ZAKAYO 1970/19
PAULO S/O MATHIAS V. R. 1970/209
PAULO V. RAMADHANI 1970/91
PETER B. DUGARA V. R. 1970/223

PETER PROTAGE AND ANOTHER 1970/169
BAITANI V. SAMWEL RWEKAMWA 1970/2
PETRO KIMOANI V. R. 1970/203
PETRO SAMSON V. R. 1970/35
PHILLIP & OTTHERS V. MKAMA 1970/93
PHILLIPO V. R. 1970/244
PROSPER V. MARY 1970/97

R

RAJABU ABDALLAH V. AZIZA MBUSHA 1970/127
RAJABU ATHUMANI V. ISSA MDOHI 1970/270
RAJABU MWALIMU V. HADIJA MAWULIDI 1970/237
RAMADHANI ALLY V. R. 1970/215
RAMADHANI S/O BAKARI V. R. 1970/90
RAMADHANI WAZIRI V. R. 1970/206
RASHIDI V. R. 1970/290
RASHIDI V. R. 1970/306
RASHIDI V. R. 1970/337
RICHARD RWEIKIZA V. RFRANSIE STEPHANO 1970/20
RUTH BI PEMBA V. DAUDI MFALINGUNDI 1970/105

S

SAADA JAMALI V. HASSANI SWALEH 1970/9
SAIDI MFAUME V. RAJABU FUKO 1970/106

SAIDI S/O ABDALLAH V. R. 1970/62
SAIDI V. MSAMILA 1970/228
SAIDI V. R. 1970/145
SAIDI V. R. 1970/149

SALIM S/O ABDALLAH V. R	1970/38
SALUM ISSA V. R.	1970/222
SAMSON ELIAS V. R.	1970/65
SAMSON MSIBA V. R.	1970/224
SANDA V. R.	1970/309
SASITA V. KIGUKU1970/99	
SAVERI S/O PASCHAL V. R.	1970/88
SEBASTIAN GILBERT V. R.	1970/281
SENGE V. R.	1970/ 274
SERIKALI S/O LESAKARA V. KIRIWASI S/O KUKUTIA	1970/28
SEVERINE TARASION V. R.	1970/141
SHABANI ALI AND ANOTHER V. R.	1970/348
SHABANI MASUDI V. R.	1970/53
SHAABANI SAIDI V. R.	1970/43
SHEIK AHMED EL HAJ V ABDULLA SAHEH	1970/134
SHILINDE MATHEW V. R.	1970/ 143
SHUMA V. KITAA	1970/241
SIMON V. R.	1970/335
SIMON V. MPANGALA	1970/194
STATE TRADING CORPORATION V. TANGANYIKA FIRE APPLLANCE CO.	1970/320
STATE TRADING CORPORATION V. TANGANYIKA FIRE APPLIANCE CO.	1970/332
SWALEHE UREMBO V. SOPIAA YUSUFU	1970/112
SYAKISYA S/O MWAMBENGO V. R.	1970/218

T

TAJDIN ALIARAKHIA V. H.H. THE AGA KHAN	1970/121
TAKOLIZE V. TAKOLIZE	1970/110
TANZANIA TALLORS V. KESHAVAJI LALJI	1970/236

TASASHA V. R.	1970/252
TASMA FINANCE CORPORATION V. LUCY ESTATES CO	1970/321
TATU TAIJIRI V. R.	1970/289
THADEUS CHACHA V. ROBI MKIBA	1970/109
THEREZA NGEMELA V. CANDIDA NGEMELA	1970/16
THOMAS SALEWI V. ISSA KIRARI	1970/116

U

THE UNITED AFRICA COMPANY OF TANZANIA V. MANJI'S LTD.	1970/231

V

VENANCE NKAMA V. R.	1970/34
VINCENT MAPUNDA V. R.	1970/227
VOGORA BROS LTD. V. R.	1970/80

W

WALJI AN OTHERS V. UNITED AFRICA CORPORATION	1970/233
WAWERU NGA'NG'A V. R.	1970/84
WILLIAM V. R.	1970/176
WILLIAM HAINING V. R. HIGH COURT	1970/171
WILLIAM HANNING V. R. COURT OF APPEAL	1970/302
WILLIAM MAZIKU V. R	1970/174.
WUTHRUCH V. R.	1970/144

Y

YESAYA GWESEKO V. R.	1970/160
YOEL HARMANI V. SAID HARMANI	1970/258

YOHANA S/O JOSEPH V. R. 1970/57
YUSUFU S/O BERTRAM V. R. 1970/31
YUSUF S/O ISSA V. R. 1970/275
YUSUFU SALEHE V. R. 1970/68

X111.

Z.

ZACHARY V. BIHARAMULO DISTRICT COUNCIL 1970/323
ZALKHA BINT MOHAMED V. JUMA MAZIGE 1970/132
ZEPHRIAN MGAMBONA W. JONES KALUMUNA 1970/12

X1V.

GENERAL INDEX*

ADMINISTATIVE LAW

Certiorari or Mandamus – Only way to challenge correctness of procedure under Security of Employment Act, 574. 1970/n.24.

ADMISSIBILITY/ADMISSION

See EVIDENCE (CIVIL AND CRIMINAL); PROCEDURE (CIVIL AND CRIMINAL).

ADULTERY

See FAMILY LAW – Adultery.

ADVERSE POSSESSION

See LAND LAW – Adverse Possession.

ADVOCATE

See EVIDENCE (CIVIL CRIMINAL); LEGAL PROFESSION; PROCEDURE (CIVIL AND CRIMINAL).

AGENCY (See also CONTRACT)

Agency by estoppels – No created unless principal by words or conduct represents another as having authority. Fact that agent and principal were great

friends and that agent habitually acted as principal's lawyer not sufficient of itself. 1970/n.26.

Principal's liability for agent's fraud – Scope of employment – Advocate holding title deed of client – Does not justify inference that he had authority to raise money on the security of the property. 1970/26

Trust and Trustee – Agency relationship under Right of Occupancy. 1970/267.

AGREEEMENT

See CONTRACT; HIRE PURCHASE; SALE OF GOODS.

ALLIENS AND NATIONALITY

Immigration – Unlawful entry – Mens rea not essential – Immigration Act. Cap. 534. 1970/271.

Immigration - Unlawful entry – Sentence – Fine of Shs. 3,000/- excessive in circumstances where accused had no mens re- Immigration Act. Cap. 534. 1970/n. 271.

ANIMALS

See CRIMINAL INDEX – FAUNA CONSERVATION ORDINANCE, See also TORT.

*NOTE: SEE ALSO SEPARATE CRIMINAL LAW INDEX

XV

APPEAL (CIVIL) (See also CRIMINAL LAW INDEX – APPEAL

Appeal out of time

- Explanation for delay must be supported by an affidavit. 1970/102.

- Prospects of success a major factor in granting leave to appeal out of time. 1970/240
- Time for lodging appeal – Circumstances under which extension will be refused. 1970/262.
- Whether permissible where delay due to advocate's lack of vigilance and diligence. 1970/236.
- Application of Law – Application for extension of time to appeal to Court of Appeal – What law applicable. 1970/236.
- Certified copy of order appealed from not attached to memorandum of appeal – Appeal incompetent. 1970/23.
- East Africa Court of Appeal – Case originating in the primary court – Point of law of general public importance must be at stake.

Evidence

- Additional evidence – Admitted only for good reasons. 1970/107.
- Additional evidence – Reasons for allowing must be recorded. 1970/115.
- Ex parte judgment – Appeal court cannot deal with merits unless there has been application to set aside judgment. 1970/326.
- Income tax – Appeal from Commissioner to single judge of High Court is an appeal and therefore a further appeal to the Court of Appeal is a second appeal. 1970/1
- Parties to appeal – Appellant must have been a party or at least have intervened before the completion of the suit in the lower court. 1970/102.
- Precedent – High Court refused to follow Court of Appeal case decided per incurium. 1970/1
- Rent Restriction Act – Powers of High Court as regards evaluation of facts on appeal. 1970/234

Revision

- No revision by district court of primary court after 12 months. Even where lack of jurisdiction. 1970/12.

- Whether High Court may set aside an order made without jurisdiction even though an appeal from the order was not properly presented and cannot be entertained. 1970/23

APPEARANCE

See PROCEDURE – Appearance.

XV1.

ARBITRATION (See also CONTRACT)

- Arbitration Ordinance Cap. 15 – Application for further particulars – Whether a "step in the proceedings" under section 6. 1970/133.
- Jurisdiction – Resort to foreign arbitration – whether court's jurisdiction ousted. 1970/133.
- Stay of counterclaim – Whether a stay can be refused when applied for by plaintiff suing on bills of exchange but entitled to plead arbitration clause when defence and counterclaim inextricably mixed. 1970/133.

ASSESSORS

See PROCEDURE (CIVIL AND CRIMINAL) – ASSESSORS.

ASAMBA LAW

See CUSTOMARY LAW – Asamba Law.

ASSOCIATIONS

Companies

- Debentures – Powers of debenture holder. 1970/131.
- Receivership – Appointment, duties and powers of receiver. 1970/131.
- Winding up – Application by aggrieved party against act or decision of liquidator – Creditors not a party to the application. 1970/321.
- Winding up – Application for Provisional Liquidator's Bill of Costs to be paid by Liquidator after company's assets have been sold – Companies Ord. s. 191(5) 1970/321.
- Partnership – Partner's suit for wages dismissed – Subsequent suit for dissolution of partnership and accounts whether res judicata. 1970/329.

- Religious Society – Mission – Parties to suit – Right party to be sued in case of Mission is Mission itself and not one of the fathers. 1970/259.

ATTACHMENT

See PROCEDURE

AWARD

See ARBITRATION; CONTRACT

BANKRUPTCY

Scheme of composition – Consented by three quarter majority of creditors – whether acceptance by creditors good reason – Sufficient reason – for the court's approval – Whether receiving order should be discharged. 1970/230.

BREACH OR CONTRACT

See CONTRACT – Breach.

XV11.

BRIDEWEALTH

See CUTOMARY LAW; FAMILY LAW.

BURDEN OF PROOF

See EVIDENCE (CIVIL AND CRIMINAL).

CARRIAGE (See also CONTRACT)

Common carried – what constitutes exemption clause – Clear notice must be given that clause and conditions constitute special contract. 1970/190.

CERTIORARI

See ADMINISTRATIVE LAW.

CHAGGA LAW

See CUSTOMARY LAW – Chagga Law.

CHARITY

See TRUST AND TRUSTEE.

CHILDREN

See FAMILY LAW – Custody of children.

CIVIL PRACTICE AND PROCEDURE

See PROCEDURE

CLAN LAND

See CUSTOMARY LAW; LAND LAW.

COMPANY LAW

See ASSOCIATIONS – Companies.

COMPENSATION

See LAND LAW – Compensation.

CONTRACT

Agency – See AGENCY.

- Agreement under Islamic Law by which husband to grant divorce by "talak" on payment of money by wife enforceable in courts. 1970/9.
- Arbitration – see ARBITRATION.
- Breach – agreement to build a house as a conditional compromise upon divorce – Breach of condition – whether agreement enforceable. 1970/312.
- Chose of Action – Assignment of manufacturer's guarantee – Whether assignment valid without consent or knowledge thereof by assignee. 1970/265.

CONTRACT (continued)

- Common carrier – What constitute exemption clause – Clear notice must be given that clause and conditions constitute special contract. 1970/312.
- Divorce – Agreement to build a house as a compromise upon divorce – Whether enforceable. 1970/312.

Evidence

- Admissibility – Secondary evidence – Sale of goods – whether and how admissible to prove contents of note or memorandum which has been destroyed. 1970/253.
- Variation of written agreement by verbal understandings – Evidence required of such variation. 1970/323.

Hire-purchase – Right of the owner to repossess vehicle on default in payment of installments by hirer. 1970/261.

Insurance contract. 1970/136.

Islamic law – Agreement by which husband to grant divorce by "talak" on payment of money by wife enforceable in courts. 1970/9.
Parol contract – See CONTRACT – Evidence.
Parties – Privity of contract – Assignment of manufacturer's guarantee – Whether assignment valid without consent or knowledge thereof by assignee. 1970/265.
Public authority – Contract with Local Authority – Local Government Ordinance Cap. 333. 1970/135 and 1970/253.
Sale of goods – See SALE OF GOODS.
Specific performance – Contract of sale annexed – Whether time barred where payment of purchase price extended. 1970/3.
Time – Not of essence – Contract annexed to order of specific performance. 1970/3
Waiver

- Contract with public authority – Procedural notice – Non-compliance with Local Government Ordinance Cap. 333 – Whether and when non-compliance can be waived 1970/135 and 1970/253.
- Party precluded from setting up a condition precedent in agreement if he waives his right to insist on arbitration as condition precedent. 1970/136 sees also 1970/133.

COSTS

See PROCEDURE – Costs.

COUNSEL

See LEGAL PROFESSION.

COURT

See APPEAL (CIVIL AND CRIMINAL); PROCEDURE CIVIL AND CRIMINAL Jurisdiction.

XIX.

COURT OF APPEAL

See APPEAL (CIVIL AND CRIMINAL).

CRIMINAL PRACTICE AND PROCEDURE

See CRIMINAL LAW INDEX – PROCEDURE.

CUSTODY OF CHILDREN

See FAMILY LAW – Custody of children.

CUSTOMARY LAW

Asamba Law

- Land – Inheritance from mother. 1970/317.
- Land – Long occupation. 1970/317.

Blood – money

- Action maintainable if person admits liability even though acquitted in criminal proceedings. 1970/17.
- Action maintainable under customary law. 1970/17.
- Length of prison sentence to be taken into account in assessing damages in civil action. 1970/17
- May be claimed whether intentional or accidental. 1970/17.
- May not be claimed if killer executed. 1970/17.

Caretaker – Stranger given share of plot on intestacy – Stranger cannot inherit clan land. 1970/16.

Chagga Law – land law – Sons cannot claim full right over kihamba before their father dies – Rights of first, third and last sons considered – Customary Law Rules G.N. 436/63 considered. 1970/238.

Customary Law Declaration

- Family law (See also CUSTOMARY LAW – Family Law; FAMILY LAW.)
- Bridewealth 1970/101, 118, 123 and 188.
- Bride – wealth – Court has discretion as to how much be to be retuned where divorce granted because husband ill treats wife. 1970/5.
- Bridewealth – No refund where marriage produced children. 1970/319.
- Custody. 1970/103 and 228.
- Divorce – Constructive desertion – Where husband ceases sexual intercourse and wife returns to parents. 1970/319.
- Elopement – Girl over 21 – No damages. 1970/11.
- Legitimacy – Illegitimate children – Legitimization after child is weaned. 1970/228

CUSTOMARY LAW (continued)

- Legitimacy – Law of Persons s. 86. 1970/311.
- Limitation of Action. 1970/188.
- Maintenance – Of illegitimate child by putative father – Cost of maintenance considered. 1970/228.
- Marriage. 1970/311.
- Parentage 1970/110, 117 and 327.
- Succession – Intestacy – Wills. 170/183 and see also customary law succession.
- Elopement – No damages when girl is over 21 1970/11.
- Family Law (See also CUSTOMARY LAW – Customary Law Declaration; FAMILY LAW).
- Adultery – Claim for compensation for adultery "ugoni" cannot succeed if wife has been already divorced. 1970/240.
- Bridewealth. 1970/101.
- Bridewealth – Return of part of brideprice does not constitute divorce – although it constitutes intention to divorce. 1970/29.
- Custody. 1970/28.
- Legitimacy. 1970/20 and 1970/225.
- Maintenance. 1970/19.
- Parentage. 1970/327.

Gogo Law

- Award for looking after grazing another's cattle – Number depends on agreement between parties. 1970/313.
- Award of one cow for looking after and grazing cattle over and above enjoyment of milk and manure – Whether reasonable. 1970/313
- Family Law – Parentage – Children born of brother's widow inherited – Customary Law Declaration. 1970/327.

Haya Law

- Claim for maintaining wife made against husband by father of wife – Sustained. 1970/19.
- Clan land may not be alienated to stranger without acquiescence of clan member. 1970/16.
- Intestacy – Child born of illicit association – Whether legitimized – Whether entitled to inherit – Customary Law Declaration. 1970/255.
- Land – Nyarubanja tenancy rules. 1970/94

XX1.

CUSTOMARY LAW (continued)

- Land – Redemption of clan land. 1970/100.
- Nyarubanja tenancy (Enfranchisement) Act 1965 – Application of Act – Did not apply where tenant had abandoned possession 1970/2
- Woman died intestate – Her land divided equally between two surviving sister by head of clan in consultation with other clan members. 1970/16.

Land law

- Common land – Possibility that Village Development Committee may not allocate it - Whether general land law to be applied. 1970/6.
- Title to land – Registration not required of Africans transferring unregistered land as free hold under customary law. 1970/330.
- Various general propositions vide Customary Land law 1970/2, 16, 94,100, 106, 238 and 317.
- Whether burial of ancestors' good evidence of ownership. 1970/266.

Limitation of Actions

- Customary Law (Limitation of Proceedings) Rules, 1963 interpreted. 1970/189
- General Law of limitation of actions. 1970/94, 98, 100, 110, 188 and 328.
- Luguru law – Land – Transfer must be evidenced by certificate of title. 1970/106
- Luo Law – Family law – Refund of bridewealth on divorce. 1970/101

- Masai Law – Custody of children – first marriage a failure – Wife given away in marriage to another husband by family – whether first husband may claim children borne by wife. 1970/28.
- Nyakyusa customary law – land allocation by V.D.C. 1970/6.
- Nyarubanja – 1965 Act – Application. 1970/2
- Procedure – Holding 'baraza' or meeting at the site where unsworn evidence taken is irregular. 1970/20.

Succession

- Intestacy 1970/16, 94, 110, 183, 238,255 and 317.
- Wills – Requisite formalities under customary law. 1970/255.
- Wills – Oral v. written wills. 1970/183

DAMAGES

See TORT – Damages.

XX11.

DEFAMATION

See TORT – Defamation.

DIVORCE

See FAMILY LAW.

EAST AFRICAN COURT OF APPEAL

See APPEAL.

EMPLOYMENT

See LABOURT LAW.

EVIDENCE (CIVIL) See also CRIMINAL LAW INDEX – EVIDENCE

Admissibility

- Additional evidence for clarification of issues raised on record may be heard by District Court. 1970/195.
- Secondary evidence – Contract – Sale of Goods – Whether and how admissible to prove contents of note or memorandum which had been destroyed. 1970/253.

Affidavit

- Defective – Court may act upon facts properly deposed. 1970/262.

- In formations – Acted upon only if sources are specified. 1970/262.
- Assessment of Evidence – land Law – Redemption of land – Factors determining whether pledge of shamba – Primary Court's findings preferred. 1970/258.

Burden of Proof

- Burden of proof in criminal and civil cases being different acquittal in the former does not affected claim on the same fact in the latter. 1970/93.
- Burden is on the party which is setting up an agreement especially when it is oral. 1970/96.
- Civil case to be decided on balance of probabilities – Misdirection by trial magistrate requiring proof beyond reasonable doubt – Misdirection not fatal if judgment fully supported by evidence. 1970/241.
- Complainant in primary court must prove all facts necessary to establish case. 1970/110.
- Rent Restriction Act – Claim for possession due to unlawful sub-letting – Burden not on landlord to prove that he did not consent. 1970/256.
- Oral evidence admitted to vary a written document under s. 101 Evidence Act 1967. 1970/7.
- Procedure for admitting additional /new evidence in higher court 1970/195

XX111.

EVIDENCE (continued)

- Rent Restriction Act – Facts within the knowledge of the tribunal – Manner of using them. 1970/234,
- Testimony – Record should indicate whether given on oath or affirmation. 1970/114.
- Visit to site – Procedure as regards taking of evidence from by standers. [Vide Primary Court Civil Procedure Code – Rule 46 (2)] 1970/257.

EXECUTION

See PROCEDURE

FAMILY LAW

Adultery – Claim for compensation for adultery (ugoni) cannot succeed if wife has been already divorced. 1970/240.

Bridewealth

Bridewealth and Divorce – see FAMILY LAW – Divorce.

Death of husband – no repayment of bridewealth – Customary Law Declaration. 1970/101.

Not necessary for validity of marriage vide Customary Law Declaration. 1970/188

Only part returnable if divorce granted due to husband's ill treatment of wife. 1970/5

Redemption of daughter by paying bridewealth – Sukuma law. 1970/108

Refund of – Luo custom and Customary Law Declaration. 1970/101.

Services performed by prospective husband – Whether dowry or gift. 1970/91.

Custody of Children

- Child born in wedlock belongs to father – Customary Law Declaration. 1970/103.
- Illegitimate children – Prima facie/mother has right to custody. 1970/97.
- Masia Law – Wife given away by family after breakdown of first marriage – whether first husband has right to children subsequently born. 1970/28.
- Mother to have custody because of the child's tender age. 1970/103.
- Muslim who purports to marry woman already married to another by Christian rites not entitled to custody of children born after woman returns to lawful husband. 1970/127.
- Successive claims for custody of child maintainable – Res judicata inapplicable. 1970/126.

FAMILY LAW (continued)

- Welfare of the child paramount consideration in granting custody. 1970/105 and 1970/228.
- Where child of tender years – Mother to have custody. 1970/103.

Divorce

- Agreement between husband and wife under Islamic Law by which husband to grant “talak” divorce to wife on payment of money enforceable in courts. 1970/9.
- Bridewealth – No refund where husband grossly mistreated wife – Customary Law Declaration. 1970/123.
- Bridewealth – No refund where marriage produced children. 1970/319.
- Bridewealth – Part only returnable if divorce granted due to husband’s ill treatment of wife. 1970/5.
- Bridewealth – Partial refund where wife not guilty party 1970/118.
- Bridewealth - Refund of – no obligation to return same cattle as originally given. 1970/125.
- Constructive desertion – Where husband ceases sexual intercourse and wife return to parents. 1970/319.
- Customary law – Return of part of bride-price does not constitute divorce – Only intention to divorce may be inferred. 1970/29.
- Desertion – Grounds for divorce. 1970/322.
- “Kula” divorce – Consideration therefore is based upon a bargain between the parties and has no relation with the amount of dowry. 1970/95.
- “Kula divorce by consent is proper under Islamic Law. 1970/119.
- Maintenance – See FAMILY LAW – Maintenance.
- Restitution of conjugal rights – Wife failing to return to matrimonial home – Islamic right of recall (rejea? – Islamic law. 1970/237.
- Elopement and enticement – No damages under Customary Law Declaration where girl is over 21. 1970/11.
- Illegitimate children – Legitimisation may be allowed even after child is weaned – S. 181, Law of Person interpreted. 1970/228.

Legitimacy

- Illegitimate children – Legitimisation after child is weaned 1970/228.
- Legitimization of children by payment of money – Limitation of action – Customary Law Declaration. 1970/188.

- Parties engaged but not married – Cohabitation – Ligitimisation of issue – Law of Persons s. 86. 1970/331.

XXV.

FAMILY LAW (continued)

Maintenance

- Agreement to build a house as a compromise upon divorce – Whether enforceable. 1970/312.
- Maintenance – Assessment – Income of putative father to be considered. 1970/228.
- Ex-parte injunction – Husband ordered to leave matrimonial home and not to disturb wife's occupation of it – Whether and when such injunction should be granted – Whether Court has power to vary, discharge, or rescind injunction once granted. 1970/316.

- Haya Law – Claim by wife's father for reimbursement from husband established. 1970/19.
- Illegitimate child by putative father – Maintenance arbitrarily assessed when income of putative father not considered. 1970/228.
- Must be fixed in relation to husband's means – Islamic Law. 1970/119.
- Not entitled to where terms of "Kula" divorce not accepted. 1970/95.
- Whether husband can repossess house allegedly occupied by wife as provision for maintenance. 1970/263.

Marriage

- Change of religion by either spouse does not necessarily nullify marriage. 1970/127.
- Jurisdiction – Primary Court has no jurisdiction to entertain suit involving marriage under Marriage Ordinance. 1970/187.
- Masai Law – Marriage ends by 'breakdown' – wife given away by family to another husband. 1970/28.

- Parties engaged but not married – Cohabitation – Not even customary marriage – 1970/311.
- Procedure – Restitution of Conjugal rights. – Whether father-in-law can be sued. 1970/187.
- Restitution of conjugal rights – Islamic law. 1970/237.

Parentage

- Children born of brother's widow inherited – Gogo customary law – Customary Law Declaration. 1970/327.
- Claim of inheritance – Customary law Declaration. 1970/110.
- Man whom the woman names as the father of her child may not deny paternity unless he can prove that he had no sexual intercourse with her – Customary law Declaration. 1970/117.
- Seduction – Pregnancy – Damages which may be awarded. 1970/112.

XXV1.

FEES

See PROCEDURE (CIVIL) – Costs.

FRAUD

- Certificate of title – No obligation on purchaser to inspect certificate when acting through an advocate. 1970/26.
- Liability of principal for agent's fraud – Advocate holding title deed does not justify the inference that he had authority to raise money on the security of the property.
- Mortgagee under obligation to identify principal when dealing with agent. 1970/26

GIFT

Land – Not complete until accepted. 1970/116.

GOGO LAW

See CUSTOMARY LAW – Gogo Law.

HAYA LAW

See CUSTOMARY LAW – Hay law.

HIRE PURCHASE (See also CONTRACT].

Right of owner to repossess vehicle on default in payment of instalments by hirer. 1970/261.

HUSBAND AND WIFE

See FAMILY LAW.

ILLEGITIMATE CHILDREN

See FAMILY LAW – Illegitimate children, Legitimacy.

IMMIGRATION

See ALIENS AND NATIONAQLITY.

IMPROVEMENTS

See LAND LAW – Compensation

INCOME TAX

- Capital of Income – Sums deposited with parent company on seven day call at low interest – Where deposits investment of capital nature. 1970/254.
- Income – Profits – Grants received by subsidiary suffering trading losses from non-resident parent company – Whether grants made to preserve subsidiary's capital or supplement trading receipts and therefore taxable. 1970/193
- Profits of trade – Diamond concern incorporated in Tanzania with all its dealing in sterling – Income accrued during accounting period kept in London – Whether justified – Whether loss on devaluation trade loss. 1970/254.

XXV11.

INCOME TAX (continued)

Remission – Employed wife living with husband – Husband entitled to remission of tax on wife's earning – income Tax Act ss. 74 and 121 B interpreted. 1970/239.

INHERITANCE

See SUCCESSION.

INSURANCE

See CONTRACT – Insurance.

INTERPRETATION OF STATUTES

See STATUTES (CIVIL AND CRIMINAL)

INTESTACY

See SUCCESSION.

ISLAMIC LAW

Bridewealth. 1970/91.

Divorce

- Grounds for – Desertion. 1970/322.
- Husband to given three days for proof that he is unable to maintain wife or children before declaring marriage “faskin”. 1970/322.
- “Kula” divorce by consent is proper under Islamic Law. 1970119
- “Kula” Divorce – Consideration is based upon a bargain between the parties and has no relation with the amount of dowry. 1970/95
- Marriage declared “faskh” because of neglect to prove for maintenance of wife and children/ 1970/322.
- Marriage – Restitution of conjugal rights – Right of recall (rejea). 1970/237

- Mutual agreement – agreement – “Mubara ‘at” divorce – Divorce to be effected by husband at end of period agreed on receipt of money. 1970/9
- Talak divorce in “mubara’ at” form – Agreement enforceable in courts. 1970/9

JUDICIAL PRECENT

PRECEDENT – High Court refuses to follow Court of Appeal case decided per incuriam. 1970/1

JURISPRUDENCE

See JUDICIAL PRECEDENT.

LABOUR LAW See also CRIMINAL LAW INDEX – LABOUR LAW

- Contract of service – Summary dismissal – Security of Employment Act 1964, s. 28 – Removing jurisdiction from courts – whether termination of service of without notice summary dismissal. 1970/242.
- Failure to report employee's death – Delay in reporting to Labour Officer – What constitutes delay – Whether delay in reporting constitutes offence – Accidents and Occupation Diseases (Notification) Ordinance, Cap. 330. ss. 3(5) and 8(1) 1970/377.
- Minimum wages – Failure to pay minimum wages – Absolute offence – No mens rea required – Ignorance of law no defence. 1970/346.
- National Provident Fund Act – Failing to pay the fund – Failing to have employees registered – Whether employer having three employee and an unpaid apprentice in employ covered by Act – whether employer criminally liable. 1970/292.
- Oral Contract – Failure to maintain records – Statutory offence absolute – No mens rea required. 1970/346.
- Payment in lieu of notice – Person not dismissed not entitled to. 1970/128

Security of Employment Act. CAP 574.

- Jurisdiction of courts ousted – May only challenge by certiorari or mandamus. 1970/24.
- Termination of oral contract of employment under Employment Ordinance Cap. 366, as amended by Act 82 of 1962, on payment of emoluments – Right not abrogated by Security of Employment Act, Cap. 574. 1970/24

- Summary dismissal – Distinct from termination with notice of oral contract of employment 1970/24.
- Wages – Partner's suit for wages against partnership dismissed – Subsequent suit for dissolution of partnership and accounts. Whether res judicata. 1970/329.
- Workmen's Compensation Ordinance

- Amendments – Substantial and Procedural provisions – whether retrospective operation. 1970/182
- Whether compensation under the Ordinance bar to further claim of damages. 1970/182.

LAND LAW

Abandonment – Tenant of Nyarubanja out of possession for 23 years Nyarubanja tenancy (enfranchisement) Act did not operate to enfranchise former tenant. 1970/2

Adverse possession

Occupation of land for three years should not be disturbed. 1970/317.

Occupant of land for twenty years should not be disturbed without very convincing evidence. 1970/106

XXIX.

LAND LAW (continued)

Allocation

- Land already occupied – In absence of re-allocation by Local Authority general equitable principles to be applied 1970/333.
- Land already occupied – Village Development Committee should not reallocate. 1970/109.
- Village Development Committee – Court will only interfere with decision if tainted with fraud, duress or misconduct, 1970/6.
- Common land – alleged limitation on powers of Village Development Committee under customary law to allocate common land. 1970/6

Compensation

Right of occupancy (1970) H.C.D. 267 and 268 statutorily overruled. 1970/314.

Right of Occupancy – Whether compensation payable for revocation of right of occupancy or for unexhausted improvements – S. 57 Land Registration Ordinance. 1970/267 & 268.

Consent

- S. 19, Freehold Titles (Conversion) and Government Leases Act. Cap. 523 – Consent by Commissioner to agreement for sale constitutes consent to the whole disposition – Separate consent to agreement and to sale not necessary. 1970/18
- S. 19, Freehold Titles (Conversion) and Government Lease Act Cap. 523 "Consent in principle" by Commissioner subject to formalities being complied with, is unqualified consent to disposition. 1970/18

- Disposition to non-native-Meaning of "Native" under s. 11 of Land (Law of Property and Conveyancing) Ordinance Cap. 144. 1970/132.

Gift of land

- Existence of gift a question of fact – Trial magistrate ought to give reasons when he differs from the assessors. 1970/238.
- Not complete until accepted. 1970/116.
- Land Registration Ordinance – Jurisdiction of Primary Court – Under what circumstances Primary Court has jurisdiction on matters affecting registration under the Ordinance. 1970/192.

Mortgage

- Of a Kihamba does not displace legal ownership even if the mortgagee has been given possession. 1970/195.
- Oral evidence to vary in the terms of a mortgage deed admitted. 1970/7
- Postponement of instalments – Oral evidence admitted. 1970/7.

XXX

LAND LAW (continued)

Mortgage (continued)

- Right of occupancy – (1970) H.C.D. 267 and 268 statutorily overruled. 1970/314.
- Right of occupancy – Whether mortgagor can trace his money into compensation obtained by mortgagee for improvements o land when mortgagee's rights of occupancy revoked. 1970/267 and 268.

- Nyarubanja tenancy (Enfranchisement) Act 1965 – Did not apply where tenants had abandoned possession of plot before Act came into force. 1970/2.
- Nyarubanja Tenancy Rules – Right of the landlord to repossess land where a tenant abandons it. 1970/94.
- Ownership – Whether burial of ancestors good evidence of ownership. 1970/266.
- Redemption of land – Whether pledge of shamba – Factors influencing assessment of evidence – Primary Court's findings preferred. 1970/258.

Registered Land

- Compensation from Assurance Fund after rectification – Negligence of Registrar irrelevant – 1970/26.
- Estate agent's lien registered as caveat – Caveat removed if lien lost by delivery of possession of certificate of title even in by trick. 1970/15.
- Land Registration Ord. – Jurisdiction of Primary Court. 1970/192.
- Rectification – Compensation out of Assurance Fund – "Loss by reason of rectification". 1970/26
- Rectification of register by removal of memorial of mortgage – Owner of property may rectify when third party having possession of title deed fraudulently gives It as security for raising money. 1970/26.
- Right of occupancy – Document authorizing disposition of right of occupancy inoperative unless consent of Land Office obtained. 1970/134.
- Sale of clan land – Relatives may invalidate sale if not informed. Haya Law. 1970/100.

Title of Land

- Chagga law – Sons cannot claim full right over kihamba before their father dies – Rights of first, third and last sons considered Customary Law Rules G. N. 436/63 considered. 1970/238.
- Proof – Registration not required of Africans transferring unregistered land. 1970/330.
- Whether cultivation good evidence thereof. 970/270

LAND REGISTRATION

See LAND LAW – Registered Land.

LANDLORD AND TENANT – RENT RESTRICTION ACT

- Appeal Powers of High Court as regards evaluation of facts on appeal. 1970/234.
- Application of Amending Act No. 57 of 1966 not retrospective.
- Application of Rent Act – Whether retrospective. 1970/325
- Arrears – Cause of action whether arising from Rent Restriction Act – Whether District Court's jurisdiction ousted. 1970/185.
- Assignment by tenant without consent – Assignee not protected by S. 19 (6) of Rent Restriction Act where no serious attempt was made to obtain landlord's consent or time allowed within which he could consent or refuse. 1970/22.
- Assignment without consent – if landlord given opportunity to give consent and refuses, and refusal unreasonable, court may grant consent, in which case assignment is lawful and new tenant would be protected under s. 19(6). 1970/22.
- Evidence – Both parties must be heard. 1970/234.
- Interpretation of Rent Restriction Act – Both sides must be given opportunity to be heard and of dealing with facts. 1970/234.

Jurisdiction

- District court has no jurisdiction even when presided over by Resident Magistrate. 1970/121.
- District court has no jurisdiction to decide matters arising out of the Act. 1970/21, 1970/23, and 1970/124, 1970/263.
- Jurisdiction
- District court has no jurisdiction even when presided over by Resident Magistrate. 1970/121.
- District court has no jurisdiction to decide matters arising out of the Act. 1970/21, 1970/23, and 1970/124, 1970/263.
- Jurisdiction of Rent Tribunal. 1970/104.
- Pleadings – Failure to aver notice to quit, reasonableness of order for vacant possession, and legality of rent – Not grounds for rejecting plaint. 1970/235.

Procedure

- Tribunal may use its knowledge in absence of the parties leading any evidence 1970/233.
- Right to be heard. 1970/234.
- When shall the tribunal use its knowledge to fix the standard rent. 1970/234.

Standard Rent

- Housing shortage – Board not unreasonable in taking it into account. 1970/25.
- Increasing of rent by reason of changes in character, in size, in use. 1970/129.

XXXII

LANDLORD AND TENANT –RENT RESTRICTION ACT (continued)

Standard Rent (continued

- Reduction in rent on the ground that rent is discriminatory. 1970/122,
- Rent assessment – Power to fix standard rent – Tribunal not to base decision on information gained through its regular word. 1970/331.

Vacation of Premises

- Application to execute for vacant possession – Order made before suit premises became subject to rental controls – Whether jurisdiction to discharge or rescind – Rent Restriction Act (Cap. 479), ss. 19(5) and 29 (1) (2). 1970/325.
- Claim for possession for non-payment of rent. 1970/124.
- Claim for possession for unlawful subletting – Burden not on landlord to prove that he did not consent – Rent Restriction Act. 1970/256.
- District Court has no jurisdiction: see Jurisdiction (above)
- Monthly tenancy – Notice to terminate tenancy posted on door – whether effective – Hogg v. Brooks (1885) 15. Q.B.D. 256 inapplicable. 1970/256.
- Order for possession against sub-tenant trespasser – Finding as to “reasonableness” not necessary. 1970/256.
- Retrospective effect of s. 19(5) of Rent Restriction Act (Cap. 479 – Not invalidating orders already made – whether it gives jurisdiction to discharge or rescind such orders. 1970/325.

LEGAL PROFESSION

Witnesses – Irregular for advocate appearing both as counsel and as witness – Whether and when application to preclude counsel premature. 1970/324.

LEGISLATION

See STATUTES (CIVIL AND CRIMINAL)

LEGITIMACY

See FAMILY LAW – Legitimacy.

LIBEL

See TORT – Defamation.

LICENSING

See CRIMINAL LAW INDEX – LIQUOR.

LIEN

Law of Contract Ordinance, s. 173 – Agent's lien over property of agent. Possession necessary. 1970/15.

LIEN (Continued)

Estate Agent's lien on certificate of title – Registered as caveat under Land Registration Ordinance Cap. 334. – Possession necessary for lien – If possession regained by trick, lien extinguished, but may revive if possession taken again. 1970/15.

LIMITATION ACTIONS (see also CRIMINAL LAW INDEX – LIMITATION OF ACTION

Action for damages – Limitation period with respect to actions against Community – Municipality law ousted by community legislation 1970/182.

Application for execution of a decree – Whether Indian Limitation Act ss. 182, 183 OR Civil Procedure Code 1966 s. 39 applied. 1970/186.

Customary Law Actions.

- Claim of bride –price debt – When time barred. 1970/328.
- Claims time barred generally – Various proposition considered. 1970/94, 1970/98, 1970/100, 1970/110, 1970/188 1970/189 and 1970/328.
- Legitimization by payment of money – When time barred. 1970/188.

- Limitation period commences on the day when the right of action first accrued or on the day when the limitation rules came into operation whichever is the later. 1970/94.
- Limitation rules – Only technical rules of procedure – Where conflict of evidence as to original time of transaction case must be decided on merits. 1970/98.
- Power of court to reject a case – Rule 5 of the Magistrate Courts. (Limitation of Proceeding under Customary Law) Rules, 1964. 1970/110.
- Whether limitation rules can resurrect a right expired as a result of customary law. 1970/100.
- Indian Limitation Act, 1908 – Failure under it is no bar to a suit based on different right involving different principles of law. 1970/96.
- Indian Limitation Act, 1908, - S. 11 & S. 11A – Whether applicable to non-party to a suit. 1970/132.
- Local Authority – Actions against Local Authority – For limitation to apply to an act, the act must be one done in the direct execution of statute or in discharge of a public duty or the exercise of a public authority. 1970/120.

LOCAL GOVERNMENT LAW

See PUBLIC AUTHORITY.

MAINTENANCE

See FAMILY LAW – Maintenance.

XXXIV.

MANDAMUS

See ADMINISTRATIVE LAW.

MARRIAGE

See FAMILY LAW – Marriage.

MASTER AND SERVANT

See LABOUR LAW.

MATRIMONIAL CAUSES

See FAMILY LAW.

MOHAMEDAN LAW

See ISLAMIC LAW.

MORTGAGE

See LAND LAW – Mortgage.

MUSLIM LAW

See ISLAMIC LAW.

NATIONALITY

See ALIENS AND NATIONALITY.

NEGLIGENCE

See TORT – Negligence

NYAKYUSA LAW

See CUSTOMARY LAW - Nyakyusa law.

NYARUBANJA LAW

See CUSTOMARY LAW; LAND LAW.

PARENTAGE

See FAMILY LAW

PARTIES TO SUIT

See APPEAL; PROCEDURE.

PARNTERSHIP

See ASSOCIATIONS – Partnership.

PERSONAL TAX

See CRIMINAL LAW INDEX – TAXATION.

PLEA

See PROCEDURE (CIVIL AND CRIMINAL).

PLEADINGS

See PROCEDURE.

POSSESSION

See LAND LAW – Adverse possession.

PRECEDENT

See JUDICIAL PRECEDENT.

PREROGATICE ORDERS.

See ADMINISTRATIVE LAW.

PRESCRIPTION

See LAND LAW; LIMITATION OF ACTIONS.

PRINCIPAL AND AGENT

See AGENCY; CONTRACT.

PROBATE AND ADMINISTRATION

See SUCEESSION.

PROCEDURE (CIVIL) (See also CRIMINAL LAW INDEX – PROCEDURE)

- Adjournment – when may a Primary Court dismiss suit for plaintiff non-appearance after adjournment. 1970/257.
- Advocate – Not under a duty to see that plaint properly entitled has been filed in correct registry. 1970/21.
- Appeal – Application for extension of time to appeal to court of Appeal – What law applicable. 1970/236.
- Appeal to High Court – Advocate's error not a sufficient cause for extending time. 1970/4.
- Appearance – Dismissal of whole suit in default of appearance interlocutory proceedings - Where applicant/advocate had two simultaneous cases to attend – High Court has preference over lower court. 1970/184.

Application

- For leave to defend – Whether admissibility or otherwise of oral evidence to contradict written evidence may be decided on such application. 1970/269.
- For leave to defend under O. 35 R. 1 – Supporting affidavit sworn by defendant himself – Effect thereof. 1970/269.
- For letter of administration – Probate and Administration Oral Deceased's relatives must be unable or unwilling to act – whether application should be allowed. 1970/260.
- Out of time to set aside sale failed for insufficiency of reasons. 1970/8.

- Stay of counterclaim – Arbitration – Defence and counterclaim inextricably mixed. 1970/133.

XXXVI

PROCEDURE (CIVIL) (See also CRIMINAL LAW INDEX – PROCEDURE) (cont'd)

Application (cont'd)

- Stay of counterclaim – Whether a stay can be refused when applied for by plaintiff suing on Bills of Exchange but entitled to plead arbitration clause. 1970/133.

Assessors

- Difference of opinion between Primary Court Magistrate and assessors – Decision to be made by majority of magistrate and assessors present. 1970/313.
- Opinion as regards boundaries without visiting the site – Weight to be attached thereto. 1970/270
- Trial magistrate ought to give reasons when he differs from the assessors. 1970/241.
- Attachment – Sale in execution of judgment debt. 1970/12.

Costs

- Taxation scales – Considerations. – Complexity of matter and research needs. 1970/315.
- Taxing master's failure to state reasons for decision not a fatal error – Desirability of taxing master setting out reasons. 1970/318.
- Cross – examination – Where opportunity denied to cross-examine-Procedural breach in material and retrial justified. 1970/266.
- Customary law – "Baraza" assembly, where evidence given is unsworn, is irregular. 1970/20.

Dismissal of Suit

- In default of appearance – Failure of parties to appear in interlocutory proceedings – whether the Magistrate can dismiss the whole suit. 1970/184.
- In default of appearance – Whether proper when once plaintiff has made out his case. 1970/257.

Execution of Decree

- Application to discharge or rescind or suspend order for possession under s. 19(5) of the Rent Restriction Act (Cap. 479) considered. 1970/325.
- Conversion of judgment into foreign currency – Date of conversion is date on which liability to pay arises. 1970/264.
- Judgment to be in Tanzania currency only. 1970/264.
- Procedure for attachment of property owned jointly. 1970/130.

Ex-parte judgment

- Appeal from – Duty of Court to advise appellant on proper procedure to challenge judgment. 1970/326.

PROCEDURE (CIVIL) (continued)

- Ex-parte judgment (continued)
- Application to set aside judgment can be made by post. 1970/326
- Proper method to challenge is application to set aside judgment. 1970/326.
- Ignorance of law no excuse. 1970/1.
- Judicial precedents see JUDICIAL PRECEDENT.

Jurisdiction

- Action relating to immovable property in District Court. 1970/137.
- Arbitration – Resort to foreign arbitration – Whether court's jurisdiction ousted. 1970/133.
- District Court has no jurisdiction to hear Rent Restriction cases – But order made without jurisdiction not set aside in case where appeal incompetent. 1970/21, 23, 121, 124, and 263.
- Inherent jurisdiction under s. 94 of Civil Procedure Code – Order to extend time limit contained in contract annexed to order of specific performance. 1970/3
- Land Registration Ordinance under what circumstances Primary Court has jurisdiction on matters affecting registration under the Ordinance. 1970/192.
- Primary Court – has no jurisdiction to entertain suits involving Christian marriages under Marriage Ordinance. 1970/187.

- Primary Court has no jurisdiction to try contractual claims over Shs. 1000/-. 1970/259
- Primary Court – Written Laws (Miscellaneous Amendment) Act No. 50 of 1968 – Primary Court has no jurisdiction to entertain claims like a loan between private individuals unless it arises out of contract and does not exceed 1, 000/-. 1970/12.
- Rent Restriction Act – District Court – Action relating to immovable property 1970/137.
- Rent Restriction Act – District Court has no jurisdiction to decide matters arising out of the Act. 1970/21, 23, 121, 124 and 263.
- Rent Restriction Act – District Magistrate's Court has jurisdiction to decide questions as regards arrears of rent this does not necessarily arise from the Rent Restriction Act. 1970/185.
- Rent Restriction Act – Rent Tribunal's jurisdiction. 1970/104.
- Resident Magistrate's Court has jurisdiction exclusive of District Court in Rent Restriction matters – Case wrongly filed in District Court Registry –Proceedings not void – Were held in Resident Magistrate's Court – Documents ordered to be amended.

XXXVIII

PROCEDURE (CIVIL) (continued)

Jurisdiction (continued)

- Revision – Civil action in district court for termination of service without notice – Security of Employment Act 1964, s. 28 – Ruling of district court that its jurisdiction not ousted by s. 28 – Power of High Court to revise interlocutory order of district court – Whether application for revision constitutes a "case which has been decided' – Civil Procedure Code s. 79 (T) 1970/242.
- Security of Employment Ordinance Cap. 366 – High Court's jurisdiction ousted – May only proceed by certiorari or mandamus. 1970/24.
- Leave to appeal to Court of Appeal. – s. 17 of Appellate Jurisdiction Ordinance – Principles on which time extended. 1970/1

- Partis to the suit – Right party to be sued in case of Mission is Mission itself and not one of the Fathers. 1970/259.
- Parties to the suit – Marriage – Restitution of conjugal rights – Whether father – in-law can be sued. 1970/187.

Pleadings.

- Application to amend plaint – Whether allowed where original plaint discloses no cause of action – Whether allowed where defect in plaint would be remedied. 1970/231.
- Contract – Failure to state place where a cause of action in contract arose – Not ground for rejection of a plaint 1970/231.
- Plaint not disclosing cause of action – Whether mandatory upon court to reject plaint. 1970/231.
- Rent Restriction Act – No averment that defendant' tenant served with a notice to quit – whether plaint disclosed cause of action. 1970/235.
- Rent Restriction Act – No averment that it is reasonable to make an order for vacant possession – Whether plaint discloses cause of action 1970/235.
- Rent Restriction Act – Whether necessary to plead legality of rent. 1970/235.
- Unconditional leave to defend claiming a set off – When granted – relevant considerations. 1970/320 and 1970/332.
- Whether failure to plead facts showing jurisdiction must result in rejection of plaint. 1970/231.
- Whether court may decide issues not raised in the pleadings. 1970/132.
- Preliminary decree – Provisions relating to payment of instalments under contract annexed to order of specific performance – Decree preliminary where consequences of non- payment are not provided for 1970/3
- Record of proceedings – Should indicate if testimony given on oath or affirmation. 1970/114.

- Registry – Advocate not under a duty to ensure that a properly – entitled plaint is filed in the correct registry. 1970/21.

Res Judicata

- District Court proceedings declared nullity – fresh suit filled – Whether doctrine of re-judicata applicable. 1970/263.
- Does not operate where the suit is based on a different right based on different principles of law. 1970/96.
- Former action dismissed because plaintiff as partner could not sue for wages until partnership dissolved – Plea not maintainable in subsequent suit for dissolution of partnership. 1970/329.
- Successive claims for custody of child maintainable. 1970/126
- Trespass fresh action or each trespass – Rule 12 Civil Procedure in Primary Court Rules (G.N. 310/64) considered. 1970/229.

- Retrial – Conducted before same magistrate and assessors – whether fatal. 1970/266.
- Review – Extension of time to pay installment of purchase price order of specific performance not by way of review. 1970/3.
- Sale in execution of judgment debt – Purchaser had improved the property – Application to set aside sale refused. 1970/8.
- Sale in execution of judgment debt will not be set aside out of time unless strong reasons. 1970/8.
- Stay of counterclaim – Arbitration. 1970/133.
- Suit against Local Authority – Commencement of action before expiry of one month after written notice. – Non – compliance with Local Government Ordinance (Cap. 333) Ss. 151 & 152. Whether action maintainable – Whether and when non-compliance can be waived. 1970/253, see also 1970/135.
- Suit against Local Authority – One month's notice necessary - local Government Ordinance. 1970/135 and 1970/253.
- Summary procedure – Application for leave to defend – Supporting affidavit not sworn by defendant himself – effect thereof. 1970/269.

- Summons – Service of summons on an executive officer of a Local Authority is deemed to be a service on the chairman or Clerk of the Authority. 1970/120.
- Witnesses – Court does not have duty to call for corroboratory evidence where insufficient. 1970/95.

PUBLIC AUTHORITY

- Municipality – Procedure for suit against Local Authority – Action commenced before expiry of one month after written notice – Non-compliance with Local Government Ordinance (Cap. 333) ss. 151 & 152 – Whether action maintainable – Whether and when non-compliance can be waived. 1970/135 and 1970/253.

PUBLIC AUTHORITY (continued)

Municipality – Procedure for suit against Local Authority – One month's notice necessary – Local Government Ordinance Cap. 333. 1970/135 and 1970/253.

REDEMPTION

See LAND LAW – Redemption.

RENT RESTRICTION

See LANDLORD AND TENANT.

RES JUDICATA

See PROCEDURE – Res Judicata.

RETRIAL

See PROCEDURE – Retrial.

REVIEW

See PROCEDURE – Review.

REVISION

See APPEAL – REVISION.

ROAD TRAFFIC

See CRIMINAL LAW INDEX – ROAD TRAFFIC.

SALE OF GOODS See also CONTRACT

- Memorandum need not be contemporaneous with the Contract. 1970/253.
- Oral Agreement followed by written L. P. O. order after goods supplied and rejected – Whether failure to reject in reasonable time constituted acceptance – whether L.P.O. constituted sufficient note or memorandum – sale of goods Ordinance Cap. 214 ss. 6 and 37 construed and applied. 1970/253.
- Oral sale of specific goods of a trade name – Goods found defective – Offer of exchange of defective tyres accepted – Whether further compensation obtainable – S. 16 Sale of Goods Ordinance.
- Sale by description – Goods not in accordance with description – Buyer can repudiate the contract. 1970/323.

SECURITY OF EMPLOYMENT ACT

See LABOUR LAW

SOURCES OF LAW

Per Incuriam – High Court refuses to follow court of Appeal case decided per incuriam. 1970/1

XLI.

SPECIFIC PERFORMANCE

See CONTRACT

STANDARD RENT

See LANDLORD AND TENANT.

STATUTES (See also CRIMINAL LAW INDEX – STATUTES)

- "He" includes "she". 1970/64.
- Interpretation – Workmen's Compensation Ordinance – Amendment – Substantial and Procedural Provisions – Whether retrospective operation. 1970/182
- Rent Restriction (Amendment) Act No. 57 of 1960 not retrospective. 1970/13.,
- Retrospective effects – Rent Restriction Act – Acts do not have retrospective effect unless express or implied intention. 1970/13 and 1970/325.

SUCCESSION

Administration of Estates

- Administrator of an estate liable for deceased's debts only to the extent of his inheritance. 1970/92.
- Application for the grant of letters of administration to the Administrator – General – Deceased's relatives must be unable or unwilling to act – Probate and Administration Ordinance. 1970/260
- Application for the grant of letters of administration to Administrator – General to defend deceased's suit – Danger of misappropriation or deterioration of assets to be apprehended –administrator-General's Ordinance. 1970/260.

Intestacy

- Caretaker of land – Sister of deceased who died intestate had looked after land in latter years of deceased's life – Gift of shamba by head of clan in consultation with clan members – invalid. 1970/16.
- Child born of illicit association – whether legitimized – Whether entitled to inherit – Customary Law Declaration – Hay a Law. 1970/255
- Haya Law – On death of woman clan head allocated land equally between surviving sisters. – Decision upheld by primary court and High Court. 1970/16.

Wills

- Disinheritance of natural heir – will must mention it specifically 1970 /111.
- Oral will to be valid must be witnessed by four witnesses at least two of whom are non-clan members – Customary Law Declaration. 1970/183.

XLII.

SUCCESSION (continued)

Wills (continued)

- Under customary law – Not signed by testator – Showing alterations – Whether valid. 1970/255.
- Written will not in conformity with Customary Law Declaration invalid. 1970/183.

TAXATION

See CRIMINAL LAW INDEX – TAXATION.

TORT

- Animals – Damage caused to crops by cattle. 1970/1113.
- Assault – Acquittal in criminal case for assault does not affect claim for compensation in civil proceedings. 1970/93.
- Blood-money – Action maintainable under customary law – Whether intentional or accidental. 1970/17.
- Damages – loss of services of daughter as a result of being impregnated. 1970/194.
- Damages – Seduction. 1970/112.

Defamation

- Accusation of theft made at a public meeting to investigate cattle theft not actionable. 1970/10.
- Damages – extent of circulation of libel and vindication of plaintiff's character – Important factors in assessing damages. 1970/232.
- Innuendo – facts constituting – Allegation of theft whether defamatory. 1970/232.
- Malice required where communication privileged. 1970/232.
- Qualified Privilege – Privileged occasion implies legitimate and reciprocal interest in communication on part of defendant and third person. 1970/232.

Law Reform

- Law Reform (Fatal Accidents & Miscellaneous Provision) Ordinance Cap. 360. Dependency – Support by extended family not taken into account. 1970/27.
- Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 369 – Provident Fund moneys deductible. 1970/27.
- Law Reform (Fatal Accidents & Miscellaneous Provision) Ordinance Cap. 360 s. 7 – Sum paid out under pension scheme operated by employers of deceased exempted under the Act and not deductible from damages. 1970/14.

Negligence

Contributory negligence – damages – Workmen's Compensation – Whether compensation under the Ordinance bar to further claim of damages.

TORT (Continued)

Negligence (continued)

- Inevitable accident to be shown by defendant after prima facie case of negligence made out. 1970/27.
- Quantum of damages – Sum paid under joint pension scheme operate by employers of deceased not deductible from damages. 1970/14.
- Seduction – Pregnancy – Damages which may be awarded. 1970/112.
- Trespass – Dispute over land – Law permits a fresh action for trespass every time one is committed – Res Judicata inapplicable – Rule 12 Civil Procedure in Primary Courts Rules (G.N. 310/64) considered. 1970/229.

TOWN AND COUNTRY PLANNING

See PUBLIC AUTHORITY; CRIMINAL LAW INDEX – TOWNSHIP RULES.

TRAFFIC

See CRIMINAL LAW INDEX – ROAD TRAFFIC.

TRUST AND TRUSTEE

- Charity – Whether "University" is a charity. 1970/258.
- Terms – Settler treasury supplying money to Agency to provide loams to new occupiers of revoked right of occupancy to enable them to discharge their statutory obligation of paying compensation for unexhausted improvements to previous occupiers – Whether settle can impress money paid to previous occupiers with certain condition 1970/268 and 314.
- Trading – Equitable doctrine of tracing assets – Whether mortgagor can trace his money into compensation obtained for improvements on land when mortgagee's right of occupancy revoked. 1970/267, 1970/268 and 314

VILLAGE DEVELOPMENT COMMITTEE.

See LAND LAW.

WAIVER

See CONTRACT.

WILLS

See SUCCESSION – Wills.

WITNESSES

See APPEAL (CIVIL AND CRIMINAL); PROCEDURE (CIVIL AND CRIMINAL.

WORK AND LABOUR

See LABOUR LAW.

WORKMEN'S COMPENSTION

See LABOUR LAW.

XLIV.

CRIMINAL INDEX

ABUSE OF OFFICE

- Arrest without warrant by primary court magistrate. 1970/169.
- Elements of the offence – An act public servant for prosecution of his own design and whims. 1970/169.

ABUSIVE LANGUAGE

Breach of peace – Language used should be likely to cause breach of peace – R. v. John [1967] H.C.D. 61 applied. 1970/310.

ACCOMPLICES

See EVIDENCE.

ACQUITTAL

See APPEAL; PROCEDURE.

ADMISSIBILITY/ADMISSION

See EVIDENCE, PROCEDURE.

ADULTERY

See GENERAL INDEX – FAMILY LAW.

AGE OF ACCUSED

See MINIMUM SENTENCES ACT.

ALIBI

See EVIDENCE

ALLIENS AND NATIONALITY

Immigration

Unlawful entry – Mens rea not required – Immigration Act, Cap. 534 1970/271

Unlawful entry – Sentence – fine of Shs. 3,000/- excessive in circumstances where accused had no mens rea – Immigration Act, Cap. 534. 1970/271

ALTERNATIVE VERDICTS

See PROCEDURE.

ANIMALS

See FAUNA CONSERVATION ORDINANCE.

APPEAL

Acquittals – Appeal from acquittal. 1970/334.

Appeal out of time

Acquittals – Date of order is date of acquittal. 1970/334.

XLV.

APPEAL (continued)

Appeal out of time (continued)

- Acquittals – Good cause must be shown. 1970/334.
- Both notice of appeal and petition of appeal must be lodged in time. 1970/338
- Good cause shown by fact that counsel's clerk mistakenly sent notice to another court. 1970/338.

Bail pending appeal

- Appeal must have overwhelming chance of success – Test not met where arguments need detailed reference to evidence or judgment – Hassani Walji v. R. [1968] H.C.D. 174 followed.
- Different considerations apply to grants of bail before trial and after conviction. 1970/150.
- Granted in exceptional circumstances where appeal has an overwhelming chance of success. 1970/150.
- Granted where appeal is not frivolous or vexatious, and has reasonable grounds of success, and where accused can offer adequate security. 1970/173.

Evidence

- Additional Evidence – High Court may call for additional evidence on appeal to elucidate matter left vague in trial court – Desirable that s. 322 C.P.C. is broadly interpreted. 1970/181.
- Appeal court may take own view of evidence on first appeal. 1970/151.
- Appeal court not to interfere with trial court's finding of fact unless manifestly unreasonable. 1970/303.
- Misdirection by trial court – Conviction may be upheld where evidence establishes guilt of accused. 1970/151.
- Notes by judges – Brief notes by judges on admitting cases for appeal – Such notes may indicate grounds of appeal but are not meant to prejudge issues. 1970/274.
- Petition of appeal – Need not be taken literally when framed by layman. 1970/42.
- Refusals to entertain appeal for non-compliance with set procedures does not render it functus officio to admit a late appeal if good cause is shown. 1970/338.
- Sentence – Minimum sentences should not be imposed on appeal without giving accused opportunity to be heard. 1970/77.
- Summary rejection – Appeal from Primary Court – Summary rejection by District Court unlawful. 1970/226.

AREST

See PROCEDURE

XLVI

ASSAULT CAUSTING ACTUAL BODILY HARM

- Provocation – No defence to charge – Grounds for mitigation in sentencing. 1970/144.
- Sentence – Compensation to the injured person a better and more appropriate remedy than imprisonment. 1970/144.

ASSAULT PUNISHABLE WITH FIVE YEARS

- Accused arrested by police not for stealing or for being suspected of stealing – Resisted arrest – Accused entitled to defend himself – S. 243 (a) and (b) of Penal Code. 1970/290.

ATTEMPTED OBTAINING GOODS BY FALSE PRENTENCES

Intent to defraud required. 1970/73.

AUTREFOIS ACQUIT OR CONVICT

See PROCEDURE.

BAIL

See APPEAL, PROCEDURE.

BREACH OF PEACE

Abusive language – Charge – Language should be likely to cause breach of peace [1967] H.C.D. 61 applied. 1970/310.

Procedure – Abusive language – Breach of peace. 1970/224.

"BREAKING" (See also Housebreaking)

- Constituted by opening padlock that was not locked. 1970/164.
- Does not include climbing over partition between rooms in house. 1970/90.
- Doest not include entering by climbing through hole left between wall and roof of house. 1970/35.
- Does not include entering through permanent opening not left open for necessary purpose. 1970/90
- Does not include pushing upon door or window which has been left ajar. 1970/90.
- Includes opening door or window which has been properly shut. 1970/90.

BUILDING CONSTRUCTION (Township Rules)

Unauthorised construction may be demolished. 1970/156.

BURDEN OF PROOF

See EVIDENCE.

BURGLARY

See BREAKING; HOUSEBREAKING.

CARELESS DRIVING

See ROAD TRAFFIC.

CAUSATION

See HOMICIDE.

CAUSING DEATH BY DANGEROUS DRIVING.

See TRAFFIC.

CAUSING GRIEVOUS HARM WITH INTENT

See GRIEVOUS HARM

CHARGE

See PROCEDURE.

CHASTISEMENT OF WIFE

See HOMICIDE.

CHEATING

See OBTAINING BY FALSE PRETENCES.

CHILDREN

See JUVENILES

CLAIM OF RIGHT

- Conviction for house-breaking quashed where accused took properly he honestly believed to be his father's property. 1970/283.
- Cutting of trees in exercise of honest claim of right does not constitute malicious damage to property. 1970/145.

Defence

- To Criminal Trespass. 1970/164, 1970/310 and 1970/349.
- To Malicious Damage to Property 1970/333.

- Does not exist where accused is primary court magistrate, and so must have known lack of legal basis for claim. 1970/227.
- Loan to himself by Chairman of Prison Staff Club – Loan possible unauthorized – Fraudulent intent not proved. 1970/225.
- Not limited to belief in ownership of property – Includes belief in right to dispose of it. N. 219.
- Sale of goat held for owner not theft where belief that owner would consent to sale. 1970/219.

- Taking of ex belonging to another in presence of elders called as witnesses. 1970/77.
- Unauthorised use of vehicle not conversion not amounting to theft where belief that uses was authorized. 1970/196.

XLVIII.

COMMON ASSAULT

- Alternative verdicts – Common assault can be substitution for indecent assault. 1970/78.
- Beating of wives – Illegal. 1970/218
- Provocation cannot justify assault but can be a mitigating factor. 1970/284.
- Sentence – Imprisonment for nine months where wife of accused dies following beating. 1970/218.

COMPENSATION

See SENTENCE.

CONCURRENT SENTENCES

See SENTENCE.

CONFESSIONS.

See EVIDENCE.

CONSERVATION

See FAUNA CONSERVATION ORDINANCE.

CONSTPIRACY

- Charge – Undesirable but not illegal to join conspiracy charge with charges of specific offences based on same evidence – Verdicts must be entered on all charges. 1970/180.

CONTEMPT OF COURT

- Refusal by court clerk to produce file when so ordered – whether contemptuous behaviour. 1970/141.
- Sentence – Maximum fine should be reserved for cases of most contemptuous behaviour. 1970/202.

- Summary procedure – Accused must be told charge and given opportunity to defend himself. 1970/141.
- Summary proceedings – Should be rarely employed. 1970/202.

CONVERSION

See THEFT.

CONVERSION NOT AMOUNTING TO THEFT

- Bicycle borrowed for one day but kept for four months. 1970/32.
- Claim of right – See CLAIM OF RIGHT.
- Colour of right – Unauthorized use of vehicle – not offence where belief that use was authorized. 1970/196

CONVEYING

See POSSESSION; POSSESSION OF PROPERTY SUSPECTED OF HAVING BEEN STOLEN; RECEIVING STOLEN PROPERTY; RECENT POSSESSION.

CORPORAL PUNISHMENT

See MINIMUM SENTENCES ACT.

CORROBORATION

See EVIDENCE

CORRUPTION

See PREVENTION OF CORRUPTION ORDINANCE, CAP. 400.

COSTS

See SENTENCE – Costs.

CREATING A DISTURBANCE

Alternative verdicts – Creating a disturbance cannot be substituted for threatening violence. N. 1970/165.

CREDIBILITY

See EVIDENCE.

CRIMINAL RESPASS

- Alternative verdicts – Criminal trespass can be substituted for housebreaking. 1970/164.

- Complainant must lodge complaint in good faith. 1970/349.
- Essence of offence – Forcible entry with intent to annoy necessary. 1970/349.
- Facts constituting offence. 1970/164.
- Intention – Ingredients of offence – Intent essential. 1970/310.
- Property – Whether only private property covered – Whether Magistrate's chambers within ambit of section – Kombo v. R. [1967] H.C.D. 225 applied. 1970/310.
- Sentence – Compensation appropriate. 1970/164.

CUSTOMS AND EXCISE

Uncustomed goods see: EAST AFRICAN CUSTOMS MANAGEMENT ACT, 1952.

DANGEROUS DRIVING

See ROAD TRAFFIC.

DEFENCE OF PROPERTY

- Excessive use of force resulting in death – Manslaughter. 1970/138.
- Killing in defence of property – When permissible. 1970/211.

L

DEFILEMENT BY HUSBAND OF WIFE UNDER TWELVE

Father or mother permitting defilement – Intention to have girl carnally known is necessary element. 1970/154.

DEPOSITION

See EVIDENCE

DISMISSAL OF CHARGE

See PROCEDURE – Charge defective.

EAST AFRICAN CUSTOMS MANAGEMENT ACT. 1952

- Possession of uncustomed goods.
- Burden or proof – Knowledge that goods were uncustomed. 1970/53.

- Evidence of customs officer as to where goods are manufactured not reliable. 1970/350.
- Imports from Ujiji port not unlawful per se. 1970/350.

EVIDENCE

Accomplices

- Conviction unsafe on accomplices' uncorroborated testimony. 1970/305.
- Evidence requiring corroboration cannot constitute corroboration. 1970/305 1/2
- Police decoy not accomplice – Corroboration not required as matter of law – Court must direct itself that decoy's evidence should be examined closely. 1970/214.
- Victim of extortion not accomplice and evidence does not require corroboration. 1970/169.
- Additional Evidence – High Court may call for additional evidence on appeal to elucidate matter left vague in trial court – Desirable that s. 322 C.P. C. be broadly interpreted. 1970/181.

Admissibility

- Admissions. 1970/178.
- Circular letter from Regional Commissioner admissible in appropriate cases. 1970/294.
- Confessions. 1970/84 and 1970/178.
- Evidence obtained in course of illegal search. 1970/204.
- Evidence of bad character. 1970/67
- Post-mortem report of absent doctor – Court has discretion to refuse to admit if prejudicial to accused. 1970/307.
- Statements constituting conduct. 1970/84.

LI

EVIDENCE (cont'd)

Admissibility (cont'd)

- Statement by accused admitting that he had “picked up” an object is capable of an innocent construction and so is admissible not being a confession. 1970/178.
- Admissions – See EVIDENCE – Confessions.
- Alihi – Need only raise reasonable doubt – Need not be proved by accused. 1970/65.

Appeal

- Appeal Court – Evaluation of evidence. 1970/151.
- Appeal court not to interfere with trial court’s finding of fact unless manifestly unreasonable. 1970/303.
- Bad character – Evidence of – What constitutes. 1970/67.

Burden of Proof

- Alibi need not be proved by accused. 1970/65.
- Corruption – By public servant – Whether accused to satisfy he did not accept advantage corruptly as inducement or reward-Prevention of corruption Ordinance (Cap. 400), ss. 3(1) and 8. 1970/302.
- Corrupt transaction – Burden placed on accused by s. 8, Prevention of Corruption Ordinance – Nature of burden – Proof on balance of probabilities – Proof beyond reasonable doubt not required. 1970/171.
- Corrupt transaction – Magistrate’s find that no substance in accused’s demand – Misdirection and incurably wrong approach – MOSHI RAJABU v R [1967] H.C.D. 384 followed. 1970/289.
- Criminal cases – Accused should never have to prove innocence beyond reasonable doubt. 1970/171.
- Extra – judicial statements – Prosecution must satisfy court as to admissibility. 1970/220.
- False information – Knowledge that information false essential – Prosecution must prove that information given was false. 1970/276.
- False pretences – Obtaining money by false pretences – Whether prosecution to prove parting with money induced by false. 1970/276.
- False pretences – Obtaining money by false pretences – whether prosecution to prove parting with money induced by false pretences. 1970/301.

- Identification of stolen goods – Prosecution must prove beyond reasonable doubt that goods found with accused were those of owner/complainant. 1970/243.
- National Agricultural Products Boards Act – Prohibition of dealing in scheduled products by persons other than agents of Board – Burden lies on dealer to prove he is agent o board. 1970/172.

LII

EVIDENCE (Continued)

Burden of Proof (continued)

- Obtaining by false pretences – Prosecution to prove parting with money induced by false pretences. 1970/301.
- Possession of housebreaking instruments – Burden need not be explained to accused. 1970/68.
- Possession of property suspected of having been stolen – Burden of proof on accused to give reasonable explanation as to how he came by suspect property – Burden not heavy one. 1970/297.
- Possession of uncustomed goods – Whether knowledge that goods, were uncustomed to be proved. 1970/53.
- Recent possession of stolen goods – Burden does not shift 'to accused. 1970/151.
- Road Traffic – Carrying passengers for hire without licence – Onus on accused to prove contrary – Defence that passengers were his employee's shifts burden back to prosecution. 1970/250.
- Theft – Court need not be convinced of accused's denial before acquitting him. 1970/282.
- Wrongful confinement – Accused to show that confinement lawful on balance of probabilities. 1970/294.
- Wrongful confinement prosecution need prove only confinement. 1970/294.
- Wrongful confinement – Prosecution need only prove fact of confinement – Accused must justify it. 1970/169.

Circumstantial Evidence

- Inference of guilt must be irresistible and incompatible with innocence. 1970/197.
- Must be such as not to be reasonably explicable except by accused's guilt. 1970/62
- Co-accuseds
- Each accused free to give evidence against co-accused. 1970/247.
- Evidence inculpating other accused – Unsafe to base conviction on. 1970/247.
- Conduct – Statements constituting conduct. 1970/84.

Confessions.

- Admissibility – admissions. 1970/84, 1`970/178, and 1970/301.
- Admissibility – See Evidence – Admissibility.
- Admission of responsibility for sums signed subsequently found short- Whether admission of theft – Admission to police – Whether confession and inadmissible. 1970/301.

LIII.

EVIDENCE (continued)

- Confessions (continued)
- Admissible when lead directly to discovery of material fact. 1970/84.
- Admissions distinguished. 1970/178.
- Inadmissible as evidence against co-accused. 1970/247.
- Inadmissible when made to threatening crowd following arrest by police. 1970/84.
- Inadmissible where made to District Council's messenger equipped with police powers – Even where "messenger – police" in disguise. 1970/335.
- Police officer used as interpreter – Confession admissible in circumstances.
- Statements constituting confessions. 1970/84.

Corroboration

Accomplices – requirements. 1970/348.

- Accomplices – Requirements. 1970/348.

- Accomplice's evidence requiring corroboration cannot constitute corroboration. 1970/305.
- Children of tender years – Evidential requirements. 1970/54.
- Children's testimony – Corroboration required of prosecution witnesses not of defence witnesses. 1970/179. complainant delayed in reporting rape – Whether and what corroboration required. 1970/277.
- Person with interest of own to serve – evidential requirements. 1970/148.
- Police decoys – Evidential requirements. 1970/214.
- Police traps – evidential requirements. 1970/148.
- Sexual Offences – Evidential requirements. 1970/347.
- Sexual offences – Evidential requirements. 1970/347.
- Sexual Offences – Torn clothing not necessarily corroborative of rape. 1970/66.
- Single witness – Corroboration – Whether or not necessary. 1970/204.
- Witnesses who delay in reporting a crime – Evidential requirements. 1970/56.

Credibility

Statements by complainant who had ample opportunity to recognize accused. 1970/304.

LIV.

EVIDENCE (continued)

Credibility (continued)

- Stealing by public servant – testimony – Conviction justified where the discrepancies or contradictions in the testimony by the prosecution witnesses are neither material nor capable of raising any doubt as to the guilty of the offenders. 1970/278.
- Witnesses – Testimony – Rejection of part of the testimony of a witness does not necessarily make his whole testimony suspect or discredited. 1970/278.

Experts

- Evidence of Customs officer as to where goods are manufactured not reliable. 1970/350.

- Grievous harm – It is not for the medical officer but the court to say whether harm done amounts to “grievous harm” s. 255 P.C. 1970/281.

Extra – Judicial Statements.

- Not admissible when possible made as result of inducement by police as to release. 1970/22).
- Procedure where admissibility is challenged. 1970/220.
- Prosecution must satisfy court as to admissibility. 1970/220.
- Hearsay – Admission to police by accused’s wife not admissible. 1970/210.

Identification.

- Breaking and stealing – Accused running away from scene – Evidence must be adduced to connect accused with crime. 1970/231
- Forgery – Handwriting – Documents alleged to be written by the accused – Quantum of proof – S. 49(1) Evidence Act. 1970/273.
- Of accused by single witness not reliable. 1970/343.
- Of liquor – Qualifications of identifying witness must be established 1970/39; 1970/40.
- Of “Moshi” – Exact percentage of alcohol must be proved. 1970/40.
- Stolen goods – Bare statements claiming to identify common objects inadequate. 1970/210
- Stolen goods – complainant must be asked for description or special marks before goods are shown to him – [1967] H.C.DD. 446 followed 1970/243.
- Stolen goods – Facts leading to the conclusion that goods were identified must be recorded. 1970/248.
- Stolen goods – Method of identification should form part of record. 1970/210.

EVIDENCE (continued)

Identification (continued)

- Stolen goods – Prosecution must prove beyond reasonable doubt that goods found with accused were those of owner /complainant. 1970/243; and 1970/274.

- Stolen goods – Prosecution must prove beyond reasonable doubt that item with accused was that of complainant owner. 1970/274.

- Law applicable – Indian Evidence Act does not apply to Tanzania. 1970/335.
- Misdirection by trial court – Conviction may be upheld where evidence establishes guilt of accused. 1970/151.
- Notes by judges – Not meant to prejudge issues. 1970/274
- Plea – Cannot be used as evidence against accused. 1970/30
- Plea of guilty – Corrupt transaction – When equivocal. 1970/51.
- Police agents – When evidence requires corroboration. 1970/148.
- Proof – Accused charged of stealing from his gardener by short paying Whether defence that balance kept as savings raises sufficient doubts – Whether conviction maintainable. 1970/272.
- Substantial justice – Conviction upheld despite fact that it was grounded on inadmissible evidence where no doubt of accused's guilt. 1970/217.
- Unlawful possession of "piwa" – Court not concerned with the method by which admissible evidence was obtained. 1970/204.

Witnesses

- Credibility – See EVIDENCE – Credibility.
- Dumb witness – Interpreter skilled in sign language must be used. 1970/31.
- Single witness – Corroboration not necessary. 1970/204.
- Witnesses who delay in reporting a crime – corroboration may be required. 1970/56.

EXPERTS

See EVIDENCE.

EXTRA-JUDICIAL STATEMENTS

See EVIDENCE.

FAILURE OF JUSTICE

See PROCEDURE.

FALSE IMPRISONMENT

See WRONGFUL CONFINEMENT.

LVI.

FALSE INFORMATION

- Burden of proof – Prosecution must prove that information given was false. 1970/276.
- Mens rea – Knowledge that the information is false essential. 1970/276.

FALSE PRETENCES

See OBTAINING BY FALSE PRETENCES.

FAUNA CONSERVATION ORDINANCE, CAP. 302

- Forfeiture of firearm – Unjust when property of innocent third party – Third party must be notified to show cause why there should not be forfeiture. N. 149.
- Hunting game animal without licence – Mere possession of leg of game animal inadequate proof. 1970/197.
- Limitation – Sec. 44 of the Ordinance does not create a limitation period for criminal offences. 1970/227.
- Sentence – Fines – Adequate when other losses are taken into consideration. 1970/153.
- Unlawful possession of government trophy – Invalid permit – Accused not convicted where belief that permit was valid 1970/45.

FINE

See SENTENCE.

FORCIBLE ENTRY

- Essence of Offence – Use of force must be proved. 1970/33.
- Peacefully removing property from shamba believed to be one' own not forcible entry. 1970/333.
- Person with right of entry enters land in violent manner – whether forcible entry. 1970/333.

FORGERY

- Identification – Handwriting – Documents alleged to be written by accused – Quantum of proof – S. 49 (1) evidence Act. 1970/273.
- Mens rea – Intention to defraud or deceive necessary

GAME

See FAUNA CONSERVATION ORDINANCE.

GEMSTONES

Charge

- Defective – Laid under Act not yet in force – Error curable 1970/77.
- Unlawful possession of gemstones – Whether defective where the Act wrongly cited. 1970/246.

LVII.

GEMSTONES (continued)

Charge (continued)

- Defence – Whether consent of Area Commissioner to mining gemstones a good defence. 1970/246
- Plea of guilty – Possession of gemstones – Equivocal. 1970/71.
- Specified gemstones
- Beryl – Must be of gem variety – Need not have value. 1970/71.
- Cyanite – Not prescribed unless used in making jewellery. 1970/71.
- Garnet – Must be of gem variety – Need not have value. 1970/71
- Quartz – Must be of gem variety – Need not have value. 1970/71.
- Stone of "gem variety" means stone with which jewellery is made. 1970/71.
- Zoisite – Must be of gem variety – Need not have value. 1970/71.

Sentence

- Imprisonment inappropriate where stones are not precious but only semi-precious. 1970/170.
- Whether 18 months imprisonment severe for first offender 1970/246, 1970/246.

GOVERNMENT PROPERTY

See MINIMUM SENTENCES ACT – Public Property.

GRIEVOUS HARM

- Defence of drunkenness – Drunkenness per seris not defence in criminal charge – Accused indulged in excessive liquor drinking and struck complainant – Held lack of mens rea not established. 1970/293.

- Plea of guilty – Equivocal - Whether can be remedied by facts constituting offence. 281.
- What constitutes grievous harm. Under S. 225 of the Penal Code 1970/281.

GUILTY PLEA

See PROCEDURE – Plea of guilty.

HOMICIDE

Bail – Only granted in exceptional circumstances. 1970/85

Causation

- Established where death is caused by bleeding resulting from defilement. 1970/175.
- No causality where woman died following slaps, but where exact cause of death could not be determined. 1970/218.

LVIII.

HOMICIDE (continued)

- Evidence – Recent Possession – High standard of proof required to deduce murder from recent possession. 1970/86.

Manslaughter

- Burning of body of man thought to be dead. 1970/138.
- Excessive use of force in defence of person or property. 1970/138.
- Sentence – compensation appropriate in minor case. 1970/140.

Murder

- Arrest – Killing in course of – when lawful. 1970/147.
- Killing of thief – Offence in circumstances. 1970/211.
- Malice aforethought – Accused cut off their deceased's arm – Intention established where no efforts made to save deceased's life. 1970/285.
- Malice aforethought – Disestablished where a person is acting on lawful authority e.g. in self defence, out of provocation or causing lawful arrest and has used only reasonable force 1970/147.
- Malice aforethought – Felony – murder rule – Intention to commit defilement dies not establish malice aforethought. 1970/175

- Malice aforethought – Not found where deceased and accused were very drunk. 1970/307.
- Malice aforethought – Son rescuing father – When common intention to be inferred. 1970/280.
- Provocation – Accused cut off thief deceased's arm – Custom of beating or killing thieves deprecated – Assessors opinion giving allowance to such prejudices not preferred. 1970/285
- Provocation – Accused cut off thief Deceased's arm – Legal provocations when wrongful act or insult done to a person and not to property. 1970/285.
- Self defence – Attempted rape – Victim entitled to defend herself by use of force. 1970/344.
- Self defence – son rescuing father – When force used excessive. 1970/280.
- Self defence – Throttling to effect rape – Victim entitled to defend herself by use of force. 1970/344.

- Previous convictions – Disentitle accused to leniency – Grounds for imposing more than minimum sentence. 1970/87; 1970/88;

Provocation

- Accused with history of psychiatric disorder not insane but easily irritated and impulsive – Held accused had not the necessary mens rea for murder. 1970/244.

LIX

HOMICIDE (continued)

Provocation (continued)

- Adultery committed by mistress. 1970/143.
- Former wife found with new boyfriend. 1970/70.
- Murder – Provocation. 1970/285.
- Wife found in circumstances suggesting adultery. 1970/58.

- Woman who lived in concubinage with man for 8 months is his "wife" in the circumstances. 1970/58.
- Self defence – Murder – self defence. 1970/280 and 1970/344.

HOUSEBREAKING

Alternative Verdicts

- Criminal trespass can be substituted for housebreaking. 1970/164.
- When alternative charge of entering dwelling house with intent to commit felony can be substituted for housebreaking. 1970/283.
- "Breaking". See BREAKING.
- Intent to commit felony essential – Must be established beyond reasonable doubt. 1970/164.
- Mistake as to owner of house – negates intent to commit felony. 1970/78.

HUNTING

See FAUNA CONSERVATION ORDINANCE.

IDENTIFICATION

See EVIDENCE.

IGNORANCE OF LAW

No Defence – No defence does not warrant presumption that everyone knows law. 1970/346.

See also: MISTAKE OF FACT.

IMMIGRATION ACT, CAP. 534

Unlawful entry

Mens rea not required. 1970/271.

Sentence – Fine of Shs. 3,000/- excessive in circumstances where accused had no mens rea. 1970/271.

IMPRISONMENT

See SENTENCE.

INDECENET ASSAULT

Alternative verdicts

INDECEMENT ASSAULT (continued)

Alternative verdicts (continued)

- Common assault can be substituted for indence assault. 1970/78.
- Indecent assault can be substituted for rape. 1970/38.
- Rape cannot be substituted for indecent assault. 1970/38.
- Victim not assaulted in part of body associated with sex – Common assault rather than indecent assault. 1970/78.

INTENTION

See MENS REA.

INTERPRETATION

See STATUTES.

JOINDER

See PROCEDURE

JURISPRUDENCE

Precedent – English decisions persuasive but not binding in criminal matters. O Section 4 of Penal Code inapplicable.

JUVENILES

Sentence – Magistrate must consider that – Imprisonment inappropriate and unsuitable method of dealing with juvenile – Children and Young Persons Ordinance Cap. 13. 1970/278.

Witnesses

Child or tender years – Requirements and procedure. 1970/54.

Corroboration required only when children are prosecution witnesses not when they are defence witnesses.

LABOUR LAW

- Failing to pa the Fund – Failing to have employers registered – Whether offence committed where employer had three employees and an unpaid apprentice in employ – National Provident Fund Act. 1970/292.
- Failing to pay contribution Sentence – Absolute discharge appropriate only in exceptional circumstances such as over whelming hardship – National Provident Fund Act. 1970/162.

- Failure to report employee's death – Delay in reporting to Labour Officer – What constitutes delay – Whether delay in reporting constitutes offence – Accidents and Occupational Diseases (Notification) Ordinance, Cap. 330 ss. 3 (5) and 8(1).
- Statutory offence – Failure to maintain records of oral contract Failure to pay minimum wages – offences absolute – No mens rea required – Ignorance of law no defence. 1970/346.

LXI.

LARCENY

See THEFT.

LIBEL

Publishing defamatory matter – Regional Police Commander giving unnecessary dismissals – Reason for dismissals may be looked into by court. But absence of good faith must be shown. 1970/345.

LIMITATION OF ACTIONS

- Charge – Abusive language – Charge must be laid within one year from time of offence. 1970/224.
- Limitation of time for summary trial – Minor Offences. 1970/224.

LIQUOR

- Alternative verdicts – Unlawful possession of moshi c/s. 30, Moshi (Manufacture and Distillation) Act cannot be substituted for illegal sale or manufacture of intoxicating liquor c/s. 65, Intoxicating Liquor Act. 1970/37.
- Identification of liquor – Qualifications of identifying witness must be established. 1970/39; 1970/40.
- Identification of moshi – Exact percentage of alcohol must be proved. 1970/40.
- Moshi not covered by Intoxicating Liquors Act. 1970/37.

Sentence

- Possession of moshi – Prison sentence correct for firs offenders where quantity is plainly for distribution. 1970/158.
- Possession of moshi – Probation inappropriate. 1970/158.

- Unlawful possession of “piwa” – Court not concerned with the method by which admissible evidence was obtained. 1970/204.

LICENSING

See LIQUOR.

MALICIOUS DAMAGE TO PROPERTY

Defence of Property

- Claim of right when good defence. 1970/333 see also: CLAIM OF RIGHT.
- Excessive use of force not permitted – Resulting death – Manslaughter. 1970/138.
- Killing in defence of property – when permissible. 1970/211.
- Whether destroying of crops planted by trespasser permitted. 1970/145 and 1970/330.

Essence of Offence

- Claim of right – When vitiates intention. 1970/333 see also CLAIM OF RIGHT.
- Mens rea – Act must be intentional. 1970/157.
- Ownership of land – Owner destroying crops planted by trespasser – whether illegal. 1970/330.
- Ownership of land – Ownership of land by complainant must be established. 1970/145.
- Separate offence – Damage to clothing during assault – Not a separate offence. 1970/157.

MANLAUGHTER

See HOMICIDE.

MENS REA

- Claim of right – see CLAIM OF RIGHT.
- Defilement by husband of wife under twelve – Parent Permitting defilement – Intention required. 1970/154.
- False information – Knowledge that the information is false essential. 1970/276.
- Forgery – Intention to defraud or deceive necessary. 1970/273.

- Immigration – Unlawful entry – Mens rea not required. 1970/271.
- Malicious damage to property – Act must be intentional. 1970/157.

Murder

- Malice aforethought – Accused cut off thief – deceased's arm – Intention established where no efforts made to save deceased's life. 1970/285.
- Malice aforethought – Son rescuing father – Whether common intention – When common intention to be inferred. 1970/200.
- Provocation – Accused with history of psychiatric disorder not insane – Held accused had not the necessary mens rea for murder. 1970/244.

- Possession of house breaking instruments – Intention to use instruments for housebreaking required. 1970/68.
- Possession of uncustomed goods – Knowledge that goods were uncustomed – Burden of proof. 1970/53.
- Reckless and negligent acts – Dangerous animals – Knowledge that animal is dangerous is required. 1970/54 $^{1}/_{2}$
- Requirement – Relevant considerations in determining. 1970/271.
- Statutory offences – Labour law – Failure to maintain records of oral contracts – Failure to pay minimum wages – offences absolute – Mens rea not required – Ignorance law no defence – Though no defence does not warrant presuming that everyone knows law. 1970/346.

MENS REA (continued)

- Unlawful possession of government trophy – Invalid permit – Accused not convicted where believed permit was valid. 1970/45.

MINIMUM SENTENCES ACT CAP. 526

- Alternative Verdicts – Charge of simple theft but particulars reveal theft by public servant – Conviction under Minimum Sentences Act decreed. 1970/293.
- Appeal – Minimum Sentence should not be imposed on appeal without giving accused opportunity of being heard. 1970/77.

- Application – Whether Act applies to offences under s. 6 of Prevention of Corruption Ordinance (Cap. 400) for accepting advantages for inadequate consideration – Item 7 of Schedule to Cap. 526. 1970/302.
- Government Property See below Public Property.
- Interpretation – Meaning of "taking part in a corrupt transaction with agent' – Whether apply to any party to such transaction – item 7 of Schedule to Cap. 526 – 1970/302.

Public Property

- Funds of Prison Staff Club – Not public property. 1970/223.
- Government trophy is public property. 1970/227.

Public Service

- National Housing Corporation not included. 1970/72.
- University – As a charity included. 1970/288.
- University – as E.A. Community Institute included. 1970/288

Sentence – Authorised Sentence

- Corporal punishment – Only one order of strokes imposable in single trial. 1970/52, and 1970/208
- Corporal punishment – In concurrent sentences – Twice imposition illegal. 1970/208.
- Sentence imposed under s. 5 (2) – Must be either prison term or strokes. 1970/33.
- Sentence imposed under s. 5(2) – One day prison term permissible in exceptional cases. 1970/33.

Sentence – Material factors

- Previous convictions – Disentitle accused to leniency – whether ground for imposing more than Minimum sentence. 1970/87 and 1970/88
- Special circumstances – For other relevant and irrelevant considerations see: minimum Sentences Act – "special circumstances".
- When deterrent and exemplary sentences called for. 1970/293.

MINIMUM SENTENCES ACT CAP. 526 (continued).

Sentence – "Special Circumstances"

- Brilliant academic qualification not material factors. 1970/288.
- Hardship to dependants – Irrelevant considerations. 1970/245.
- Where accused first offender – Special circumstances not found. 1970/308.
- Where sum involved Shs. 566/- Special circumstances not found

Sentence – Unauthorised Sentence

- Conditional discharge cannot be imposed under the Act. 1970/33.
- Waiving conviction – Not a lawful action by court – Not an authorized sentence. 1970/336.
- Warning and discharging accused after conviction not an authorized sentence. 1970/336.

MISTAKE OF FACT (See also IGNORANCE OF LAW)

- Burglary – Mistake as to owner of house – Negates intent to commit felony. 1970/78.
- Unlawful possession of government trophy – Invalid permit – Accused not convicted where believed permit was valid. 1970/45.

MOTOR VEHICLES

See ROAD TRAFFIC.

MURDER

See HOMICIDE.

NATIONAL AGRICULTURAL PRODUCTS BOARD ACT, CAP. 567

- Prohibition of dealing in scheduled products by person other than agents of Board – Burden lies on dealer to prove he is agent of Board. 1970/172.
- Prohibition of dealing in scheduled products by persons other than agents of Board – Covers all retailers. 1970/172.
- Purchasing specified and scheduled agricultural product without a licence – not illegal for villagers to buy specified agricultural products from their neighbours. 1970/55.

NATIONAL PROVIDENT FUND ACT

- Failing to pay the Fund – Failing to have employers registered – Whether offence committed where employer had three employees and an unpaid apprentice in employ. 1970/292.
- Failure to pay contribution – Sentence – Absolute discharge appropriate only in exceptional circumstances such as overwhelming hardship 1970/162.

NATIVE LIQUOR

See LIQUOR

LXV.

NEGLIGENCE

Damages to property not harm within the meaning of – s. 233 (d) Penal Code. 1970/249.

OBTAINING BY FALSE PRETENCES

Charge

- False pretence should be set out – Credit obtained by false pretences. 1970/63.
- Need not state to whom goods belong – Goods obtained by false pretences. 1970/67.
- Theft distinguished from charge of obtaining by false pretences 1970/82.

Elements of offence

- Facts constituting offence. 1970/67 and 1970/89.
- False pretence – Construct – Existence of contract of sale does not negative criminal liability of one party to contract for false representations which induced other party to part with his money. 1970/291.
- False pretence – Post – dated cheque – Giving of post – dated cheque – whether prosecution to prove parting with money induced by false pretences. 1970/301.
- False pretence Post – dated cheque – Normally constitutes promise as to future and so cannot be false pretence – However in circumstances where accused knew “he had no funds” false pretence may be found. 1970/225
- Intent to defraud – Does not exist where palpable false pretence made to reinforce valid legal claim. 1970/73.

PERSONAL TAX

See TAXATION.

PERSONATING A PUBLIC SERVANT

Elements of offence – Unlawful action must be taken as result of personation. 1970/63.

PLEA

See EVIDENCE; PROCEDURE.

POSSESSION

Joint possession – Constructive control of house by father where son possesses key. 1970/200.

See also: POSSESSION OF PROPERTY SUSPECTED OF HAVING BEEN STOLEN, RECENT POSSESSION.

POSSESSION OF HOUSE BREAKING INSTRUMENTS

Burden of proof – Court need not explain to accused that he has burden of giving explanation. 1970/68.

LXVI.

POSSESSION OF HOUSEBREAKING INSTRUMENTS (continued)

Instruments capable of being used for lawful purposes – Intention to use for housebreaking required. 1970/68.

POSSESSION OF PROPERTY SUSPECTED OF HAVING BEEN STOLEN [See also: RECENT POSSESSION]

Claim of right – See CLAIM OF RIGHT

Conviction

- Not possible unless accused arrested while conveying property in question. 1970/216.
- Possible where accused arrested while having in possession property in question. 1970/200.
- Whether unsatisfactory explanation and conflicting statements from accused with respect to suspect property can support conviction. 1970/297.
- Defence of Satisfactory Explanation

- Accused's duty to give explanation with respect to suspect property does not arise until he is before court. 1970/297
- Burden of proof not heavy one. 1970/297.
- Whether unsatisfactory explanation and conflicting statements from accused with respect to suspect property can support conviction. 1970/297.

Elements of offence

- Accused need not be in course journey for possession – Holding in R. v. Msengi s/o Abdallah, I.T.L.R. 107, impliedly over ruled. 1970/200.
- Conveying suspect property. 1970/216.
- Guidelines for trial magistrates. 1970/166.
- Possession – Having in possession suspect property. 1970/200 and 1970/248.

Evidence

- Accused's duty to give explanation with respect to suspect property does not arise until he is before court. 1970/297.
- Burden of proof on accused to give reasonable explanation as to how he came by suspect property – Burden not heavy one. 1970/297.
- Presumption – Possession cannot be presumed if the accused was not in the house where stolen goods were found. 1970/248.

PREVENTION OF CORRUPTION ORDINANCE, CAP. 400

Charge

Charge cannot stand where statements are ambiguous and equivocal to justify inference of corrupt transaction. Amir Nathoo v. R.[1970] H.C.D. 51 distinguished. Corrupt transaction c/s 3(2). 1970/286.

LXVII.

PREVENTION OF CORRUPTION ORDINANCE, CAP. 400 (continued)

Charge (continued)

- Charge defective – No failure of justice. Corrupt transaction c/s. 3(2). 1970/51.

- Charge may allege that accused obtained for himself or on account of another without duplicity. Corrupt transaction c/s. 3(1). 1970/49.
- Whether public servant can be charged under s. 3 (1) rather than s. 6. 1970/155.

- Consideration – See below Elements offence.
- Conviction – No conviction where no reason for offer of money since accused was neither arrested nor suspected of specified offence by police. 1970/289.

Elements of offence – Corrupt transaction.

- Advantage – Public servant obtaining an advantage without consideration – Distinguished from corrupt transaction with agent. 1970/50.
- Bribe – Accepting bribe to release arrested person – Proof that arrest was legal not necessary. 1970/48.
- Consideration – By public servant – Money paid to accused as loan – Whether "consideration" includes loan – Whether promise to repay loan without interest "adequate" consideration – Meaning of "inadequate" – (Cap. 400) s. 6 1970/302.
- Consideration – inadequate consideration. 1970/302.
- Conviction – Accused neither arrested nor suspected – No conviction. 1970/289.

Evidence

- Accomplices – Corroboration Requirements. 1970/169 and 1970/348.
- Accomplice victim – Whether a victim of extortion can be an accomplice whose evidence needs corroboration. 1970/169.
- Burden of proof – Whether accused to satisfy he did not accept advantage corruptly as inducement or reward ss. 3(1) and 8. 1970/302.
- Burden proof as provided in s. 8 – Accused's burden is to prove on the balance of probabilities, not beyond reasonable doubt. 1970/171.
- Corroboration – Accomplices. 1 970/169 and 1970/348.
- Misdirection – Magistrate's finding that no substance in accused's denial – Misdirection and incurably wrong approach – MOSHI RAJABU v. R. 1967 H.C.D. 348 followed. 1970/289.

PREVENTION OF CORRUPTION ORDINANCE, CAP. 400(contd.)

Evidence (continued)

- Presumption – Presumption guilt as provided in s. 8 – Nature of presumption. 1970/171.
- Prima facie case – What facts establish a prima facie case. 1970/49.
- Plea of guilty – Not equivocal merely because accused did not say he acted "corruptly" - Corrupt transaction c/s 3(2). 1970/31.
- Police traps – When allowed. 1970/148.
- Sentence – Whether and when Minimum Sentences Act (Cap. 526) he acted "corruptly" – Corrupt transaction c/s. 3(2). 1970/302.

PREVIOUS CONVICTIONS

See MINIMUM SENTENCES ACT; SENTENCE – Material factors.

PROCEDURE

- Additional evidence – High Court may call for additional evidence on appeal to elucidate matter left vague in trial court – Desirable that s. 322 C.P.C. is broadly interpreted. 1970/181.
- Alternative counts – Where conviction is entered on one count no finding need be made on other count. 1970/227.

Alternative verdicts

- Creating a disturbance cannot be substituted for threatening violence. 1970/165.
- Common assault can be substituted for indecent assault. 1970/78.
- Criminal trespass can be substituted for housebreaking. 1970/164.
- Conversion not amounting to theft can be substituted for theft. 1970/32.
- Conversion not amounting to theft may be substituted for theft. 1970/221.
- Charge for house-breaking –alternative charge entering dwelling house with intent to commit felony cannot be substituted where no such guilty intention. 1970/283.
- Indecent assault can be substituted for rape; but proper procedure to be followed. 1970/38 and 1970/347.
- Minimum Sentences Act – Charge of simple theft but particulars reveal theft by public servant – Conviction under Minimum Sentences Act decreed. 1970/293.

- More serious charge should not be substituted for less serious charge. 1970/37.
- Rape cannot be substituted for indecent assault. 1970/38.
- Theft may be substituted for stealing by public servant. 1970/225 and 1970/227.

PROCEDURE (continued)

Alternative verdicts (continued)

- Unlawful possession of Moshi c/s 30. Moshi (Manufacture and Distillation) Act cannot be substituted for illegal sale or manufacture of intoxicating liquor c/s. 65, Intoxicating Liquor Act. 1970/37.

Appeal – See APPEAL.

Arrest

- Compelling attendance of witness – Requirements. 1970/80.
- Powers of justice of peace. 1970/169.
- Powers of primary court magistrate. 1970/169.
- Without warrant – When lawful. 1970/147.

Assessors

- Primary courts – Magistrates must accept findings of assessors on facts. 1970/216.
- Primary Court – Same assessors must be present throughout trial. 1970/75.

- Autrefois acquit – can be pled where former charge was withdrawn under s. 86 (b), Criminal Procedure Code. n. 76.
- Bail pending appeal – Appeal must have overwhelming chance of success – Test not met where arguments need detailed references to evidence or judgment – Hassan Walji v. R. [1968] H.C.D. 174 followed. 1970/287.
- Sureties need not be town residents where accused is from rural area. 1970/44.

Bail – Relevant Considerations.

- Different considerations apply to grants of bail before trial and after conviction. 1970/150.
- Homicide – Murder only granted in exceptional circumstances. 1970/85

- Likelihood of similar offence being committed while on bail. 1970/177.
- Likelihood that accused will commit offence while on bail. 1970/59
- Proper test whether accused likely to appeal for trial. 1970/342.
- Seriousness of offence. 1970/342.

Charge

Accused charged with stealing money from his gardener Accused entitled to receive gardener's wages from the Bank – Gardener short paid – Whether money belongs to the Bank or gardener. 1970/272.

LXX

PROCEDURE (continued)

Charge (continued)

- Accused may be convicted on his own plea of offence not originally charged but of which he could have been convicted by virtue of the court's powers regarding alternative verdicts. 1970/221.
- Amendment of defective charge – Variance between charge and evidence renders charge "defective" – Contrary ruling in Mbithi v. R. (1955) 22 E.A.C.A. 484 held to be obiter. 1970/221.
- Contempt of court – Failure to frame a formal charge and set out particulars not necessarily fatal. 1970/202
- Defective – Accused charged with theft of goods rather than proceeds of sale of goods – Error incurable. 1970/139.
- Defective – Carrying passengers for hire or reward – Reference to Transport Licenses Ordinance unnecessary and irrelevant. 1970/340.
- Defective – Corrupt transaction c/s. 3(2), Prevention of Corruption Ordinance – No failure of justice. 1970/51.
- Defective Dangerous driving – Statement of facts must allege particulars of negligence. 1970/341.
- Defective Employee charged with using a motor vehicle without third part risk insurance – Appropriate person to charge is owner of vehicle. 1970/306.

- Defective – Error incurable where section quoted incorrectly and particulars do not reveal offence under section which was meant to be quoted. 1970/224.
- Defective – Fraudulent false accounting charge when defective 1970/61 and 1970/279
- Defective – Laid under Act not yet in force – When error is curable. 1970/71.
- Defective – Obtaining credit by false pretences. 1970/.63.
- Defective – Obtaining goods by false pretences – Not necessary to name owner of goods. 1970/67.
- Defective – Theft. 1970/62.
- Defective – Wrongful confinement – Incurable irregularity – particulars failing to state confinement wrongful. 1970/339.
- Duplicity – corrupt transaction c/s. 3(1). Prevention of corruption Ordinance – Charge not invalid for duplicity where it alleges accused obtained for himself or on account of another. 1970/49.
- Duplicity – Receiving or retaining stolen property. 1970/74.
- Joint Rape – Not defective where subsequent was committed jointly. 1970/277.

PROCEDURE (continued)

Charge (continued)

- Lack of correspondence between offence charged and conviction does not necessarily occasion failure of justice. 1970/203.
- Rape – when charge of joint rape common intention necessary. 1970/277.
- Withdrawal of charge – Difference between withdrawing a charge by substituting a fresh charge and with drawing from the prosecution discussed. – ss. 86 and 209 of Criminal Procedure Code considered. 1970/299.

- Companies – Summons – Requirements. 1970/80.
- Conduct of case – Prosecution evidence led after close of defence case – Requirements. 1970/62.

Conviction

- Improper conviction – Conviction for two offences based on same facts improper. 1970/227.
- Waiving a conviction – Magistrate not entitled to waive a conviction which is registered. 1970/336.

- Costs – see SENTENCE – Costs.
- Counsel – Refusal of adjournment for accused to obtain counsel – criteria for – Whether accused prejudiced. 1970/224.
- Delays – Prosecution witnesses not available Case should be withdrawn and reinstituted later if appropriate. 1970/44.

Failure of justice

- Corrupt transaction – Magistrate's finding that no substance in accused's denial – Misdirection and incurably wrong approach – MOSHI RAJABU v. R. 1967 H.C.D. 384 followed. 1970/289.
- Does not exist where accused's case not properly made due to error. 1970/76.
- Does not exist where error occasioned by accused himself. 1970/76.

Joinder

- Of accused – Different offences committed in same transaction – Facts constituting. 1970/68.
- Of accused – Receiving stolen property – Improper where accused received separately. 1970/74.
- Of charges – Undesirable but not illegal to join conspiracy charges with charges of specific offences based on same evidence – Verdicts on all charges must be entered. 1970/180.

Judgment

- Failure by magistrate to analyse evidence improper. 1970/148

PROCEDURE (continued)

Judgment

Ruling – Ruling upholding submission of no case to answer is judgment and must conform to requirements thereof. 1970/334.

Jurisdiction

- District court has no power to summarily reject appeal from Primary Court. 1970/226.
- Primary court has jurisdiction over offence committed outside its local limits where offender is in custody within those limits. 1970/207.
- Primary court has no jurisdiction where accused elects to be tried in district court. 1970/146.
- Traffic Ordinance – District Court has no jurisdiction to try offence c/s. 44A (1) even if presided over by a Resident Magistrate. 1970/300.

- Limitation of time for summary trials – Minor offences – Charge must be laid within one year of the commission of the offence. 1970/224.
- Misdirection by trial court – Conviction may be upheld where evidence establishes guilty of accused. 1970/151.

Non-appearance

- Non –appearance of accused after adjournment – Arrest authorized 1970/76.
- Non – appearance of accuse after adjournment – Proper procedure when accused arrested and brought back to court. 1970/76.

- Notes by Judges – Not meant to prejudge issues. 1970/224.
- Plea – Cannot be used as evidence against accused. 1970/30.

Plea of Guilty

- Accused may be convicted on his own plea of an offence not originally charged but of which he could have been convicted by virtue of the court's powers regarding alternative verdicts. 1970/221.
- Assault causing actual bodily harm- Not equivocal. 1970/144.
- Defilement by husband of wife under twelve – Insufficient where it does not refer to any intention to have the girl carnally known. 1970/154.
- Corrupt transaction – When equivocal. 1970/51.

- Equivocal – Can be remedied by full statement of facts. 1970/209.
- Equivocal – Whether can be remedied by facts constituting offence. 1970/281.
- Facts of case must be given by prosecution followed by plea. 1970/271.

PROCEDURE (continued)

Plea of Guilty

- Failing to report possession of government trophy – Accused must admit he did not report forthwith. 1970/209
- Lack of correspondence between charge and conviction does not necessarily invalidate plea. 1970/203.
- Must contain an unequivocal admission of every ingredient necessary to constitute the offence. 1970/209
- Possession of gemstones – Equivocal. 1970/71.
- Possession of government trophy – accused must state possession was unlawful. 1970/209.
- Short time between arrest and charge not significant. 1970/51.
- Where facts do not disclose offence. 1970/249, and 1970/252.
- Where plea charged – Causing death by careless driving – Admission of charge must be set out in accused's own words. 1970/168.

- Preliminary inquiry – Whether inquiry begun shortly before repeal of governing section remains valid following repeal. 1970/152.
- Primary courts – Magistrate must accept findings of assessors on facts. 1970/216.
- Search and seizure – Evidence obtained in course of illegal search is admissible. 1970/204.
- Summary proceedings – Contempt of court – Should be rarely employed. 1970/202
- Summary rejection – District court no power to summarily reject appeal from Primary Court. 1970/226.

Summons

- Disobedience to by company – Proof of proper service required before arrest ordered. 1970/80
- Service on company – Proof of when officer not present at hearing. 1970/80.
- Transfer of case from primary court – Accused has right to elect to be tried in district court and to be informed of his right. 1970/146.
- Transfer from primary court – Accused must be informed of right to elect to be tried before district court for grave offence – Failure to do so incurable irregularity in circumstances. 1970/222.
- Traps – Prevention of Corruption Ordinance – Police traps allowed in order obtaining evidence. 1970/148.

Trial

Held before successive magistrate –Proper procedure. 1970/76.

LXXIV

PROCEDURE (continued)

Trial (continued)

- Held before successive magistrates – what is proper procedure on magistrate taking over trial – 1970/279.
- Unsworn testimony by accused – Questions by court not permitted. 1970/62.
- View of scene of crime – Requirements. 1970/62.

Withdrawal

- Of charge – Bar to further proceedings if done under s. 86(b),
- Criminal Procedure Code. 1970/76.
- Of charge – cannot be done under s. 86(a), Criminal Procedure Code, where accused has been called upon to make defence. Must be done under s. 86(b). 1970/76.
- Of charge – Should not normally be allowed after prosecution has produced its evidence. 1970/69.

- Of complaint – Court must act under section requested by prosecution – Has no discretion to withdraw complaint under other section carrying different consequences. 1970/205.

Witnesses

- Accused not informed of right to recall witnesses – Whether miscarriage of justice – 1970/279.
- Compelling attendance of – Proof of proper service of summons required before arrest ordered. 1970/80.
- Payment of expenses – Where court cannot afford to pay to have defence witnesses brought to testify trial should be post-poned until funds are available. 1970/57.
- When may be called by prosecution after close of defence case.

PROOF

See EVIDENCE.

PROVOCATION

See HOMICIDE.

RAPE

Alternative verdicts

- Indecent assault can be substituted for rape. 1970/38.
- Rape cannot be substituted for indecent assault. 1970/38.

Charge

Joint rape – Common intention necessary. 1970/277

RAPE (continued)

Charge (continued)

Joint rape – Not defective where subsequent act was committed jointly. 1970/277.

Consent

Complainant's societal background "permissive society" – Delay in reporting rape – Whether consent be assumed. 1970/277.

Consent vitiated by fears for daughter's health. 1970/304.

Corroboration

- Complainant delayed in reporting rape – Whether and what corroboration required. 1970/277.
- Torn clothing not necessarily corroboration. 1970/66.
- Elements of offence – Penetration necessary. 1970/38.

RECEIVING STOLEN PROPERTY

Charge

- Duplicity – Receiving or retaining. 1970/74.
- Joindure of accused – Improper where accused received separately. 1970/47.
- Of theft – Verdict of receiving property where no reasonable explanation adduced by accused for being in possession of cattle admittedly not his property. 1970/282.

Possession

- Admission to possession of parcel not admission to contents thereof. 1970/295.
- Definition – Wide definition of "possession" in Penal Code does not apply in relation to charge of receiving stolen property – Reliance on s. 5 of Penal Code misdirection. 1970/295.
- Either exclusive or joint control of stolen property sufficient to constitute the offence. 1970/295.
- Receiving distinguished from retaining. 1970/74.
- Sentence – Professional receiver may be dealt with more severely than thief himself – Does not apply to first offenders. N. 151.

RECENT POSSESSION [See also POSSESSION OF PROPERTY SUSPECTED OF HAVING BEEN STOLEN]

- Burden of proof – Does not shift to accused. 1970/151.
- Claim of right see CLAIM OF RIGHT.
- Explanation which could reasonably be true should be investigated and not rejected until proven false. 1970/176.

RECENT POSSESSION (continued)

- Murder – High standard of proof required where based on recent possession alone. 1970/86.
- Six months not "recent" where article passes readily from hand to hand. 1970/79.
- Three weeks "recent" in case of burglary where accused found with radio and clothing. 1970/174.

RECKLESS AND NEGLIGENT ACTS

- Animals – Knowledge required of probability that animal is dangerous. 1970/54.
- Harm – Refers only to physical or mental harm to persons, not to damage to property. 1970/206.

RESISTING ARREST

Sentence – Compensation appropriate. 1970/157.

REVISION

See APPEAL.

ROAD TRAFFIC

- Carrying passenger for hire on reward – Driver unauthorised – whether offence c/s. 27(A) Traffic ordinance – Whether Transport Licence Ordinance as amended relevant. 1970/340.
- Carrying passengers for hire without licence – Onus on accused to prove contrary – Defence that passenger were his employees shift burden back to prosecution. 1970/250.
- Causing death by dangerous driving – Imprisonment appropriate where negligence grave. 1970/43.
- Dangerous driving – Charge – Statement of facts must allege particular of negligence. 1970/341.

Disqualification – special reasons.

- Disqualification from holding driving licence – "Special reasons" what may constitute special reasons. 1970/309.
- Disqualification from holding driving licence – "Special reasons" do not exist where accused driving whilst drunk. 1970/309.

- Disqualification form holding driving licence – “Special reasons do not exist where accused’s job involves driving. 1970/60.
- Disqualification from holding driving licence – “Special reasons exist where not a duty of accused to insure vehicle. 1970/306.

Driving without Insurance

- Driving motor vehicle without insurance – Owner of vehicle than driver should be prosecuted. 1970/306.
- Driving motor vehicle without insurance policy of insurance issued retrospectively – not a defence in criminal prosecution 1970/306.

ROAD TRAFFIC (continued)

Driving while efficiency impaired by drinks

- Standard of proof – Prosecution does not have to prove that driver’s efficiency was so impaired that he was deprived of ability to control vehicle – Prima facie case established once impairment shown. 1970/163.
- Failing to comply with timetable – Only licence holder – not usually driver – Can be charged. 1970/252.
- Failure to stop for police signal – Signal must amount to an order to stop. 1970/286.
- Failure to stop for police signal – Signal must be properly communicated. 1970/286.
- Jurisdiction – District Court has no jurisdiction to try offence c/s 44A (1) Traffic Ordinance even of presided over by a resident Magistrate. 1970/300.
- Plea of guilty – Causing death by careless driving – Change of plea – Admission of charge must be set out in accused’s own words. 1970/168.

Sentence

- Imprisonment – Long prison sentence – To protect public – Reformation of accused not sole object of punishment. 1970/296.

- Imprisonment should be imposed on a first offender only where there are aggravating circumstances which point to a total disrespect for the law. 1970/161.
- Irrelevant considerations – Drunkenness – Accused indulged in excessive liquor drinking and struck complainant – Whether drunkenness can serve as mitigating factor 1970/298.

Material factors see SENTENCE.

Responsibility – Primary responsibility to insure vehicle rests with owner – Driver should not be fined heavily 1970/306

ROBBERY

With violence

- Violence – Immediately after stealing – fact constituting. 1970/36.
- Violence – Must be for purposed of stealing. 1970/34.
- Violence must be for the purpose of stealing. 1970/213; 1970/215.
- Violence – threat of – Facts constituting. 1970/36.

ROGUES AND VAGABONDS

Charge – Insufficient particulars given – Prosecution cannot create a hybrid offence by combining some ingredients of subsections – MOHAMED S/O MZEE [1968] H.C.D. 148 followed and strongly recommended to those responsible for drafting charges. 1970/290.

ROGUES AND VAGABONDS (continued)

Facts constituting offence – Prosecution must prove that accused is a suspected person – Suspicion must be one arising from acts antecedent to act occasioning arrest, 1970/290.

SENTENCE

Absolute discharge

- Failing to pay contributions to National Provident Fund – Appropriate only in exceptional circumstances. 1970/162.
- May be granted for any criminal offence unless expressly excluded. 1970/162.

Appeal

- Circumstances in which appeal court will interfere with sentence imposed by trial court. 1970/158; 1970/159.
- Minimum sentence – Whether can be imposed on appeal. 1970/77

Compensation

- Appropriate in case of assault causing actual bodily harm. 1970/144.
- Appropriate in case of criminal trespass. 1970/164.
- Appropriate in case of resisting arrest. 1970/157.
- Appropriate in minor case of manslaughter. 1970140
- Not appropriate where ownership not established and no offence committed. 1970/249.

Concurrent Sentences

- Appropriate for convictions for housebreaking and rape save in exceptional circumstances. 1970/201.
- Two corporal punishments illegal. 1970/208.

Corporal punishment

- Twice – in concurrent sentences illegal. 1970/208.
- One sentence only of strokes may be awarded at single trial 1970/52, 1970/208 and 1970/275.
- Whether order can be carried out when, due to lengthy appeal, order reaches prison authorities more than six months after originally passed by trial court. 1970/83.
- Where two or more distinct offence – Whether must be attached to all offences. 1970/275.

Costs

Cannot be ordered against accused when Republic has not incurred any actual costs. 1970/212.

SENTENCE (continued)

Costs (continued)

- Cannot be “unliquidated.” 1970/212.
- Discharge – Absolute discharge 1970/162.

Fine

- Ill health of accused – Resulting impecuniosity’s – Relevant factors. 1970/46.
- Not appropriate where accused has no means to pay. 1970/156.
- Partnership – Each partner who is convicted must be fined separately. 1970/47.
- Road Traffic – Primary responsibility to insure vehicle rests with owner – Driver should not be fined heavily. 1970/306.
- Whether to impose in lieu of imprisonment is up to discretion of Court. 1970/294.
- Forfeiture – Fauna Conservation Ordinance – Unauthorised possession of firearm – Belonging to third party – Forfeiture order can not be supported unless owner notified to show because why there should not be forfeiture. 1970/149.
- Gemstones – Unlawful possession of gemstones – Whether 18 month’s imprisonment a severe sentence for a first offender. 1970/246.

Imprisonment

- Appropriate for a first offender only where there are aggravating circumstances which point to a total disrespect for the law. 1970/161.
- Inappropriate for unlawful possession of gemstones when stones are only semi-previous and of no commercial value. 1970/170 – Long prison sentence – To protect public – Reformation of accused not sole object of punishment. 1970/296.
- Possession of moshi – Short prison term appropriate for first offender where quantity is plainly for distribution. 1970/158.
- Receiving stolen property – Professional receiver may be punished more severely than thief himself – Does not apply to first offenders. 1970/151.
- Short prison terms may be imposed as shock deterrents for widespread offences. 1970/159.
- Short prison terms not reformative. 1970/159.
- Subordinate Courts – Certain sentences not be carried into effect without confirmation by the High Court. 1970/275.

- Youthful offenders - Magistrate must consider inappropriateness of imprisoning juvenile delinquent – And must show on record reasons for preferring prison sentence – Children and Young Persons Ordinance Cap. 13. 1970/278.

LXXX

SENTENCE (continued)

Interpretation

- Penal Code expressions need not be interpreted in accordance with English decisions – Section 4 of Penal Code inapplicable, 1970/160.
- Repeal of section authorizing preliminary inquiry – Whether inquiry begun under old section remains valid. 1970/152.

Material factors

- Accused being police –officer on duty. 1970/303.
- Age of complainant. 1970/304.
- Amount of force used – Fist offender – Youth long term imprisonment may convert accused into hardened criminal. 1970/275.
- Breach of trust. 1970/72.
- Damage reasonably foreseeable – Road traffic. 1970/43.
- Degree of negligence – First Offender. 1970/309.
- Fact that accused was Are Secretary and well aware of the law. 1970/167.
- Frequency in the area. 1970/159.
- Gravity of injuries caused. 1970/218.
- Ignorance of law. 1970/199 and 1970/271.
- Ill-health. 1970/46.
- Irrelevant considerations – Drunkenness – Accused indulged in excessive liquor drinking and struck complainant – Whether drunkenness can serve as mitigating factor. 1970/298.
- Killing under influence of drink. 1970/307.
- Loss of job and social status as result of conviction. 1970/153.

- Minimum Sentences Act – Brilliant academic qualifications not material factors. 1970/288.
- Minimum Sentences Act – Irrelevant considerations – Hardship to dependents. 1970/245.
- Minimum Sentences Act – "Special Circumstances" – Not found where accused first offender – Where sum involved is Shs. 566/-. 1970/308.
- Minimum Sentence Act – When deterrent and exemplary sentence called for. 1970/293.
- Overwhelming hardship leading to commission of offence. 1970/162.

SENTENCE (continued)

Material factors (continued)

- Poverty. 1970/46
- Prevalence of offence. 1970/218
- Property of parastatal body. 1970/72.
- Provocation – Act of adultery with accused's wife a mitigating factor for assault. 1970/284.
- Reformation of accused not sole object of punishment – Protection of public relevant factor. 1970/296.
- Security of state. 1970/198 and 1970/271.
- Status of accused – Whether relevant. 1970/159.
- Terror caused to victim. 1970/78.

- Partnership – Each partner who is convicted must be sentenced separately. 1970/47.
- Previous convictions – Disentitle accused to leniency – Not excuse for imposing heavy sentence but may be grounds for imposing more than minimum sentence. 1970/87; 1970/88.

Principles of punishment

- Increase in maximum penalty for offence should be reflected in level of sentences imposed. 1970/158.
- Maximum penalty must be reserved for the worst cases. 970/202.
- Mitigating circumstances ignored where offence concerns state security. 1970/198.
- Repeated offender upon whom prison terms have no deterrent effect may be sentenced to long period of imprisonment for protection of society. 1970/88.
- Probation – Inappropriate in cases of possession and sale of moshi. 1970/158.
- Procedure – several convictions – Sentence on lesser charge should not be merely nominal. 1970/78
- Repatriation order – Court has no power to make. 1970/41.
- Unauthorised sentence – Waiving a conviction not a lawful sentence. 1970/336.

STATUTES (INTERPRETATION)

Application of Minimum Sentences Act – Meaning of "taking part in a corrupt transaction with agent" – Whether apply to any party to such transaction – Item 7 Schedule to Cap. 526 – 1970/302.

Interpretation

Penal Code expressions need not be interpreted in accordance with English decision – Section 4 of Penal Code inapplicable. 1970/160.

STATUTES (INTERPRETATION) (continued)

Interpretation (continued)

- Repeal of section authorizing preliminary inquiry – Whether inquiry begun under old section remains valid. 1970/152.
- Section 322 C.P.C. to be broadly interpreted. 1970/181.

STEALING

See THEFT.

SUMMARY PROCEEDINGS.

See APPEAL; PROCEDURE.

TAXATION

See APPEAL; PROCEDURE.

TAXATION

Failure to pay personal tax – duty of employer to deduct tax from salary – improper to convict employee for employer's failure to do this. 1970/223.

THEFT

- Admission – admission of responsibility for sums signed subsequently found short – Whether admission of theft – Admission to police – Whether confession and inadmissible. 1970/301.
- Agent – Stealing by agent. 1970/81.
- Alternative verdicts – Conversion not amounting to theft can be substituted for theft. 1970/32.
- "By virtue of his employment" sees below stealing by Agent, Stealing by public servant, and stealing by servant.
- Accused charged with stealing money from his gardener – cause entitled to receiver gardener's wages from the Bank – Gardener short paid – Whether short paid – Whether money belongs to the Bank or gardener. 1970/272.
- Conviction cannot be supported where accused was charged with theft of proceeds of cheques, but found guilty of theft of cheques themselves. 1970/142 followed in 1970/273.
- Should itemize the property stolen. 1970/62.
- Whether stealing of cheques and depositing them in one's personal Bank account amounts to theft of the proceeds of the cheques. 1970/142.
- Claim of right – See CLAIM OF RIGHT.

Conversion

Article borrowed for one day but kept for four months – No conversion. 1970/32.

Unauthorised use of vehicle – But belief that use authorized – No conversion. 1970/196

Conversion

Unauthorised to carry passengers for hire or reward – Driver retaining property of passengers as security for payment – Driver a special owner and does not commit theft. 1970/340.

Fraudulent intent

- Intention to annoy not sufficient to establish fraudulent intent. 1970/164.
- Money – Loan to himself by Chairman of Prison Staff Club – Possibly unauthorized – No fraudulent intent proved. 1970/225.

Identification of Stolen goods

- Complainant must be asked for description or special marks before goods are shown to him – [1967] H.C.D. 446 followed. 1970/243.
- Prosecution must prove beyond reasonable doubt that goods found with accused were those of owner/complainant. 1970/243

- Money received for another – Property remains with gier until direction complied with – Where receiver is not authorized by third party to receive on his behalf. 1970/72
- Obtaining by false pretences – See OBTAINING BY FALSE PRETENCES.
- Obtaining by false pretence distinguished. 1970/82.
- Retaining property of passengers as security for payment – Driver unauthorised to carry passengers for hire or reward – Held: Driver a special owner and does not commit theft. 1970/340.
- Stealing by agent – Money entrusted for specific purpose used for other purposes to benefit principal – No theft. 1970/81

Stealing by public servant

- Conviction justified where discrepancies or contradiction in testimony by prosecution witnesses are neither material nor capable of raising any doubt as to guilt of offenders. 1970/278.
- Does not cover employee of National Housing Corporation. 1970/72.
- Does not cover theft by prison officer of funds of Prison Staff Club. 1970/225.
- Does not cover theft committed by public servant committed outside of his public role. 1970/227

THEFT (continued)

Stealing by public servant (continued)

- Money obtained by virtue of employment – Defined. 1970/89.
- Money obtained by virtue of employment – Facts constituting theft 1970/72.
- Phrase "by virtue of his employment" interpreted – Holding in Rajabu s/Mbaruku v. R. overruled. 1970/160.
- Property of Republic – facts constituting, public property. 1970/72.
- Testimony – Rejection of part of testimony of a witness does not necessarily make his whole testimony suspect or discredited. 1970/278.
- Where money received by virtue of employment appropriated. 1970/245.
- Money obtained on account of employer – Facts constituting theft. 1970/272.

- "Taking" – Fact constituting. 1970/82.
- "Taking" Includes handing over induced by fear. 1970/36.
- Testimony – rejection of part of testimony – Whole testimony not suspect or discredited. 1970/278.
- Theft by trick – Facts constituting. 1970/227.
- Unauthorised driver carrying passengers for hire or reward – Retaining property of passengers as security for payment – held: Driver a special owner and does not commit theft. 1970/340.

THREATENING VIOLENCE

- Alternative verdicts – Creating a disturbance cannot be substituted for threatening violence. 1970/165.
- Charge – Charge stand where particulars of offence do not correspond with element of offence. 1970/224.
- Mere act of carrying panga combined with act of assault does not constitute offence of threatening violence. 1970/165.

TOWNSHIP RULES CAP. 101.

Erecting a building without complying with township rules – Authority may carry out the demolition and removal and recover expenses. 1970/156.

TRAFFIC

See ROAD TRAFFIC.

TRESPASS

See CRIMINAL TRESPASS.

LXXXV.

WRONGFUL CONFINEMENT

- Arrest and confinement by Executive Officer of suspected tax defaulters – When lawful – 1970/294.
- Burden of proof – Prosecution only prove fact of confinement – Accused must justify it. 1970/169.
- Charge – When irregularity in charge fatal. 1970/339.
- Elements of offence. 1970/169 and 1970/339.

CIVIL CASES

1.

Mohamed Dewji v. The Commissioner of Income Tax. Civ. App. 4-A-68; -; Platt J

The applicant unsuccessfully appealed against a decision of the Commissioner for Income Tax. He later gave notice to appeal to the Court of Appeal, but did not apply for leave. The omission was noticed just before the appeal was about to be heard. He then applied for leave to appeal under s. 17 of the Appellate Jurisdiction Ordinance. Cap. 451.

(1) "Section 113 (h) of the East African Income tax (Management) Act 1958 provides that when there has been an appeal to a judge under section 111 of the Act, then "no appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact". The sub-section does not give an absolute right of appeal, since it is phrased in a negative and not a positive form. While there cannot be an appeal

except on a matter of law or mixed law and facts, it does not follow conversely that there is automatically a right of appeal on such conditions." (Citing G. v. THE COMMISSIONER OF INCOME TAX, Case No. 7, Vol. 1, East African Tax Cases 43 at page 56). (2) "One is then bound to refer back to the provisions providing for appeal from the High Court to the Court of appeal in civil proceedings, and they will be found in Part 11 of Cap. 451. Section 7 (1) provides that in civil proceedings except where otherwise provided by any other ordinance for the time being in force, an appeal shall lie to the Court of Appeal against decrees and orders as specified in sub-paragraphs (a) and (b) of the sub-section and then sub-paragraph (c) provides: - "With the leave of the High Court against every other decree, order, judgment, decision or finding of the High Court." It would seem therefore that leave to appeal is necessary, as the decision from which the applicant intends to appeal could only fall within section 7(1)(c) of Cap. 451. If this is the true position, then the intended appeal is at present incompetent, and would no doubt be struck out. " "There is no ground on which the "G". Case could possibly be distinguished and therefore I am bound to hold that the applicant must obtain leave to prosecute his appeal: otherwise the Court of Appeal would be without jurisdiction." (3) "This then brings me to the question whether leave should now be granted. It is conceded that by Rule 23 of the EAST AFRICAN COURT OF APPEAL RULES 1954, leave to appeal not having been sought at the time when the judgment was delivered an application should have been made for that purpose within 14 days of the date of the judgment. The present application is of course out of time, but notwithstanding the decision of the Court of Appeal in HOGAN v. ADRIANWALLA (1965) E.A 594; it is submitted that this court may entertain the application to grant leave out of time. (The Judy then stated the facts of the case) I understand that it is now accepted that this opinion was per incur am, because section 17 of the Appellate Jurisdiction Ordinance was not brought to the notice of the Court of Appeal. Section 17 provides as follows: - "17. – The High Court and, where an appeal lies from subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of a subordinate court exercising extended powers or for making an application for leave to appeal or for a certificate that the case is fit or appeal, notwithstanding that the time for giving such

notice or making such application has already expired:" with respect. Therefore, I am not bound to follow the ruling of the Court of Appeal in HOGAN case in view of the statutory provisions of section 17, which must, of course, take precedence." (4) "Nevertheless, the problem remains

On what principles leave should be granted out of time. The controversy between the parties was whether section 17 should be considered to give this court unlimited discretion to extend the time within which the application might be made or whether section 17 should be read as importing the same limitations as are provided in Rule 9, (of the Court of Appeal Rules 1954). The latter Rule recites as follows, sub-rule (1) only being applicable. "(1) The Court shall have power for sufficient reason to extend tie for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limit therefore may have expired, and whether the time limited for such purpose was so limited by order of the Court or by these Rules or by order of a Superior Court or by any written law of any of the Territories." From a comparison of the two sections, it will be apparent that while they are both concerned with an application for extension of time to obtain leave to appeal (inter alia) the Court of appeal is only entitled to grant such leave "for sufficient reason". These words not being present to qualify the power of the High Court in section 17. their absence raises a question of some complexity on which neither the researches of Counsel nor my own have been able to find any authority; and the importance to the applicant of implying the words "for sufficient reason" may be discovered in the line of cases, which may be Said to have culminated in NGONI – MATENGO CO-OPERATIVE MARKETING UNION LTD. v. ALIMOHAMED OSMAN (1959) E.A. 577, and the recent review per Georges, C. J. in ESSAJI v. SOLANKI (1968) E.A. 218, of all the earlier authorities. I need not review the authorities considered in those cases, but it will suffice if I set out what I consider to be the principles deducible from those decisions. (The judge then reviewed the principles). "These principles have been resolved in denying the applicant an extension of time

where the error arose through his failure to appreciate the legal necessity or his lack of diligence in taking the necessary steps, (see Farrab Incorporated v. The Official Receiver and Provisional Liquidator (1959) E.A. 5, and N.A. S. Airport Services Ltd. v. Attorney General of Kenya (1959) E.A. 53, and Commissioner for Transport v. Attorney General of Uganda (1959) E.A. 329); while on the other hand, the applicant has not been debarred where his error was of a different kind or less grievous – (see the Ngoni-Matengo case, Essaji v. Solanki, both quoted above which drew strength from Gatti v. Shoosmith (1939) 3 All E.R. 916).” “After careful consideration, it does not appear to me that I am bound to read the section and the rule as synonymous. For one thing, the rules were in existence from 1954, while the Ordinance came into force in 1961. I think it reasonable to consider that the rules, about which there had been so much litigation, especially Rule 9 and the meaning of “sufficient reason”, must have been well in mind when the draughts men presented the Ordinance to the Legislature. It is difficult to think, indeed, that the 1959 volume of the East African Law Reports, b itself such a compendium of knowledge on Rule 9, could not have been familiar reading in 1961. I would therefore hazard the opinion that the words “sufficient reason” was omitted from section 17 by design and for no other reason. In my view hem, on a plain reading of the section, I am not bound to consider this application under the exacting light of the decisions relating to Rule 9; I consider that my discretion is unfettered by the qualification in rule 9.” (5) “That does not mean that I should approach section 17 as if there were no principles to be followed in exercising the discretion provided by that section. Obviously gross errors would not attract the

court’s indulgence. But as I understand section 17, it provides a free discretion, and whether or not the court’s indulgence is to be granted, must depend upon the facts of the individual case. It seems to me that support for this view can be gleaned both from SHABIR DIN v. RAMPRAKASHI ANAND, (1955) 22 E.A.C.A. 48, and GATTI v.

SHOOSMITH (quoted above).” “There is no case here of lack of diligence. The only difficulty is that he failed to take leave to appeal, and on ascertaining his mistake, he brought this application.” “As to his misunderstanding of the nature of the appeal, he cited the definition of Appellate Proceedings in Rule 2(a) of the High Court Registries (Amendment Rules 1963, which defines such proceedings as relating to appeals to the High Court from subordinate courts and to all applications to the High Court for review or revision of proceedings in subordinate courts. That may be so but …… those rules have no application, since the Income Tax (Appeal to the High Court) Rules 1959, Legal Notice No. 13 in fact applies. No doubt, this type of appeal to the High Court is not in the ordinary sense an appeal as from the decision of another judicial body. And Rule 17 applying the procedure in civil suits before the court muatis mutandis shows that this appeal is of a hybrid nature. Nevertheless, it is clear that it is an appeal, and therefore the next appeal is a second appeal.” “The mistake of law made in this case would not appear to be different in principle, though different in kind, from that made in the Gatti Case. Therefore basing myself largely on the decision in the Gatti case, and considering it reasonable in all the circumstances, I shall grant the application. Accordingly leave to appeal is granted out of time.”

2. Petro Baitani v. Samwel Rwekamwa. Civ. App. 236-M-69; 16/12/69; Bramble J.

The appellant brought a claim for damages for trespass in that the respondent had wrongfully cut 15 bananas bunches from his shamba. The proceedings on the ground that cases involving Nyarubanja tenancies were for the Nyambanja tribunal only. It was not disputed that the original owner of the shamba in question was a Nyambanja tenant. The appellant, who was the land – Lord’s son occupied it in 1944 after the tenant had abandoned it and had been using it for 23 years before the alleged trespass. The respondent admitted that the original owner, Kante, had stopped using the shamba because of illness but said that the farmer had bequeathed the shamba to him. There was no evidence whatever to support the respondent’s word on the question of the bequest and the trial magistrate held that it was not roved and found against the respondent.

Held: (1) “There were, therefore, no conflicting claims in law as to a Nyarubanja tenancy in that the respondent was found to have no claim at all. It might have been otherwise if there had been satisfactory evidence of a bequest. In any case the matter was decided by the court of first instance on the 12th June, 1969 when the now repealed Nyarubanja tenancy (Enfranchisement) Act 1965 was in force. Section 4(1) provided that – On the commencement of this Act, every parcel of land held, immediately before the commencement of this Act, by any person as a tenant under or I accordance with Nyarubanja tenant shall, by virtue of this Act be enfranchised and cease to be so held. Since the trial court properly found that the landlord had resumed possession through his son, the appellant, after the tenant had abandoned the shamba, the appellant was not holding as a tenant but an owner from his point of view and the shamba

did not come within the provisions of the Act. The respondent was not in possession and could not then claim to be holding under a tenancy so as to invoke section 4 (1) of the Act. This was not a dispute as to land enfranchised under the Act and the learned district magistrate was wrong in holding that it should be referred to the Nyarubanja Tribunal. Moreover, there was such Tribunal at the date of trial as it was only brought into being under the 1968 Act which came into force on the 1st August, 1969.” (2) Appeal allowed.

3. Attilio v. Mbowe. No. 2 Civ. 95-D-69; 23/1/70; Georges C. J. (See [1969] H.C.D. n. 284).

The plaintiff claimed possession of a part of the Splendid Hotel on Independence Avenue, Dar es Salaam, which he alleged the defendant was unlawfully occupying. The defendant claimed that he was in possession under a contract of sale between the plaintiff and himself, and counter claimed for specific performance of the contract. In a previous judgment, the High Court held that there was a contract granted specific performance, and awarded damages to the defendant, which were to be assessed. Under the order, the plaintiff was to execute a transfer to the defendant, who was to pay

the purchase price in instalments. The defendant defaulted on the first installment, being unable to raise a loan from his bank who informed him that they could not advance the money due to a change in credit policy. The plaintiff's advocates wrote to him on the day after the one on which the installment was due, saying that they were rescinding the contract. The defendant produced the money some days later. The plaintiff refused to accept it. The defendant applied to the court for an extension of time for the payment of the money. The plaintiffs filed an application asking that the contract of sale annexed to the decree of specific performance be rescinded and that the defendant be ordered to hand over the premises.

Held: (1) It would appear that in England it is not usual to set out in a decree for specific performance the dates on which payment is to be made or a conveyance executed. It is merely ordered that there be specific performance of the contract. If the steps necessary for that purpose are not taken by the appropriate party, the person who whished to enforce the decree can apply to have dates fixed and methods of performance detailed. Two cases were cited by Mr. Talati: - Foligno v. Martin 16 Beav. 586 and Simpson v. Terry 34 Beav. 423. in the latter case the Court fixed a date three weeks from the date of the hearing of the application for the payment of the purchase price. In the former it was clear that the defendant would not perform and that it would be idle to have a date fixed. In both case was an extension granted of a date already fixed, and both cases differ in that sense front the case under consideration. The general principle on which the Court acted, however, seems in my view, apposite in this matter – the granting of further relief in consequence of one party or the other defaulting in the performance of something which it was his duty to perform under the judgment. Implicit I the decisions also is the power assumed b the Court to supervise the order until it is performed or until it is clear that it cannot be performed and some alternative remedy will have to be granted. These principles appear to me to be both convenient and sensible and unless something positive can be found in our law to make them inapplicable they could be adopted by reason of the provisions of the Judicature and Application of Laws Ordinance cited above."

(2) “It is urgued, in effect, that there was such a positive provision which made these principles inapplicable. He stated that the Court on 23rd December, 1969, had issued a decree which was in effect a final decree as far as the date for payment and executions were concerned. Under Order XX Rule 3 of the Civil Procedure Code the judgment once signed could not after wards be altered or added to, save as provided y s. 96 of the Civil Procedure Code or on review. Section 96 provides for the correction of clerical, arithmetical and other mistakes and accidental slips and omissions in judgments. It cannot apply here.” “Even though a suit may come up for final disposal it does not necessarily follow that the order made there after is a final order. The decree in this case was in some respects unarguably a preliminary decree. Damages for breach of contract were still to be agreed or assessed. The total sum which the plaintiff would eventually receive nett had not been quantified though the purchase price had been fixed. The Court specifically reserved to both parties liberty to apply. All of this would clearly indicate that the Court still retained general super-intendance of the matter and that the decree was a preliminary decree and not a final decree. No provision was made as to the consequences of default by the defendant in meeting any of the instalments he was ordered to pay. In the event of default the plaintiff would have had to come to court to ask for the rescission of the contract. This would not involve a review of the decree for any of the reasons set out in Order XLII. It would involve a working out of the consequences of the order or the occurance of an event for which the Court had not provided namely the defendant’s inability to meet his obligations under it. Review would involve correction of an error which was either apparent on the face of the record or had become clear because f subsequently discovered circumstances. The principle underlying a review is that the Court would not have acted as it had if all the circumstances had been known. In specific performance cases the Court does not review its order for specific performance because the party ordered to perform has failed to do so. It cancels the contract ab-initio.” “Mulla Civil Procedure Code (13th Ed.) page 12 states as follows in its commentary on the definition of decree in the Indian Civil Procedure Code, 1908 which is identical with the definition in the Tanganyika Civil Procedure Code: - “A preliminary decree is one which declares the rights and liabilities

of the parties leaving the actual result to be worked out in further proceedings. Then as a result of the further enquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination." Mr. Jhaveri pressed very strongly that this decree was final as regards the manner of payment of instalments though preliminary as regards the assessment of damages. It is possible for a decree to be in part preliminary and in part final. I don not think this was the case here. Even the provisions for the payment of the instalments must be regarded as preliminary since the consequences of non payment were not provided for." The Chief Justice then referred to the case of Someshwar Dayal and others v. Widow of Lalman Sah and others A. I. R. 1958 Allahabad 488 and stated the facts. "The dominant view was that a decree for specific performance was in effect nothing more than an affirmation that a contract existed and had to be performed. Any time limits therein set out therefore, could only have the same force as time limits set out in an ordinary contract. Once time was not the essence, failure to fulfill the time limits set out in a contract did not result in total loss of all rights under the contract. Extension of time was always possible – the extended time often being made of the

essence of the contract. The situation was no different in the case of a contract the existence of which had been affirmed by the court and therefore an extension of time was also possible in such a situation to enable a party to carry out the obligation imposed. This approach strikes me as not raising any serious clash of conflicting principles. I would hold that in granting extension of time in such circumstances the court is acting under its inherent power preserved in s. 94 of the Civil Procedure Code "to make such orders as may be necessary for the ends of justice." I would hold that the situation is not one in which an alternative remedy of review is available because the decree partakes of the nature of a preliminary decree, and the court remains seised of the matter." (3) "It may well be that the Court could in effect have make the decree a

final decree by fixing a date for payment and providing that in default of payment on that day the contract should be deemed rescinded abinition – thereafter specifying the remedies to which the party not in default would be entitled. The order here was not in that form. The plaintiff would in any event have had to come to the court in an application in this action to have the contract declared rescinded." (4) "The rule is that time is not normally of the essence of a contract and there is nothing here to take the case out of the rule," (5) Time for payment of first instalment extended. Plaintiff's summons dismissed with costs.

4. Abed Mohamed v. Nassor Suleman. Misc. Civ. App. 10-D-68; 4/9/69; Duff J.

An application for extension of time within which to appeal against an assessment of income tax was dismissed. It was alleged that the applicants were misinformed by their advocate as to the period within which an appeal could be lodged. The applicants then applied for leave to appeal to the Court of Appeal for East African against this decision, urging the advocate's error as a sufficient reason why the time should be extended.

Held: (1) "In the case of the Commissioner of Transport v. Attorney – General of Uganda and another (1959) E.A. 329 it was held that an error of an advocate was not a sufficient reason to justify an extension of time being granted for lodging an appeal against a decision of the High Court. Mosdell J. in Northern Province Labour Utilization Board v. Commissioner of Income Tax (1960) E.A. 1015 declined to extend the time for giving notice of an intention to appeal against the decision of the Moshi Local Committee, the appellant having applied under section 111 (3) of the East Africa income Tax (Management) Act, 1958; the appellant's advocates had given notice of an intention to appeal to the Registrar of the High Court when in fact it was the Commissioner of Income Tax who should have been notified. The learned judge held that the error could not be termed a reasonable cause or sufficient reason, he basing his decision on the Court of Appeal case earlier cited." (2) "I am not persuaded that I would be justified in granting the application, the authorities available clearly indicating that this is not a proper case to extend the time as requested." (3) Application dismissed.

5. Mtatiro Chacha v. Lucas Ochola Civ. App. 244-M-69; 29/12/69; Brambel J.

The parties had obtained a divorce after 51/2 years of married life during which the wife bore one child who died the divorce was granted because of the husband's ill-treatment of the wife. The husband sued in the primary court for return of brideprice. He claimed 36 head of cattle and Shs. 200/- but was awarded only 17 head of cattle and Shs. 100/-. The judgment was upheld by the

district court. He then appealed to the High Court. Section 56 of the Law a Persons provides that; - "If a husband is the guilty party the wife is granted her divorce immediately the court has decided the case. The question of repayment of bride wealth is dealt with separately." Section 57 provides: - "If a husband ill-treats his wife with the object of forcing a divorce, the court can decided that none or only part of the bridewealth is to be returned even if no children have been born o the marriage."

Held: (1) "The evidence is perhaps not very clear but it could be inferred from the divorce case that it was the appellant's ill-treatment of his wife that led to the break-up of the marriage. The court, therefore, had discretion to determine what part of the bridewealth was to be refunded. There is nothing to show that discretion was improperly exercised." (2) Appeal dismissed.

6. Elia Mwaitenda v. Kajeti Mwaisela. Civ. App. 31-D-69; 3/11/69; Mustafa J.

The piece of land in dispute was allotted to Elia Mwaitenda by the Village Development Committee. Some villagers alleged that the land was used as common land for the grazing of cattle and that the VDC had no right to allocate it. The primary court held that Elia had rightly acquired the land. In an appeal to the District Court. "[The villagers] then successfully appealed to the District Court of Tukuyu/Rungwe. The District Magistrate

said he was satisfied that the land originally belonged to a number of villagers who had given it up for purposes of grazing cattle belonging to the villagers. He said the village development committee was well aware that this was common pasture land reserved by the villagers for them before the Village Development Committee came into being. He also held: “There is no law or rules which governs that the V. D. C s. have got powers to interfere with what the villagers had mutually done or reserved heir pasture before. The V. D. Cs. came into being, and this is not in accordance with Nyakyusa customary law, that the Chief had the power to interfere with such pasture which his people or villagers had mutually reserved their pasture. The duty of such Chief or Chiefs was to preserve and maintain what his people or villagers had done. I believe that the V. D. Cs. are doing the same work which the Chiefs were doing before.”

Held: (1) “It seems the district magistrate was of the view that Kajeti Mwaisela was representing himself as well as sixteen other villagers, and he appears to believe that the view of Kajeti represented the consensus of the village. He mentioned Nyakyusa customary law in relation to common grazing land In his judgment, but unfortunately there were no views of the assessors given as to what constituted Nyakyusa customary law. No evidence as such was given by a party as to such customary law either.” (2) “The point I think I have to decide is whether, when a village development committee in the normal exercise of its powers allocates to a party a piece of land a court should interfere. If the allocation for instance was done under duress or by fraud or there was misconduct, it is clear a court could and should interfere. But when the allocation has been done bona fide, as apparently was done in this case, and no misconduct has been alleged or proved, I do not think a court should substitute its view of what should be done for that of the village development committee and interfere in such allocations. I believe the village development committee is the proper body to deal with land allocation in the various areas and villages, and the members of such committee would be aware of the prevailing customary laws.” (3) Appeal allowed. Judgment of District Court set aside and that of the Primary Court, restored.

7. Land Development Company of Tanzania Ltd. v. Jinah. Civ. Case 3-D-69; 14/11/69; Georges C. J.

The plaintiff claimed 35,000/- due on a mortgage. The defendant mortgaged his right of occupancy to the plaintiff to secure a sum of money repayable in instalments of 35,000/- for three years and in smaller yearly amounts thereafter. The defendant admitted the mortgage and that he had not paid the second instalment, but alleged that the plaintiff had not paid 40,000/-, being part of the mortgage consideration, at the time of the execution of the deed. He, the defendant, had been given a cheque for that amount, but it had been dishonoured. He further alleged that he and the plaintiff had agreed orally to postpone each instalment by six months. The plaintiff objected to this evidence, relying on s. 101 of the Evidence act, 1967, which excludes oral evidence to vary, add to or subtract from a document required by law to be in writing, but which provides a number of exceptions, one of them, on which the defendant relied, to the effect that such evidence is admissible to show want of consideration.

Held: (1) "I would hold in this case that the evidence is admissible. The statement of the law by Nannerji and Nommen JJ in Indarjit v. Dal Chand [1696] 22 I.L.R. (All) 168 at p. 171 seems to me based on sound principle and I would adopt and extend it. "In Hakum Chand v. Hira Lal it was held that section 92 of the Evidence Act does not prevent a party to a contract from showing that there was no consideration or that the consideration is different from that described in the contract. If it is open to a party as is undoubtedly the case to show, notwithstanding a recital in the sale deed, that no consideration passed or that the consideration was different from that stated in the deed, it is, in our opinion, open to a party to prove under what circumstances the payment of consideration was postponed and what was the mode agreed upon as to the payment of it." Here it is alleged that there was a delay of nearly six months in payment of part of the consideration. Because of this it is alleged that repayment of instalments was postponed for six months. Oral evidence should be admitted to establish this as clearly the date for commencing repayment must have been fixed in relation to the date when the mortgage money was receiver Oral evidence of the

postponement of the one because of delay in fulfilling the other should be admissible." (2) Ruling that defendant's evidence admissible.

8. Hamisi Rajabu v. Masudi Simba. Civ. App. 255-M-69; 23/12/69; Seaton J.
The respondent, the plaintiff in the Primary Court, was given judgment against the appellant. The judgment debt was not paid and a warrant of attachment was issued against his house. The house was sold. At the time of the sale the appellant was 20 miles away from where the house was, looking after his sick father. It was 18 months later before the appellant went to court to have the sale set aside. He claimed that there was no notice of sale published and that the sale was unlawfully carried out by the respondent himself, instead of a court brokers.

Held: "There is a presumption that omnia rite acta sunt (all acts re presumed to be legal) but if it could be shown that these preconditions of sale were absent, the appellant would have a remedy. Such remedy is provided by Rule 85 (1) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, G. N. No. 310 of 1964, which states as follows; "85 (1) On application made within thirty days any person affected or of its own motion, the court may set aside a sale of immovable property if it is satisfied – (a) that there has been fraud or material irregularity in the proceedings leading up (sic) or in the conduct of the sale; or (b) that the judgment-debtor had no saleable interest in the property sold:- Provided that no sale shall be set aside unless the judgment-creditor, the judgment-debtor, the purchaser and any other person affected have been given an opportunity to be heard and produce evidence." (2) "If it was really an appeal, it was much out of time. If it was an application to set aside the sale in execution, it should have been made to the Primary Court, as the "court" referred to in Rule 85 (1) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules is defined in Rule 2 thereof." (3) "It appears from the record that the respondent is a Primary Court Clerk. Thus he should have known the correct procedure and this Court would scrutinize very carefully to see whether he abused his position by taking

advantage of the appellant. But, as the District Court pointed out, the third party who purchased the house has since carried out valuable improvements and settled in it as his home. In view of the lapse of almost 18 months since the date of the sale, it would be unfair to interfere with the purchaser's possession unless strong reasons appeared for the delay." (4) Appeal dismissed.

9. Saada Jamaliv Hassani Swaleh. Civ. App. 24-D-69; 31/10/69; Makame Ag. J.

The plaintiff petitioned for divorce in the primary court on the ground that she had agreed with her husband, in accordance with Islamic Law, that if she paid him a sum of money (in this case, Shs. 400/-), he would divorce her by talak within three months, Before the expiry of the period she paid the money into court, but the defendant refused to accept it or to give her a divorce. The primary court held that she was entitled to a divorce. On appeal to the district court, the husband claimed that he had agreed to give a divorce only on receipt of the money and not automatically at the end of the period. The district so held and set aside the primary court judgment.

Held: (1) "In his judgment the district magistrate referred to section 57 of Nikahi by Buhriy, which says, inter alia:- "Mume alisema wakati wowote unipapo Shs. 100/- nimekuacha, hawezi kukataa tena, na wakati wowote mke atowapo Shs. 100/- ataachika tu.." the magistrate seeks to distinguish this from the agreement in the present case apparently on the basis that the word "nimekuacha" is in the past perfect tense. I am of the clear opinion that such a fine distinetion is wrong." "Reading the whole khului (sections 52 to 67) as opposed to a mere quotation of a part of section 57 out of context, it emerges quite clearly that the words quoted by the district magistrate are merely one of the possible formulae to be used and are not meant to exclude any other formula. If the learned author had intended to exclude any word other than "nimekuacha" he would have done so specifically."(2) "In this type of divorce the operative factor is the offer to pay, and once this offer is accepted the operation of the divorce is immediately effective and not postponed until the execution.

In the instant case therefore it would be at the end of the three months agreed upon between the parties. This view is supported by D.F. Mulla in his Principles of Muhammadan Law, 14th Edn., at page 272." (3) "It would be inequitable and against the spirit of the law for Swaleh to make Saada fulfil her part of the contract – find and offer to him the Shs. 400/- and then for him to refuse to perform his part of the contract." (4) "The correct position would seem to be that the transaction was agreed upon as a result of a mutual agreement (and aversion). This makes it a mubar'at divorce and not a khula divorce." (5) Judgment of District court set aside, Respondent to accept the 400/- and to execute talak. For avoidance of doubt, in either case, the talak was to be talak-i-bain complete, irrevocable, and not subject to 'rejeya'.

10. John Yamo & another v. Obiyo Achieng & another Civ. App. 211-M-69; 27/10/69; Kimicha J.

The appellants claimed Shs. 400/- damages for defamation. The respondents were husband and wife and had their cattle stolen. One of the suspects was arrested. But the village headman still called a public meeting in his area and asked the respondents to mention the persons they suspected to have stolen their cattle and they mentioned the two appellants. The village headman subjected the two appellants to public interrogation and he was satisfied that there was no sufficient evidence connecting them with the crime. The appellants felt strongly that their character had been stained and that the respondents were found guilty and fined Shs. 50/- each in default three months imprisonment. This decision was quashed by the district court on appeal by the respondents. Having been dissatisfied with the decision of the district court, the appellants' instituted civil proceedings for deformation against the respondents before the same primary court. This time claiming 1,000/- damages. The primary court gave judgment in their favour but reduced the claim to 400/-. Again the respondents appealed to the district court and their appeal was allowed. The appellants have now appealed to this Court against the decision of the district court.

Held: “The fact that one suspect was already under arrest did not mean that the respondents had no ground in thinking that there were still more suspects at large.” “The procedure that was adopted by the village headman in calling a public meeting in his area and then to publicly ask the respondents to mention suspects was the one used everywhere in the area. The fact that the respondent was prepared to mention the names of the appellants in public and in their presence is proof that heir suspicion was genuine although not proved. I am also surprised that this claim should be made by citizens from Musoma. For they know very well that it is common government practice to call for names of suspected cattle thieves and the public has always been very cooperative in furnishing such names. They also know that such suspects have been arrested and kept in custody for months while investigation on their conduct was being made. The appellants should therefore consider themselves lucky that the village headman declared them innocent at the public meeting and were not kept in custody.

(1970) H.C.D.

- 11 –

11. Bernard Boyikafundi v. Tamayamali Mganidas. Civ. App. 62-D-69; 17/1/70, Saidi J.

The respondents claimed damages against the appellant for enticing and eloping with the respondent’s daughter. The Primary Court ruled that the respondent was not entitled to claim any damages, as the girl was over twenty-one years of age. Clause 90 of the Customary Law Declaration provides that: - “a man who elopes with a woman who is free of matrimonial bonds and has passed the age of 21 years has to pay neither fine nor compensation”. The appellant took the respondent’s daughter into his house as a second wife. They had a child and he offered to pay the dowry, 4 cattle, 12 goats and Shs. 780/-, to the respondent, but the offer was turned down. He further said that he could pay an instalment of 3 cattle and 8 goats immediately.

Held: (1) “The District Court was not entitled to award damages to the respondent to the extent of Shs. 502/50, as it did.” (2) “In the circumstances, it is clear that the relationship of a father and his son-in-law has been established. I direct that the

appellant pay to his father-in-law the first instalment of 3 cattle and 8 goats as dowry forthwith, and arrangements for the balance be agreed upon."

12. Zephrin Mgabona v. Jones Kalumuna. Civ. App. 163-M-69; 26/11/69; Seaton J.
The objector appealed a second time against attachment of his property in execution of civil proceeding made under rule 17 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, 1964. The appellant, the objector in the proceedings in the lower courts, asserted that his property had been improperly seized by the court, in execution of a decree which the primary court had given in favour of the respondent Jones against the appellant's nephew, Martin s/o Andrea. The decree had been made in Kamachumu Civil Case No. 281/67 in which Jones, the present respondent, had sued Martin Andrea to recover a loan of Shs. 1515/-. By consent, judgment was given in favour of the present respondent Jones and it was in execution of this judgment debt that the property was seized which the present appellant/applicant Zephrin in now claiming rightful belongs to him. The primary curt heard Zephrin's objection but decided that the property really belonged not to him but to the judgment debtor Martin. This decision was upheld by the district court on appeal but the district court noted in its judgment as follows:- "Although the primary court had no jurisdiction to try a case of such a debt of 1515/-, under s. 18 of Cap. 537 no revision can be entertained at this stage since the case was decided on 17.11.67 – now over 12 months. While I decline to distort the status quo, I shall deal with the matter in the form this application has been presented."

Held: (1) It appears to be correct, as the appellant Zephrin urges in his petition of appeal, that the primary court had no jurisdiction to hear the civil case No. 281/67 which was a claim for recovery of a loan of Shs. 1515/-. Section 14(1) of the Magistrates' Courts Act, Cap. 537 sets out the jurisdiction of the primary courts. As was held by Mustafa, J. in the case of ENDWARD KALEMELA vs Muyebe Rwenjege, P.C. Civil Appeal No. 105 of 1967, the primary court was given jurisdiction under section 14(1) (ix) and (ii) in all proceedings of civil nature where the law applicable is customary law or Islamic law or for the recovery of civil debts, rent or interest due to the Republic, the Government or any municipal, town or district council, but was given no jurisdiction to entertain claims like a loan between

private individuals. Since the decision in the last quoted case, section 14 of the Magistrates' Courts Act has been amended by the Written Laws (Miscellaneous Amendment) Act No. 50 of 1968. The amendment adds a new sub-paragraph (iii) to subsection (1) of section 14, giving additional jurisdiction to the primary courts in civil proceedings – "(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed one thousand shillings, and any proceedings by way of counter-claim or set-off therein of the same nature and not exceeding such value." "It would seem that the Written Laws (Miscellaneous Amendment) Act No. 50 of 1968 has not affected the position as explained by Mustafa, J., namely, that a primary court has no jurisdiction to entertain claims like a loan between private individuals, unless such a loan arises out of contract and does not exceed Shs. 1,000/-. However, the decision in Kamachumu Civil Case No. 281 of 1967 was by consent. No application to set it aside was made. The district court was therefore justified in holding that it could not after 12 months revise the matter and therefore was right to uphold the primary court's decision which dismissed the respondent Zephrin's objection to the execution proceedings." (2) "Appeal dismissed."

13. Karimbhai Jariwalla v. Babubhai Vadgama & the Empire Theatre Ltd. Civ. Case 202-D-61; 27/11/69; Mustafa J.

The assignee of the plaintiff/decree holder, applied for execution of a decree against the second defendants, Empire Theatre Limited, for possession of the suit premises. The Empire Threatre Limited made an application in answer to the said notice, to show cause, relying on s. 19(5) of the Rent restriction Act 1962 (as amended) to discharge or rescind the order, or to stay or suspend the execution of it. When the suit was filed, the premises were not subject to the Rent Act, but by the Amending Act No. 57 of 1966, they became subject to it, as the amending Act extended the provisions of the principal act to business premises. The preliminary point of law was taken, that the application of

the Empire Theatre Ltd. was incompetent, that they could not rely upon the Rent Restriction act since the amending Act was not retrospection.

Held: (1) “In my view the main question I have to decide is whether the provisions of section 19(5) of the amending Act 57 of 1966 have retrospective effect. The Court of Appeal for East Africa in Jivraj v. Devraj (1968) E.A. 263, in dealing with a similar provision in the Kenya rent law, held that the amending Act did not have retrospective effect so as to prevent a plaintiff in pending proceedings from obtaining possession from a person who had ceased to be a tenant before the amending Act became effection. As I have said, when the proceedings were initiated in this case and at the time of the recording of the order of adjustment, the suit premises were not subject to rent control. It seems to me that at first sight section 19(5) does give the impression that the amending Act has retrospective effect in that an order for recovery of possession of this premises, whether before or after the passing of this Act, and not executed, could be subject t the executing court, which may discharge or rescind any such order. However, there are in the said amending Act certain transitional provisions, section 29(1) of which read [S]: “29 – (1) Where, at the commencement of this act, any claim, application, proceedings or other matter, or any appeal, is pending before any Rent Restriction Board established under section 5 of the principal Act as in force immediately before the commencement of this Act or before a court or the High Court, the same may be continued and concluded b the Board, the court or the High Court as the case may be as if this Act had not been enacted.”…..

In view of the transitional provisions I am of opinion the amending Act No. 57 of 1966 has no retrospective effect and the Empire Theatre Limited cannot invoke the provisions of section 19(5). According to common law, where the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights. Here the amending Act shows no such intention, in view of the transitional provisions. I also refer to cap. 1, Interpretation and General Clauses

Ordinance, section 10, which reads: - (2) Where an Ordinance repeals any other enactment, then, unless the contrary intention appears, the repeal shall not: - …. (c) affect any right, privilege or obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or ….. (e) affect any investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceedings, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Ordinance had not been passed." I was referred to the judgment of the learned Chief Justice of Tanzania in Kotak Ltd. v. Kooverji reported in (1969) E.A. 295, where at 298, after he had discussed obiter various statements made by the learned judges in Jivraj v. Devraj supra, he states: - "The fact remains, however, that the relation of the transitional provisions of the amending Act to the amended s. 19(5) is not as clear as it could be, and it would be desirable if the position were made more certain." Unless an amending Act shows either expressly or by necessary implication an intention that the provisions should operate retrospectively, the amending Act has no retrospective effect. Here the learned Chief Justice has said the position is not as clear as it could be. That very fact, I think, would be sufficient to rule out that the amending Act in this case could have retrospective effect." (2) "The application by Empire Theatre Limited for this Court to review, suspend, stay, discharge or rescind the said Order was incompetent." Application dismissed. Leave granted to decree holder or his assignee to execute decree.

14. Griffiths v. Kadir & Salimu. Civ. Case 112-D-68; 5/12/69; Saidi J.

The action arose out of a car accident which occurred at the junction of Bagamoyo Road and Kaund Drive. The deceased, husband of the first plaintiff and father of the second, third and fourth plaintiffs, was killed. The plaintiffs sued the first defendant, the driver of the lorry involved in the accident, and the second defendant, his employer.

Held: (1) "The death of the deceased was caused by the negligence of the second defendant, and that the deceased did not contribute in any way himself to his death." (2) [Counsel] contended that out of whatever was allowed by the Court the sum Pension Scheme in respect of the deceased should be deducted. In support of this

contention he relied on the English decisions in Smith v. British European Airways Corporation and another (1951) 2 All E.R. 737, and O'Neill v. S.J. Smith & Co. Ltd. and another (1951)2 All E.R. 737, and O' Neill v.
S.J. Smith & Co. Ltd. and another (1957) 3 All E.R. 255. Two other cases which had been cited by Mr. Reigels were also referred to. These are Bowskill v. Dawson and another (1954) 2 All E. R. 649 and Green v. Russell (1959) 2 All E.R. 529. In the first two cases the court held that the sum payable to the dependants under a pension

scheme was to be taken into account in assessing damages as it was not payable under any contract of insurance or assurance within section 1 of the Fatal Accidents act, but in the last two cases it was held that such sums could not be so considered as the dependants had a right enforceable in equity to the life assurance benefit. The instant case seems to be similar to the last two English cases. The assurance was taken under the E.A.P.T. Retirement Benefits Scheme as shown in the copy of the Rules tendered in court, Exhibit P. 4. The contents of Rules 1, 4 and 10 are relevant and are quoted verbatim." [The judge then quoted the rules] ….. "It is clear from rules 4 and 10 that the assurance are taken out by the trustee in respect of and for the benefit of the members, i.e., the respective employees, and that in the event of the death of a member the proceeds of the assurance shall be paid by the trustee to the dependants or the personal representative, i.e. the executors or administrators of his estate. Quite clearly the sum of Shs. 135,702/- is exempted by section 7 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance and should there-fore not be taken into account in assessing the damages."

15. Dhanji v. Machani. Misc. Civ. Case 34-D-69; 1/12/69; Georges C. J.

The applicant applied under s. 78(4) of the Land Registration Ordinance Cap. 334 for the removal of a caveat registered against the property owned by him. The caveat had been filed by the respondent, on estate agent fees. He said that the certificate a sale.

Later, the owner gave him a cheque and he returned the certificate, but the cheque was dishonoured. Under s. 78(4) of the Land Registration Ordinance the burden is on the coveator to show cause why the caveat should remain on the Register. The Law Contract Ordinance Cap 433 section 173 reads as follows: - “In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal, received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid o accounted for to him.” It was argued that possession was not necessary for the continuance of the lien, or if it was, it had not been lost by the certificate being retaken by a trick.

Held: ”The right conferred by section 173 is a right of retention of things received by the agent. There can be no retention unless there has been possession in the first place. I would hold that under section 173, as under the English Law, a lien cannot exist unless the lien holder is in possession.” In Halsbury’s Laws of England (Simonds Ed) Vol. 24 page 170-1 Para 320 the position in England is stated thus: - “A legal lien is lost if possession is lost, so that redelivery of goods to the owner or his agent destroys the lien and when once made cannot be recalled, even if made by mistake; but if redelivery is induced by fraud or is otherwise wrongfully obtained the lien revives if possession is recovered, even though the recovery is affected by a stratagem. There is no such thing as a notional lien and the court has no power to allow an applicant to part with possession while retaining his rights as holder of a legal lien.” It would appear that a lien can be based only on possession of the property over which it is claimed and the right to retain it. It confers no right to sell the property. If the owner retakes possession by fraud the lien holder would have the right to retake possession and, if successful, could not be sued in detinue

by the owner.” Where property is actually conveyed to a purchaser and the purchase price remains unpaid the purchaser holds the legal estate as a trustee for the vendor, who holds a beneficial interest until the purchase price is paid. This is a right in equity. If

the vendor in addition still holds the title deeds he would have a legal lien in respect of the deeds. In equity his lien would continued even where he had parted with the deeds. There can, however, be no question of a lien in equity arising in this case since the caveator as an agent never had any other right except that of retaining the deed in his possession. Unlike the vendor he had no beneficial interest in the property itself which required protection until the purchase price had been paid." (4) "Where title deeds are deposited with an agent to negotiate a sale of the property, it cannot be said in the absence of any other agreement between the parties that an equitable mortgage by deposit of title deeds arises in respect of any commission earned by the estate agent with regard to the sale of that land. His lien is a legal lien attaching to the title deeds alone and not to the land possession of which he does not have. If he loses possession of the title deeds then he loses his lien though it would revive if he did manage to regain possession." (5) It follows from this that I hold that such a lien is not an "interest in registered land" within the meaning of the Land Registration Ordinance Cap. 334 section 78(1). Unless a person holds such an interest he cannot present a caveat for registration." (6) Direction that the caveat be removed from the Registrar.

16. Thereza Ngemela v. Candida Ngemela. (PC) Civ. Case 207-M-67; 18/11/69; Seaton J.

"The appeal arose out of a contest between two sisters for a shamba valued at Shs. 400/-. The shamba which they are claiming was part of a larger whole which originally belonged to their father and passed upon his death to his son Petro, the brother of the parties. When Petro died, the original shamba that had belonged to their father was divided amongst his three sisters, that is to say, the appellant and the respondent in this suit and a third sister, Bi. Mukajuna who is now dead. Upon Mukajuna's death, the respondent Bi. Candida who had been looking after the shamba during the later years of BiMukajan's life, continued to live on the shamba and to enjoy the proceeds. For the past seven years since Bi Mukajan's death, the appellant Bi. Thereza made no claim to the shamba which had belonged to Bi. Mukajuna, the subject matter of the suit, but she then filed the present suit claiming that the respondent Bi. Candida wished to dispose of it to her married daughter. As this would mean that the shamba would pass out of the

clan, the appellant Bi. Thereza claims that the shamba should be divided between herself and her sister the respondent Bi. Candida. Bi. Candida objected to the claim on the ground that Bi. Mukajuna intended her to enjoy the shamba after her death although there was no written will to this effect and that the appellant Bi. Thereza's acquiescence for seven years indicates her agreement to this bequest. The primary court of Katoma accepted the testimony of the head of the clan that they had, in accordance with the views of other clan members, divided the disputed shamba between the appellant Bi. Thereza and her sister BI. Candida, the respondent and accordingly the primary court made an order dividing the disputed shamba between them. The district court of Bukoba set aside the judgment of the primary court because although there was no will by the deceased, since the respondent Bi. Candida had

taken care of the shamba and had not been specifically disinherited by will, she was entitled to its ownership. Further, the district court was of the view that the period of seven years during which the shamba had been undisturbed was corroboration of Bi. Candida's claim."

Held: (1) "in my view, the important consideration is that this is a clan land and that it could not therefore be disposed of to a stranger. As Bi. Mukajuna made no will, her property must be deemed to pass as upon intestacy. The two sisters Bi. Candida and Bi Thereza are the proper heirs for the deceased Bi Mukajuna and there fore they are entitled to share the land equally between them. The decision of the primary court was therefore just and I am of the view that it should be upheld>" (2) Appeal allowed.

17. Mtuse Itumo v. Mung'aa Mkula. (PC) Civ. App. 65-D-66; 25/11/69; Saidi J.

The parties in the dispute are Kambas living in Tanga. The appellant sued his mother-in-law for return of bride price. The mother –in-law set up a counterclaim for blood-money. It was not disputed that the appellant had married the respondent's daughter some years ago and paid the brideprice of 8 cattle, 12 goats and Shs. 64/- The couple had several children. It was not disputed that after his marriage the ppellant killed

another child of his mother-in-law. He was imprisoned for one year on account of this. As a result of the killing the marriage broke down and his wife left him and took all the children to her mother. It was accepted in both courts below that under Kamba law, the whole bride-price was refundable if the wife left the husband and took the children with her. If was also accepted that a claim for blood-money was maintainable under Kamba law, if a relative was killed by a stranger. The mother-in-law claimed 14 cattle as blood-money. This occurred about 10 years ago. The record of the local court could not be produced, but a letter was found, written by the Chief Jumbe of Mknga Local Court to another jumbe indicating that the then District Commissioner had asked him to persuade the mother-in-law to accept half the claim, since the appellant had been imprisoned for a year. The parties accepted the contents of the letter, but denied that the reduction had been agreed to. Before the claim for blood money was settled, the appellant sued for return of bridewealth. A decree was later obtained in the suit for blood-money but was not executed until the present suit was brought, and it appeared in the present suit as a counter-claim. The district magistrate adjusted both claims and held in the result that the appellant had to pay his mother-in-law a balance of I cow and 3 goats, or 15 goats as blood-money. Against this finding the appellant appealed to the court.

Held: (1) The claim for brideprice was not time barred, nor was the claim for blood-money, as it had been lodged in time but remained unexecuted, only appearing in this suit as a counter-claim which it was not. (2) “Amongst mot African tribes claims for blood – money was common in the past and these were taken to be compensation for the loss of a relative who met his death at for the benefit of the family or clan. His death meant a loss and if the death was caused by another person blood-money was claimed to replace those services the deceased would have rendered. Scales for blood-money were therefore set up and these were followed at all times. Blood – money is still being claimed by some tribes in several parts of Africa. Amongst the iteso of Uganda a person who kills another pays 5 cattle or Shs. 500/- as blood-money (see “Uganda” be H.F. Morris

and J.S. Road, page 313). Pleed money is always claimed whether the killing was intentional or accidental. It is not however claimed where the killer is executed. In Tanzania blood-money used to be claimed amongst most of the tribes. The Local Government Memoranda No. 2 (Local Courts), 1957, made provision in paragraph 81 of Part 111 for recovery of blood-money. The paragraph reads: - "81. Blood money. – Claims for blood money can be heard in the local courts in certain circumstances only. No claim lies: - (1) unless local customary law has always allowed it; (2) it sentence of death has been carried out on the accused; (3) where the person accused has been acquitted by the High Court, unless fresh evidence becomes available which was not available to that court or unless the person acquitted later admits his liability before the local court; (4) where the accused has been imprisoned, until he has been released. The length of time he has been in prison should be taken into consideration." Claims for blood-money were not maintainable where sentence of death had been passed and carried out or where the person accused had been acquitted by the High Court unless fresh evidence became available or the accused person admitted his liability before the local court. Provision was also made to the effect that the length of prison sentence served should be taken into account to reduce claims for blood-money but the Memoranda did not attempt to fix the amount of blood-money. So far there are in Tanzania only two cases of blood-money reported. These are Sembo Gwaru v. Gudada d/o Ganugwanda (Central Court Appeal No. 12 of 1955) and Abdallah Misai v. Mnsasasu Tandu and Muua Simba (Central Court Appeal No. 34 of 1955) appearing in Local Courts Digest Nos. 92 and 167. Both claims appeared to have failed as it had not been established that the defendants were responsible for the death of the victims. Claims for blood-money may be considered to be out o date in European legal concepts but even in modern Europe and America blood-money in other forms is still claimed. In fact, claims for damages by the dependants of a man who dies in a motor accident are definitely a form of blood-money. The damages, like blood-money, compensate the

dependants for the services or benefits they would have obtained from the victim if the had not been killed. Under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360, claims for damages are allowed for the benefit of the dependants of a person whose death has been caused by the wrongful act of another person. The law does not cover deaths caused by wrongful acts other than those arising from motor accidents where damages could equally be claimed for the benefit of the dependants of the victim. Claims for blood-money seem to have been dropped by most tribes in Tanzania, but I think they would, if revived, go a long way to cutting down the mounting wave of homicide. In the last two or three year's homicide in Tanzania has grown to the alarming figure of over 800 per annum. Most of these turn to manslaughter caused by drunken brawls. If the killers were subjected not only to prison sentences but also to the payment of sizable blood-money, I think they would try to avoid becoming involved." (3) Appeal dismissed.

18. Kanji and others v. Christie. Civ. Case 25-A-68; 20/12/69; Platt J.
A preliminary point was taken, as to whether the consent of the Commissioner for Lands was obtained to the transaction between the parties. The plaintiffs claimed that consent having been obtained to an agreement for sale, the defendant refused to sign the transfer. The plaintiffs claimed damages. The defendant.

claimed that the agreement was void for lack of consent. The facts were not in dispute. By a letter, the defendant confirmed his offer to purchase the farm. Part of the money was to be paid on acceptance, part on 'provisional consent being obtained', and the rest on registration of the transfer. The document then recited that the transfer when approved, would be made in the name f a private company to be formed in Tanzania and the purchase price and other finance was to come from outside. The plaintiff accepted thereafter. The document therefore became an agreement for sale and a disposition within s. 19 of the Freehold Titles (Conversion) and Government Leases Act Cap. 523. Counsel for the plaintiffs wrote on the 15th August 1966 to the Commissioner

applying for provisional consent to the sale. The letter set out the terms of the sale. The Commissioner replied that he gave 'consent in principle', but without prejudice to the right of the Commissioner to refuse formal consent should all legal and other requirements not be complied with when formal consent was sought.

Held: (1) "it is clear that the Commissioner for Lands did not sign the letter himself but it was signed for him and nothing turns on that point after the views expressed in ODENDAAL v. OFFICIAL RECEIVER & GRAY (1960) E. A 263 at page 276" (2) It is also clear that the Commissioner referred to the "proposed disposition" explained in Mr. Reid's letter of the 15th August 1966, extracts of which have been set out above. It is to that disposition, I am obliged to reiterate, that consent in principle was given. If that is a proper consent, then section 19 was complied with, and the preliminary point fails." (3) "It will be seen of course that a disposition under section 19 (1) of Cap. 523 shall not be operative without the consent of the Commissioner; and section 19(2) defines the types of dispositions contemplated. Sub-paragraph (a) of subsection (2) sets out the first of these types in the words – "an assignment, sub-lease, mortgage or settlement of the terms whether in the whole leased land or a part thereof. It is the assignment of the term of the whole land leased to which the parties refer as the "sale". Then sub-section 2(d) provides another class of disposition – "a deed or arrangement or declaration or trust binding any party thereto to make any such disposition aforesaid, including a deed or agreement entitling a party thereto to require any disposition to be made." The disposition in question is therefore, as the parties concur, the agreement to the assignment of the whole lease. It is true that there might be a disposition under subsection 2(a) distinct form one under sub-section 2(d). But it is difficult to imagine the first without having passed through the process of the second, or to begin with the second without contemplating the first. The substance of the matter is to transfer the land, and in the land, and in the course of attaining that object, the parties might, of course, fall out at some stage. It may also be a matter of prudence in these days to keep the Commissioner in touch with developments. Nevertheless, it seems an extraordinary repetition of work if it is to be considered a legal necessity for the Commissioner to give consent at several stages. What, in my view, the Commissioner has done here is to give what he calls consent in principle to the whole transaction as

contemplated by the parties. He must have taken note who the principal parties were initially, and that a company will be one of the parties in the final form of the transaction. He has intimated that he finds no objection to any of the proposals set out in the document put before him. He has not said, for instance, that he would prefer to suspend judgment until he has seen the draft documents of the proposed transfer, including the manner in which the new company is to be formed. It seems to me that he has accepted the agreement in the offer and acceptance as the basis of the proposed dispositions

and has consented to the whole proposed disposition. It seems impossible to say that while he might have consented to the sale he has no consented to the agreement for sale in these circumstances – I might say in any circumstances, but I shall confine myself to the facts in issue. What distinction could he make? How would he judge the so-called “sale” except in terms of the agreement? Suppose conversely that he was doubtful of the company’s bona fides, could he give consent to the agreement? He would be obliged to give qualified consent, perhaps to the defendant Christie alone. Although I acknowledge that I can find no specific authority on the point, it seems to me that in the circumstances before me, that the Commissioner did give consent in principle to the agreement and that it is but casuistry to divide the agreement from the “sale.” (4) “It may not be without interest however to follow the arguments in Odendaal’s case (referred to above concerning the construction to be put on section 7(1) and (3) of the Kenya Land Control Ordinance. Dispositions such as sale and mortgage required consent (s. 7(1)). So did agreements for such dispositions reduced into writing. Windham, J. A. refused to distinguish between the agreement for mortgage and the actual instrument of transfer. The argument was developed at length at p. 279. The conclusion seems to be summed up as follows:- Every sale, lease mortgage etc. must of course, be proceeded by an agreement, but if that agreement is “reduced into writing” in terms of the proposed transaction, It seems to me that this is a sufficient reduction into writing for the purpose of subsection (3), such an instrument signed by the parties cannot of course take effect otherwise than as an agreement until consent of the board

has been obtained, but I see no reason why it should not take effect as a transfer, mortgage etc. upon the necessary consent being obtained within the time limited by the section. If the transaction is preceded by a written agreement and consent is obtained to threat agreement, then it would seem, no further consent is necessary under sub-section (1). In other words, the section requires one consent of the board to any transaction. If the consent is given to a prior written agreement, that consent will cover the transaction. If the "reduction into writing" of the agreement take the form of setting out the terms in the actual form of the final convergence mortgage etc. it still remains a mere agreement and is the agreement referred to in sub-section (3) until consent to the transaction has been given." Therefore it was incorrect to say that the consent stamped on in "memorandum of charges by deposit of title" in respect of the mortgage in question was not consent to an agreement and was therefore void. It is a converse of the present case but serves as a warning against the proposed distinction between the agreements referred to in sub-section (3) until consent to the transaction has been given." Therefore it was incorrect to say that the consent stamped on in "memorandum of charges by deposit of title" in respect of the mortgage in question was not consent to an agreement and was therefore void. It is a converse of the present case but serves as a warning against the proposed distinction between the agreement and the sale, and the supposed necessity for several consents. It brings clearly into focus the relation of the steps of the transaction. I think I may safely rule that consent, at least in principle was given to the agreement in this case." (5) "There is next the question of the quality of the consent. When is consent not consent? The answer is for the purposes of this debate, when it is qualified. I was referred to the well-known observations of Lowe, J. in T. H. PATEL v R. LAWRENSON AND ANDERS MATZEN (1957) E. A. 249. That was a case where a proposed sale of land held on a right of occupancy had got as far as the land officer intimating that it was unlikely that he would refuse his consent. That was not of course consent. Then at the end of his judgment, the learned judge went on the observe that he considered that purchasers should forward their agreement to the land officer for his consent. All matters being satisfactory to the land officer. He could then give his consent, although he would, no doubt, wish to see the final

document of transfer so as to satisfy himself that it was “in proper form and acceptable to him.” “Confirmatory approval could always be endorsed on the actual document which is registered …..” from these remarks, much of the present practice of giving consent in principle has stemmed. It makes no difference for this purpose that lower, J. was dealing with a right of occupancy whereas the present transaction concerns land held for a government leas. The phrase consent in principle has been employed in both. (I use the past tense advisedly because of recent legislation). The Commissioner in this case seems to me to have given all the consent that was necessary. The only qualification that he made was that which Lowe J suggested, namely, all the necessary legal formalities in drawing up the documents and the purchasers properly constituting they a company being carried out to his satisfaction. As far as the transaction itself is concerned, he has consented. I am told that some consent in principle is withdrawn. What the position then is, I leave for further consideration. In this case, the Commissioner has not withdrawn his consent, which therefore stands. In my view consent in principle in this case means unqualified consent to the proposed transaction as embodied in the agreement pleaded.” (6) Preliminary point failed. Suit to go for trial.

19. Paulo Ifunya v. Edward Zakayo. (PC) Civ. App. 233-M-69; 16/12/69; Bramble J.

The appellant is the respondent’s father-in-law. His case was that the respondent’s wife delivered twins while he 9th respondent was on leave. He returned and stayed with her for two weeks and retuned to his job without leaving her any money. The respondent’s mother prevented his wife from taking produce from the shamba and when his wife found herself in bad circumstances she went to her parents with her children. She informed the respondent but he did not reply or sent any money for her. The appellant supplied the means to maintain the respondent’s wife and children. The respondent claimed that he gave his wife Shs. 80/- to maintain them while he was away and paid charges for the midwife and admitted that he sent no money for the 41/2 months that he was away. He said that the appellant took away his wife in his absence. The trial court found that the respondent had left no money or means to support his family and that

there was ample evidence to support the amount claimed. It was basically a claim for money used to supply necessities to the respondent's wife. The district court reversed the decision.

Held: (1) "The decision of the district court was based on what was said to be the Bahaya Customary Law and it is that – "if the children of a man are sent to their father-in-law it depends on the agreement of the father of the children and his father-in-law upon whether the father-in-law can claim maintenance." On the other hand it had been stated that according to custom if a wife is not well treated by a husband she can go back to her parents' home. The return in this case was a necessity caused by the failure of the respondent to provide subsistence. It cannot be reasonably held that the shamba, which is about 1/8 acre, could provide the necessities for the children more particularly as the wife was not allowed to use the produce. There was no evidence that the appellant invited his daughter to stay at his home. Because of the legal obligation of the respondent and the necessity induced by his failure to provide for his children I hold that an agreement to pay for their maintenance can be implied." (2) Appeal allowed.

(1970) H.C.D.

- 21 –

20. Richard Rweikiza v. Fransis Stephano. (PC) Civ. Rev. 6-M-69; 31/12/69; Seaton J.
The respondent Fransis filed suit in the Primary Court on behalf of himself and 4 other children of Stephano who died in 1953, against 3 defendants, Severian and the applicants, John and Richard Stephano. It was alleged that Fransis and the 4 other children had received nothing in the distribution of the estate of their deceased father Stephano, b the defendant Severian, the administrator of the estate. The defence denied that Stephano had any children except John and Richard, who were represented by their mother. The Primary Court found that the defendant Severian had failed in his duties and that one shamba had been sold by John to a third party. They also found that Fransis and the other children were all children of Stephano. Richard then swore an affidavit applying to the present curt to declare the proceedings null and void and order a new trial on the ground that his mother was wrongly made a defendant and had no authority to represent him.

Held: (1) Primary Court proceedings were not invalid. (2) “The District Court Magistrate has included in the record the plans of four shambas and the names of 22 people who were present when he visited the site. The notes made at the site are copious and included measurements of the various fields or shambas originally belonging to the deceased Stephano and names of persons to whom they were allocated or distributed. At the end of the notes, the District Magistrate recorded as follows: “All the people who had attended had expressed that Fransisco Stephano was entitled to receive some inheritance i.e. Portion of shamba of Nyaruju, because the one which he had been given had been taken on account of Nyarubanja maters. Kashangaki is also entitled to receive a portion of a shamba of Nyaruju, because the field which he had been given at Nyakitunga had been disposed in order to settle the debts of deceased. The people present at the Baraza (assembly) had expressed In Kiziba they do not recognize any children known as BISISI – (illegitimate children). The children whose mother had not conceived while their supposed father was still alive, ere not entitled to any inheritance of the deceased property. (1) Kyaruzi and (2) Faustine had been born long after the deceased had died in 1953.” It thus appears from the record that the District Court was influenced by the statements of bystanders when he visited the site and that he held some kind of a Baraza” or assembly in order to help him determine the appeal. None of the persons whose statements were made during this Baraza were apparently sworn no were their statements recorded separately and included in the case file. The procedure followed may have some basis in traditional custom but under our present system was irregular and contrary to instruction repeated given by this Court as to the procedure to be followed when a court visits a site in the course of a trial or of an appeal. For these reasons, the proceedings of the District Court must be declared null and void. The decision and order are accordingly set aside and it is ordered that the appeal to that Court be re-heard before another Magistrate.

21. Onorato Della Santa & others v. Peera. (Part I) Civ. App. 15-D-69; 31/10/69; Georges C. J.

The appellant appealed from an order by the Senior Resident Magistrate, granting vacant possession of the suit premises to the landlord – respondent and ordering the

tenant – appellants to any mesne profits for occupation. The first ground of the appeal was that the court

had no jurisdiction. There was no dispute that the court that has jurisdiction to hear claims for vacant possession of premises subject to Rent Restriction is the Court of the Resident Magistrate – Rent Restriction (Amendment) (No. 2) Act 1966 s. 11 A and s. 4(a) (iii). The plaint was headed "In the Resident Magistrate's Court of Dar es Salaam'. It was clear from this that the plaintiffs wished to file their case in the correct court. (In Allarakhia's case cited in the judgment below, the plaint was headed for filing in the District Court). Summons for disposal of suit were signed by a Resident magistrate. The form used was clearly designed for use in the District Court, but the word 'District' had been crossed out and the letters 'R.M.' s' inserted. The statement of defence was also headed for the Resident magistrate's Court. It was clear that both parties thought they were contesting a matter in the Resident Magistrate's Court. The jacket folder, however, shoed that the matter was filed in the District Court and the number of the suit was that of the District Court Registry. Both registries are in the same building and the public attend for business at the same desk. The notes of the magistrate made at the hearing did not indicate in what court he was sitting. The formal decree embodying the result of the judgment is headed for the District Court, and proceedings for execution bear the same heading.

Held: (1) "It has also been held by Biron J. in Tajdia Allarakhia v. H. H. Agakhan Civil Appeal 23 of 1968 that a District Court presided over by a Resident Magistrate is not a Court of a Resident Magistrate within the meaning of the relevant enactments . Such a court has no jurisdiction to deal with matters under the Rent Restriction Ordinance ….. The question is whether or not the decision in this case was the decision of the District Court or of the Court of a resident Magistrate. It is really quite unsatisfactory that the administration of justice should depend on matters of sheer form such as this without any substantial merit in terms of justice and fair play. It is to be hoped that the argument will be made impossible by a simple amendment vesting

jurisdiction both in the court of the resident Magistrate and in the District Court when presided over by a Resident Magistrate because the Courts are in effect the same ….. [it was argued] that the matter has been heard by the District Court Dar es Salaam without jurisdiction and that the entire proceedings were presented for filing in the Resident Magistrates' Court, Dar es salaam. Both parties treated it as having been filed there as the pleadings and the summons for disposal of suit would show. The magistrates who heard the case were all persons who would in the normal course of things preside over a Resident Magistrates' Court in dare s Salaam. All that has happened is that by clerical error at it has been given a number on the District Court side of the Register." (2) "I cannot agree that there is a duty on an advocate to check whether a plaint which he has presented properly intitled has been directed to the appropriate registry. The receipts for the fees for filling both the plaint and the written statement of Defence give no indication of the Registry in which the proceedings have been filed. They are marked "Court Fees and Fines Receipt" and the matter is designated as Civil Case 1628. They are signed on behalf of the Senior Resident Magistrate." (3) (The Chief Justice referred to the case of Kotak v. Koovsnji [1967] E.A. 348)". In that case the ruling by the magistrate was attached to a memorandum of appeal instead of a certified copy of the order. The Court held that the appeal could not be entertained because it had not been properly presented in conformity with the rules." (The Chief Justice then quoted from the judgment of Hamlyn at p. 300).

"I would agree with the remarks of the learned Judge but they do not seem applicable in this case. Anyone who asks for an order and is given a ruling will immediately realise that he has not got that for which he has asked. A mere number on a suit properly entitled gives no such indication – more especially when the summons for disposal and the written statement of defence are also properly intituled." (4) "I would hold that the suit was presented for filing in the Court of the Resident Magistrate Dar es Salaam, that it was accepted there for filing and that it was determined by the court of the Resident Magistrate Dar es Salaam. In error the matter was assigned a number in the District

Court Registry. I would order that the matter be transferred to the Registry of the Resident Magistrate's Court and wherever necessary documents be amended to bear the appropriate heading of the Registry of the Court of the Resident Magistrate bearing the case number unchanged."

22. Onorato Della Santa & Other v. Peera (Part 11). Civ. App. 15-D-69; Georges C. J.

The evidence disclosed that the landlords had leased the premises to Onorato Della Santa for a term of 3 years commencing 1st April 1966. The lease contained a term that the lessee was not to assign or underlet a part of the demised premises without first obtaining the written consent of the lessors. On 1st June, 1968 Onorato Della Santa without first obtaining the consent of the lessors assigned the demised premises to the second, third and fourth appellants. Annexed to the Written Statement of Defence was a letter asking for consent for the assignment. The landlords by their advocate replied by letter stating that they were not willing to give consent but would be prepared to reconsider the matter if the proposed assignees could provide a banker's guarantee for payment of the rent. It would appear that at the date of the assignment rent was in arrears. On 17th July 1968 the landlords wrote demanding the arrears and on 19th July they demanded vacant possession of the premises in accordance with the provisions of the lease. Prior to this assignment, the lessor had been irregular in paying the rent and civil cases had been filed against him in 1967 and 1968 for arrears. At the date of hearing of the suit the original lessor was no longer in the country. The landlords claimed that because they had not received their rents regularly they had failed in meeting their mortgage payments in respect of the premises and had been sued b their mortgagees. The landlords further claimed that they now occupied rented premises and since their business was expanding they intended to use the premises themselves. The Resident Magistrate granted vacant possession and the appellants appeal against that finding.

Held: (1) "[It was] argued that the Court had the power to approve sub-lease under the Rent Restriction (Amendment) No. 2) Act 1966 section 11 A(1) (c) ….. [The Court] was also referred to the Rent Restriction act Cap. 479 section 31(1) (a) and (b)

which gives a tenant the power to sublet for a period of not more than six months with a possible extension for a further six months any premises of which the tenant is in personal occupation. I am satisfied that this section is not applicable to this case. It contemplates a short term subletting of premises to which the tenant intends to return. Indeed subsection (2) of section 30 imposed heavy per diem penalties on a subtenant who holds over. Subsection (5) does contemplate the situation in which the tenant does not reentor on the termination of the specified period and provides that the subtenant shall then be deemed to be the tenant of the landlord. Provision for this eventuality does not in my judgment expand the application of the section. There is absolutely

no doubt that an order for possession can be made against Onorato Della Santa. He is clearly in breach of his covenant not to assign or sublet without consent. He has gone to Europe and has no connections with the premises any more his lease has expired. No question as to the reasonableness of making the order can apply in his case. The question remains whether or not the other appellants as his assigness are protected. The Rent Restriction Act section 19(6) reads as follows: - (The Chief Justice then quoted the section) Are the appellants in this case persons to whom the premises have been lawfully sublet? This issue was considered with reference to identical legislation in England in the case of Maley v. Rearn [1946]2 All. E. R. 583. The tenant in that case whose tenancy contained a clause prohibiting subletting without the written consent of the landlord sublet a room to the defendant without obtaining consent. Subsequently he died and the landlord sued the defendant for possession. It was held in the Cot of Appeal by Morton, Somervell and Asquith L. JJ that defendant was not a person to whom the premises or any part thereof had been lawfully sublet within the meaning f the Increase of Rent and Mortgage Interest Restrictions) Act – the equivalent English enactment. He was a mere trespasser and the landlord was entitled to possession. The Court quoted with approval a passage from Norman v. Simpson (1945) 62 T.L.R. 113 at p. 114 which stated: - “it would appear that the Legislation has in mind two classes of subtenant – namely, subtenants to whom the premises have been lawfully sublet, and

sub-tenands to whom the premises have been lawfully sublet, and sub-tenands to whom the premises have been unlawfully sublet. It is not easy to see exactly what tenants fall within the latter class, but we think the most reasonable explanation of the sub-section is that premises are in a state of being 'unlawfully sub-let' within the sub-section if the head lessor has a subsisting right of re-entry, and are being 'lawfully sub-let' when the head lessor has no such right." Once the premises had been sub-let to the second, third and fourth appellants without the consent of the landlord, he had a subsisting right of re-entry. It does not appear to me that one can consider in this action the question as to whether or not consent had been unreasonably withheld and should have been granted. This may have been considered had an application been made for consent, refusal received and thereafter an assignment made on the basis that the refusal was unreasonable. On an action by the landlord then for possession the reasonableness of the refusal could be litigated. If it were found to be unreasonable then the subletting would be lawful and the protection on the Ordinance would be available. In this case there was no serious request for consent. A letter dated May 30th asking for consent was dispatched and on 1st June the assignment had been made. A landlord must obviously be given time to consider a request for a consent to assignment. He would need to make enquiries about the proposed tenants. That the position in East Africa is similar to that in England can be deduced from the report in the Privy Council of Ngara Hotel Limited and ors v. Rajabally Kassam Suleman and others. (1952) 19 E.A.C.A. 214. In that case the landlord rented the suit premises to defendants 2 and 3 on a monthly tenancy with a covenant against assigning or parting with possession without the written consent of the landlord. The second and third defendant sold the premises to the fourth and fifth defendants; they in turn sold to the sixth, seventh and eighth defendants. Later the defendant company was incorporated to take over the hotel as a going concern. None of these assignments was with consent. One of the defences raised to the action by the landlord for possession was the protection of the Rent Restriction Acts. Dealing with this thief Lordships stated as follows: - "It was suggested that the defendants were protected by the Rent Restriction Ordinances applicable to Kenya.

The point was not pressed, nor was it easy that it should be. The provisions of the Ordinance only protect (i) a tenant and (ii) as their Lordships understanding it a tenant in occupation. Of the persons who have invoked the protection of these provisions, the 1st defendant the limited liability company was at the material time in occupation, but was not a tenant and the 2nd and 3rd defendants at that time, if tenants were not in occupation." [I was referred] to Chogley v. Bains (1955) 22 E.A.C.A. 27. I do not think this authority helps. It considers the case of an assignment made by a tenant when there is no covenant in the tenancy agreement against subletting. In the course of the judgment a passage from megarry's Rent Acts 6th Ed. P. 345 is quoted with approval. The passage reads:- "A subletting is not unlawful', however, merely because ….. without contravening the terms of the tenancy, it was a subletting of the whole of the premises made without the consent of the landlord and so became one of the statutory grounds on which an order for possession can be made. In such cases the subtenant will be protected, despite the order or possession against the tenant." A distinction is clearly implied between tenancies in which there is a prohibition against subletting and those in which there is not. 92) "I would agree, therefore, with the finding of the Senior Resident Magistrate that the second, third and fourth appellants are trespassers now that the original lease has expired. They do not come under the protection of the Ordinance. No questions can arise as to the reasonableness of making the order." (3) Appeal dismissed.

23. Farook v. Jeraj. Civ. App. 25-D-69; 14/11/69; Georges C. J.

A tenant appealed from the judgment of the District Court at Songea, then presided over by a Resident Magistrates, ordering him to quit and deliver up the landlord possession of the suit premises. The landlord's right of occupancy has expired. The Land Officer served on him a notice to quit and deliver up possession of the plot. To comply with this order he sought vacant possession from the tenant. The tenant admitted the facts, but pleads that he has been unable to find other suitable alternative accommodation in

Songea. He states that he carries on business on the premises and that he will suffer great hardship if he is forced to move. The landlord states that this is in fact not true. The business on the suit premises is being run by the tenant's sons and he has two other sons each running his own business in other parts of the town. It appears not to be disputed that the tenant does have two sons with business in the township.

Held: "On the facts, it is clear that it was correct that an order for possession should be made. The landlord's right of occupancy having expired he must give up the plot. The evidence is that the area is to be redeveloped and more substantial buildings put up, so that in any event the suit premises cannot continue to exist in their present condition." (2) "A certified copy of the order appealed from has not been attached to the memorandum of appeal. It has been held in Kotak Ltd v. Koovarji [1967] E.A. p. 348 that an appeal filed without such an order has not been properly presented and cannot be entertained." (3) "I pointed out ….. that the order appealed from had been made by the District Court whereas the Rent Restriction Act had vested jurisdiction in the Resident Magistrate's Court. In a yet unreported case, Tadjin Allarakhia v. H.H. Aga Khan, Civil Case No. 28 of 1968 Biron J. held that the District Court had no power to hear an application for vacant possession under the Rent Act even if preside over by a Resident Magistrate. He held:-

"The fact that a court is presided over by a magistrate of a particular grade does not ipso facto transform that court into the class of the magistrate's grade. It is expressly provided for in the Act that each class of court shall have its own register and its own prescribed seal. These instant proceedings were heard and tried by the District Court of Dar es Salaam, and the order and decree had issued from that court. Therefore, in my judgment despite the fact that the court was presided over by a Senior Resident Magistrate, the trial was in fact held in and the order and decree made by, the District Court of Dar es Salaam, which court has, as indicated, no jurisdiction to try such suit." The question, therefore, arises whether this Court ought not, in its revisionary jurisdiction, to set aside an order which has clearly been made without jurisdiction even

though an appeal from that order has not been properly presented and cannot be entertained ….. it would appear that in the case of Dayaran Jagivan v. Govardhandas Dyaram, I.L.T. 28 Bombay 458, a not dissimilar situation arose. In that case certain property was attached in execution arose. In that case certain property was attached in execution of a judgment obtained in the court of Small Causes Bombay. The defendant applied to have the attachment set aside and succeeded. The plaintiff appealed to the District Court and on appeal the attachment was restored. The defendant further appealed to the High Court. There, it was admitted that the District Court had no jurisdiction to make an order on an appeal from the removal of an attachment. The order made by the District Court was, therefore, completely without jurisdiction. Since there could have been no appeal in the first place, it followed that the second appeal to the High Court was itself incompetent. The court was, however, asked to exercise its revisional jurisdiction to set aside the order made by the District Court. This the court refused to do on two grounds:- (1) that no objection to jurisdiction had been taken at the hearing before the District Court; and (2) that setting aside the proceedings might prejudice the plaintiff who would find himself time barred if he began at that stage to make a fresh start in pursuing his remedies. The High Court allowed the order of the District Court to stand although made without jurisdiction. It is true that in this case the landlord will not be time barred should he be ordered to begin again in the proper court to enforce his rights. The facts, however, are so clear that only one result can be forecast if the proceedings are commenced again. There will only t be delay and additional costs. Taking this into account and taking into account also the fact that the District court was presided over by a Resident Magistrate, the class of officer who would have presided had the case been heard in the appropriate court, I would hold that this court ought not to interfere to set aside the decree." (4) Appeal dismissed.

24. Mapanda v. The Manager, East African Airways. Civ. App. 21-D-69; 18/12/69; Georges C. J.

The appellant in this case was employed by East African Airways as a security clerk. On the 9th February, 1967, the Personnel Officer of the company sent a letter to him informing him that his services had been terminated by one month's notice effective

from the date of the letter. He informed the appellant that he would in fact be given one month's salary instead of notice and that he would also be paid whatever other emoluments to which he would be entitled. Two reasons were stated in the letter for the termination of his services. It was alleged that he had come to work late on one occasion. He had reported at 8.00 a.m. instead of at 5.30 a.m. In addition, he had altered the time-sheet to read

5.30 a.m. instead of 8.00 a.m. it was also alleged that he had disobeyed an order to remain on board a certain plane until he had been relieved. It is quite clear that both these matters would be offences under the Disciplinary Code set out in the Security of Employment Ordinance which, if established, would justify the summary dismissal of the appellant. The company, however, did not choose to dismiss him summarily, but chose instead to terminate his services. The appellant took the letter to N.U.T.A., his trade union; a consultation took plans between N.U.T.A and the Personnel Department of the respondent company. As a result of these consultations, it seemed to have been established that the appellant had in fact reported late for work and has in fact altered the time-sheet. It does not appear to have been established that he had failed to stay on the 'plans until his relief had arrived. On the advice of the N.U.T.A. steward, he wrote a letter to the company asking forgiveness for having arrived late and having altered the time-sheet. The appellant stated that he was compelled to write this letter by his N.UT.A. Adviser. He denied that he was late or that he altered the time-book. He asked that the altered time-book be produced in Court. This was not done in the court below. The trial magistrate was satisfied that he appellant had committed the offence. The appellant did not state in the court below that he had been compelled to write the letter.

Held: (1) The trial magistrate was justified in finding that the appellant had committed the offence. (2) "Even if, however the offence had not been established against the appellant, I am satisfied that he could not succeed in his claim. This was an oral contract of service. Section 32 of the Employment Ordinance, Cap. 366, as amended by the Employment ordinance (Amendment) Act, No. 82 of 1962, specifically

provides that an oral contract of service may be terminated by payment to the other party of appropriate entitlements under the contract. This right does not seem to have been abrogated by the Security of employment Act, Cap. 574. The Security of Employment Act deals entirely with summary dismissal, not with termination of contract of employment. Before me, the appellant based his claim largely on the Security of Employment Act. He argued that he should have been taken before the Words Committee and that his offence should have been established before them. He states that since that had not been done, the termination of his services had been improper. All that he says would be quite true if he had been summarily dismissed, but in fact he has not been summarily dismissed." (3) "It is also worth pointing out that the jurisdiction of the courts has been entirely ousted under the Security of Employment Ordinance. If the appellant's claim, therefore, was under this Ordinance, he would have had no right of audience, except, of course, by way of certiorari or mandamus, in order to challenge the correctness of the procedure followed." (4) Appeal dismissed.

25. Pardhan v. Tailor. Civ. App. 8-M-66; 14/4/67; Mustafa J.

The appellant applied to the Rent Restriction Board at Bukoba against the respondent for vacant possession. Rent had not been paid for 18 months. The Board, in its Ruling states; "Further, because of shortage of houses in the town, the prayer for vacant possession is equally rejected."

Held: "Learned counsel for appellants has urged before me that since it is not in dispute that the respondent has not paid rent for a long period, the Board was wrong not to order vacant possession. He also states that it does not appear that there was sufficient.

Material for the Board to find as to whether it would be reasonable for it to make an order for possession in terms of the provisions of section 19 (2) of the Rent Restriction Act. He suggests that the matter in so far as the question of possession is concerned, should be referred back to the Board for its consideration. However, I believe that the

Board did deal with the matter as regards the question of vacant possession and there is enough evidence for the Board to find that it would be unreasonable in the circumstances to grant the appellants vacant possession. The Board took into consideration the shortage of houses in the town and I cannot say that there is no or no sufficient evidence before the Board for it to refuse to make an order for possession or that its finding on the score was so unreasonable as to call for interference."

26. In the Matter of the Land Registration Ordinance and a Memorial of Mortgage. Misc. Civ. Case 43-D-67; 31/10/69; Georges C.J.

A petition was presented to the Registrar of Titles to have a memorial of mortgage removed from the register of a title. The certificate of Title was in the name of the applicant, Mr. Karsan. The Registrar refused to act, on the ground that he might be found to have an interest in the matter if compensation should be sought from the Assurance fund if rectification was ordered. An advocate, Shah, had practiced in Dar es Salaam until 1965 when he absconded to India. He was, or appeared to be, a close friend of Mr. Karson and acted as his legal adviser. Mr. Karsan bought the suit property in 1964 and Mr. Shah acted for him. Karsan did not inspect the title deed. He paid the purchase price by installments. Thereafter he kept asking Shah for the Certificate of Title. Shah, after much delay, eventually gave him a document which Karsan did not inspect. The document was forgery. Shs then went to India, and later a Mr. Somji approached Karsan asking for interest on a mortgage which he held over the property. On investigation, Karsan discovered that a memorial of mortgage had been registered and his signature on the memorial had also been forged. It appeared that Shah through a third party had approached Somji to obtain a mortgage over the property. The third party told Somji that Shah was acting for Karsan. Somji agreed and later and the third party showed him the forged memorial of mortgage. Somji signed the mortgage and gave a cheque which, for a reason that remained obscure, was made out to Shah. Shah was later extradited from India, charged with forgery, pleaded guilty and sent to jail for 3 years. The Land Registration Ordinance Cap. 334 section 99 reads in part as follows:-

"99(1) Subject to any express provisions of this Ordinance, the land register may be

rectified pursuant to an order of the High Court or by the Registrar, subject to an appeal by the High Court, in any of the following cases: …. (d) where the High Court or the Registrar is satisfied that any memorial in the land register has been obtained by fraud: (2) The land register shall not be rectified so as to affect the title of an owner of an estate who is in possession:- (a) unless such owner is a party or privy or has caused or substantially contributed to the fraud, mistake or omission in consequence of which such rectification is sought; or (b) unless the immediate disposition to him was void ….; or (c) unless for any other reason, in any particular case it is considered that it would be unjust not to rectify the register against him.

Held: (1) "The citation on p. 492 of Korr (op cit) dealing with the liability of a principal for the fraud of his agent when acting in the course of his employment [is relevant]. The principle is, however, applicable only where the agent is acting within the scope of his authority. Mr. Karsan had not authorized Shs to

raise money on his behalf. Indeed he had not even entrusted the certificate of title to his hands for safe keeping. He had asked for his certificate of title after the purchase of the property had been completed and had been fooled with a forgery. Shah's possession of the certificate from then on could be as better than the possession of a thief and it seems to me quite unrealistic to claim that Mr. Karsan could be responsible for Shah's acts as his own. Much reliance was placed on the case of Lloyd v. Grace Smith and Co. [1912] A.C. 716….. the situations are so different that no paralled can be drawn the clerk was in the full employ of the principal and engaged in the particular tasks for which he was employed. Mr. Karsan never engaged the services of Shah in the transaction under review. He was not acting within the scope of his authority. He had not even been appointed an agent." (2) "Leaving title deeds in the custody of advocates for safe keeping is a common custom. The fact that an advocate holds a title deed does not justify an inference that he is authorized to raise money on the security of the property.

The possession of the title deed does not invest him with authority to pledge the property. If he does this he cannot be said to be acting within the acope of his authority. No one should be entitled to assume that an advocate is acting for a client in any matter merely because this advocate has previously acted for the client in other unrelated matters. An agency by estoppel cannot be held to have been created unless the alleged principal by words or conduct represents or permits it to be represented that another person has authority to act for him. Mr. Karsan made no such representation to Mr. Somji in relation to Shs. There had never even been any previous transaction between Mr. Somji and Mr. Karsan in which Shah had acted for Mr. Karsan …….. “All that [Mr. Somji] knew was that by general repute Shah and Mr. Karsan were great friends. This cannot be a basis for setting up a representation on which agency by estoppels can be held to exist ….. The principle is very clearly stated in Rimmer v. Webster [1902]2 Ch. 163 …….. it has been restated in the case of Mercantile Bank of India v. Central Bank of India where the following passage from Johnson v. Credit Lyonnais Co. 3 C.P.D. 36 was quoted with approval:- “The mere possession of the property of another without authority to deal with the thin …. Otherwise than for safe custody … will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights against a third party, however innocent in the transaction the latter may have been.” As I have already mentioned the case for Mr. Karsan is even stronger than this since Shah’s possession of the certificate of title was not that of a custodian appointed by the owner but was that of a person who by a trick had retained possession while leading the owner to believe that he had not. It was dishonest.” (3) “In any even I would hold that there is no obligation on a person purchasing a property to examine a certificate of title himself. He cans properly and without negligence leave to his advocate the task of ensuring that the document which he receives is a proper document effectively conveying to him the interest which he had purchased. There would be no need for advocates if clients had the still to scrutinize documents of title, note minor discrepancies and draw correct conclusions as to their importance … A client is expected to have some faith in the integrity of his advocate. He is not to be expected to treat him in the manner of an officer of police scrutinising the words and actions of a suspected offender. Business would be impossible on that basis. One engages an

advocate because on lacks the necessary knowledge to handle a transaction or because the law insists that only an advocate can act in the matter … Since there was a fraud and since Mr. Karsan

did not cause or contribute to it in any way then he is entitled to have the register rectified." (4) At the hearing of the action before me the Registrar General was represented by advocate who agreed on his behalf to be bound by any order the Court might think fit to make on the question of payment of compensation out of the assurance fund to any person who may have suffered loss as a result of the registration of any document which ought not to have been registered. The relevant provisions are section 100(1) & (4) of the Act. (The Chief Justice then quoted the section). On the evidence I have no cause to find the Registrar General in any way negligent. But negligence on the part of the Registrar General appears to me quite irrelevant in the scheme of the Ordinance. Compensation is not dependent on his negligence ….. [It was] further argued that Mr. Karsan had not suffered any loss "by reason of any rectification of the land register". He had suffered loss because he had accepted a forged mortgage. This was quite independent of registration. The document which he had had placed on the register was a nullity in any event and the loss could not be said to have been caused by its removal. This argument was rejected by Kekewick J. in the court of first instance in Attorney-General v. Odell [1906] 2 Ch. 47 at p. 55. (The Chief Justice then quoted the passage). In the Court of Appeal this decision was reversed …… some of the reasoning of the members of the Court would indicate that they did not seem to accept the analysis by Kekewick J. quoted above. Vaughan Williams C. J. in particular at p. 75 held: - "The act of the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost it confers on him is the capacity to transfer, to a purchaser for valuable consideration unaware of any irregularity in the transaction. But it may be said that Mr. Odell has, by the rectification of the register, lost this capacity to transfer, because until the rectification by the erasure of his name from the

register, he could have given a good title to a transferee of the charge for valuable consideration and that by erasure he has lost this; but I do not think that it is by erasure he has lost this capacity. He could not, in my judgment have exercised this power … after notice of the fact of the forgery and I think he could be restrained by injunction from so doing." The argument, it would appear to me, are both strong. For my part the view expressed by Kekewick J. would appear to be a more reasonable construction of the Ordinance and I would not be prepared to hold that Mr. Somji has not suffered loss by reason of the rectification of the register merely because the document which was registered on his behalf was a forgery. I am much impressed by the view that until the forgery had been discovered there were rights that he could exercise. He was capable of passing a good title. Indeed the register could not have been rectified against a bonafide purchaser for value from Mr. Somji. In my judgment, however, Mr. Somji was negligent and his negligence contributed substantially to his loss. For that reason I would hold that he is not entitled to indemnification from the assurance fund. In Gibbs v. Nesser [1891] A.C. 248 Lord Watson stated as follows: - "In the opinion of their lordships the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor and of seeing that they get a genuine deed executed by that principal rests with the mortgagees themselves and if they accept a forgery they must bear the consequences." This appears to me to be sound business commonsense. It was extremely negligent on Mr. Somji's part to have accepted the word of Kanji

Nanji that he was raising a loan for Mr. Karsan through Shah when he had spoken neither to Shah nor to Mr. Karsan. It is not placing an undue burden on mortgagees to specify that they should made enquiries to ensure applicants for loans are indeed the persons whom loan agents allege that they are. This involves far less astuteness than would be required on the part of clients if they were expected to scrutinize all documents handed to them by their legal advisers against the possibility that these

documents might be forgeries." (5) Ordered that the Registrar General rectify the register by deleting the memorial of mortgage.

27. Nawoneiwa Demangwa & others v. Maweta. Civ. Case 9-T-68; 28/11/69; Platt J.

The plaintiff sued the defendant for damages on behalf of her self and her 9 children as dependants of the deceased under s. 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360 on the basis of negligence. The deceased had been traveling in a bus on a murum road. While going up hill the driver came upon a stone in the road on his right-hand side. The stone was about 1 foot across and protruded out of the surface. Between the edge of the road and the stone there was about 10 foot of hard surface. The bus was 5 feet 3 inches in width. The driver swerved to avoid the stone and drove onto the soft shoulder at the side of the road. This proved unable to support the weight of the bus, which then plunged into a ravine, killing the driver and the deceased instantly. The defendant was the owner of the bus and the driver was his servant. The deceased was 39 years old, and was a Divisional Executive Officer, drawing a salary of Shs. 360/- a month. He lived with his wife and children in a part of his father's house with had been provided for him, together with a shamba of about one and a half acres. The amount spent on the wife and children was about Shs. 190/-.

Held: (1) I would rely on such authority as THE MERCHANT PRINCE (1892) P. 179, and apply maritime rules to cases of accidents on land. The essence of an inevitable accident is that where the circumstances are such that a prima facie case of negligence is made out against a party, it is for that party to show that the misfortune are occurred by an accident, the cause of which was such, that he could not by any act of his, exercising proper care, caution and skill, have avoided its result. Applying these principles to the facts of the instant case, it is clear that there was no need for the driver to drive off the surface of the road which was prepared for the carriage of vehicles. It is within ordinary experience that the shoulders of roads off the surface proper are not necessarily constructed, and are certainly not guaranteed to be able to carry weight; especially in the case of secondary roads. It is therefore a risk to drive off the surface of

the road, especially when there is a ravine adjacent to the road. By exercising ordinary skill in staying upon the surface of the road, the accident need not have occurred. Accordingly I must hold that the river was negligent and that the defendant is liable in damages." "It was suggested that this family was not entirely dependent upon the deceased. No doubt other members of the deceased's family are assisting [the deceased's wife]. That would only be natural after this tragedy, but it does not strike me as suggesting that that was necessary before the deceased's death. Moreover …., there is no duty to help [her] in her present difficulties. There is no reason to consider that this sort of help is in any real sense a pecuniary benefit arising as a result of the deceased's death. It must be quite gratuitous depending upon the ability and good-will of the rest of the family. The point was considered in stronger circumstances in JESSI NYOKABU

v. PUBLIC TRUSTEE (1965) E.A. 530, the decision being to a like effect." (3) "Taking the retirement age as 55, there would be a dependency of 16 years, at Shs. 2,280/- a year, giving Shs. 25,080/-," (4) "The only question concerns the deceased a Provident Fund paid to his brother on the behalf of the plaintiffs, amounting to Shs. 814/-. I find nothing in section 7 of the Ordinance which permits this sum to be left out of this calculation. It is perhaps high time that the Ordinance was brought up to date, possibly in line with the English 1959 Act, permitting benefits such as this, to be excluded. It is also contended by the defendant that this sum must be deducted. In my opinion, I cannot evade authority in this matter and I therefore deduct Shs. 814/-. (See LORY v. GREAT WESTERN RAILWAY CO. (1942) 1 ALL E. R. 230; SMITH v. BRITISH EUROPEAN AIRWAYS CORPORATION (1951) 2 ALL E. R. 737; O' NEILL v. S. J. SMITH & CO. LTD. (1957) ALL E. R. 255). The dependency figure is then Shs. 24,266/-. No special damages were claimed." "There is finally the question of apportionment. Counsel addressed the Court in terms suggestive of a special dependency calculation on the part of the children. It seems that after the Privy Council's observations in KASSAM v. KAMPALA WATER CO. LTD. (1965) E.A. 587, and the manner in which

the calculations were made with the approval in HAYES v. PATEL (1961) E.A. 129 that the general dependency should be assessed in a lump sum according to the working life of the deceased and then divided amongst the dependents according to their legitimate claims. That seemed also to follows from MURLYDHAR v. KAEMANEY (1961) E.R. 547 at page 553. In view of these authorities, the greatest part must go to Nawoneiwa [the wife of the deceased] on the ground that she will have the responsibility of looking after the young children. I apportion Shs. 18,000/- to her. Next, Zacariah, the cripple, stands out above his brothers and sisters; Shs. 3,000/- is awarded to him. Then Shs. 350/- will go to each of the eldest children Jeremiah and Nakundwa. Azza, Issac, Julius, Christen and Nafiwa will have Shs. 475/- each, and the baby Nazail, the balance of Shs. 191/-. There will be judgment for the plaintiffs in these sums as specified above, making the total of Shs. 24,266/-, together with costs and interest as prayed."

28. Serikali s/o Lesakara v. Kiriwasi s/o Kukutia. (PC) Civ. App. 25-A-69; 21/11/69; Platt J.

The case concerned the custody of two children the offspring of the appellant and his wife. This woman had been married to the Respondent with whom her relations appear to have been sour and she bore no children. She left the respondent and after some time she was given to the appellant by the elders of her family. The question in issue was whether the appellant and his wife had the right to the children. The dispute came to a head when the Respondent took possession of the children. Therefore the Appellant sued in the Primary Court of Kissongo for their return. He was successful, but the District Court allowed the appeal. The children were then returned to the Respondent. Now the appellant appeals for their return back to him and their mother. The lower Courts found as a fact and there was a preponderance of evidence to support the finding that the children had been born while Naiwasubot was living with the appellant.

Held: (1) "I cannot say that the children have been really prejudiced. Generally, in my view, the Court should leen whenever possible consistent with the rules of customary law, to unite families, as that would seem in the long run to be of greater benefit to the children, whose interests are paramount. Customary

law is clear that during the existence of a lawful marriage the children borne by the wife in adultery may be claimed by the husband. This is the Respondent's case and the assessors and District Court agreed with him. But it is also said that customary law provides amongst the Masai that if a woman leaves her husband and stays at home without the husband seeking after her the marriage is deemed to be at an end and the parents or those who stand in lose parentis may give the woman formally in marriage to another man. The period should be three years. It was on this ground that the assessors and Primary Court acted. As far as I can see there is no dispute in principle between the lower courts, the argument arising out of the inference to be drawn from the facts whether there was an end to the first marriage was indeed somewhat conflicting. On the whole it seems that the first marriage was a failure. It is no doubt true that [the Respondent] obeyed all the customary laws as to the marriage, out [the woman] failed to produce him any children and left her husband for a period of eight years. This was not too great a hardship it seems, as he had three other wives and as he himself said "a woman who does not give birth to children is useless". He alleged that he had visited her and he sent her presents on the birth of the children…… the views expressed below are all understandable, but it seems to me that the views of the Primary Court, though in relation to other tribes. I am inclined to think that too legalistic an approach was adopted by the assessors in the District Court. Moreover to accept the views of the Primary court would seem to me to result in broader justice. Therefore while not wishing to detract from the Masai rules granting the husband custody of children born as a result of his wife's adultery I would agree that the marriage was properly deemed to have ended before the children were born and that therefore Kirimasi had no right to them." (2) "In the result the decision of the District Court is reversed and the judgment of the Primary Court restored."

29. John Nyelu v. Maganga Nalimi. (PC) Civ. App. 260-M-69; 3/12/69; Brimble J.

The appellant claimed for a child in the primary court and was successful. The District Court reversed the decision and the present appeal is against that judgment. The appellant was married to the respondent's sister. After a year she left and returned to her father where she later had the child in question. She said that the appellant was not the father. Part of the dowry was retuned. The respondent is the head of his clan and the child was put under his custody, and care by the Elders. The only point in issue was whether the appellant was the father. The trial magistrate held that – "This case, as it stands, envisages the claim for the child who has been born/conceived during the wedlock and it does not involve paternity in respect of an unmarried lady."

Held: (1) "The evidence before the court was that when the mother left her husband she was pregnant and, apart from the there was no evidence to the contrary. In addition there was no evidence that the parties were divorced. A separation and a refund of part of the bridewealth may point to an intention of divorce but cannot be considered as a divorce. There are specific rules laid down for obtaining a divorce and no attempt was made to comply with them. The record fully supports the

finding quoted above." (2) "In commenting on the judgment of the primary court the District Court said – The lower court also purported to act under section 175 of G. N. 279/63 which states: Children born by married people are father's property. In order to properly apply this section in the instant case the respondent must prove to a high degree that the woman Maria conceived while married to him failure of which section 178 will apply which states; Children born out of wed-lock belongs to the woman's side that is to say belongs to their mother's father. Since there was no divorce the parties were still legally married and there would be a very heavy burden on the woman to prove that a child was not her husband's. This was not a case of a child born out of wed-lock." (3) Appeal allowed.

CRIMINAL CASES

30. Hamadi Juma v. R., Crim. App. 715-M-69, 8/1/70, Seaton J.

The appellant was convicted of rape c/ss 130 and 131, Penal Code. The appellant's unsworn statement admitted that the complainant was his girl friend but denied having intercourse with her on the day in question. The Magistrate disbelieved the appellant and, in his judgment, mentions as one of his reasons, the fact that the appellant when he first came before the court to plead, said that he had sexual intercourse with the complainant's consent.

Held: "It was misdirection for the Magistrate in deciding the appellant's guilt or innocence to consider his statement when making his plea. The only purpose for which the words of a plea of not guilt are to be used is to ascertain whether or not he is admitting his guilt as charged. Once it is clear that he is denying guilt, everything is in issue and the trial court may not use part of the words in his plea in order to fill up subsequently the scales of evidence against him. However, in the present case, I am of the view that there was ample other evidence to support the conviction. The appeal is accordingly dismissed and the sentence confirmed."

31. Yusufu s/o Bertram v. R., Crim. App. 781-D-69; 8/1/70, Mustafa J.

The two appellants were jointly charged with robbery with violence. The complainant was a dumb person, and it would seem he alleged he was robbed of Shs. 350/- by the appellants. It appears complainant and appellants and some other persons were drinking at a bar and when they left, complainant alleged, he was robbed. At the trial, the complainant gave evidence by signs, and no interpreter skilled and sworn was used. One of the appellants told the trial magistrate he could not understand sign language

and could not cross- examine on what complainant by certain signs alleged had happened.

Held: “In my view, although according to section 128 of the Evidence Act a witness who is unable to a peak may give his evidence by signs; this must be done through an interpreter skilled in sign that one of the appellants was completely prevented from cross-examining the complainant. Indeed, the trial magistrate in his judgment states, inter alia, “Admittedly, it was sometimes difficult for the court to understand the signs made by the dumb when he gave his evidence ….” In view of these very unsatisfactory features I do not think it is at all safe to uphold the convictions against the appellants.” Convictions quashed.

32. Lexicon Oduntu v. R., Crim. App. 721-M-69, 2/1/70, Seaton J.

The appellant was convicted of theft of a bicycle. It appears from the evidence that he borrowed a bicycle from the complainant, his brother-in-law, on 3rd March, 1969 and disappeared. Some four months later, the complainant managed to recover the bicycle when he met the appellant near the latter’s home on 10th July, 1969. The complainant testified that the appellant had persuaded him to lend him the bicycle by saying the wanted it to go to see a certain person at a mission some 3 miles away and would return it the same

day. The Resident Magistrate believed the complainant. He also found that the appellant had converted the bicycle to his own use, and so convicted him of theft.

Held: “Leaned State Attorney did not support the conviction submitting that the bicycle was loaned hence the original taking was lawful and there was no subsequent overt act showing an intention permanently to deprive the owner thereof. With respect, I would agree that the prosecution evidence did not establish beyond reasonable doubt an intention to deprive the complainant permanently of his bicycle. However, as the trial court believed the bicycle was retained for 4 months when it was only lent for a day I

think that the prosecution had established beyond reasonable doubt that the appellant unlawfully converted the bicycle to his use. I accordingly quash the conviction for stealing under s. 265 of the Penal Code and substitute a conviction for the minor offence of conversion not amounting to theft under s. 284 of the Penal Code."

33. R. v. Alexander Mabele. Crim. App. 764-D-69, 16/1/70, Georges C.J.

The accused was charged (inter alia) with theft by public servant c/ss 270 and 265, Penal Code, of Shs. 77/50. Although the offence is scheduled under the Minimum Sentences Act, the court discharged the accused conditionally, purporting to act under s. 5(2) of the Act.

Held: "It has been clearly decided by this Court that the discretion granted to a trial magistrate under section 5(2) of the Minimum Sentences act is discretion to impose a term of imprisonment or 10 strokes instead of the minimum penalty prescribed by the Act. A full Court has so ruled. In extraordinarily exceptional circumstances where it is patently obvious that no real punishment should be imposed, the Court has suggested that the way out of the dilemma could be to impose a sentence of 1 day's imprisonment which would result in the immediate discharge of the convicted person. It must be stressed that the cases where such a course would be proper would be extremely rare indeed. Mr. Kanabar submitted that the trial magistrate was under no obligation to impose a sentence of imprisonment because under s.27 (a) of the Penal Code a person liable to imprisonment may be sentenced to a fine instead of imprisonment. If this section could possibly apply, the Minimum Sentences Act would be made immediately ineffective even as far as convictions in circumstances where no discretion could apply. The argument is bad and has been decisively rejected on more than one occasion." Order of conditional discharge set aside and a prison term of 9 months substituted, the court finding that special circumstances existed.

34. Venance Nkama v. R., Crim. App. 826-D-69, -/1/70, Mustafa J.

Appellant was convicted of robbery. Complainant, Police Constable Joel, alleged that when he was sitting in a bus, somebody from outside snatched the hat he was wearing. He managed to snatch the hat back from the said person, and when he looked outside

of the bus window to see who the person was, the person slapped him on the face. Complainant got off the bus and saw the person who had struck him. Complainant said the person struck him once again. The person then ran away, but complainant gave chase and managed to arrest him. That person turned out to be the appellant.

Held: "The evidence does not support a charge of robbery the evidence would be more consistent with a charge of simple theft, or possibly of stealing from the person of another. At the time the appellant stole the hat, he did not use or threaten to use actual violence in order to obtain or retain the said hat." Conviction for robbery set aside, and conviction for theft substituted.

35. Petro Samson v. R., (PC) Crim. App. 789-M-69, 7/1/70, Seaton J.

The appellant was convicted of burglary and theft. The prosecution witnesses testified that the appellant entered the complainant's room through an opening between the top of the wall and the roof and stolen therefrom a bundle of clothes. As to the first count, which related to burglary, the conviction was against the personal view of the Primary Court Magistrate. He was of the view that no offence had been committed but felt constrained to convict because of the majority view of his two assessors and the provisions of s. 8(2) of Act No. 18 of 1969. Why this, the owner of the house knows. I am satisfied that the accused's climbing of the wall and entering the room cannot be said as 'breaking'. For the above reasons, I am personally convinced to find that the accused is not guilty on the first count and I do not see the reason why was he charged with burglary."

Held: "The essence of the matter, therefore, is whether there can be said to be a "breaking" when the thief gains access by an opening such as was left between the inner wall and the roof over the complainant's room. Under the Indian Penal Code of 1860, s. 445, this would not be a matter for doubt because breaking includes entering through any passage not intended for human entrance. In English law, it is clear that if a person deliberately leaves an opening in his house to admit air or light, for example through a door or window, and a thief enters, no burglary is committed. It is also clear

that if a person's house has a chimney and a thief enters through this aperture, it is a burglary. The reason in the latter case is that 'it is as much closed as the nature of things will permit." So says Archbold, 35th ed., 1800-1802 and Russell, 11th Ed., 914-916. However, in connection with gaining entry by overleaping a wall, Russell seems to rule out burglary (at 917). By definition, s. 293 of the Penal Code also seems to rule it out unless an aperture is left open "for any necessary purpose ……" the present appeal seemed important because of the prevalence in this country of houses having rooms without ceiling boards and with apertures between the inner walls and roofs of corrugated iron sheets….. The Senior State Attorney …. Pointed out that there was no evidence why the opening in the complainant's house was left; it may have owed to lack of funds to complete the wall. Hence it could not be said with certain that the opening was "for a necessary purpose" and learned Senior State Attorney declined to support the conviction for burglary. With respect, I share the view that in law no burglary was committed. Therefore I quash the conviction and substitute one under s. 295 of the Penal Code for entering dwelling house with intent to commit a felony."

36. Jumanne Hassani Kaluwona v. R. Crim. App. 732-M-69, 8/1/70,
Seaton J.

The accused was convicted (inter alia) of robbery. The following facts appear from the evidence. The complainant, who was selling ropes in Ujiji, met a small boy who told the complainant that his (the boy's) father wanted to buy five of the ropes, and he invited the complainant to follow him to his father. The complainant agreed. On their way, the boy picked up a purse from the ground and he put it in his pocket. After some distance accused told both the small boy and the complainant to stop, and he asked the complainant what he had seen. The complainant replied that he had seen a small boy pick up a purse. At the request of the

Accused the small boy handed the purse to the accused. Then the accused, who at the time had a book and a pen, introduced himself as a police officer, and said that

someone had lost Shs. 1,000/- and that police were investigating the matter. The accused then asked the complainant how much money the complainant had so that the accused could have some evidence and he further told the complainant that if the complainant then said he had Shs. 205/- and he took it out. Accused then demanded the money. Fearing that he might be beaten up, the complainant handed over the money to the accused. Accused then put some of the money into his book, and he shoved some of it in the complainant's shirt pocket. Then the complainant asked the accused to return his money. Accused, however, told the complainant to remain there while he took the small boy to police station. The complainant told the accused that he would not remain there because the accused had taken his money. The complainant then followed the accused. After some distance, the complainant noticed that the accused. After some distance, the complainant noticed that the accused was trying to run away. So he dropped his ropes down and caught the accused. As the complainant held him, the accused threw the book, in which he had kept the money, to the small boy who disappeared with it. The complainant, however, held on the accused and raised an alarm. Many people gathered there but no one intervened. While the two were fighting, a Primary Court Messenger came to the scene and caught accused.

Held: "Violence is one ingredient of the offence of robbery as defined by s. 285 of the Penal Code. Was the violence used by the appellant in connection with the stealing either immediately before or immediately afterwards? On the above facts, the learned Resident Magistrate found that after stealing, the appellant used violence to retain the complainant's money. I see no reason to differ from such finding, the appellant not having proceeded so far on his way without discovery to be a thief as the appellant had in the case of Gathuri Njuguna v. Rep. (1965) E.A. 583. It seems to me that the conviction could also have been based upon an alternative ground, that is, that the appellant's acts immediately before the taking of the money amounted to the threat of violence. The appellant told the complainant that if he had no evidence, he would beat up. In the English case of Merriman vs. Chippenham Hundred (1768) 2 East P.C. 709 cited by Russel on Crime, 11th ed., Vol. 2 at p. 968, the complainant had been stopped on the highway by the accused, who seized some cheeses she had in a cart, for want of a permit. This was a mere pretence, no permit being necessary. After some alteration,

the complainant agreed to go before a magistrate to determine the matter, and during the complainant's absence, other persons in confederacy with the accused for the purpose, carried away the goods. Herwitt, J. left the case to the jury, who were of opinion that the accused's conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence for the purpose of defrauding the complainant, and found that the offence was robbery; which was afterwards confirmed by the Court of King's Bench. It is borne in mind that English precedents over 200 years old must be used with care, particularly regarding the offence of robbery for the common law crime, since made statutory, differs slightly from s. 285 of our Penal Code. the comment on Merriman's case in Russell (previously cited) is that the conclusion that the acts done amounted to robbery must have been grounded upon the consideration that the first seizure of the cart and goods by the accused was by violence. From the evidence in the present case,

there seems to me to be strong consideration for holding that the appellant obtained the complainant's money by the threat of violence. The fact that the complainant handed over the money does not make it any less a "stealing" because the handing over was not voluntary but induced by fear." Conviction for robbery upheld.

37. Adija Juma v. R. Crim. Rev. 2-A-70, 15/1/70, Platt J.

The accused was convicted under section 65 of the Intoxicating Liquors Act (No. 28 of 1968) of being found in unlawful possession of a bottle of Moshi.

Held: "Although the accused admitted unlawful possession of the moshi, she did not admit the ingredients of a charge under section 65 of Act No. 28, which concerns the illegal sale or manufacture of the intoxicating liquors concerned in that Act. It is to be further noted that Act No. 28 specially provides in section 2 that Moshi is not one of the liquors covered by that Act. The charge was therefore entirely misconceived; because manufacture and sale does not cover mere unlawful possession, and the Act has nothing to do with Moshi. The proper provision of law on which the charge should have

been based was section 30 of the Moshi (Manufacture and Distillation) Act (No. 62 of 1966), and the question which arises is whether a conviction can be substituted under section 30. On the one hand, the particulars of the charge and the accused's admissions referred to unlawful possession of Moshi. Hence to substitute a conviction under section 30 would not, in one sense, affect the accused as far as she understood the charge. But on the other hand, the difficulty is that section 30 provides for a more serious offence in terms of the punishment which may be awarded, than that in section 65 of the act No. 28 of 1968. It is generally against principle for a more serious charge to be substituted for a lesser charge, unless there are specific provisions allowing such substitution. The broad principles applicable t that type of case were reviewed by Sir Ralph Windham in R. v. INDO PRASAD JAMIETRAM DAVE (Cr. Rev. No. 40 of 1963 published in the Law Report Supplement to the Gazettee (No. 1 of 1964) dated 21st February 1964), and at page 14 of the Supplement the learned Chief Justice (as he then was) noted that, in the case before, him, no injustice could accrued to the accused, because the new charge to be substituted would be one for a lesser offence than the charge wrongly charged. It seems to me that it would be wrong to allow the substitution of a greater offence in case there might be injustice to the accused, and that the principle should be adhered to, that an accused should known the real charge brought against him. Accordingly by virtue of my revisional powers, I quash the conviction and set aside the sentence."

38. R. v. Salim s/o Abdallah, Crim. Rev. 1-D-70, 14/1/70, Mustafa J.

The accused was charged with indecent assault, contrary to section 135(1) of the Penal Code and was instead convicted of rape, contrary to section 131 of the Penal Code. Evidence was adduced by the complainant that while she was asleep one night, she was suddenly awakened by finding someone lying on top of her, and she then believed she had been sexually assaulted as she found seminal fluid on her vagina and her thighs.

Held: (1) "Rape carried a sentence of life imprisonment, whereas indecent assault carries a maximum of only fourteen years' imprisonment. Rape is certainly not a

minor offence to indecent assault. Section 181 (1) of the Criminal Procedure Code allowed a cognate and minor offence to be substituted in certain cases.

The provisions of section 185(1) of the Criminal Procedure Code allow a person charged with rape to be convicted of indecent assault, but not the reverse." (2) "Even on the evidence adduced, there does not appear to have been rape. There was no evidence of penetration. In the circumstances, I substitute a conviction for indecent assault against the accused, as originally charged, and set aside the conviction for rape."

39. R. v. Damiano Paulo. (PC) Crim. App. 765-M-69; 6/12/69, Seaton J.

The appellants were convicted of unlawful possession of moshi. The only evidence as to the nature of the pombe was that of two police officers that they recognised the pombe by its smell. The prosecution witnesses did not describe themselves as experts in the detection of moshi or indicate in what manner they came to be certain what kind of pombe it was.

Held: "This Court has frequently pointed out the necessity of establishing the qualifications or experience of witnesses who testify regarding the nature of substances or liquids alleged to be prohibited. I would cite as an example the case of Salum Haruna v. R., Crim. App. 773-M-67, (1968) H.C.D. 37, where Cross J. held as follows: "It 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." In the case cited the evidence for he prosecution was stronger than in the present case because at least one police officer had testified; "I knew bhang". Nevertheless, the conviction was quashed on appeal to this Court. In the absence of any indication in the present case that the Police Officers were qualified or experienced, their mere description of the pombe as moshi because of its smell is insufficient to establish the guilt of the appellants beyond reasonable doubt. The appeals are accordingly allowed, the convictions quashed and sentences set aside."

40. Hamisi Ally v. R., Crim. App. 728-M-69; 17/12/69, Bramble J.

The two appellants were jointly charged with unlawful possession of local liquor known as Moshi c/o 30 of Act No. 62 of 1966. the evidence was that the first appellant was found holding a bottle of Moshi. The only evidence as to what was contained in the bottle was that of P.W. 2 who said – "I knew it was Moshi because I tested it by smelling. I have seen and smelt Moshi many times."

Held: "The definition of Moshi for the purpose of the Act is- "The distilled liquor commonly known as Moshi, nipa or piwa and containing more than one pr centum by weight of absolute alcohol and spirits, potable or otherwise, manufactured by distillation of moshi; but does not include any potable spirit manufactured by a distiller under a licence granted under section 19." From the above definition the basic test would be whether the substance is distilled liquor and whether it contains more than one per centum by weight of alcohol. It would be quite possible for a layman to say that a particular liquid is distilled liquor and that it was manufactured from a particular substance the court would be entitled to consider the nature of his experience in assessing the weight of his evidence. I do not, however believe that the bare statement that he has smelt moshi may times is sufficient evidence of such experience as to give much weight to the evidence of the witness. In addition, it is clear that possession of all moshi is not an offence. In order to commit an offence a person must be found in possession of distilled moshi which 'contains more than one per centum of absolute alcohol and spirits.' The exact percentage of alcohol must be proved and this could not be done by smell. I do not think that the court

could accept a guess from a qualified chemist as conclusive evidence since the fact that it is a guess will room for doubt. More so the guess of the layman. Reference was made to the decision in the case of Jumanne Juma v. R. (1968) H.L.D. No. 304 in which Seaton, J. held: - "The prosecution bears the burden of showing that the substance found is in fact moshi. Attached to every Police Station in the country were usually one

or two officers who, by virtue of this experience are qualified to identify this liquor by sight and smell, if not by taste. They should so state when called upon to give evidence for the prosecution." This was a case under the old law where possession of any moshi was an offence. Under the Local Liquor (Moshi) Order 1941 possession of moshi was prohibited. This order was revoked by the Act 62/66. While the observation above was proper under the old law, the specifying of the percentage of alcohol under the present act requires more exact proof. There was no evidence that the liquid found was moshi for the purposes of the Act and I allow the appeals.

41. R. v. Paulo Hamisi, Crim. Rev. 42-M-69, 19/12/69, Seaton J.

The accused, who was convicted of stealing by an agent c/s 273(b) of the Penal Code and sentenced to the statutory minimum penalty, was ordered to "be repatriated to his home in Kasulu on completion of his sentence."

Held: "There does not seem to be any authority for a court on its own initiative to order repatriation within this country. Under s. 3 of the Townships (Removal of Undesirable Persons) Ordinance, Cap. 104, (hereinafter called "The Ordinance") a District Commissioner or an administrative officer vested with or deemed to be vested with the powers of a first class magistrate has power to order removal or undesirable persons from townships and certain other areas. A person aggrieved by such order may appeal, under s. 5 of the Ordinance, to a district court which may affirm, cancel or vary the Removal Order. It is an offence contrary to s. 6 of the Ordinance for any person to willfully fail to comply with any of the terms of a Removal Order. A person accused of such offence may be brought for trial before a court of competent jurisdiction. By s. 10 of the Ordinance, a magistrate who has made the Removal Order in his capacity as District Commissioner or administrative officer is not precluded from taking cognizance of the alleged offence. It follows that officers of the administration may have dual capacities in making Removal Orders and enforcing them while Judicial Officers on the other hand, are restricted to their normal court functions, i.e. hearing appeals against Removal Orders or trying persons charged with violating such Orders. Another kind of control is authorized by the Resettlement of offenders Act, 1969, which provides for resettlement orders to established centers. Such resettlement orders are not subject to

review by any court. It appears that the order for repatriation made in the present case was ultra vires and it is accordingly set aside."

42. Paskari Kapanda v. R. Crim. App. 130-D-69, 1/1/70, Makame Ag. J.
The appellant was convicted in Primary Court of housebreaking and stealing. His appeal to the District Court was dismissed.

Held: "In his judgment the learned district magistrate said that the appellant had appealed against sentence only and dealing with the appeal on that basis, he dismissed it, as he was dealing with the appeal on that basis, he dismissed it, as he was clearly entitled to do. But it seems quite clear that the appellant was appealing, as he now is, against both conviction and sentence. I

have had occasion to observe in another case that it is important to read the whole petition and consider its contents as a whole before one can decide whether the appeal is against conviction and sentence or against sentence only, remembering, as one should that most convicts do not use the fine language of the courts. Therefore one must not be dogmatic about set phrases." Appeal dismissed on other grounds.

43. Shaabani Saidi v. R. Crim. App. 663-D-69; 7/11/69, Georges C. J.
The appellant in this case pleaded guilty to causing death by dangerous driving contrary to section 44(1) A and section 15 of the Traffic Ordinance Cap. 168. The gist of the matter was that the appellant who was driving a Fiat Lorry with trailer attached overtook another vehicle ahead of his on the Iringa Road. This vehicle was raising a cloud of dust as it went along so that it was not possible to see what lay ahead. The appellant continued his overtaking maneuver and ran into a railway bus parked on its correct side of the road facing the direction in which the appellant was going. Both vehicles were extensively damaged. Two passengers in the bus were killed, one suffered serious injury and many of them minor injuries. The appellant was convicted and sentenced to 3 years imprisonment.

Held: "The sentence of 3 years imprisonment is in my view too severe …. Accepting the case put forward by the prosecution the negligence was serious. The appellant was, however, a first clean driving record for 10 years. Mr. Kanabar quoted a case decided in Kenya some 7 years ago – Selhi v. R. [1962] E. A. 523. In that case the defendant drove on to a pedestrian crossing hen she had not a clear view of the whole crossing are. She struck and killed a pedestrian who was moving to the other side of the road. She had been traveling at 25 miles per hour. Her footbreaks were not in good working order. The magistrate found the appellant guilty of dangerous driving and sentenced her to 3 months imprisonment. On appeal the sentence was varied to one of Shs. 1,000/-. The Court held that the moral turpitude on the appellant's part was not such as to merit a prison term. As far as driving offences are concerned the criterion does not appear to me to be one of moral turpitude. There is hardly ever moral turpitude in negligent driving involving as it does act not deliberately done. Punishment should be graded according to the degree of negligence and the damage which could reasonably be for seen as a consequence. It must be clear that driving a heavy lorry and trailer on the wrong side of the road through a cloud of dust which reduced visibility greatly is a serious act of negligence. The legislature contemplates that imprisonment is an appropriate penalty where the negligence is sufficiently grave. I think in this case imprisonment was appropriate. The minimum which could be imposed was 10 years. This must be reserved for the very worst of case, where the accused has a bad record as well. With a good record, as in this case, a sentence of 2 years would be adequate, with a suspension of the driving licence for 3 years. The sentence is varied accordingly."

44. R. v. Bakari Abdu, Crim. Case 977-M-68; (and 6 other cases); Inspection Note, 29/11/69, Seaton J.

Noted: (1) "I have noted from the fields of these cases that there have been numerous adjournments in some of them. This has led to complaints from the accused who are being kept in remand

prison. It is evident that the adjournments have been at the request of the prosecution. It has not been the fault of the trial courts …… nevertheless; such delay is felt as hardship by the accused. It seems that in some cases, bail conditions have stipulated that sureties must be residents of Mwanza town. This may be a difficult condition for all accused to meet. In such cases where the accused come from the rural areas, the trial court may consider whether such conditions may not be eased. A respectable peasant, possessing property in cattle or land, may often be as acceptable a surety as a town resident." (2) "I would also like to mention particularly on case, in which a re-trial was ordered over a year ago; this seems to be one in which delay has been most striking. If prosecution witnesses are no longer available, the prosecution should consider withdrawal and discharge of the accused persons, who are four. They can always re-institute proceedings later. That will be fairer to the accused than keeping them as now has happened, in continual custody for such a long period."

45. Mtengie Mark and others v. R., Crim. App. 237-A-69, 24/11/69, Platt J.

The appellant Mtengie Mark and fourteen other appellants pleaded guilty in the terms "true" to being in unlawful possession of a Government trophy contrary to sections 49 and 53 of the Fauna Conservation Ordinance Cap. 302. The appellants admitted that they had five tons of elephant meat on the 1st September 1969. The facts put forward by the prosecution contained the allegation that the appellants had no permit to kill elephants or possess elephant's meat. They did not specifically accept this fact, but were nevertheless convicted. It is now said on appeal that the appellants were partners in a business selling elephant meat lawfully shot by some European hunters of Wildlife Services Ltd. They had acquired a permit from the Game Division of the Ministry of Agriculture and Co-operatives, dated the 24th August 1969 to sell the meat. A Photostat copy was attached to the petition of appeal. This permit is relevant to the Mkomazi game Reserve where the offence took place, and the meat was specified as that of the animals shot by the Wildlife Services Ltd.

Held: "I am told that the document was not a forgery as far as these appellants are concerned. The Game Assistant and Officer in charge of the Mkomazi game

Reserve admitted that he issued such permits and that in his absence he had instructed his assistant, a Game Scout called Hamisi Rajabu Mwamba to issue permits. The permit in question was in fact issued by Mwamba. It seems a pity that the appellants could not have said so at once in this Court. But their difficulty might well have been that the legitimacy of the game Assistant and his Game Scout in issuing these permits may have been suspect. For when the documents were seized from the appellants, the Game representative of Moshi and a Game Officer from Arusha advised the Moshi Police that the permit had been issued by an unauthorised person. It seems to have been this aspect of the case which has caused all the trouble because on the strength o the permit's apparent illegitimacy the appellants were charged, and possibly did not think they could rely upon it at the trial, and possibly were even diffident in this Court of explaining its origin. The course which should now be adopted is clear. The appeal must be allowed because although the officials concerned appear to have been unauthorised to issue the permit, they have issued it and as far as the appellants are concerned that is an authorisation to possess the elephant meat." Appeal allowed.

46. Omari Yakubu v. R., Crim. App. 218-A-69, 31/10/69, Platt J.

The appellant pleaded guilty to failing to pay National Provident Fund contributions for two registered employee over a period of twelve months. The contributions amounted to Shs. 270/-. He was fined Shs. 500/- and in addition ordered to pay Shs. 270/- to the Fund. The objection is raised simply to the quantum of fine.

Held: "I am told that the appellant runs a small restaurant, is of 65 years of age and has sundry creditors. He is unable to pay the rent. In view of greatly reduced business he had financial difficulties. He has had difficulty in making ends meet and on top of these difficulties, had a heart attack which kept him away from business for two months. It is certainly a hard-luck story. He is also a first offender. The learned Magistrate had in mind no doubt the necessity for demonstrating the importance which must be attached to paying National Provident Fund contributions. I entirely agree. On the other hand, one must weigh the circumstances of the appellant. From what I am told

there is a risk of the employees' employment coming to an end. The aim of the Act is to support the employees. Therefore without in any way wishing to weaken the principle on which the learned Magistrate acted, I think it suitable to reduce the fine to one of Shs. 300/-, or distress in default. I do so largely on the grounds of ill-health."

47. Abbashbhai Gulamhusein and others v. R., Crim. Rev. 9-A-70, 15/1/70. Platt J.
The accused, four partners, were jointly convicted of failing to comply with r. 6 of G. N. 582/1965, C/S 38 (1) (f), National Provident Fund Act. They were given an omnibus fine of Shs. 80/- or distress in default.

Held: "As the partners were each charged and convicted on their separate pleas of guilty, it followed the each accused had to be fined separately. The charge concerned the failure of the accused to complete a certain form concerning a register able employee. I imagine that the learned Magistrate in fining the "partnership" had in mind a fine of Shs. 20/-. To be paid by each of the partners. Therefore by virtue of my revisional powers I set aside the sentence imposed and substitute a fine of Shs. 20/- or distress in default, to be paid by each accused partner."

48. Hussein Kabona and another v. R., Crim. App. 851-M-69, 2/1/70, Seaton J.

The two appellants were jointly convicted of corrupt transaction c/ss 3(1) and 3(3) (a), Prevention of Corruption Ordinance. Both of the appellants are messengers of the Simbo Primary Court and employees of the Kigoma District Council. It was alleged by the prosecution that sometime in April, 1969 they demanded and received from Ntabindi d/o Gwibunza the sum of Shs. 120/- as a reward for forbearing to prosecute her for the offence of unlawful possession of native liquor commonly known as "moshi".

Held: "The learned Resident Magistrate found it quite clear from the evidence that in their capacity as messengers of the primary court, the two appellants used to affect arrests for certain offences. He was further satisfied that the two appellants did in fact arrest Ntabindi, P.W. 2, for, ostensibly being in possession of "Moshi", and that after

such act, they promised to release her if she gave them money and did so when she gave them Shs. 120/-. Although there was no satisfactory evidence that Ntabindi was in fact in possession of "moshi" and therefore that the arrest was proper, the learned Resident Magistrate held, on the authority of Attorney-General vs. Shamba Ali Kajembe (1958) E.A. 505, that proof of the corrupt intention on the part of the appellants and that the act of the appellants was in relation to their principal's affairs were sufficient on which to base the conviction of the appellants. The case cited dealt with s. 9(1) of the Penal Code, which has since been repealed and replaced by Cap. 400(3) (1), with slightly different wording: for example s. 91(1) concerned itself only with public servants; and the words "in the discharge of the duties of his office" at the end of the sub-section have been replaced by "in relation to his principal's affairs or business" in Cap. 400(3) (1). However, I would agree with respect with the learned Resident Magistrate's finding as to the applicability of the case cited to the present law as set out in Cap. 400 (3) (1). From a perusal of the record, it appears the finding and convictions are amply supported by the evidence." Appeals dismissed.

49. R. v. Joseph Chapala, Crim. App. 289-D-69, 12/11/69, Mustafa J.

The accused was charged with corrupt transaction with an agent contrary to section 3(1) of the Prevention of Corruption Ordinance, Cap. 400 of the Laws. At the close of the prosecution case the trial magistrate held that no prima facie case had been made out against the accused and also that the charge was bad for duplicity and he accordingly acquitted the accused under section 805 of the Criminal Procedure Code. The Republic now appeals. The facts are as follows. The accused was a court interpreter at the Iringa Resident Magistrate's Court. At the material time the Resident Magistrate was on 0.0 Sholu, a Nigerian. One Iddi Abdallah was charged before the Resident Magistrate's Court with criminal trespass. His case was being tried by Mr. Sholu and the accused was the court interpreter. Iddi Abdallah was convicted on the 20th of February 1968 but sentence was deferred to 22nd February 1968. Agatha, the wife of Iddi, approached the magistrate after conviction for bail but was refused. The

same day the accused approached Agatha and told her that if she would pay out a certain sum of money the magistrate would arrange to fine her husband instead of sending him to prison. Agatha then got in touch with her relatives, who in turn informed the police, and a sum of Shs. 1,500/- produced by Agatha was duly handed to a police officer. The serial numbers of the notes were taken down, and Agatha was told to hand over the money o the accused when he came for it. At the same time the police officers arranged to keep a watch on the house of Agatha. Agatha said the magistrate and the accused came to the house on the evening of 21st February, but she made some excuse and did not pay out the money then. Agatha testified that the Resident Magistrate, through accused, as an interpreter, spoke to her. Accused told her she could pay over the money the following morning, the 22nd of February 1968, at the court office. Agatha went to the court the following morning and handed over the Shs. 1,500/- in an envelope to the accused, somewhere near the court premises. He was immediately arrested by two police officers who had been keeping watch nearby. It transpired that Iddi Abdallah was that morning sentenced to a fine of Shs. 200/-.

Held: (1) The trial magistrate held that no prima facie case had been established for the following reasons. The accused was charged with obtaining the sum “for himself or otherwise on account of the Resident Magistrate”. However there is no evidence that the

Accused accepted the money for himself. Moreover, to prove that accused obtained the money on account of the R. M. it would be necessary to show that the accused was actually acting as the agent of the R. M., - but this has not been proven either. So reasoning, the trial magistrate dismissed the case. The High Court held as follows: “In my view, on the facts, it is quite clear that the appellant had corruptly asked for Shs. 1,500/- from Agatha so that Agatha’s husband would not be sentenced to imprisonment by the Resident Magistrate but would be merely fined for the offence of which he was convicted. P.W. 7 Agatha testified the accused had told he wanted the money in order to prevent her husband from being imprisoned. She said that accused had told her the

Resident Magistrate would not release her husband unless she did something and that the complainant in the case in which her husband was involved had earlier offered Shs. 3,000/- to the Resident Magistrate would not release her husband unless she did something and that the complainant in the case in which her husband was involved had earlier offered Shs. 3,000/- to the Resident Magistrate as an inducement to imprison her husband, and the accused therefore asked Agatha to give Shs. 4,000/- if she wanted the Resident Magistrate to fine her husband instead of imprisoning him. After some negotiation the accused agreed to accept Shs. 1,500/- for that purpose and asked Agatha to produce the money. Agatha handed over Shs. 1,500/- to the accused, which was accepted by him. On these facts, and keeping in mind the particulars of offence contained in the charge, any reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation were offered by the accused. Clearly a prima facie case has been made out against the accused for him to answer ….." (2) The trial magistrate also held that the charge was invalid for duplicity. He reasoned that corruptly obtaining money for oneself and corruptly obtaining it for another are two distinct offences. Since these two offences are charged in the alternative in one count, the charge is invalid since the accused is not made to understand the exact nature of the alleged offence. With regard to this, the High Court held as follows: "As regards duplicity, learned State Attorney has properly pointed out that the provisions of section 138 (b) (i) of the Criminal Procedure Code would be applicable in this case. The said section reads (in part); "Where an enactment constituting an offence state s the offence to be the doing of r the omission to do any one of any different acts in the alternative ….. the acts ……. Or other matters stated in the alternative in the enactment, may be stated in the alternative in the court charging the offence." The accused was charged with corruptly obtaining from Agatha Shs. 1,500/- for himself or on account of the Resident Magistrate. The substantial offence is the corruptly obtaining money, and whether it was for himself or on account of the Resident Magistrate is merely the commission of the offence in either capacity. Indeed it can be said to be one indivisible act which involves either person. It is wrong to say hat two distinct offences have been charged in the same count as held by the trial magistrate. I am satisfied accused was left in no doubt from he prosecution evidence what he was charged with and the case

he had to meet. With respect, it seems the trial magistrate has failed to understand the principals underlying the decision in Cherere Gukuli v. R. (1965) 22 E.A.C.A. 478." (3) Appeal allowed, acquittal set aside, and case remitted to trial court for hearings to proceed.

50. Mohamed s/o Ramadhani v. R. Crim. App. 815-D-69; 31/12/69, Georges C.J
The appellant in this case, a police constable, was charged with corrupt transaction contrary to sections 3 (1) and 4 of the Prevention of Corruption Ordinance, Cap. 400. The facts were that on 20th December, 1968 at Dar es Salaam, Cap. 400. The facts were that on 20th December, 1968 at Dar es Salaam he had corruptly obtained.

Shs. 110/- each from one Ramnikial Purshettam Semani as an inducement to forbear the prosecution of his sister, Miss Pushpa Samani, for a traffic offence. He was convicted and the minimum sentence imposed.

Held: Counsel for appellant, Mr. Kanabar, argued that there was no evidence from the prosecution that the appellant had any power to prevent prosecution in this case. He had stated in evidence that s a police constable he could neither authorize nor prevent a prosecution. There was no evidence from any of the prosecution witnesses that he did have any such power. Mr. Kanabar argued therefore, that the offence proved was one of obtaining money by false pretences rather than corruption. He cited no authority. The argument struck me as lacking in merit. Although Mr. Kanabar said that there were no authorities on the matter, in East Africa which he could trace, it does appear that this contention has been considered in at least two cases. In Haji Moledina v. R. (1960) E.A. 678, the Chief Justice of Uganda considering the comparable Uganda provision dealing with corruption stated as follows at p. 681: "In regard to count 2 it was argued that s. 78(1) of the Penal Code is applicable only to a case where the public officer is acting in the lawful conduct of his employment, or where the conduct to be influence is the lawful conduct of his employment. I cannot read any such limitation into s. 78(1). If a police officer offers to drop a prosecution, even though he has no power to

do so, or it is not lawful for him to do so, the offer, in my opinion, is nevertheless made with reference to his conduct in his employment as a police officer." There is also a discussion of his argument in the High Court of Kenya in Gilbert Ouko v. R. (1966) E.A. 286. In that case the offence charged was one against s.2 of the Prevention of Corruption Act in Kenya. This section is in almost the same words as the corresponding section in Tanzania except that where the Tanzanian section refers to forbearance to do anything in relation to the affairs of the accused's principal the Kenya section refers to forbearance to do anything in respect of any matter in which a public body by which the accused is employed. In that case a police officer was charged with receiving a bribe for releasing a convicted prisoner. It was urged on his behalf that this could not be an offence under the Corruption Ordinance because as a policeman he could no possibly have had any power to release a convicted prisoner. The court agreed that there was clearly nothing that the appellant could do as a policeman to have the prisoner released. That could have resulted only from an order of the High Court on appeal or revision, or from an exercise of the President's power to grant a pardon. The Court, however, accepted the prosecutor's argument that the term 'public body' as defined in the Kenya Act would include not only the police force of which the appellant was a member but also the whole Government of Kenya, and since the Government of Kenya was concerned with the safe custody of convicted prisoners then the appellant as a servant of the Government was in breach of the section if he received money corruptly to act in a matter in which the Government was concerned whether or not it was the concern of the appellant in his particular role as a policeman. I think the same arguments are applicable to the Prevention of Corruption Ordinance Cap. 400. The appellant in this case is a policeman. His principal is the Government of the United Republic of Tanzania. The prosecution of offenders is part of the business of the Government of the United Republic and if the appellant corruptly accepts money to do or forbear to do anything in relation to his principal's business then he is guilt of an offence whether or not he has the power to do that which he held out himself as being able to do …… it can be said that any

Servant or officer of the Government of Tanganyika can be fixed with liability if he corruptly undertakes to act in respect of a matter in which the Government of Tanganyika, as his principal, is concerned whether or not the matter is the concern of the particular officer or servant. Since this was the only substantive argument advanced against the conviction as such the appeal against conviction has been dismissed."

51. Amiri Nathoo v. R. Crim. App. 719-D-69, 12/11/69, Mustafa J.

Appellant was convicted of the offence of corrupt transaction. He was charged as follows: - "Offence Section and Law: Corrupt transaction with agent c/s 3 92) (3) (a) of Cap. 400. Particulars of offence: The person charge on the 11th day of September, 1969, at about 0715 hours at Regional Residential Area within the Township and District of Singida, Singida Region, did corruptly give Cash Shs. 800/- to one Percival Mwidadi, the Regional Education Officer could give him the examination papers for Standard VII for 1969 which his sister namely Naaz Nathoo was a candidate." The charge was read over and explained to the appellant, who replied as follows: "It is true I gave Shs. 800/- to Mr. Percival Mwidadid so that he could release the 1969 Standard VII examination papers to me for use by my sister Naaz Nathoo." That was entered as a plea of guilt to the charge. The appellant now appeals on these grounds: (1) the plea was equivocal in that it did not admit that the Shs. 800/- had been given "corruptly"; (2) the charge was defective in that it was not alleged that the Regional Education Officer was an agent acting in relation to his principal's affairs; and (3) appellant was under severe mental strain due to the fact that he was arrested at 7.15 a.m. and charged in court at 9.00 a.m. the same day.

Held: (1) "Here the appellant knew exactly what he was being charged with and in answer to the charge he stated that it was true that he gave Shs. 800/- to Percival Mwidadi so that the 1969 Standard VII examination papers could be released to him for use by his sister. When the facts were outlined by the prosecution, which made it perfectly clear that the appellant was inducing the Regional education Officer by monetary reward to let him have the papers so that his sister could make use of them for the Territorial examination, appellant agreed they were correct. It is inconceivable

appellant could have thought the Regional Education Officer could give him the said examination papers other than dishonestly or in a corrupt transaction." (2) "It is true in the charge the allegation that the money was given to a person who was acting as an agent in relation to his principal's affairs should have been included, but in my view the omission in this case does not occasion any prejudice and there is no miscarriage of justice. I am satisfied that the Regional education Officer as mentioned in the charge is a Government official and appellant knew he was a Government official, and whatever he does in relation to his official business would be an act in which the Government as principal would be concerned: see for instance Gilbert Ouko v. R. (1966) E.A. 286 at page 287." (3) "The fact that appellant was brought before the court within two or three hours of his arrest has no significance. In fact it was the duty of the prosecution to take appellant before the court at the earliest opportunity." Appeal dismissed.

52. R. v. Kaduchi Bulolo, Crim. Rev. 41-M-69, 19/12/69, Seaton J.

The accused was convicted on his own plea on two counts of burglary and rape. He was sentenced to 3 years imprisonment and 24 strokes corporal punishment on the first count and 3 years imprisonment and 12 strokes on the second count, the sentences to run consecutively. The sentences were sent to this Court for confirmation.

Held: (1) "According to s. 10 of the Corporal Punishment Ordinance Cap. 17, when a person is convicted at one trial of two or more distinct offences, any two of which are legally punishable with corporal punishment, only one sentence of corporal punishment may be passed in respect of all the offences. As the imposition of corporal punishment is mandatory for the offences of burglary under the Minimum Sentences Act, while Corporal punishment is a discretionary penalty for offences of rape, I propose to set aside the order of 12 strokes on the second count in order not to offend against s. 10 of the Corporal Punishment Ordinance. It is so ordered." (2) "In ordering the consecutive sentences of imprisonment, the trial Magistrate realized that he was breaching a well-established principle, that offences committed in the same transaction should carry concurrent sentences. However, he felt justified in doing so because of

what he considered to be the very exceptional circumstances of this case. The Magistrate referred to Regina v. Kasongo s/o Luhogwa (1955) 2 T.L.R. 47, 48 where Lower J. observed that consecutive sentences would be justified in a case where a person commits the offense of house-breaking and rape. Lowe J. himself cited as his authority the case of Rex v. Sawedi Mukasa s/o Abdulla Aligwaisa 13 E.A.C.A. 97 decided by the court of Appeal in 1945. the relevant passage in the judgment in the latter case is the following: "While we recognize that the accused is a hardened criminal deserving of a severe sentence, our view is that where, as here, both offences have been committed at the same time and in the same transaction, the practice referred to should be adhered to save in very exceptional circumstances, where, for instance, a person breaks and enters a house and commits the felony of rape therein where an order that the sentences on both counts might be directed to run consecutively." It is clear from a perusal of the two cases above cited that the dicta were obiter …… one can imagine instance in which a person breaks into a house with the intention of committing one felony, for example theft, and while inside the house commits a different felony, such as rape. In such a case, although both offences may have been carried out at the same time and in the course of the same transaction, the circumstances may be considered as exceptional as to justify consecutive sentences. It is no clear whether such circumstances were in the mind of Lowe J. in Kasongo Luhogwa's case or of Sir Joseph Sheridan, C. J. who delivered the Court of Appeal's judgment in Sawedi Mukusa's case. Both judgments elaborated upon the distinction between burglary with intent to commit rape and burglary with intent to commit theft which should made the former require exceptional punishment. The trial magistrate considered the present case to be "a very exceptional type of rape" justifying severe and consecutive sentence. The admitted facts were that the accused, who is a male aged about 35 years on the night of 12th September, 1969, forced open the front door of a house and had sexual connection in quick succession with two girls whom he found therein. The girls were aged 121/2 and 13 years respectively. The accused threatened them with a knife and thus secured their submission. Medical evidence showed that as a result of the rape, one girl's

Hymen was broken and both girls had vaginal infections indicated by pus cells. The accused readily admitted his crime but claimed to have been drinking after which he decided to go to these girls. He is a first offender and unmarried. No mitigating factors in the accused's favour were investigated by the magistrate who seems to have been under the impression that he was precluded from doing so by the authority of Kasongo Luhogwa's case. Thus he did not consider whether the degree of guilt might be reduced by the fact that the accused had been drinking prior to the commission of the offence; nor whether his plea of guilty might be an indication of contrition. For the reasons I have attempted to set out above, I am of the view that there is nothing in either of the two cases previously cited which compel a court to treat like every case involving burglary and rape in the same transaction and therefore to impose consecutive sentences of imprisonment; whether in such trial court on the particular facts of each case and the circumstances of the accused. I bear in mind that burglary and rape are grave crimes, the latter punishable with a maximum of life imprisonment. However, in the circumstances of this case, I am of the view that the sentences were excessive." Sentences varied to 4 years for burglary and 3 years for rape, to run concurrently.

53. R. v. Shabani Masudi, Crim. App. 638-M-69, 26/11/69, Seaton J.

This is an appeal by the Republic against an acquittal. The respondent was charged with being in possession of uncustomed goods c/s 147(d) (iii) of the east African Customs Management Act, which provides as follows. - "Any person who acquires, has in his possession keeps or conceals or produces to be kept or concealed any goods which he knows or ought reasonably to have known to be …. Uncustomed goods; shall be guilty of an offence against this Act." The undisputed facts were that he respondent bought a bale of second –hand clothing value at Shs. 4,464/- in Bujumbura, Burundi Republic, and transported it by bus to Kasulu Minor Settlement, Kigoma Region. There the goods were seized by Police Officers from on top of a bus where the respondent had loaded them with a view to transporting them to Uvinza. When questioned by the Police, the respondent produced 5 sales invoices for the goods but admitted that he had

paid no customs duty on them. On these facts, the trial Magistrate held that the prosecution had proved the respondent's possession of the goods and also that they were uncustomed. But he was of the view that there was no evidence before the Court showing that the respondent knew or ought reasonably to have known that the goods were uncustomed. As the burden was upon the prosecution to prove such knowledge, the Magistrate held that the appellant was entitled to be acquitted. Learned State Attorney has objected to the Magistrate's ruling that the burden lay upon the prosecution to prove knowledge. He concedes that under an earlier version of this section, since repealed, the onus lay upon the prosecution, vide: Nizer Mangari v. Ugandas, (1964) E. A. 507. However he argues that under the new section this is no longer true, citing s. 167 of the Act in support, and also Ali Ahmed Saleh Amgara v. R., (1959) E.A. 654. He points out that the present S. 147 (d) (iii) of the Act replaced an earlier sub-section which was in the following terms:

Held: "It seems to me that for a prosecution to succeed under S. 147 (d) (iii), there must be evidence either that the accused knew that the goods were uncustomed or that a reasonable man, in a situation such as the accused, would know that the goods were uncustomed. In the present case, the respondent is, according to

the charge sheet, a businessman. He bought a considerable quantity of clothing, presumably for resale. At his trial, he made an unsworn statement in which he neither admitted nor denied knowledge that the goods were subject to customs duty. I would concede that the onus lay on the prosecution to prove its case in this as in every other case. But it seems to me that the words "knows or ought reasonably to have known" import an obligation on the accused to give some kind of explanation when the prosecution have proved his possession of uncustomed goods. In this case there was no explanation at all. I would accordingly disagree, with respect, with the trial Magistrate's finding and hold that upon the evidence it was established affirmatively that the respondent was guilty of the offence charged. The appeal is accordingly allowed.

The case will be sent back to the trial court with instructions to record a conviction and sentence accordingly."

54. R. v. Mustafa Abdallah, Crim. Rev. 131-D-69, 3/12/69, Georges C. J.

The accused in this case was charged with reckless and negligent acts c/s 233 (d) of the Penal Code. There was evidence that a dog belonging to the accused had attacked and killed hares which were kept in a "den" or hutch at an upper primary school. The principal witness for the prosecution was a girl aged 9 years. The District Magistrate examined her before allowing her to testify. One would have expected that the purpose of this examination would have been to discover whether or not she understood the nature of an oath so as to be allowed to testify on oath. That particular question was never put. The magistrate allowed her to give unsworn evidence.

Held: (1) "It must always be borne in mind that before allowing a child giving evidence two matters are of importance. In the first place the child should be examined to find out whether or not he or she understands the nature of an oath. If the child does not understand the nature of an oath then the magistrate seeks to discover whether or not the child is sufficiently intelligent to under stand the duty of speaking the truths. If the child does, then the evidence can be taken unsworn. Quite clearly in this case the magistrate though that the child fulfilled the second requirement and the record of the examination shows that she did. She might also have said that she understood the nature of an oath if she had been asked, in which case she could have given sworn testimony. There are obvious advantages to having testimony on other. The unsworn evidence of a child has to be corroborated before it can be acted upon. This requirement seems to have escaped the attention of the District Magistrate and nowhere in his judgment in there reference of it. Fortunately the oversight is not vital since there was in fact corroborative evidence …." (2) "I am satisfied that even on the case put forward by the prosecution the accused ought not to have been convicted of the offence charged. Looking at the section, it is clear that a conviction is possible if the person recklessly and negligently omits to take the requisite precautions. There was no evidence that the accused knew that his dog was fierce or that it was likely to attack hares. All the evidence indicates that it was an average dog which wandered in the

neighborhood of the accused's shop without causing any trouble to anyone. It would also appear that the hutch in which the hares were kept was not particularly strong, nor were they kept in such a place that they could not easily

be reached by a stray dog which happened to be attracted. It could not be said to have been reckless and negligent of the accused to omit to tie his dog. The section does not contemplate imposing criminal liability on the owner for every wrongful act committed by his pet. If it is known that the dog is fierce then it would be reckless and negligent of him not to take precautions to confine it. It is otherwise where he has no such knowledge, as in this case. Accordingly the conviction recorded by the District Magistrate is quashed and the accused is discharged."

55. Hassani Amrani v. R., Crim. App. 734-D-69, 5/12/69, Saidi J.

The appellant was convicted on his own plea of purchasing specified and scheduled agricultural products without a licence c/s 12(1) and (2), National Agricultural Products Board Act, 1964. The appellant was found unloading 89 bags of maize from a lorry he had hired. It appears he was doing this at his own house. He was then charged. In answer to the charge he said "it is true", and a plea of guilty was entered. The facts having been stated by the public prosecutor in a very brief manner, the appellant said "I admit the facts. I paid Shs. 38/- per bag."

Held: "The facts do not disclose any offence, because the National Agricultural Products Board Act does permit people in the villages to buy from their own neighbours any of the produce specified for their own home use. The Act is intended to bar subsiness me from buying from the farmers direct, in order to safeguard the interests of the farmers as well as of the public at large. Before this act came into existence business men normally bough local produced very cheaply from the farmers and later sold it at inflated prices, thus making large profits." Appeal allowed and conviction quashed.

56. R. v. Amsi Marangi and another, Crim. Sass. 25-A-69, 7/10/69, Platt J.

The accused Amsi Marangi and his son Ramadhani were jointly charged with murder of Safari Gwandoo on the 2nd June, 1968. The prosecution alleged that the 2 accused, who had a longstanding hard quarrel with the deceased's family, had been seen beating the deceased with a stick, as a result of which he died. The accused denied being involved. The prosecution's case depended largely on the evidence of three witnesses. The witness Boo Tlatla (PW. 1) testified that on the Sunday morning in question the deceased had called at his house and had then gone away. Shortly afterwards the accused Ramadhani called on him and then followed the direction that the deceased had taken. After a little time Boo heard shouts and going to that direction, he saw the two accused from 3 paces away beating the deceased with sticks on the head. When the deceased fell down Boo, being afraid ran away and hid, retuning home sometime later. He never reported what he had seen. The witness Neema Ami (PW. 5) on seeing some people standing by a path went to see what they were doing. He approached to within 15 paces and saw the accused standing holding sticks with the deceased lying down between them. Like Boo, Neema was unseen by the accused. Neema ran home and said nothing. In court, a stick was produced which belonged to Amsi Gadiye (PW. 2). At about 9 p. m on the Sunday in question the accused Ramadhani had called for the return of a debt of Shs. 2/- which Amsi Gadiyo owed him. Amsi Gadiye repayed it. And then the accused Ramadhani took away his stick without permission. It appears that Amsi Gadiye did not especially mind, and shortly afterwards he went to the shops. When he retuned at about 2 p.m. he found that the stick had been retuned

in as broken condition with what appeared to be blood on it. Amsi Gadiye threw it away as useless and did not mention the incident to anyone. All three witnesses kept quit until, at a second meeting held in the village concerning the murder, it was said that if anybody, knew of the deceased's death and did not tell what he knew he would be condemned by an oath.

Held: “The witnesses who thus gave their information all told this Court that the reasons why they had not at once informed the authorities what had happened were because, the two accused were well known to be bad people and that they were afraid. It is somewhat difficult to accept this excuse. Both accused had been arrested guite quickly and at least the witnesses ought to have spoken out at the first meeting. Neema added that he was afraid that he would be accused. Amsi Gidiye stated that he had thought that probably the accused Ramadhani had killed a snake with his stick and therefore he did not connect the deceased’s death with his broken stick. The assessor discredited all these excuses. He thought them most impossible especially that of Amsi Gadiye, and thought that it could well be that these witnesses might have taken part in the fight. It certainly seems strange that as neither Boo nor Neema had been seen by the accused, that they could not have gone to the authorities and reported the matter as is the usual custom, even as Amsi Girwana did. Neither accused left the village nor could they easily have been apprehended. This is not a case where the witnesses were under any compulsion (See M’NDUYO M’KANYORO V. R. (1962) E.A. 110). The law relating to such a situation as this is that witnesses who, though they may not be accomplices in the strict sense of that word, may nevertheless give evidence which is tainted and ought not to be accepted without corroboration. So in HODULRASULT S/O JIVRAJ vs. R. IT. L.R. 667 it was held: (as noted in the head note).

“When a witness admits that he was cognizant of the offence as to which he testified, and took no steps to communicate his knowledge with a view to preventing the commission of the projected offence he must ordinarily be taken to be in sympathy with the criminals and so to be a witness upon whose evidence a Court should only act after the closest scrutiny.” R. vs. GAS IBRAHIM 13 E. A. 104 is example where witnesses who were present at the commission of the crime and might have committed it, and who failed to report it for he reasons that they were trying to evade the authorities were held to require corroboration. In contrast R. vs. LIFA MAHEGA 13 E.A.C.A. 102. Shows that the evidence of witnesses present at the scene of the rime and who failed to report the fact at once being under the accused’s influence … could be relied upon. It seems that each case must depend upon its own merits and while not every witness who delays in reporting a crime must be considered as an accomplice or even one not any better than

that of accomplice, if there are circumstances indicating his sympathy with the criminals, it would be unsafe to depend on his evidence without corroboration. With these principles in mind I return to the evidence. To begin with the witness Qarasi Bua (P.W.6) described the meeting of the deceased, and Ramadhani with Boo in very different terms to that of Boo himself. According to Quarasi he had found Ramadhan talking to Boo before the deceased came. Indeed Ramadhani was still there while the deceased visited Boo. Ramadhani was seen with a different stick by Quarasi to that which Boo described. Qarasi Said that the stick Exhibited was not like Ramadhan's which Boo thought it was. The witnesses who saw Ramadhani all described his dress in very different terms and Boo and Neema described

Amsi Marangi's dress in different terms. The descriptions are irreconcilable and while such discrepancies are not always important it was possibly another indication in this case that the evidence is not sound. These discrepancies seen against the back ground of great reluctance to give information until a threat was issued of condemnation of an oath contribute to the general ruling of doubt expressed by the assessors, that the witnesses might have been parties to the offence themselves. At least they may have been sympathizers; as such I would not consider it safe to rely on their evidence without corroboration. It appears to be a case more akin to Gas Ibrahim's case that Lifa Mahega's case." Accused acquitted.

57. Yohana s/o Joseph v. R., Crim. App. 606-M-69, 4/12/69, Seaton J.

The appellant was charged and convicted of arson contrary to section 319 of the Penal Code and was sentenced to two years' imprisonment. At his trial appellant wished to call three defence witnesses and so informed the court. But his witnesses were not present in court. The learned magistrate in his judgment has commented regarding this request as follows: "The accused in his defence elected to make unworn statement and later abandoned his intention to call his witnesses because he could into afford it, nor

could the court afford to pay for the fare and posho of his witnesses because the vote for assessors and witnesses at that time was exhausted

Held: "It was apparently upon financial reasons that the learned resident magistrate based his failure to assist the appellant to procure witnesses in his offence Section 145 (1) of the Criminal Procedure Code authorizes the trial court to issue summons for a witness's whenever it is made to appear that material evidence can be given by any person. Section 353 of the Criminal Procedure Code authorizes any court to order payment of reasonable expenses of any assessor, complainant or witnesses attending before such court could for the purpose of an inquiry, trial or other proceedings under the code. If, as the learned magistrate has stated in his judgment, the court could not afford to pay for the fare and posho of his witnesses, then in fairness to the appellant the trial should have been postponed until such time as additional funds were available to the court." Conviction quashed and re-trial ordered.

58. R. v. Fita s/o Mihayo Crim. Sass. 173-Shinyanga-69, 8/10/69, Bramble J.

The accused stands charged with murder c/s 196 of the Penal Code. The basic facts are that he lived together with a woman for a period of about 4 to 8 months. On returning home he found her in the bush with another man. He out the man, the deceased, with a panga inflicting a deep wound on the head. The doctor was of the opinion that death was due to shock caused by the head injury. The accused said he met the couple in the act of sexual intercourse. He admitted he attacked the deceased. The defence is one of provocation in that the accused alleges that P.W. 2 was his wife. The question for decision is whether the accused and P.W. 2 were married.

Held: (1) "The law is clear. If two people are living in concubinage for a considerable time they can be considered as being married ad in circumstances such as these the accused would be entitled to raise the defense of provocation. In this case. However, the period in which the parties lived together was about 8 months. It is difficult to describe it as a considerable time. I have however put the questions to the assessors for them to

Consider in the light local custom and they are of the unanimous opinion that the couple were married giving as their reasons for this decision that many people had taken women in the way in which it was done in this case and they referred to it as 'Mtende'. They pay the dowry later. A man in this status is entitled to claim for adultery according to the custom. The evidence was that the accused and the woman lived together for a short time and subsequently got the approval of the woman's parents. P.W. 2 said that no arrangement was made for the payment of the dowry but the accused say that he made arrangements with her parents for the payment of the dowry. If there is any doubt about this arrangement I should accept the evidence of the accused. In the circumstances I cannot but accept the unanimous opinion of the assessors that the parties were married according to custom." (2) "On a charge of murder a husband is entitled to raise as his defence the fact of provocation through an act of adultery by the wife on circumstances suggesting adultery. The only evidence in this case is the evidence of the accused and P.W. 2 P. W. 2 denies she was committing adultery. Having regard to all the circumstances there must be doubt whether she was having sexual intercourse with the deceased. She admitted that day he had asked her for sexual intercourse and the only question was whether they were in the act or merely sitting down. Again the evidence is not absolutely clear and any doubt must be resolved in favour of the accused and I agree with the unanimous opinion of the assessors that the parties were found in the act of adultery. Accused acquitted of murder and convicted of manslaughter.

59. John Mswani and others v. R., Misc. Crim. Cause, 19-D-69, 16/12/69, Georges C. J. This is an application for bail. The applicants appeared first on charges involving theft from the High Court. They were given bail. Shortly after they appeared again on charges involving forgery of a cheque stolen from the High Court. They are now applying for bail again. There is evidence that they may have committed the second alleged offence while on bail for the first.

Held: "I accept the principles laid down in R. v. Abdullah Nassor (1945) I Tanganyika Law Reports 289. The Court held there were factors to be taken into

account other than the seriousness of the charge, the strength of the evidence in support and the severity of punishment involved. The cardinal principle was whether the granting of bail would be detrimental to the interests of justice and good order. In my view, the likelihood of the applicants committing offences of a similar nature when on bail is a factor to be taken into account …. There is evidence indicating that the applicants may have committed an offence while on bail for another. This appears to me to be a good reason for refusing bail unless there are circumstances which would make it inequitable to do so. If for example the police take an inordinate time to complete their investigations and presents the cases then clearly there will be need for review and the applicants could apply again." Application refused.

60. Angelo Munyagi v. R., Crim. App. 720-D-69, 5/12/69, Said J.
The appellant was convicted of (1) driving while impaired by drink c/s 49(1), Traffic Ordinance Cap. 168; and (2) driving a motor vehicle not in good mechanical repair c/r 49 and 60 Traffic Rules, Cap. 168. He was fined on both counts, but no order for disqualification from driving was made, on the grounds that there were "special reasons." The reasons advanced for non-disqualification are that the appellant, being in charge of the E.A. P. & T for Mtwara and Ruvuma Regions, is

Often called out for emergencies and has to drive himself to wherever he may be required, so that disqualification would make his work difficult and put him as well as the public to inconvenience.

Held: "In any case the reasons advanced cannot be held to be special reasons as they do not relate to the offence but to the appellant himself. Special reasons which would entitle an accused person to non-disqualification must be special to the occasion of the driving, such as where a person, though drunk and his efficiency impaired, has to drive in a case of extreme emergency, perhaps to save the life of a member of his family afflicted by sudden and serious illness or who has been injured unexpectedly,

and the accused cannot secure the services of another driver for the purpose. The same would apply where such a driver, though drunk, has to drive out of danger say to escape from floods or fire or from wild animals and the like. But no such occasion arose in the appellant's case, and he was therefore not entitled to non-disqualification." Appeal dismissed and disqualification order for one year imposed.

61. Moses s/o Masimba v. R., Crim. App. 732-D-69, 5/12/69, Saidi J.
The appellant was convicted (inter alia) of fraudulent false accounting c/s 317 (a), Penal Code.

Held: "The learned State Attorney stated that he was unable to support the conviction for the reason that the particulars of the offence were incomplete and defective. In this instance the words "with intent to defraud" were not included in the particulars of the offence of fraudulent false accounting. In a similar case, Omari Juma v. R., 1968 H.C.D. n. 441, Duff J. held that the omission of these words was not a curable irregularity, and the conviction had to be quashed. I think the same applies to this case. Accordingly the conviction on the second count of fraudulent false accounting is quashed and the sentence passed thereon set aside."

62. Saidi s/o Abdallah v. R., Crim. App. 688-D-69, 17/12/69, Georges C. J.
The appellant in this matter was charged jointly with Ramadhani Mohamedi (who was the first accused at the trial) with shopbreaking and stealing c/s 296 (1) of the Penal Code. Ramadhani Mohamed was acquitted but the appellant was convicted and the minimum sentence imposed. There were many unsatisfactory features in the conduct of the trial and the judgment did not, in my opinion, deal with all the issues raised by the evidence.

Held: (1) "The particulars of the charge alleged that the two accused persons had, on 16th June, 1969, broken into the shop of Ramadhani s/o Athumani and had stolen "goods valued Shs. 2,500/- property of the said Ramadhani s/o Athumani." This is, in my view, not sufficiently specific. The goods allegedly stolen should be itemised. The Criminal Procedure Code section 138(c) (i) provides: _ "The description of property in charge or information shall be in ordinary language and such as to indicate with

reasonable clearness the property referred to." The phrase "goods valued Shs. 2,500/- "is certainly not enough to indicate with reasonable clearness the property referred to. In the circumstances of this case I do not think that this failure may have led to a miscarriage of justice. The prosecution did not, in proving the case, rely on the doctrine of possession of property alleged to have been recently stolen. Where this is the method of proof, however, it is clear that it would be very important to describe in detail the property allegedly stolen so that the accused person

would know the case he was to meet. At the very beginning of enquiries police should insist that complainants give a detailed account of articles missing with as accurate a description as possible of each article." (2) "Certain evidence was led after the close of the case for the defence; I think the trial magistrate acted properly in admitting it. He should however, have made a note of the application to have the evidence admitted and the grounds on which the application was based. Thereafter, he should have asked the accused persons whether they had any objections. If they had any he should have considered the matter and made a ruling. The record merely shows that additional witnesses were called after the closs of the prosecution's case. He did refer to the matter in his judgment but again did not discuss his reasons for admitting this evidence at so late a stage. A more significant error is that the magistrate did not offer the accused persons as opportunity to give further evidence or to call witnesses if they wished to do so with regard to the additional evidence which the prosecution had led. The nature of the evidence was such, however, that I am satisfied that the appellant would not have wanted to lead any evidence or to call any witnesses in rebuttal. I would hold that the mistake, though serious, could not have caused a failure of justice in the circumstances of this case". (3) "After the additional evidence had been taken there is no note on the record that the Court would visit the scene on the morning of 18th August, 1969. Thereafter the record ends. There is no note of what happened at the visit but there is a reference in the judgment to it ….. This appears to refer to a plan but the record does not show that any plan was every put on evidence …. This procedure is

improper and is not recommended. The Magistrate is never to make himself a witness in a case. The accused persons have had no opportunity of challenging his plan if they wish to do and of questioning him about it. When there is a visit to a scene a note should be made of this as of any other sitting of the Court. It must be noted that the accused persons are present. No oral evidence as such should be taken on the scene – people should merely be asked to point to various placed referred to in their evidence. Normally a police officer should accompany the Court so that he is available to take measurements and make any observations that may be necessary. After the visit the Court demonstrations at the scene can then be recalled and questioned as to what happened on the scene. A witness who during the visit had stood at a spot to demonstrate what could be seen from there can then describe what he did that day. If the accused persons wished to deny that the witness could see as far as he had said he did they could cross-examine having regard to their own observations on the scene. If a plan seems necessary the magistrate should ask the police officer to have one prepared. The police officer could tender this and be cross-examined by the accused in the normal manner. These procedures are not mere unnecessary and tedious matters of form. They are important if an accused person is to have an opportunity of challenging all the evidence against him and of having all the evidence for the prosecution given an oath except in the cases where the law provides for the reception of unsworn testimony. The method followed in this case was a serious breach of procedure." (4) "One final procedural error remains to be mentioned. The appellant elected to make an unsworn statement but he magistrate nonetheless questioned him. This is not permissible." [Citing: Cosmo Alias Mvwane s/o Kafwebe [1950] 17 E.A.C.A. 123 and R. v. Birmin s/o Kujanga [1935]2 E.A.C.A.] (5) The magistrate based his judgment on certain on certain circumstantial evidence, holding

that it “implicated” the accused. “There is a clear misdirection in this statement of the law. Circumstantial evidence must not merely implicate an accused person. It must be such as not to be explicable on any other reasonable hypothesis but the guilt of the accused. The matter was put thus by the Court of Appeal for East Africa in Sharmmal Singh v. R. [1960] E.A. 762 at p. 776. “It is the bounden duty of a judge in dealing with circumstantial evidence, to consider every possible set of circumstances, in the process of determining, as he must, whether the evidence is incapable of explanation upon any other reasonable hypothesis than that of the guilt of the prisoner. He must examine every other reasonable possibility and test it against the evidence – only if it is incompatible with the evidence may be discard it.” (6) Despite these irregularities, appeal dismissed because evidence sufficient to convict.

63. Godfrey Naftali v. R., Crim. App. 173-A-69, 24/10/69, Platt J.

The appellant was convicted of personating a public servant c/s 100(2) of the Penal Code, and of obtaining credit by false pretences c/s 305(1) of the Penal Code. In November 1968, the appellant arrived at Mbulu where he had a friend. The appellant had the advantage of a good education and had been employed in the East African Institute for Medical Research at Mwanza. But he had admittedly ceased to be employed in research before he had come to Mbulu in 1968. as members of the East African Common Services Orgnaisation were defined as public servants, any attempt to pass himself off as still employed in the public service stood to be an offence of personating. The first count alleged that “on the 25th November 1968 at 08.30 hours at Government Hospital Mbulu … (the appellant) did falsely represent himself to be a person employed in the Public Service; to wit introduced himself to Senior Laboratory Auxillliary Mr. James Francis that he is a Research Officer from Mwanza and came to Mbulu for lecturing the laboratory staff”. The witness Mollel (P.W. 3) employed in the X-ray Unit of Mbulu, testified that he met the appellant on the 23rd November 196 in a bar and during the conversation that followed, the appellant represented himself as a research officer from Mwanza, temporarily transferred to Mbulu Hospital, to do research on bilharzias. On the 25th November the appellant came to the hospital and met Mollel, and promptly asked him for Shs. 40/- to give to his driver, who had exhausted his

money. He promised to return the money on Saturday. Mollel did not give him any money. The appellant then asked to be shown the laboratory and Mollel took the appellant there and introduced him to James Francis, the laboratory auxiliary. There was some talk about bilharzias and according to Mollel; the appellant said that his work would mainly e concerned with the dams in that area. The appellant then left …. Then the appellant called on James again on 27th November 1968 ….. and this time he asked for a report on bilharzias. James showed him all types of bilharzias, and the appellant said that at 2 p. m. he would give a lecture on how bilharzias eggs hatch out. James and Abdi [a microscopist] attended, but the appellant never came.

Held: (1) "The offence created by s. 100(2) is laid down as follows. "100. – Any person who (2) falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment, is guilty of a misdemeanour. I take it that the prosecution alleged that on the 25th November 1968, apart from representing himself to be a Research Officer from Mwanza, he had attended at the Government Hospital Mbulu for

the purpose of lecturing the laboratory staff. It was not stated that this was an act to be done by virtue of his employment. There was no evidence whether research officers do go around lecturing the staff of smaller stations, connected with headquarters in Mwanza. But if he had represented himself as being sent to do this duty, or had let it be known that it was part of his duty, all well and good. On the other hand, if he had simply offered to give a lecture for the interest of the staff, apart from his duties, it seems that no offence was committed. The essence of the offence, as I see it, is that only when unlawful action is taken as a result of a hoax is the criminal law involved. Mere representations of being employed in the public service, without further actions as laid in the Section, are the sort of day-dreams which the public are expected to see through by themselves …. It is clear that on the 25th November is concerned; the appellant did not make any representation that he had been sent to give lecture to the staff. The reference to a lecture occurred on the 27th November. As far as the 25th November is

concerned, the appellant played a trick on the witnesses, without doing he act or attending at he hospital for the purpose of doing the act, complained of in the charge. It is clear that the prosecution or the trial court ought to have seen that the charge was amended to represent what fault the appellant had actually committed. Certainly he never introduced himself as a research officer who had come to Mbulu for the purpose of lecturing the laboratory staff. I would not be proper now to amend the charge completely. In the result the conviction cannot be allowed to stand, on the principle that an accused ought to know with certainty the offence alleged." (2) "On the second count, the particulars were that "on the 27th November 1968 at about 22.00 hours at Madaraka Bar Mbulu District …. In incurring credit or liability obtained credit of 14 bottles of beer valued at Shs. 38/70 and one tin of fish valued at Shs. 3/50, total value at Shs. 42/20 from Mwarabu Mesewe by false pretences … the ingredients of the offence are (1) that the accused should obtain credit in incurring a debt or liability (2) by a false pretence of any existing fact with the intent to defraud; or (3) by means of any other fraud. Although the particulars given are in accordance with precedent, (See Archhold 36th Ed. Para 3692) it would seem that the better practice is to set out the false pretence alleged, as in an ordinary case of obtaining goods or money by false pretences. It appears that R. v. PERRY 31 Criminal Appeal Report 16 is considered to be some authority in not setting out the particulars Counsel argued in that case that it was necessary to give particulars, but the English Court of Criminal Appeal considered in effect that it was not necessary and that Counsel should asked for the particulars if he had been embarrassed. However as Perry is not now generally followed, I venture to think that the prosecution should specify the false pretence alleged." However, conviction quashed on other grounds, for inadequate evidence.

64. R. v. Amina d/o Sefu, Inspection Note, Korogwe Crim. Case 647-69, 26/11/69, Georges C. J.

The accused, a lady, was charged with having committed three offences under the Employment Ordinance Cap. 366, two offenses under the Regulation of Wages and Terms of Employment Ordinance Cap. 300 and one under the Workmen's Compensation Ordinance Cap. 263. She was the owner of a bar and the prosecution

led evidence to establish that she had paid a bar maid less than the statutory minimum wage, had failed to make a memorandum of an oral agreement

of employment, had failed to keep proper books and had failed to insure her workmen. Without deciding the factual issues raised the District Magistrate dismissed the charges. He pointed out that the pronoun "he" had been used in relation to an employer in each of this Ordinance, and concluded that hey could not apply to female employer.

Held: "The answer to the apparent difficulty is to be found in the Interpretation Ordinance Cap. 1 section 2 which reads: - (quoting only the relevant part) ….."words importing the masculine gender include females words in the singular include the plural and words in the plural include the singular." There is nothing in the context of the Ordinance under which the accused was charged to show that female employers were not to be excluded nor are they excluded by the very subject matter of the legislation. This section, therefore, applies. The trial Magistrate erred. Since the prosecution do not wish to appeal this serves as an Inspection Note for the guidance of the Magistrate."

65. Samson Elias v. R., Crim. App. 768-D-69, 5/12/69, Mustafa J.

Appellant was convicted of stealing bicycle and was sentenced to two years' imprisonment. He now appeals.

Held: "The appellant's appeal has no merit at all, as the evidence against him is overwhelming. However, the trial magistrate in dealing with the defence of alibi states:- "The position at law is that the burden of proof is on the person setting up the defence of alibi to account for so much of the time of the transaction in question as to render it impossible that he could have committed the imputed act. If authority is sought then it can be found in the case of R. V. Chemulan Wero Olango (1937 4 E.A.C.A. 46….. The statement of law is wrong. It is true that that was the proposition as laid down in the case quoted by the learned trial magistrate. However, that has been overruled since by Leornard Aniseth v. Republic (1963) E.A. 206. in the Aniseth case the case of R. v. Chemulan Wero Olango was referred to and discussed and it was held that it was no

longer good law. In a defence of alibi, if the evidence adduced raised a reasonable doubt as to the guilt of an accused person, it is sufficient to secure an acquittal. There is no onus on an accused to "prove" anything. However, this misdirection of the trial magistrate has no effect at all on the case as such." Appeal dismissed.

66. Casmiri John and another v. R., Crim. App. 119-A-69, 1/11/69, Platt J.

The appellants Casmiri John and Kilafumbi Mzee were convicted of rape on the first court and robbery with violence on the second. The complainant Sofia was walking home when she met the two appellants, who are men of her village. The appellant caught her, dragged her into the coffee shamba, and threw her down. She was held by the throat to prevent her from raising the alarm. Her dress and under wear was torn and Shs. 54/- stolen from her pocket. The appellant Kilafumbii had sexual inter course with her first and then the appellant Casmiri. As a result of the struggle, Sofia sustained an injury to her leg which prevented her from walking. She raised an alarm and the appellants ran off. Her husband however responded and came to her help. He found her half-naked, her gown torn and hanging by her shoulder; and her underwear was torn. He heard people running away. Sofia reported at once that these appellants had raped her and stolen her money. The witness Valerian Shabani also heard the report. The next day,

Sofia was taken to Hospital. The medical certificate reveals that Sofia had a fracture dislocation of the fibia and multiple bruises on the frontal aspect of the neck, but no sperm was discovered in Sofia and she did not apparently suffer any wounds around her genitalia.

Held: The question was whether there was sufficient corroboration. "The Republic felt that is was arguable in the absence of clear medical evidence, that the destruction of Sofia's clothing and her injuries were attributable as much to the robbery as to the alleged rape. It might depend on where Sofia had kept her money. It was, she said, in her pocket. If that pocket was in her underwear, then that might account for the

state or her torn underclothing, and the manner in which she was found sitting. If it was in her gown on the outside, then there would seem to have been no cause for her under wear to have been torn, and that would afford some corroboration that a further offence had been committed. It is not in evidence from where the money was taken. I agree that the evidence was such that it is difficult to be sure, whether Sofia really was raped or badly injured when being robbed. Although it may well be that she is right that both offences were perpetrated it is not even clear when or how her leg was fractured. It is not said that it was due to the rape alone. As there seems some doubt, I shall allow the appeals and quash the appellants' convictions and sentences on the first count. Their convictions on the second count however are affirmed."

67. Leornard David Chamba v. R., Crim. App. 706-D-69, -/10/69, Mustafa J.

The appellant was convicted on one count of attempting to obtain money by false pretences and one count of obtaining goods by false pretences. Appellant was an assistant secretary of the National Housing Corporation. Ahmed Ali Shirwa had applied to the said corporation for the allocation of a house on a tenant/purchase basis. Appellant falsely represented to Ahmed Ali Dhirwa that his application had been approved, and obtained from him a cheque for Shs. 2,000/- drawn in favour of the National Housing Corporation as a deposit. It appears it is not unusual for an intending tenant to put down a deposit at the time he makes an application for a house. After he had received the said cheque for Shs. 2,000/-, appellant took it to the National Housing Corporation and attempted to cash it. He made false representations to the accountants and other officials of the National Housing Corporation was in the process of clearing the cheque, but before appellant was paid. Ahmed Ali Shirwa made inquiries about a receipt for his cheque. It then transpired that he cheque made out by Shirwa was in favour of the National Housing Corporation, and appellant was arrested. When appellant handed the cheque to the cashier of the Housing Corporation he was in the usual course of business issued with a receipt for the said cheque for Shs. 2,00/- and it is in respect of this receipt that the second charge was preferred against him. There are two relevant grounds of appeal. Learned counsel for appellant states the conviction is bad in law, since the charge did not lay the money or the goods as the property of

anyone. Secondly, the trial magistrate had admitted evidence which had the effect of establishing that the appellant was the type of person who would make false representations and is of bad character.

Held: (1) "As regards the first ground of appeal, learned counsel for the appellant states that it has not been alleged as regards the first count whose property the sum of Shs. 2,000/- was. He relies on two old English cases, The Queen v. Martin, 112 English Reports 921 at page 923, and The Queen v. William Marsh and James Bell Lord. 169 English Reports 348 …. In my view, a charge has to specify with sufficient certainty what a person is charged with. Here appellant was charged with falsely pretending that the cheque in question which was issued in the name of the National Housing Corporation was for him although in fact the said cheque was for the said Housing Corporation. I think it is clear enough to appellant what he was being charged with. I am not persuaded in a charge of false pretences it must be stated to whom the gods belong. The authority quoted by learned counsel refers to obtaining goods by false pretences under an old statute, 7 & 8 George IV. I very much doubt if it is still good law; in any event I am not prepared to follow it. Section 302 of our Penal Code …. Is more in line with the Larceny Act, 1916, of England. I have not been able to obtain a copy of the statute of 7 & 8 George IV clause 29 section 53, but in Archbold, Criminal Pleading Evidence and Practice, 35th Edition, in dealing with the offence of false pretences under the Larceny Act, 1916, it is stated in paragraph 1938: "Ownership of the gods need not be alleged, nor intent to defraud any particular person: Indictments Act, 1915, Sched. 1 …." I do not think therefore this particular ground of complaint is valid these days, and as I red section 302 of the Penal Code I am of opinion that it is not fatal to omit mentioning to whom the money belongs." (2) "As regards the second ground of appeal, that a considerable amount of inadmissible evidence was admitted, which must have prejudiced the appellant, learned counsel draws my attention to evidence adduced which relates to false pretences or false representations made by appellant to Ahmed Ali Shirwa ….. Learned counsel states all these pieces of evidence had the effect of

showing that the appellant was a person who would go about making false representations made by appellant to Ahmed Ali Shirwa ……. Learned counsel states all these pieces of evidence had the effect of showing that the appellant was a person who would go about making false representations. He sys appellant was not charged with making false representations to Ahment Ali Shirwa and all this evidence was irrelevant and inadmissible, and would be evidence of bad character and could have prejudiced the appellant … am not persuaded this is so. In my view the evidence which has been adduced rooms part of a pattern and the evidence is a part of the same transaction resulting in the presentation of the cheque by the appellant to the Housing Corporation. It is true appellant has made false representation to Ahmed Ali Shirwa as well as to the Housing Corporation, but in my view the false representations to both the parties are so interconnected that the false representation made by the appellant to Ahmed Ali Shirwa would be relevant and admissible; see section 8 of the Evidence act. I do not agree that the evidence objected to by appellant's counsel was inadmissible under section 56 (1) of the Evidence Act in the circumstances. (3) "As regards the second count, that of inducing the said Corporation to deliver to appellant a receipt in his name valued at 20 cents, there is evidence that appellant had never asked for the receipt to be issued. He merely handed over the cheque to the cashier, P.W. 9 P. Mwasabwite, and P.W.9 was instructed by P.W. 5 Francis Figuereido to issue a receipt to the appellant. There is evidence to show that whenever any money or chegue is handed over to the National Housing Corporation a receipt is issued. P.W. Francis Figuereido has said he sent the receipt with a messenger to the appellant, and the appellant has not challenged that piece of evidence. The trial magistrate in his judgment said: "I find it as a fact that the accused, knowing the Corporation's regulation. Expected to receive the receipt on the presentation of the cheque.

The appellant was a senior official of the Corporation, and although he did not demand a receipt he knew he would be issued with one. The trial magistrate said: "He therefore must have known that he would be issued with the receipt by presenting the cheque.

This was therefore representations by the accused by his conduct ….." I tend to agree." (4) Appeal dismissed.

68. Yusufu Salehe v. R., Crim. App. 717-D-69, 31/10/69, Georges C. J.

The appellant in this case was jointly charged with Abdu Mohamed with offence of being in possession of house breaking implements by night without lawful excuse c/s 298(c) of the Penal Code. It was alleged that they were found with the implements on 18th May 1969 at Mnazi Moja. Abdu was in possession of a bunch of keys and a piece of timber shaped like a wedge and the appellant with a single key and a similar piece of timber. They were both convicted. Two policemen testified that on the night of 18th May they were on duty at Mnazi Moja when they saw the accused persons coming towards them in the park. The policemen were suspicious and searched them and found on each of them the articles already mentioned on the charge. Neither accused gave any explanation for having these implements with him. The policemen explained that the wedge could be pushed in between the frame of a door ad the door itself to make a space to enable the door to be levered open, while the keys could be used to open such doors as they might happen to fit. When called upon by the magistrate in terms of section 206 of the Criminal Procedure Code both said that they had nothing to say and that they had no witness to call.

Held: (1) "On appeal it was urged that the trial was itself a nullity because the two accused persons should not have been jointly charged. Section 137 of the Criminal Procedure Code states that the following persons may be tried together on one charge or information, namely: - (1) persons accused of the same offence committed in the course of the same transaction; (2) person accused of an offence and persons accused of aiding and abetting them: and (3) persons accused of different offences committed in the course o the same transaction. There are two other categories of persons laid down in the section which are not relevant in the circumstances of this case. Mr. Shukla argued that the two accused persons in this case did not fall into any of the three categories. They clearly did not fall within category (2). Since each accused person was found with separate implements on him it could not be said that they were accused of the same offence committed in the course of the same transaction, so that they did not

fall within category. (1). It is my view, however, tat they fell within the third category – that is persons accused of different offences committed in the course of the same transaction … it is clear ….. that the two persons ere together and that they answered together, giving similar explanation for their presence in the park. On this I think one could justifiably find that he two accused persons were engaged in the course of the same transaction. The fact that similar housebreaking implements were found on them would help to fortify this inference, particularly when it is borne in mind that hey gave no evidence in denial or in explanation." (2) "Mr. Shukla also argued that since the keys and the wedge were not in their very nature housebreaking implements, proof of an intention to use them as such was needed. He contended that no such intention had been proved in this case ….. I agree with the proposition that where an instrument is capable f being used for house breaking although ordinarily it can also be used for lawful purposes, as for example, the house door keys in this case

And the wedges of wood which could be used for keeping a door open, one can only be found guilty of being in possession of housebreaking implements within the meaning of the Code if from the circumstances of possession an inference can be drawn that there was an intention to use the implements for housebreaking. Whether or not such an inference can be drawn in a question of a fact …. I see no reason for differing from the Senior Magistrate who quite clearly thought that the circumstances under which the appellant was found in possession of the implements indicated an intention to use them for the purpose of housebreaking." (3) "Finally Mr. Shukla urged that the Senior Magistrate should have explained to the appellant that the burden of giving an explanation for his possession of the articles was on him and that he could be convicted if he failed to do so. He quoted a case dealing with the obligation of the Court to explain fully to the accused person the ingredients of an offence before accepting a plea o guilty. I do not think the authority is relevant in the circumstance of this case. Section 206 of the Criminal Procedure Code sets out what the magistrate out to do. At the close of the case for the prosecution. The magistrate must explain again to the accused the

nature of the charge and inform him of his right to give evidence on oath in the witness box, his liability to cross examination if he does so and of his right to make a statement not on oath from the dock. He must also inform the accused of his right to call any witnesses if he wishes to do so. It may be very dangerous to depart from the prescribed procedure laid down in this section and to attempt to explain to an accused person matters dealing with the burden of proof. There is a strong possibility that it may be argued then that the magistrate was in some way exercising pressure on the accused to induce him to give evidence when he did not wish to do so. In the course of giving evidence the accused may well strengthen weaknesses which may exist in the case for the prosecution. The charge in this case was being found by night in possession of housebreaking implements without lawful excuse. If this was explained to the accused and if he was told that he had the right to give evidence eon oath or to make a statement from the dock if he wished then it must have been obvious to him that he could take advantage of that opportunity to set up any lawful excuse which he might wish to give. I do not think his failure to do so can be blamed on the magistrate." Appeal dismissed.

69. Eliah s/o Mwafura v. R., Crim. App. 712-D-69, 7/11/69, Georges C. J.

The appellant was convicted of shop breaking and stealing c/ss 296 (1) and 265 of the Penal Code. the appellant was first charged in Cr. Case 134?69 together with Haruna Kasinlaya, who was P.W. 3 in this case and Aden Mwajana who was acquitted at the end of that trial. At the close of the case for the prosecution then the police applied for leave to withdraw the charge against the present appellant under s. 86 of the Criminal Procedure Code. The trial magistrate gave leave and the appellant was discharge. At that stage none of the witnesses for the prosecution had established any connection between the appellant and the stolen property.

Held: "Only in the most exceptional circumstances should the prosecution be allowed to withdraw a charge under s. 86 after they have produced against the defendant all the evidence available to them up to that time. If for some reason or other the evidence is inadequate, or some vital link which ought to be established has no in fact been established, the more appropriate course would be to grant a short

adjournment in order to allow witnesses to be produced to establish any matter which needed to be established. Be that as it may, however, the prosecution was

well within its rights once leave had been granted to lay the present charge and to proceed with it." Appeal allowed on other grounds.

70. Mpagama s/o Chalo v. R., Crim. Sass. 50-Dodoma-69, 14/10/69, Hamlyn J.
The accused is charged with the offence of murder, contrary to Section 196 of the Penal Code. the accused at the material time, was married to one Violet and had been her husband for some time. In about July, 1968 there had been a quarrel between the accused and the deceased and as a result the woman had returned to her father. The accused visited the father of the girl and asked him to re-pay the dowry of a number of cattle and goats which the accused had paid to him at the time of the marriage. The old man (who was alleged as a witness for the prosecution) informed the accused that he had not the cattle to pay to the accused. He told the court that he privately thought that perhaps his daughter would re-marry and that from the bride-price which he obtained from the next husband he would be able to repay the accused the debt which he owed to him. The deceased daughter obtained a divorce from the local Primary Court and continued to live with her parents. On the day of the homicide, the accused met Violet some place in the bush, and she was with her new "boy-friend". He chased the man, who escaped, and thereafter chased Violent and stabbed her, killing her. The main question before the court is whether there was provocation such as to reduce the offence from murder to manslaughter.

Held: "Almost all the facts not being in dispute, a decision in this matter falls directly within the scope of Gogo law-all the parties (the accused, the deceased wife and the assessors) being of that tribe. The matter for decision is a very simple one and this I put directly to the assessors in my summing up. Where a divorce has been established by an act of a competent court and the woman returns to her parents, but the parents do not re-pay the bride-price, does any matrimonial relationship still obtain

between the former spouses pending re-payment of the dowry? If such relationship still exists, to what extent will it enable the husband to control the acts of his former wife? The assessors asked for time to consider this problem and this was accorded to them. When the court re-convened, they gave their opinions and these are on the record. In brief, the local opinion of the questions put to them is this. Until re-payment of the dowry, the woman still owes duties to the former husband, though she may be living with her parents, she cannot form association with other men, and it seems, is still in some way bound to the husband, despite the divorce decrees having been promulgated by the court. The assessors went further and advised that, if the husband finds the woman to be I association with another man, this would be a cause of provocation and would suffice to reduce the act which would otherwise be murder to mere manslaughter. It appears from the opinions of the two Gogo assessors that it would not be necessary for the husband to catch the former wife in sexual intercourse with another man, but he mere fact of her being in his company during the period prior to re-payment of the dowry, would suffice to reduce the offence to the lesser form of homicide …. I find …., in conformity with the opinion of the two assessors, that the sudden finding of the woman Violet in company with this man (and for the purposes of this Judgment it is unnecessary for me to find that they were having sexual intercourse when they were discovered) sufficed to provoke the accused that in his fury, he knifed the woman. Such act in the

Community to which the accused belongs constitutes manslaughter and not murder with which he is charged and find him guilty of manslaughter."

71. Hamisi Hassani and another v. R., Crim. Rev. 28-A-69, 22/10/69, Platt J.

Two accused Hamisi Hassan and Mathias Tupa were convicted of possession of gemstones contrary to section 3 of the Gemstones Industry (Development and Protection) Act No. 11 of 1967. Each accuse, who was 18 years old, pleaded guilty to being found in possession of various gemstones on the 30th July 1969. in the case of

Hamisi, he had Shs. 114/- worth of pink garnets, as well as a quantity of smoky quartz of no value and was fined Shs. 100/- or three months' imprisonment in default. In the case of Mathias, he had Shs. 9/- worth of pink garnets, and was sentenced to six months imprisonment. Both appellants were dealt with on the 13th August 1969.

Held: (1) "It is clear that Act No. 11 of 1967 did not come into operation until the 1st August 1969 by virtue of Government Notice No. 203 of 1969. Accordingly, as act No. 11 had no retrospective effect through any saving clauses, it was not in force on the date in question. The charge should have been laid under sections 72 and 73 of the Mining Ordinance Cap. 123 and Government Notice No. 709 of 1964 if it was considered that pink garnets were gemstones in their unmanufactured state …. As explained in Papadopolous v. R. 1969 H.C.D. n. 237 I consider it would have been possible to substitute a charge and conviction under the Mining Ordinance. That irregularity might have been curable but there is yet another difficulty to be surmounted." (2) "Under either the Gemstone Act of 1967 or the Mining Ordinance Cap. 123, it is not possession alone which constitutes the offence, but possession as an unauthorized miner or dealer (see section 3 of the Gemstone Act) or possession by a person who does not hold a mining lease, claim or prospecting licence or right or a licence to purchase under section 75 of the Mining Ordinance. (See section 73 of the Ordinance). In both cases, all the accused admitted was possession; all that the prosecution averred in the facts was possession. Therefore the pleas were not unequivocal to a proper charge under either the act or the Ordinance." (3) "Mathias was misled into thinking that he had 139 gemstones although by an amendment in the charge he was only charged with a lesser amount o pink garnet weighing 18 grams, otherwise there were 29 grams of tourmaline. Now by virtue of Government Notice No. 341 of 1968 (which must be said to have come into operation with the Act on 1st August 1969) gemstones are prescribed firstly according to the list and secondly other stones excluding diamonds normally used in making jewellery. The list included "gem varieties of garnet" Presumably a gem variety is one used in making jewellery. In my view there ought to be a statement after a plea, or evidence at a trial that the garnet in question is gem variety. However as Mathias admitted he had gemstones that was probably sufficient despite his mistake as to the number of such stones he actually had." (4) "It is not without interest however to

consider the other stones in the charges which were at some stage deleted. In Mathias' case for instance, tourmaline was charged and deleted. Tourmaline is one of the specified gemstones. Nothing is said that it must be of gem variety, or normally used in making jewellery. Unauthorised possession of tourmaline is therefore an offence. But the prosecution no

doubt deleted it because the stones found were said to be of "no economic importance". Sensible as that may be, it is a technical offence as the law stands. In Hassan's case, beryl of "no gem quality" was deleted. It seems that it is not the quality but the variety of beryl which is of importance. The Schedule specifies "Emerald and other gem varieties of beryl". Once beryl is of gem variety, its value or quality is not in point as far as an infringement of the Act is concerned. Probably, as it was said to have no gem quality, it was understood to mean that it was not of gem variety. Hamisi also had 27 grams of smoky quartz. This was left in the charge although these stones were said t have no commercial value. Quartz comes under the heading in the Schedule – "amethyst and other gem varieties of quartz." I need only add that it would have been proper to state whether the smoky quartz was of gem variety. Here the prosecution seems to have understood that though the stones actually had no commercial value, never-the less they were gemstone and Hamisi was accordingly charged. Finally Hamisi had some cyanite. That is a mineral not prescribed and unless it is used in making Jewellery, It is not a gemstone. It was very properly dropped from the charge as it was not of "gem quality", and of no commercial value. These charges display some of the confusion attending prosecutions under the act of 1967 and the consequent difficulty in passing sentence. It seems to me that certain stones whatever the value, are prohibited ipso facto according to the schedule. Baryl, quartz, garnet and zoisite are prescribed if of gem variety, whatever their value. There may be a third category of other stones not specified in the Schedule which are used in making jewellery. I have hazarded the opinion that "a gem variety" may simply mean the equivalent of a stone with which

jewellery is made. At any rate, I shall take it as such until corrected." Appeals allowed and convictions quashed.

72. Lawrence Amuli v. R., Crim. App. 210-A-69, 31/10/69, Platt J.

The appellant was charged with theft by public servant c/ss 270 and 265, penal Code, and convicted of simple theft c/s 265, Penal Code. He was sentenced to 9 months imprisonment. The appellant was employed as a building inspector by the National Housing Corporation. At pay parade one day, another employee, Josephat Anasa, was absent, and the sum of Shs. 510/- due to him was taken over by the appellant from the accounts clerk. The appellant undertook to pay Josephat and signed the schedule against Josephat's name as having received the money. He never gave it to Josephat. He later claimed to have lost it, but the court found that he had stolen it. The charge as laid was theft by a public servant. There appears to have been an argument that the National Housing Corporation was an organ of Government so that the appellant was employed in the public service. The learned Magistrate seems to have been undecided whether this was so or not. He left the matter open and took two further objections purporting to show that the transaction was not within the terms of the appellant's service. First it was said that it was not part of his duties to undertake to pay Josephat, and secondly he had not received the money on behalf of the Corporation but on behalf of Jusephat. Therefore the appellant was found guilty of simple theft.

Held: (1) "There is no doubt that legally the National Housing Corporation is a separate entity distinct from Government. And that will be seen quite clearly from Parts V & VI of the National Housing Corporation Act, Cap. 481. It is not to be thought that because the Minister for Lands and Housing has some

Control over the Corporation therefore the Corporation is a part of Government. While that be understood in a general sense, it is not so in law. The learned Magistrate need not therefore have any further qualms in refusing to apply the Minimum Sentences Act, or section 270 of the Penal Code, to property or employees of the Corporation." (2) "It is

equally clear that on the last point the appellant did not receive the money on behalf of Josephat, but on behalf of the Corporation in order that he should pay Josephat. What really happened was that, without the authority of Josephat, one officer of the Corporation in order that he should pay Josephat. What really happened was that, without the authority of Josephat, one officer of the corporation allowed the appellant to receive the corporation's money in order to effect payment on behalf of the Corporation to Josephat. The money remained that of the Corporation while it was in its servant's hand." (3) on the other hand, it may be arguable whether the money came to the appellant's hand by virtue of his employment, (See section 270 of the Penal Code) or on account of his employer (see section 271 of the Code). But it is not necessary to decide these questions because the appellant was not a public servant and he was not charged under section 271 of the Penal Code. I am content to support the conviction found of simple theft because the appellant was not public servant within the meaning of section 270 of the Penal Code however else he may have been charged under section 271 of the Code." (4) "It remains to consider sentence. The appellant had acted in a most irregular manner by failing to pay the wages of another person engaged in building work. It was a gross breach of trust seriously embarrassing the Corporation. The sum was not inconsiderable. Inasmuch as the corporation was created to further the aims of government in providing housing, and there is little doubt that this type of theft from the corporation must be deal with a similar approach to that prescribed in the Minimum Sentences Act. Accordingly the appellant is called upon to show cause why his sentence should not be enhanced." (5) Appeal dismissed and sentence enhanced to 15 months.

73. Edwin Maro v. R. Crim. App. 175-A-69, 31/10/69, Platt J.
The appellant was convicted of attempting to obtain money by false pretences c/ss 302 and 281, Penal Code.

The offence alleged was that the appellant, a Court Bailiff at the District Court Moshi, attempted to obtain from one Modest s/o Ndamalya the sum of Shs. 80/- with the intent to defraud by falsely pretending that he (the appellant) had been sent by the Senior

Resident Magistrate Mr. Umezurumba to collect the said money which was needed in a civil case filed in court by one Mr. Mkumbo against Modest. This representation was said to be false as the appellant knew because Mr. Umezurumba had never sent the appellant to collect the money. Modest, a Bank official, was the tenant of Mkumbo and they had a dispute over the tenancy. The rent was Shs. 80/- per month and Modest had been given notice to vacate the premises. On his part he had paid one month's rent by a cheque on which he had stopped payment. On the 4th March 1969 Mkumbo came to court to institute a civil suit against Modest. The appellant offered to get the matter finalized by the next day if Mkumbo would not institute proceedings. The appellant and Mkumbo left Mushi's office and Mkumbo give the appellant the cheque. The appellant then met Modest and explained that he had been sent to collect the money. The appellant showed Modest the cheque. According to Modest, he did not realise that the appellant had come on behalf of Mkumbo, but he was given to understand that Mr. Umezurumba had sent the

Appellant to get the money or else he would have been arrested. Of course Mr. Umezurumba had given the appellant no such commission.

Held: "On the basis then that the appellant had falsely stated that he had been instructed by Mr. Umezurumba to collect the money on the strength of a civil suit instituted against Modest, did the appellant act with the intent to defraud? It is clear that Modest had not paid Mkumbo, and even if the rent dispute had been put before the Rent Tribunal, Modest still owed Mkumbo rent as his writing the cheque showed, and Mkumbo was entitled to sue for it. The appellant knew Modest, and as both Mkumbo and Mushi acknowledged, the appellant, from the beginning was trying to save a suit being filed by Mkumbo. It was obvious that when the appellant approached Modest with the cheque, that the basis of the demand was to get the rent paid. Although Modest dismissed the suggestion that the appellant would not have simply wanted to collect the

rent, it may be doubted whether that was not really true. To begin with the pretence was so palpably false that it could hardly have been believed in by either Modest or any one else. In fact Modest did not believe it. Magistrates do not chase people like bank officials with orders for payment. It is even more absurd to represent Magistrates as threatening arrest if payment is not made before trial. That exaggeration of Modest seems relevant to the question as to whether he was not making more of the situation than was warranted. Then there was the cheque. How could the appellant have got the cheque. It seems difficult to believe that Modest did not know that all that the appellant intended was to persuade him to pay the rent to Mkumbo. Certainly if the rent had been paid, Modest would not have been defrauded on that account. On the other hand, there was no suggestion at any stage of the trial that the appellant was trying to get the money for himself. The only other possibility was that in a limited sense the appellant had tried to force Modest to pay the rent against this will because of the Magistrate's orders. But it seems to me that Modest really knew that what was intended was that the appellant was trying to exhort him to pay the rent and had added some unwarranted nonsense about the Magistrate's reaction to the suit. Of course Modest's annoyance is understandable and the appellant's officiousness brought a certain amount of righteous retribution upon him. But I was not persuaded that even in the most limited sense the appellant had intended to defraud Modest; at least there seemed a doubt." Appeal allowed.

74. Mopuyan s/o Olendotoo and others v. R., Crim. App. 228-A-69, 7/11/69, Platt J.
The six appellants were charged with receiving and retaining stolen property and were convicted of those offences. The charged was as follows: - "Offence section and Law: - Receiving stolen property and retaining c/sec. 311(1) and (2) of the Penal Code cap. 16 of the Laws. Particulars of offence: - The persons charged on the 30th April, 1968 during the night at N.D.C. Ngarenanyuki Area, within the District of Arusha, did receive 19 heads of cattle which were stolen and retained them in their bomas, being the property of N.D.C. of Ngarenanyuki." (Sic)

Held: (1) "It will be seen at once that the charge was framed in an irregular fashion for two reasons. First, a charge of receiving stolen cattle is mutually distinct from

a charge of retaining stolen cattle. Receiving stolen cattle implies that at the time the property stolen was receive, the receiver

knew that it was stolen property. Retaining stolen property means that at the time the stolen property was received, the receiver did not know it was stolen property, but that sometime later he came to know that it was stolen property, and then retained it in his possession. A person therefore cannot be both a receiver and retained at one and the same time. If the prosecution is not confident whether the evidence will prove the offence of receiving or the offence of retaining, it must charge receiving in the first count and retaining in an alternative count. Unless that is done, the person charged with receiving or retaining in one count may not be able to know what charge it is that he has to face. Therefore, this charge was bad for duplicity, and stood to lead to a nullity unless the irregularity was cureable." (2) "The second point which I note quickly in passing is that subsection (2) of section 311 of the Penal Code had no relevance whatsoever to this count. What the prosecution alleged, was that the appellants had received retained 19 head of cattle which had been stolen. Section 311(1) of the Penal Code only was in point; but that irregularity clearly caused no difficulty." (3) "A party from these two obvious mistakes in the charge, a further difficulty arose, in that all six appellants were charged jointly of one offence of receiving 19 cattle. That was never the case put forward by the prosecution. What was said was that each of the appellants had separately received some of the cattle and kept them in their bomas. So it was said that three cattle were found with Mopuyan, four cattle were fund with Nina, six with Nelema, three with Naiterenga, and two with Ndoye and one with Kiyaani. Therefore, they all ought to have been charged separately, although it may well have been suitable to join the separate counts in one charge." (4) Conviction quashed for five appellants who were convicted on their own pleas. Conviction confirmed for appellant who plead not guilty and was convicted after trial, as irregularities in the charge did not cause any failure of justice.

75. Jumanne s/o Ramadhani and another v. R., (PC) Crim. App. 43-A-69, 10/1/70, Platt J.

The appellants were convicted in Primary Court of receiving stolen property and cattle theft respectively.

Held: "There is a fundamental objection to the trial in that he assessors, who gave verdict, had not heard any part of the evidence. It is true that they were in court on the first mention of the case, but the assessors Mwanizi and Faraji constitutes the court with the trial Magistrate when the hearing began. They continued to sit during the hearing of the prosecution case. Then Twarindwa and Abdullah were present for an adjournment. When the Defence commenced, the assessors were Mbawan and Bakari. Finally Twarindwa and Abdullah gave verdict. It is not surprising that the appellants thought that the latter assessors were biased. Now the decision of the Primary court is to be that of a majority (see Act 18/69 amending the Magistrate's Courts act Cap. 537) and it is provide that a trial may not proceed if all the assessors are absent either for good cause or absent themselves without cause. (See section 8(3) of the Act as amended). It is clear that the judgment of the trial Magistrate cannot stand alone. Therefore the trial was a nullity. I need hardly remark that the purpose of assessors is to add a broad base to the decision of the Primary Court. It would lead to obvious abuse if the assessors were to be changed in the way that occurred in this case. Accordingly the convictions of both appellants are quashed and sentences set aside."

76. Joseph Rogenah v. R., Crim. App. 704-M-69, 9/1/70, Seaton J.

The appellant, who was a Primary Court Clerk was charged with theft of Shs. 845/-, the property of the North Mara District Court which came into his possession by virtue of his employment. He was convicted and sentenced to 2 years imprisonment plus 24 strokes corporal punishment, the minimum penalty for this offence. It appears from the record that the appellant was twice charged for this same offence. He first came before the District Court in Criminal Case No. 161 of 1967. The case heard by the District

Magistrate, Mr. M.A.S. Elbusayd, who recorded the evidence of several prosecution witnesses and, after calling upon the appellant in terms of s. 206(1) of the Criminal Procedure Code, recorded the evidence of the appellant and one defence witness. The trial court was then informed that the appellants' two other defence witnesses were on safari. At the appellants' request, the case was therefore adjourned for a fortnight and the appellant was allowed to remain at liberty on bail. When the trial court convened on the 21st November, 1967, the Magistrate was informed by the prosecutor that the appellant was sick in Musoma Hospital. The case was again adjourned and thereafter there were several more adjournments owing to the absence of the appellant. On 22nd January, 1968, as the appellant had been discharged from hospital but neither he nor his surety had appeared in court, the Magistrate ordered their arrest. On 6th March, 1968, the appellants' surety was brought before the court and his recognizance forfeited under S. 131(1) and (2) of the Code. As all attempts to trace the appellant had been unsuccessful, on 23rd May, 1969, the prosecution applied to the District Court to withdraw the charge against him under S. 86(a) of the Code. The Court thereupon recorded that the charge was withdrawn under the said section but ordered that the arrest warrant should remain in force. The appellant was eventually arrested and brought before the court on 26th June, 1969. By this time the former district Magistrate, Mr. Elbusayd, had already been transferred. The case came before another District Magistrate, Mr. F. A. Munyera, who decided to open a fresh case, No. 208 of 1969. The charge was read over again to the appellant who was required to plead thereto. Upon his pleading not guilty the case was adjourned to 10th July, 1969 and again to 11th July, 1969, when evidence was presented for the prosecution before the District Magistrate, Mr. R. B. Bikongoro. A total of six prosecution witnesses were called who gave their evidence upon examination in chief but the appellant refused to cross-examine them as he had already done so in the previous case No. 161 of 1967. At the close of the prosecution, when called upon to make his defence, the appellant declined to do so. Judgment was delivered by the Magistrate, Mr. Bilongoro who, after analyzing the prosecution evidence, found the appellant guilty as charged.

Held: (1) A charge can be withdrawn under s. 86(a), Criminal Procedure code, only when the accused has not been called upon to make his defence. In this case, that

had already occurred. So the withdrawal under s. 86(a) was irregular. The charge could have been withdrawn under s. 86(b) but that would have involved a cutting the accused. (2) “When an accused person, charged with a felony, does not appear after an adjournment of his case, the trial court is authorized under s. 202 of the Code to issue a warrant of arrest. If, before the accused is brought to court at the resumed hearing the trial Magistrate has been transferred, the procedure to be followed is that set out in s. 196 of the Code [as amended; See G.N. 159/69]. It appears from the above-quoted section that it was within the discretion of the magistrate, who succeeded the former District Magistrate, Mr. Elbusayd, either to act on the evidence already recorded or to resummon the witnesses and recommence the trial. It seems the latter alternative was

Intended to be chosen in this case but the District Court went beyond the intent of S. 196 of the Code by opening a fresh case instead of continuing with the old one.” (3) “There were thus two errors or irregularities but were they such as to occasion any injustice to the appellant? The first error was to discharge the accused under S. 86(a) of the Code when he had already been called upon to make his defence. The prosecution application should properly have been made under S. 86 (b) of the Code whereupon the appellant would have been entitled to an acquittal. Had he been acquitted, he could have pleaded autrefois acquit under S. 139 of the Code if any attempt were made to try him again. He has been deprived of the right to plead autrefois acquit because of the error of the District court. However, I think it may fairly be said that the appellant himself occasioned the error by absconding before criminal Case No. 161 for 1967 was completed. Had he not done so, there would have been no need for an application by the prosecution for withdrawal. With respect to the irregularity in opening new case, No. 208 of 1969, instead o continuing with the old case No. 161 of 1967, the prejudice to the appellant has been caused by his refusal to cross-examine prosecution witnesses after have had already done so in the previous case or the make any offence. Had the old case, No. 161 of 1967, been recommenced or continued, the appellant would have had exactly the same rights and opportunities as those offered to him in the new case, No.

208 of 1969. His declining to exercise his rights or to avail himself of his opportunities may have arisen from a sence of grievance or injustice. Accordingly I am of the view that the proceedings in the case from which this appeal arises, No. 208 of 1969 would be declared a nullity. The conviction is accordingly quashed and the sentence set aside. The case is sent back to the District Court with instructions to re-open the old Criminal Case No. 161 of 1967 before a different Magistrate than Mr. Bikongor, who heard Case No. 208 of 1969. At the resumed hearing of Criminal Case No. 161 of 1967, the trial shall proceed according to S. 196 of the Code, with the appellant being informed of his rights under the proviso to that section."

77. Meraj Mihagacheri v. R., (PC) Crim. App. 793-M-69, 23/1/70, Seaton J.

The appellant was originally charged in the Primary Court with theft on an ox belonging to one Yusuf Marisho contra ss. 268 and 265 of the Penal Code. Yusuf had placed the ox in the care of one Makongoje. According to the prosecution witnesses, the appellant took the ox alleging that it belonged to him. The appellant called elders to witness he was taking the ox as it was his property; the elders advised him not to take away the ox until an investigation had been made. Notwithstanding this in the presence of both Makongoje and Yusuf the appellant, who had no other weapon except a walking-stick, took the ox away by force. On receiving a report from Makongoje, the headman ordered the appellant's arrest. On the evidence as a whole, the Primary Court found that the accused took the ox by force; hence the court convicted the appellant not of the offence charged but instead of the offence of robbery under s. 286 of the Penal Code. the District court on appeal quashed the conviction for robbery being of the view that there was no the slightest evidence that the appellant had threatened violence immediately before at or after he had taken the animal. Instead the District Court substitute a conviction for cattle theft as charged, and imposed the minimum sentence of 3 years and 24 strokes, remarking:

"It is this sentence that should be suffered by the appellant, not withstanding that he is absent and has as such not been given the chance of being heard under the proviso to paragraph (b) of S. 17 of the magistrates' courts Act, 1963 because this is the minimum sentence."

Held: (1) "I am of the view that it was an error for the District Court to enhance sentence without giving the appellant an opportunity of being heard. It is only fair to an appellant to allow him to mention whatever he may be able before an appellate court makes such a decision. It is a misdirection to suppose that minimum sentences are exempt from the mandatory provisions of s. 17 (b) of the Magistrates' Courts Act, Cap. 537." (2) "The question arises, however, whether the offence of theft was established. According to the definition in s. 258(1) of the Penal Code, theft is committed by a person who "fraudulently and without claim of right takes anything capable of being stolen." In the present case all the prosecution witnesses testified that the appellant claimed the ox to be his. The Primary Court should, before calling on the appellant, have dismissed the charge and acquitted him. The fact that in his defence, the appellant denied he took the ox does not materially effect the issue. The trial court believed the prosecution evidence as to the appellant's taking of the ox and the circumstances in which it was taken, i.e. by force while claiming that it was his. (3) Appeal allowed and conviction quashed.

78. Joel Hoja v. R., Tanga Crim. App. 2-D-6; 31/12/69, Georges C. J.

The appellant was convicted of burglary contrary to section 294 (1) of the Penal Code and indecent assault on females contrary to action 135(1) of the Penal Code. The victim Eveline Kijangwe, lived in a house with six rooms. In the room next to her lived Rehema, a nurse employed by the Lushoto District Council. She knew the appellant. On 2nd September he called on her to ask for lodging since he had nowhere to stay. She prepared a room for him and he slept there that night. On 4th September about 2.00 a.m. she heard a loud knocking on the door of her neighbour Eveline. Later she heard Eveline voice shouting an alarm. She went to see what was happening and found the appellant in Eveline 's sitting room and Eveline complaining that her door had been broken into and she had been assaulted. Eveline's evidence was that while she was sleeping she heard someone knocking on the door. The knocking was very violent and

she began to shout. In spite of her shouts the knocking continued and she heard a voice shouting, “Why you, Rehema, have cheated me.” She then replied that she was not Rehema and that this was not Rehema’s room. The benging continued and then the door broke and the appellant entered the room, caught held of her in the veranda and said, “Although I have missed Rehema today are you and me”. He caught her by the hands and attempted to pull her into the bedroom, pressing her by the ribs to force her to release the grip on part of the house to which she was holding. As a result of her shouting Piasis and Rehema came to the scene. The appellant remained sitting in the sitting room. Later he went to her bed and lay down. The police found him there. When called upon at the trial the appellant gave no testimony.

Held: (1) The magistrate was perfectly right when he pointed out “that the appellant must have been mistaken when he knocked on Eveline’s door, and that there must have been every likelihood that he must have thought that he was knocking on Rehema’s door. The offence of burglary consists of breaking and entering into premises with the intention of committing a felony therein. If the appellant

Did think that it was Eveline’s door, there was no reason to suppose that he intended to commit any felony in relation to Eveline. She was his host. She had allowed him sleeping accommodation on the previous night. At the lowest it seems to me that there must be some doubt as to whether the appellant had intended to commit any felony at the time he broke down the door. It would also of course be burglary if he had in fact committed a felony after he had entered the house. Again I am not at all satisfied that the evidence can support a charge of indecent assault. Eveline never complained of having been assaulted in any part of her body normally associated with sexual activity. There is no allegation that he touched her breasts or that he attempted to lift her clothing, or handle her familiarly. Her main complaint is that he pushed her in her ribs with the intention of forcing her to release some part of the building to which she was holding on. It is true that his conduct in inexplicable on the onus of proof is on the Republic and if there is any doubt it must go to the appellant. Once that is borne in mind

I am satisfied that the conviction for burglary cannot be sustained, since the clear evidence of mistake on his part at least at the moment when he entered the room would, at the lowest, cause great doubt on the issue of intent to commit a felony. Accordingly that conviction is quashed …. There is also great doubt as to whether the assault in this case was an indecent assault. On the other hand simple assault has definitely been established. I would therefore set aside the conviction for indecent assault and substitute a conviction for common assault under section 240 of the Penal Code." (2) "The trial magistrate discharged the appellant absolutely on the second count. This was an odd sentence indeed ….. Where there is an offence of burglary and an additional charge of having committed the felony which was alleged to have been the object of the breaking and entering, the punishment imposed in respect of that felony should be a proper punishment and should never be merely nominal even though it is a prison term made to run concurrently with the punishment imposed on the burglary charge. The assault in this case was inflicted in circumstances which could cause much terror. Assuming the appellant was mistaken when he first attempted to get into the house there would seem to be no reason why he should continue in attacking Eveline, when he must have known that he was mistaken in having entered the house. Taking into account the fact that he is a first offender I will impose a sentence of 6 months in respect of the substituted offence of common assault."

79. Jumanne Mohamed v. R., (PC) Crim. App. 181-D-69, 9/1/70, Biron J.

The appellant was convicted in Primary Court of burglary and stealing. He appealed to the district Court and his appeal was allowed to the extent that the convictions were set aside and there was substituted therefore a convictions were set aside and there was substituted therefore a conviction for receiving a shirt, one of the items stolen when the house was burgled. The original charge was that he burgled the house of the complainant on the night of the 7th of March 1969 and stole therefrom two pairs of trousers, one pair of shorts, six shirts, one bag, one table clock, and Shs. 70/- in cash, to a total value of Shs. 604/-. The complainant testified that about six months later he saw the appellant wearing a shirt, which he identified as his and one of those stolen when his house was burgled. He challenged the appellant, who claimed the shirt as his.

The complainant contacted the police and the appellant was arrested and charged. He stated that the shirt was bought at an auction. In court he said that it was bought by his

'brother'. In allowing the appeal against the convictions as found by the primary court, the district court magistrate remarked that a period of six months was too long for the court to convict the appellant of having stolen the shirt and having burgled the house as well, but not too long to convict of receiving. On further appeal, Mr. Tarimo, the appellant's advocate submitted that the period of six months which had elapsed between the shirt having been stolen and its having been found in the appellant's possession was too long to justify the application of the doctrine or recent possession.

Held: "In his argument before the District Court Mr. Tarimo cited the case of Abdullah Ibrahim v. R. (1960) E.A. 43, wherefrom it is sufficient to quote the headnote, which reads: (in part): "possession of an article of common use such as a tyre pump seven months after the burglary could not raise the presumption that the appellant was guilty of burglary and stealing …." It is notorious, in fact the Court cannot but take judicial notice, that an article like a shirt can pass readily and freely from hand to hand, and very frequently does so. As the magistrate very properly directed himself in his judgment, quoting from the case cited (at page 45): "As to what time is near enough to be recent, no general rule can be given, for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor car, and four months for a debenture bond. But for such articles as pass from hand to hand readily, two months would be a long time." In this connection it is extremely pertinent to refer to another case of this Court, Gaspare s/o Jovin V. R., [1968 H.C.D. n. 483]. In that case it was held by Bramble J., quoting from the report in the Digest, that: - ….. "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.' ……" that case concerned a watch, and I think it will not be disputed that a shirt passed more readily and more frequently from hand to hand than does watch …. Although, as remarked in the two cases cited, no general rule can be laid down as to what period of time is sufficiently recent for the application of the doctrine of recent possession, it cannot, I think, be disputed that in the case of an ordinary shirt six months is rather, if not too, long for the doctrine to be applied, and, as noted, it would appear that the learned magistrate has misdirected himself on this factor, as, before the doctrine of recent possession can be applied, throwing the onus on an accused to give an explanation of innocent possession which may reasonably be true, the court must find that the possession was in fact sufficiently recent to the theft …. In all the circumstances, apart from the question of the identification of the shirt, which as noted, was the only article found in the appellant's possession out of the very many items stolen…… as the period between the shirt having been stolen and its being found in the appellant's possession …. Was so long, it would, to my mind, be most unsafe to sustain the conviction." Appeal allowed.

80. Vohora Bros. Ltd v. R., Crim. App. 331-A-69, 27/12/69, Platt J.

This is an appeal against the order of the Resident Magistrate in the resident Magistrates Court at Arusha whereby the Managing Director of a company was ordered to be arrested. The company

had been charged with failing to comply with certain provisions of the National Provident Fund Act. A complaint was brought before the Resident Magistrates Court on the 10th December 1969. At some time on the 16th December a summons was issued requiring the company to cause an appearance to be made on the 26th December 1969. It is not entirely clear form the record how the summons was served or on what date, but the Compliance Officer of the National Provident Fund in Arusha, informed the learned Magistrate, who issued the warrant of arrest, that there had been service, saying; "I

have served the accused and he has refused to sign the summons and he also says that he does not like to appear in Court." Although it was not clear from the record who the "accused" referred to was, the Court accepts as a fact that the person to be served was the managing director of the company. The managing director asked a messenger sent by the Compliance Officer for time to contact the Compliance Officer, probably with a view to complying with the National Provident Fund act. It appears that there was correspondence, and then the case came before the court on the 26th December 1969. No officer of the company appeared, and so the District Court ordered the arrest of its managing director.

Held: (1) "The first argument posed in ground 2(i) of the petition of appeal is that there was no proof of service of the summons upon the company as required by sections 96 and 98 of the Criminal Procedure Code. Section 96 provides that – "Service of a summons on an incorporated company …. May be effected by serving it on the secretary, local manager or other principal officer of the corporation at the registered office of such company …." When the compliance officer refers to service on the accused, it should have been clear which of the officers and at what place the summons was served. One might well say who indeed was the "accused" if the charge was against a body corporate. Then section 98 provides hat where the officer, as mentioned in section 96, who has served the summons is not present at the hearing of the case, an affidavit purporting to be made before the magistrate that such summons has been served and a duplicate of the summons purporting to be endorsed in the manner hereinbefore provided by the person to whom it was delivered or tendered or with whom it was left, shall be admissible evidence and the statements made therein shall be deemed to be correct, unless and until the contrary is proved. It is clear that the general scheme of the Act or the Ordinance is that the court should not act precipitately, but it should act on direct information or information guaranteed by the sanction of an oath. Section 98, of course, deals with the case where there has been service and he person serving is no present. The appellant argued that there was no service and therefore that section if irrelevant. The Republic urges me to take the view that there was service as the Compliance Officer had informed the court – "I have served the accused and he has refused to sign the summons." Therefore, as the officer serving the summons was

present in court, there was no need to consider section 98. I am prepared to accept the republic's argument on that point, largely because I think that it is a preliminary issue which does not, in any event, affect the outcome of this order. It can be said that the court should not go behind the record that the Compliance Officer said that he did serve the summons on the accused, and although that is not very clear, presumably one might take the view that the service was effected on the person on whom the warrant was issued." (2) "Presuming that there was service and that the company had to appear on the 26th December, 1969, then an appearance before the court by a corporation must be made by an advocate or by an office of the corporation. (S. 99(A)

of the Code). It is admitted that no appearance was first made by either the advocate or the officer, when the case was first mentioned on the 26th December 1969 …. If ……. the learned Magistrate …. Thought that the warrant of arrest was the proper course to adopt, then he had to follow the provisions of the Code as set out in section 101(2) and (3). The first of those subsections provides:- "If the accused being a corporation does not appear in the manner provided for by section 99(A), the court may cause any officer thereto to be brought before it in the manner provided under this Code for compelling the attendance of witnesses." The manner provided under the Code is to be found in section 146 which recites:- "If, without sufficient excuse, a witness does not appear in obedience to the summons, the court, on proof of the proper service of the summons reasonable time before, may issue a warrant to bring him before the court at such time and place as shall be therein specified." Therefore, the learned Magistrate, before he caused the officer of the company or the corporation to be brought before it, should have had proof of the proper service of the summons a reasonable time before the hearing." (3)"The parties divided in their opinion as to what was meant by "proof of proper service of the summons". The appellant thought that it must mean some proof on oath, while the Republic considered that a sufficient compliance of the section would be simply statements by the serving officer – as long as the court had been informed what had taken place that was sufficient. I decline to take that view. In my opinion, proof of

the proper service of a summons means what is generally ascribed to that phrase, both in the civil and criminal law. It means that the serving officer must either prove on oath or affirmation to the Magistrate or by affidavit that he served a summons in the proper manner appropriate to the accused, and that it was served a reasonable time before the hearing, to enable the officer of the corporation to attend. There was no such proof, and therefore it seems clear to me that the warrant should not have been issued and was ultra vires."

81. Michael Noah v. R., Crim. App. 577-D-69, 8/1/70, Mustafa J.

Appellant was convicted (inter alia) of stealing by agent c/s 273 (b), Penal Code. Appellant was an employee of the Matenge Native Co-operative Union, with the task of managing the Ushirika Bar belonging to the Union. He was alleged to have stolen Shs. 100/- entrusted to him by his employers to buy a water filter.

Held: "The trial magistrate in his judgment held: - "Because even though the accused claims to have used this Shs. 100/- to buy spirits for the employer, but his is not what he was told to do and because he reached that decision at his own will and without prior consultation to his principals and the person who entrusted him with money and doing so for money, the act is stealing in terms of ss. 258(2)(c) and 273(b) of the Penal Code. I therefore find that his admission as to his having misappropriated the Shs. 100/- is in itself a confession of the 2nd count charged and this supports the prosecution case." The appellant admitted he received the Shs. 100/- to buy a water filter but said that he had used it to buy spirits for the bar. Apparently the water filter was also for the bar. If that were, I am of the view the trial magistrate was wrong to hold that there was any theft when he used the money to but spirits for the bar instead of a water filter. I do not think there was any theft in the circumstances." Appeal allowed on this and other grounds.

82. Nizar Yusuf Giga v. R., Crim. App. 801-D-69, 14/1/70, Georges C. J.

The appellant was charged with stealing c/s 265 of the Penal Code. It was alleged that he had stolen 31/2 bags of millet valued at Shs. 287/- the property of Omari Kanduro. He was acquitted on the charge of stealing but convicted instead of obtaining goods by false pretences c/s 302 of the Penal Code. the appellant was a businessman using a lorry to cover the countryside purchasing produce. The complainant is a farmer. On the day in question he had 3 ½ bags of finger millet for sale. According to the complainant the appellant examined his 31/2 bags of finger millet and complained that they had not been properly filled. Complainant insisted that they were full enough and asked appellant to pay Shs. 288/- if he wanted them. Thereupon the appellant took some money from his pocket and asked whether the complainant had changes. Complainant said he had none. Thereupon the appellant ordered his helpers to place the bags on his lorry though the complainant kept insisting that he would not part with the bags unless he had his money. Over his objections the bags were loaded and he too got on the lorry having received the appellant's assurance that he would have his money when they reached the next house and got change. When they reached the next house the complainant said that he got off the lorry. Some more talk followed and to his surprise the appellant went back on to the lorry and drove off leaving him without his money and without his goods. The complainant reported the matter to the police who eventually arrested the appellant. Abdallah Mohamed, the appellant's turnboy who gave evidence for him told a story which differed somewhat. He testified that after the quarrel as to price the appellant drove off saying "if you don't want Shs. 80/- that we had agreed is hall go with your bags and you shall come at my shop yourself to collect your money". The trial magistrate held, disbelieving the complainant that the complainant had agreed to the bags being put in the lorry. There was no taking therefore, and no stealing. He held, however, that the appellant had obtained the goods by false pretences. What exactly was the false pretence the trial magistrate did not find.

Held: "It is important when substituting a conviction for obtaining goods by false pretences on an original charge of stealing that the false pretence found proved should be specifically set out …. The appellant was clearly not pretending that he had the means to pay for the millet when in fact he had not. He did have the means to pay. Indeed I am satisfied that if any charge could be proved against the appellant it was the

original charge of stealing. Even if the complainant had agreed to have his bags of millet put on the lorry he had not relinquished control over them. He was there with them intending to complete the sale when he had been paid. But though he agreed to be paid later when change was available he was also retaining control of the goods until such time as payment had been made. The driving off of the lorry while the complainant was on the road amounted to a taking away of the complainant's goods against his will sufficient to support the charge of stealing. I am satisfied that the conviction for obtaining goods by false pretences is misconceived. Accordingly it is set aside and a conviction for stealing substituted."

83. Jackson Gamaliel v. R Crim. App. 208-A-69, 15/1/70, Platt J.
This is a request for a revisional order canceling an award of corporal punishment. The appellant was convicted of rape and sentenced to three years' imprisonment together with 18 strokes

of corporal punishment. Confirmation of the sentence was withheld pending appeal. As a result of the appeal, the appellant's conviction was affirmed, but his sentence was reduced to one of two years' imprisonment and 12 strokes of corporal punishment. The point which now arises is that the Prison authorities, having received notification of the appeal judgment six months after the date on which sentence was passed by the trial court, wish the court to set aside the order for corporal punishment by virtue of section 13 of the Corporal Punishment Ordinance, Cap. 17. That section provides that: "A sentence of corporal punishment shall …. In no case be carried out after expiration of six months from the passing of the sentence."

Held; in computing the period of six months prescribed by section 13, the question is when the period should commence, and that depends on the meaning of the phrase "the passing of the sentence". In the firs instance, it means the date on which the sentence is passed by the trial court …. Section 321 of the Criminal Procedure Code provides that after an appeal has been entered, the court convicting and

sentencing the appellant, May, for reasons recorded by it, allow the appellant bail or suspend the execution of his sentence pending the hearing of the appeal. These provisions will be found in section 321(1) (a) which refers to imprisonment. Section 321 (1) (b) refers to “other cases”, which would thus include corporal punishment, and provides that the court may suspend the execution of the sentence pending the appeal. Then section 321(2) provides that if the appeal is ultimately dismissed and the original sentence (being a sentence of imprisonment) is confirmed, or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released on bail, or during which the sentence has been suspended, a shall be excluded in computing the term of imprisonment to which he is finally sentenced …. Section 321 does not make provision for the execution of the period in the case of corporal punishment. As I see it, section 321 does not affect he provisions of section 13 of the Corporal Punishment Ordinance. The latter section appear to be phrased in an imperative form, saying hat “in no case” shall corporal punishment be carried out after t expiration of six months. It is clear that the purpose of the section is to avoid unnecessary delays. It seems to me, therefore, that whatever is to be doe by way of confirmation alone or confirmation as a result of revision or an appeal, must be done within the period of six months. If that is so, then the determination of the date on which the sentence is passed is of fundamental importance.” (2) “As we have seen, the date on which the trial court passed the sentence is in the first instance the date from which the period of six months begins to run. If there is no appeal, and revision is not necessary, then so long as the order of confirmation is given within six months, the sentence may be carried out; but I should not that it is not the date of the order of confirmation which is effective as far as the Prison authorities are concerned. The section says that the Prison authorities shall not carry out the sentence after the period of six months. So that while the order may have been given within time, if it is not communicated to the Prison authorities with sufficient time for them to carry out the execution of corporal punishment within the period, the Prison authorities must not carry the order into effect. The same result applied to orders on revision or appeal.” (3) “But ….. Further difficulties may arise. Suppose for instance, that confirmation is withheld pending an adjustment of the trial court’s order, either by way of revision or appeal, and

the sentence of corporal punishment awarded is reduced or enhanced, the question which then arises is whether the date of the passing of the sentence is that on

Which sentenced was originally passed by the trial court or that one which the revisional or appellate order was made. The question may be further embroiled by an order on revision or appeal, not merely adjusting the trial court's order by an increase or decrease, but enhancing for the first time, by adding a new award or corpora punishment to the sentence passed by the trial court. In the latter case the date of the passing of the sentence could well be though to be the date on which the revisional or appellate order was made; but I leave this matter open for further consideration. In the instant case, I am only concerned with the situation where the trial court's award of corporal punishment was adjusted by decreasing it from 18 strokes to 12 strokes. It seems to me that on principle such an adjustment does not result in a new sentence being imposed upon the prisoner, and that the date on which the sentence as passed is the date of the trial court's order. All that the High Court has done is to amend the trial court's order …..In coming to this conclusion, I must admit that I have not been able to trace any specific authority on the point. But I think it must be said that a strict interpretation must be placed on the appellate powers of the High Court, and on the provisions of section 13, as these are to be found in penal statutes. Hence, in case of any doubt, the provisions must be interpreted in favour of the prisoner. Therefore, I would agree with the Prison authorities in the instant case, that if they did not get notification of the result of the appeal, which merely amended the trial court's order, within six months of the 9th May 1969, they were not in position to lawfully carry out the order of this court, by virtue of section 13. Perhaps I should add that nothing in this order refers to scheduled offences." (4) "But even so, there is no further action required by this court. The appeal having been determined in time, the result cannot be altered now. The warrant issued by this court must stand, but if the Prison authorities are unable to carry it out, their action (or inaction) is covered by section 13. Of the Ordinance …. I therefore decline to make any order as requested, but confirm that on

the facts put forward by the Prison authorities corporal punishment cannot be carried out."

84. Waweru Ng'ang'a v. R., Crim. App. 239-A-69, 5/12/69, Platt J.

The appellant was convicted of shop-breaking and theft c/s 296, Penal Code. On the night of 3 May 1969 the shop of Mr. Babla at Arusha was broken into and a considerable number of radios stolen. On 5 May 1969, the police found the appellant on a sisal plantation near Moshi and arrested him. A group of civilians who helped the police to a sisal estate and after three different places had been visited; four radios were discovered in a paper bag which was clearly identified as belonging to Babla. In the result, the appellant was charged and convicted. The appeal turned on whether certain statements made by the appellant were admissible.

Held: (1) "The appellant's statements which are in dispute were related by Sergeant Major Elimwaza (P.W. 2) and Special Constable Shabani (PW. 6). The Sgt. Major alleged that after the appellant's arrest, some civilians had beaten him and told the accused that he must disclose what he had stolen if they should not kill him. The appellant replied that he was not a thief but his friends Cheusi and Focas had stolen radios from Arusha. After this, he was taken to the Police station. Special Const. Shabani related that after the civilians had threatened to kill the appellant, the latter had admitted stealing the radios

and added that he with Focas and Cheusi had broken into the shop at Arusha, and stolen the radios. Pausing there, apart from the discrepancy as to what the appellant had actually said, the learned Magistrate was not entitled to receive the evidence recorded from the Special Constable, by virtue of section 28 of the Evidence Act, 1967 …. [Which reads in part; "No confession, made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate …. Or a justice of the peace …. Shall be proved as against such person".] The learned Magistrate was at pains to point out that the alleged confession had been made to the

crowd in the hearing of the Police …. It may be that he did not consider section 28 possibly because he thought that the appellant was not in Police custody. But is clear from the evidence of the sergeant Major that he was chasing the appellant and that the crowd had assisted him in arresting the appellant. Indeed it was because the appellant was in Police custody that he was saved from being badly assaulted. Therefore, even if the confession had not been made directly to the Police, it was still made under circumstances as provided in section 28, which profited its admission. In saying so, the distinction must be drawn between what the Sgt. Major under stood the appellant to say which was not a confession, and the statement recounted by the Sp. Const. the evidence of the Sp. Const. should not have been admitted or taken into account. (2) "Then there is the evidence of what the appellant told the Police directly, at the Police Station. He gave the Sgt. Major to under stand that he and his friends had shared but the radios and hidden them in a sisal plantation. It was alleged that he indicated that the radios were at places where they had been sleeping. According to the Sp. Constable, the appellant agreed to take them to the place where he had hidden the radios. It is agreed that the appellant showed them one place where nothing was found, and where according to the Special Constable, the appellant said that they had rested at midday. Then the appellant took them to a second place, where again no radios were found and where the appellant observed that his friend Focas must have removed a radio. The appellant then led them to a third place where after some searching; the Special Constable discovered four radios in a paper bag. The Constable also noted that the appellant had explained that he, focas and Cheusi had shared out the radios." (3) "To begin with, the appellant's statements at the Police Station must be considered. Assuming that he said all that he Sgt. Major related, it could be thought that he said all that the Sgt. Major related, it could be thought that the appellant had admitted being in joint possession of the radios which had been shared out, and then hidden. He had already admitted that Focas and Cheiusi had stolen these radios in Arusha. Altogether these admissions amounted, at least, to a confession that he had received property which he knew to be stolen. Although charged with theft, the alternative verdict of receiving stolen property would have followed by virtue of section 187 of the Criminal Procedure Code. Therefore, the statements as understood by the sergeant Major,

amounted to a confession to a police officer and were accordingly inadmissible, under section 27 of the Act." (4) "The evidence of the Special Constable would have amounted to a confession that the appellant had himself stolen the radios which had been hidden and therefore was a fortiori inadmissible." (5) "It follows from section 31 of the [Evidence Act], that the statements made by the appellant to the Police while he was in Police custody, may be admitted whether confessions or not, so long as they led directly to the discovery of a material fact. The question is whether the appellant's statements to the Police Officer at the Police Station

could be admitted under section 31, although they would otherwise be inadmissible under section 27 … it was permissible for the Police witnesses to testify that the appellant had offered to show the Police where the radios were hidden, because he took the Police to the sisal estate where the radios were found. But the additional statements that the radios had been shared out and hidden were not admissible because they did not lead to the discovery. Therefore, all that the learned Magistrate could take into consideration relation to what the appellant had said at the Police Station was that he had offered to show the Police where the radios were." (6) "There are the statements which the appellant is alleged to have made at the various places in the sisal estate. At the first of these places, he is alleged to have said that he, Cheusi and Focas had rested at midday. That was admissible as the appellant's conduct under section 10 of the Act. At the second site, the appellant is alleged to have said the Focas must have taken the radio. There was no discovery here, and therefore it could not be admitted as a confession that the radio taken had been that of the appellant himself. It could be admitted if it were understood to be a statement that Focas had been in possession of a radio at that place which he had later removed. It was again a matter of the appellant's conduct. Finally at the third site, the Special Constable understood the

appellant to say that he had the others had shared out redios. That was inadmissible as not leading to a discovery. It was extraneous as already explained." (7) "It will be seen that whether one takes the evidence of the Sgt. Major or the special Constable …. – nevertheless, all the prosecution had proved was that (a) the appellant had alleged that Cheusi and Focus had stolen the radios; (b) that he would show the Police where the radios were, which led to the discovery of the four radios, and (c) that the appellant had been in the company of Cheusi and Focas. That being so, it was the learned Magistrate's task to decide whether the appellant was actually in possession of the stolen radios. The learned Magistrate did so find, but it is quite clear that his judgment was clouded by the volume of inadmissible evidence which he had admitted. Without such statements that the appellant had shared the radios, it is possible that the learned Magistrate might have held that the appellant was merely a friend of Cheusi and Focas having discovered them with stolen property, but that there was no evidence clearly indicating that the appellant had himself hidden the radios or done ay act which showed that he had been in joint or sole possession of them …. At best, the appellant only stood to be a receiver, but on the evidence, I think it quite as likely that he was not involved. The circumstances were suspicious, it may well be that the appellant was involved. But on what remained of the evidence that conviction seemed to me to be too unsafe to support." Appeal allowed.

85. R. v. Lemanda s/o Obei, Misc. Crim. Cause 787-D-69, 29/12/69, Georges C. J.
This is an application for bail by Lemanda s/o Obei who is charged with murder.

Held: 'Section 123 (3) of the Criminal Procedure Code does empower the High Court to direct a person to be admitted to bail even though he has been charged with murder or treason. It is clear, however, that in cases of murder bail will be allowed only in exceptional circumstances. This is indeed as it should be when one considers the gravity of the offence and the seriousness of the punishment which may be imposed on a finding

of guilt. The chances that an accused person would seek to escape rather than face the possible penalty of death must indeed be very high, and for that reason the courts have been very loathe granting bail in capital charges. Mr. Versi for the applicant urged very strongly that on the record it would appear that it was unlikely that the trial court would find the offence proved as charged and that the more likely verdict would be one of manslaughter. The depositions were attached to the application and Mr. Versi pointed out that there was a long session of pombe drinking immediately before the killing and that there was also some evidence of provocation. In particular there was evidence alleged that the deceased may have struck the accused with a stick on his hand, fracturing his finger …. I think this court should e very loathe to examine depositions in order to attempt to predict what verdicts are likely to be arrived at by tribunals in which is vested the jurisdiction to determine criminal matters ….. What I would say is this; that even if the applicant is in fact found guilty of manslaughter the circumstances of this case are such that it would not be the sort of offence on which one would normally grant bail unless there are unusual circumstances. I think it may be said that some 50% to 69% of killings which take place in this country are the result of drinking sessions followed by minor quarrels which end eventually in a fatal blow and I certainly would not think it desirable that in any such cases the accused persons should be released on bail pending their trial."

Application refused.

86. R. v. Kiilu Ngola and another, Crim. Sass. 29-A-69, 8/10/69, Platt J.

The accused and another were jointly charged with the murder of a shop-keeper, who was hacked to death in the course of a robbery in his shop on 22 September 1969. The case against the second accused was weak and will not be considered. The case against the first accused, Kiilu Ngola, rested entirely on the fact that he was found in possession of some of the property stolen from the shop on 19th October 1969 about 27 days after the robbery. Kiilu's explanation was that he had found the articles hidden in the bush on 4 October 1969, about 11 days after the theft. Another witness testified that the accused had brought the articles home sometime in September. Still another witness said that he accused had brought them home sometime around 14 October

1969. The court considered both these witnesses as unreliable. It also found that the accused's explanation of how he obtained possession was unreasonable in the circumstances, and so the presumption arose that he was either the thief or the receiver of stolen property, since he was found in recent possession. The main question concerned which offence he was implicated in, because if he was the thief, it could be deduced that he was also the murderer, while no such deduction could be made if he was merely the receiver.

Held: "It is easy enough to see the Kiilu was in recent possession of stolen property as far as his being a receiver of it is concerned, but the prosecution alleged, and had to allege, that he was the thief, or one of them. On this question the assessors were directed in terms of the observations of the Court of Appeal in Andrea Obonyo v. R. 1962 E.A. 542, and especially at pages 550-551. Despite the warning, that if they had any doubt that in the circumstances of this case Kiilu might have been a receiver, they were both satisfied that he must have

been the thief of these articles. Being then satisfied that he had had the intention in common with others to use force in prosecuting the offence, and that grievous harm had been inflicted, he was guilty of murder ….. in Kiilu's case I have anxiously considered his connection with the crime, especially in the light of the observations in Andrea Obonyo. That was a case where the complicity of one accused was held to have been proved, while in that of two others, also in possession within six days of that offence, of clearly identifiable property, the Court of Appeal nevertheless held, that in a case of murder a high degree of proof was necessary, and in the circumstances they are not satisfied that the possibility of receiving stolen property could be excluded. The successful appellants were also persons who had given false statements. I am of course bound to follow the observations and approach of the Court of Appeal. I have to see whether the circumstances of this case are similar to those of the unsuccessful appellant, and distinguishable from those of the successful appellants in Andrea's case. It is true that the accused Kiilu was found in possession of a radio and a number of very

new articles which although transferable as articles of value would nevertheless not be easy to transfer altogether. It cannot be said that hey were articles of no use at all and not transferable for that treason. No effort was however made by Kiilu to transfer these articles and as far as some of them were concerned, he used them quite openly. The facts do not appear to show that Kiilu was necessarily acting like a thief and he had nothing in his possession to connect him directly with the crime. Again the most favourable time limit of 11 days was not extremely recent. Even in Andrea's case, the Court of Appeal thought that the six days that had elapsed was a sufficient time to admit of some doubt that he successful appellants might have received stolen property. Again other persons were involved, and although his explanation was not true, that went as much to showing that he was in guilty possession as a receiver as to his being the thief. Taking all the circumstances of the case into account, I cannot see that this case is really distinguishable from that of the successful appellant's inn Andrea's case. Try as I may, I have not been able to satisfy myself that the possibility that Kiilu was a receiver could certainly be excluded. Other persons were involved and possibly Kiilu was harbouring stolen property. There was probably a good deal more property stolen that he had in his possession. With respect to the assessors, who may have been right, and with some reluctance, I nevertheless feel that the High degree of proof required in a murder case based on evidence such as this, which the Court of Appeal laid down was necessary, has not been established. I cannot say that the irresistible inference from the circumstantial evidence is that Kiilu was one of the thieves and so a participant in this murder." Accused acquitted.

87. Mpate Jamadini v. R. Crim. App. 621-D-69, 2/10/69, Hamlyn J.

The accused was convicted of offense of burglary and stealing, c/ss 294(1) and 265 of the Penal Code: he was sentenced to two years imprisonment and twenty-four strokes of corporal punishment on the first count and to a concurrent nine months imprisonment on the second count.

Held: "In so far as sentence is concerned, the accused has admitted a number of similar previous convictions. I observe that the last of these shows that the appellant

was convicted on August, 1967 of offences of burglary and stealing and that he received a total of two year imprisonment and twenty-four strokes of corporal

punishment on that occasion. He can have been out of prison for a very short time before committing the present offences and has apparently learned nothing by his former punishment. During the course of his judgment the District Magistrate makes a somewhat enigmatic remark, for he observes, “It should be borne in mind that some judges have repeatedly said that previous conviction should not be ground for enhancement of sentence”. He proceed “for those reasons” to sentence the accused to two years imprisonment and to twenty-four strokes of corporal punishment, - that is to a punishment exactly similar to the one which the appellant had just completed for a similar offence. Clearly there is something wrong with the magistrate’s line of reasoning. What I think that he has in mind is that a previous conviction not per se a reason for the imposing of a heavier sentence; much must depend on the nature of the previous offence, the length of time which has elapsed since completion of the former punishment and so on. Nor indeed is the previous conviction a mere excuse for the imposing of a heavier sentence upon a convicted man. The proper view of the matter is that the convicted person has forfeited his right to be treated with leniency as a first offender; he is not to be punished a second time for his former offence, but he now appears in a different guise from the one in which he came before the court on the earlier occasion – a person who has adopted an antisocial mode of existence. It is in this light that the matter should be viewed when the question of sentence rises. While this appeal in so far as convictions must be and is hereby rejected summarily, I consider that this man should receive a more deterrent sentence on the burglary count hat which he has suffered at the hands of lower court. I consequently enhance sentence for the offence of burglary to one of three years imprisonment. The sentence of twenty four strokes of corporal punishment will stand as passed by the lower court, as will the sentence of nine months imprisonment on the stealing charge, which will run concurrently with the sentence as enhanced by this court.”

88. Saveri s/o Paschal v. R., Crim. App. 418-M-69, 15/9/69, Seaton J.

The appellant was charged and convicted of burglary and theft c/ss 294(1) and 265, Penal Code, and received the minimum sentence of 2 years and 24 strokes on the first count and 6 months on the second count to run concurrently.

Held: "As to the sentence, the appellant had 4 previous convictions for offences involving either housebreaking, stealing or receiving stolen property. The appellant is only 19 years of age according to the charge – sheet. The list of previous convictions dates from 1963 when the appellant must have been only about 13 years of age. In 1963, he was sentenced to four months imprisonment for stealing. It is possible that this history of convictions indicates the undesirability of sentencing first offenders of prison and particularly when they are young offenders. The appellant was hardly out of prison after his first offence when he was sentenced in 1965 to two years' imprisonment and given the statutory 24 strokes for housebreaking and stealing. Then in 1966, he was again sentenced to the statutory minimum of 2 years imprisonment and 24 strokes for receiving stolen property and in 1967 he was given a similar sentence for house breaking and stealing. It would therefore seem that the appellant must have been continuously going into or coming out of prison since 1963 with very little period of civilian life in between. Learned State Attorney has urged the Court to consider the previous convictions and enhance the sentences of two years and 24 strokes corporal punishment on the first count of burglary and six months

Imprisonment passed on the second count to run concurrently. Learned State Attorney in asking for his enhancement conceded that the appellant may be reformed, society should be protected for a rather longer period from the activities of the appellant. The trial magistrate appeared to have been influenced by the appellant's plea in mitigation that his father and grandmother with whom he lived are very old and the appellant is the only one responsible for them. It also appears that the learned magistrate was inclined to impose an even lighter sentence but for the fact that it was a scheduled offence and

he had no power of discretion. This Court must consider whether the learned magistrate proceeded on a wrong principle or whether the sentence is so manifestly inadequate as to warrant interference by this Court. I cannot see that the magistrate has followed any wrong principle. It is not mandatory that court should impose a severer sentence upon a person previously convicted. A court which has tried the case and has had the advantage of seeing the accused may be influenced by his youth or the trial court may feel that the previous punishments have had some effect in changing the attitude of the person convicted. However, I think that the learned state attorney is correct that in regard to the present appellant, the previous punishments have failed to have any effect upon him and that here is little hope that the sentence of two years' imprisonment and 24 strokes corporal punishment will have any greater effect in persuading the appellant lead an honest life than the three previous sentences of the same nature. Accordingly, I would agree that the sentence is manifestly inadequate in the sense that the accused being apparently accustomed or determined to living upon other's property, society should be protected from him for a longer period of time. Hence, I will enhance the sentence on the first count to one of three years' imprisonment and the statutory 24 strokes corporal punishment and the sentence on the second count to one of twelve months' imprisonment, both prison sentences to run concurrently."

89. Bernad s/o Bernard Kessy, Crim. App. 127-A-69, 14/3/69, Platt J.

The appellant was charged with theft by a public servant, but he was convicted of obtaining money by false pretences. The appellant was a clerk employed at the Old Moshi Primary Court and that it was his duty to receive monies payable to the court and issue receipts. The case concerns the payment of Shs. 200/- as cash bail which according to the procedure, should have been taken on deposit and then returned if necessary. On 28th April, 1968, Fataeli came to the Primary Court in order to seek the release of one Augustino on bail. On the 27th April, 1968, the Primary Court Magistrate had told Augustino that he could be released on bail if he could produce a surety. It was in response to that statement that Fataeli came the next day. As the clerk of the court, the appellant told Fataeli that the Magistrate had ordered that Augustino could not be released unless cash bail of Shs. 200/- was paid into court. Fataeli agreed and paid this

money to the appellant. The appellant then made out the bail bond which was to the effect that Augustino was granted bail in this own recognizance and that Fataeli had merely stood surety in the sum of Shs. 200. The bail bond did not therefore represent what had really taken place. Augustino was later acquitted for lack of evidence against him. Fataeli then insisted on repayment of his money, but the appellant put him off by saying that the money had been lost when it had been put in the case file and passed to the primary court magistrate. This the primary court magistrate denied, and

the matter was reported.

Held: The main problem is whether the accused is guilty of theft by public servant or of obtaining by false pretences. Section 270 of the Penal Code, which defines the first offence "is satisfied if either the thin stolen is the property of the Government or came into the possession of the offender by virtue of his employment. The learned trial magistrate following RAJABU MBARUKU v. R. (1962) E.A. 669, and BURTON MWAKIPESILE v. R. (1965) E.A. 407 held that the appellant had not received the money in the instant case "by virtue of his employment", and then that the money had never come into the Government's possession constructively. Therefore there could be no theft of any kind. Consequently he entered the alternative verdict mentioned above. The appellant fraudulently induced Fataeli to pay over the money on the strength of a false statement that he Magistrate had ordered cash bail. Fataieli accepted the situation and paid the money to the appellant as the representative of the department of Government, with which he was dealing. The property in the money was intended to pass with payment through the appellant's hands to Government. As it was a deposit, no doubt a similar sum could be reclaimed later; but not the actual money paid. The appellant had no authority to call for a cash payment or to do anything at all in the matter of bail until the magistrate had made his order. Therefore, as between the appellant and Fataeli, he had obtained the money by false pretences. On this ground

the Republic was entitled to support the conviction. As far as a case under section 270 of the Penal Code is concerned, the learned Magistrate was guite right t hold that the appellant had not received the money by virtue of his employment. Since Rajabu's case it has not been doubted that the phrase by "virtue of employment" relates to the terms of service of the servant, as construed objectively by the court, with a view to the particular transaction in question. It may be that an act would fall impliedly within the terms of his service. But that was not the situation here, since the appellant could not usurp judicial functions. But the difference between this case and those of Rajabu and Burton, is that here the appellant fraudulently professed to e the agent of Government and to receive the cash bail on behalf of Government. In Burton's case, the accused was a servant, specifically carrying out his duties of collecting tax. In Rajabu's case, the appellant called for the payment of Shs. 200/- as instructed by the Primary Magistrate. He put himself forward as ostensibly receiving the money on behalf of the Department which employed him. In that case, can he now deny that he did not receive the money on behalf of Government? Section 262 of the Penal Code provides that when a person receives money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received. After Burton's case, the test as to whether money was received on behalf of another is to be viewed objectively from all the circumstances. It is no longer open to the accused to say that he had decided to steal the money for himself when he was carrying out his proper duties. He is however able to make that plea in a case like Rajabu's. But it is less clear in a case like the present whether section 262 applies or not. If it did apply, then on the facts, as the money must have been taken sometimes after the receipt, the possibility is that the money belonged to Government and was therefore stolen. As the parties expressed themselves, in that sense, the appellant did receive the money on behalf of Government. But the reality of the situation was this; he was not entitled to receive any money at all. Thought it may be attractive in one sense to estop the accused from

Gainsaying his own fraud, probably it is more realistic to read section 262 as meaning that he who receives on behalf of another, must do so bona fide, and not merely by pretence. For these reasons then I am of the opinion that the appellant was properly convicted." Appeal dismissed.

90. Ramadhani s/o Bakari v. R., Crim. App. 219-D-68, 19/5/69, Hamlyn J.

The appellant was convicted of housebreaking c/s 294 (1), Penal Code. The appellant occupied a room in the house where the complainant – one Clementina – also resided. At about 7 a.m. on the day in question, the complainant left her room to go to the market; she locked the door before leaving. It appears that, though each room of the house is separated from its neighbour by a wall, such division does not reach up to the apex of the roof but goes only part-way; there is no ceiling in any of these rooms. The complainant returned to her room at about 11 a.m. and found the appellant climbing the intervening wall on the way back to his own chamber. The alarm was raised and the accused's room visited where it was found that a table had been placed in the accused from in such position as would enable him to mount it and to climb over the top of the separating partition. The complainant examined her belongings and found a sum of Shs. 12/- in silver had disappeared from beneath her mattress. The accused man was arrested upon the charge on which he was tried.

Held: "The only matter for consideration in this appeal is the question of whether the facts as found by the learned magistrate constitute the offence of house- breaking. Learned counsel for the Republic supported the conviction, maintaining that the breaking and entering which form necessary ingredients of the offence have both been demonstrated. This is undoubtedly true in so far as the "entering" by the appellant of the room of the complainant is concerned and there is abundant evidence of this. But what of the "breaking?" it is trite law that "breaking" may be an actual breaking of the house, or may amount to breaking of a more technical or constructive nature, as for instance when doors or windows properly shut but unsecured inside are opened. There are numerous authorities which distinguish between instances where a door or window is shut and latched and one where it has been left ajar. In the former case here is a breaking, while in the latter the element of "breaking" is absent. The distinction appears

to be one which has in it a notional element. The authorities appear to regard an aperture needlessly left open, as it were an implicit invitation to enter or at the least as a situation not proclaiming a state of inviolability of the premises concerned. The leaving ajar of a door consequently has not the express implication of security that a closed door denotes. As was said by the court in Rex v. Springgs and Nancock. 174 E.R. 122:- "If a man chooses to leave an opening in the wall or roof of his house instead of a fastened window, he must take the consequence. The entry through such an opening is not a breaking." The court distinguished. In Rev. v. William Brice 168 E.R. 892, entry through a chimney on the grounds that such aperture is left open permanently of necessity. And in Rex v. James Lewis & Another 172 E. R. 285 the court held that entry through an aperture in a cellar window to admit light, through which a thief entered at night, is not burglary, Vaughan, E observing: - "Do you think that if a person leaves a hole in the side of his house big enough for a man to walk in, a person entering at it with intent to steal goods would be guilty of burglary? I think not and I am of opinion that this is not a burglary". Now applying the principle which seem to be disclosed in these cases, it would appear that partial screening – off only between the two rooms (which of course constitute

Separate "dwelling-houses) does not express any state of inviolability which must be breached before the offence of burglary can be committed. The opening above the common wall between the two rooms is not left for any purpose – save perhaps by reason of the costs of construction. While it may, it is true, contribute to some extent to the ventilation of the separate premises, there seems to be no real reason, left alone necessity, for the existence of this aperture, and it clearly precludes that apparent semblance of security which I think forms a necessary constituent of a dwelling-house before it can be breached and made the subject of burglarious entry. As a consequent result therefore, no offence of house-breaking is disclosed, for one of the ingredients thereof – a breaking – is clearly absent. Appeal allowed and conviction quashed.

Editor's Note: This case – n. 90 of 1970 H.C.D. – was meant to appear as n. 309 of 1969 H.C.D. but was inadvertently left out. The case has also been sent to you separately so as to complete your 1969 H.C.D. however in view of its interest; it is reproduced hereinabove as case n. 90 of 1970 H.C.D.

CIVIL CASES

(1970) H. C. D

- 90 –

91. Paulo v. Ramadhani. (Pc) Civ. App. 117-M-69; 10/3/70; Seaton J.

The father of the appellant had paid Shs. 100/- to the Respondent Ramadhani "Kufunga Mlango" and had rendered services valued at Shs. 1,191/90. This was in respect of the appellants' prospective wife, Asha, Ramadhani's daughter. The issue of Muslim Law involved was whether this was to be regarded as a present, in which case no refund would be payable, or as dowry.

Held: (1) "The position in Muslim law regarding the three questions posed in the earlier consideration of this case seems to be as follows:- (a) Services which are performed by the prospective husband to his prospective wife's parents may be regarded as a kind of present but if recorded, they may constitute part of the dowry. (b) (i) If the prospective husband dies, then it is regarded as bad luck and the dowry is not refundable; (ii) however, dowry that consists of money which is paid to the bride at the time of the marriage can be refunded. (c) The amount to be refunded under 2(ii) above will be negotiated between the heir of the man and the parents of the woman. (2) "Applying these principles of law to the facts of this case, it seems to me that if the father of the appellant Paul had paid Shs. 100/- to the respondent Ramadhani "kufunga mlango" and had rendered services valued at Shs. 1,191/90, this should be regarded as a present, in which case no refund is payable. But even if it were to be regarded as dowry (as the primary court believed it was), remission in whole or in part is a matter of grace for the prospective wife, i.e. Asha, the daughter of Ramadhani; it is not a matter that is enforceable by suit." (3) Appeal dismissed.

92. Mkang'a v. Kitobero (PC) Civ. App. 241-M-69; 23/2/70; Kimicha, J.

The appellant, as original plaintiff in the Primary Court, claimed 9 head of cattle from the respondent. He claimed that Syaga, the respondent's deceased brother owed him head of cattle. After Syaga's death, Kitobero inherited his estate i.e. cattle and wives. Kitobero claimed in his defence that he had inherited only 3 head of cattle from the deceased and that he was old, poor and blind and could not find the balance. The appellant's claim that the respondent had inherited 200 head of cattle was not substantiated.

Held: (1) "The respondent being sued in his capacity as the administrator of his deceased brother's estate cannot be compelled by the courts to pay to the appellant more than he had inherited from the deceased. He claimed that he had inherited only 3 head of cattle and his claim appears to have been substantiated in the lower courts but the primary court allowed the appellant's full claim on the understanding that the respondent had absolute obligation to meet in full the deceased's liabilities." (2) "I find that the District Court came to the right conclusion in giving judgment for the appellant for 3 head of cattle only." (3) Appeal dismissed.

93. Philip & Others v. Mkama. (PC) Civ. App. 226-M-69; 23/2/70; Kimicha J.

The respondents claimed Shs. 800/- by way of compensation for being assaulted by the respondents. On the day in question, a certain lady was found by the villagers, in possession of stolen fishing nets. While the villagers were forcing the lady to carry the nets to the court; the respondent appeared and tried to defend her; whereupon the people set upon him and beat him up. He identified the appellants among those who he said had assaulted him. His testimony was supported by two other witnesses.

The lower court, both the assessors and the trial magistrate believed that the respondent had a good case against the appellants but refused to give judgment in his favour because the appellants, who had been previously charged with assaulting the respondent, were acquitted in a criminal case. The District court reversed this judgment.

Held: (1) “I am ….. in agreement with the District Court that the primary court dismissed the complainant’s claim on a wrong principle in that the burden of proof in criminal proceedings is different from that of civil proceedings. In the criminal proceedings the prosecution was the State whereas in this case the plaintiff is the complainant himself. But the most important point in favour of the complainant is that the primary court and his assessors were in fact satisfied that he had established his claim and they would have given judgment in his favour had it not been for their misunderstanding of the law.” (2) Appeal dismissed.

94. Bura & Others v. Basimwa (P.C.) Civ. App. 239-M-69; 21/2/70; Bramble J.

The respondent was a Nyarubanja tenant of Kabachwezi. He went to Uganda and left the shamba far at least 14 years before he brought the suit. Appellant No. 1 was the heir of Murefu, the brother of the deceased Kabachwezi. Murefu sold the shamba in question to appellants’ No. 2 and No. 3. The issue therefore was whether Murefu had any title to the shamba. It was also proved that the respondent had abandoned his shamba and that the landlord resumed possession.

Held: (1) “By rules XX and XXI of the Nyarubanja Tenancy Rules Cory & Hartnoll, p. 133 it would seem that a landlord has no absolute right to repossess land where a tenant abandons it. It must be by agreement with the tenant subject to confirmation by the Native Court. These rules applied at the time the landlord resumed possession. The provision quoted by the learned district magistrate on the basis of which he reversed the primary court’s judgment related to a pledge of Family Tenure and not Nyarubanja tenancies but is more or less the same as the rules first mentioned and they are to the effect that a man cannot be dispossessed on account of neglect of a plantation.” (2) “The limitation period commences on the day when the right of action first accrued or on the day when the Limitation Rules came into operations, whichever is the later. In this case it commenced in 1964 and action instituted in 1968 and the respondent was in time. Under the Customary Law Kabachwezi had no right to take possession and hence Murefju, his heir, has no title to the shamba. This sale to appellant’s No. 2 and No. 3 did not give them any title and the district court’s decision in favour of the respondent was right.” (3) Appeal dismissed.

95. Barka Saidi Salumu v. Mohamedi Saidi. (PC) Civ. App. 181-D-69; 24/2/70; Hamlyn J.

The appellant had sued her husband, the respondent Mohamed Saidi, for a divorce. She had left the respondent in order to go and live with her parents. The trial court dismissed the action making a finding that she could purchase "a divorce from her husband" upon payment of the sum of Shs. 4,000/- On appeal to the District Court it held that she was entitled to a "kula" divorce from her husband on the same terms as set out by the Primary Court. The woman made certain allegations against her husband, but called no witnesses to support her complaints. The trial court found that such evidence as she herself gave did not suffice to establish the facts alleged.

Held: (1) "I fully agree with the opinion of the District Magistrate that it is for a party to present his or her own case to the Court and not for the Court to make a case for the litigant. In the instant case, the woman made certain allegations against her husband, merely relying upon the evidence which she herself gave; she called no witnesses to support her complaints, and thereafter, because the trial court found such evidence did not suffice to establish the facts which she alleged, the woman on appeal contended that it was the duty of the court to call corroboratory evidence. This clearly is not so, and the litigant should produce what evidence there is to establish her case. It is only rarely that a court will, of its own motion, in cases such as this seek to clarify an issue by requiring an additional witness." (2) "The District Court Magistrate was correct in the matter of his finding as to the "kula" divorce, and that the consideration therefore is based upon a bargain between the parties. Nor has such amount any relation with the amount of the dowry." (3) "The appeal must consequently be dismissed, the appellant being at liberty to accept the terms of the "kula" divorce or to live apart from her husband, she not in such case being entitled to maintenance. As the District Court correctly held, it had no power to order that the woman resume co-habitation with the respondent." (4) Appeal dismissed.

96. Nduke v. Mathayo (PC) Civ. App. 203-M-69; 20/2/70; Bramble J.

The respondent was the successful bidder in an auction sale of the appellant's property in December 1963 and from 1963 to 1967 he harvested the coffee and the beer bananas while the appellant's family still remained on the land and used the edible bananas. The respondent established that he allowed the appellant's family to remain out of compassion for them as the latter was away in Uganda. The appellant's case was that there was an oral agreement about five months before the sale and that there was an oral agreement about five months before the sale and that there was a previous suit decided by the High Court involving the same issue. The previous suit related to an application under Order 21, Rule 93 of the Civil Procedure Code for delivery of possession by a purchaser of immovable property at a sale in execution of a decree. In that suit it was held that the application was time barred under the Indian Limitation Act.

Held: "Since the appellant was setting up an agreement the burden was on him to establish a binding agreement and this was all the heavier as he claimed that it were oral. There was no serious attempt to discharge this burden and too much was left to speculation." (2) "While the object of that application and the present suit was the same the matter cannot be considered to be res judicata since each is founded on a different right and a person may use any or all the legal means of enforcing his right. A failure of one is not a bar to another were different principles of law are involved." (3) "It is important to note that at the hearing of the application the question of an agreement was raised and the evidence was more detailed but the court held that thee was no such agreement. The appellant relied on that judgment and he could not accept part and repudiate part. He cannot now contend that there was an agreement. The trial magistrate was, therefore, wrong when he held that there was an agreement as was his dismissal of the suit on this ground. The respondent established title and possession and that the appellant and his family were on the land at his will. The appellant had not a shadow of a right to possession and I must uphold the judgment of the District Court." (4) Appeal dismissed.

97. Prosper v. Mary (PC) Civ. App. 115-D-69; (no date) ……

The respondent gave birth to a child of which the appellant is the father, it being born out of wedlock. The District Court, reversing the Primary Court's decision, gave custody of the infant (about eighteen months old) to the respondent. After the District Magistrate had delivered the judgment, the appellant informed the court that he would not deliver the custody of the child.

Held: (1) "It is not disputed that the child was born out of wedlock and prima facie the child therefore belongs to the other's family. Upon a consideration of the ultimate welfare of the child, I am of opinion that the Order of the District Court is correct for that the mother has both the financial resources and ability to bring it up properly." (2) "The respondent is to have reasonable access to the child after it has been placed in the custody of the respondent." (3) "I understand from the respondent that the appellant still retains custody of the child in defiance of the Order of the District Court, dispute a copy of the District Court's Order having been served upon him. I therefore direct that the judgment of this Court in this appeal be read in open Court in the presence of the respondent, or a coy thereof be served upon him and that five days thereafter, should he fail to comply with such judgment the respondent be at liberty to apply for execution of the judgment, in the normal manner. Any prevention or interference on the part of the appellant with such execution will of course render him liable to prosecution for obstructing the execution of a process under the provisions of the Penal Code." (4) Appeal dismissed.

98. Kyapa v. Ambokile (PC) Civ. App. 87-D-69; 10/2/70; Biron J.

The appellant was claiming two cows from the respondent, the claim being based on a "somewhat peculiar" transaction described as a "mortgage of the mortgagor's cattle for that of a mortgagee". It was established that the appellant had mortgaged a cow with the respondent for one of the respondent's cows. There was over-whelming evidence in favour of the appellant's case that he had returned the respondent's cow but the respondent had refused to return his own cow, which had since given birth to a calf and he was therefore claiming both o them. The Primary Court decided in the appellant's favour but on appeal the District court ordered a retrial. The case was heard afresh and

again decided in appellant favour. Again on appeal the District Court allowed the appeal finding that the original transaction was made in 1962 and not in 1965 as alleged and therefore it was time-barred.

Held: (1) “Although courts must apply the law and where claims are in fact time-barred by limitation they cannot be entertained, it cannot be gainsaid that this is not the most satisfactory way of disposing of disputes, as the merits of the case are disregarded. In this instant case there was a dispute as to when the transaction took place and a conflict of evidence. At very lowest there was therefore a doubt as to whether or not the claim was time-barred. In such a case it behooved the court to decide the case on its merits and not on what is in effect a technical rule of procedure. (2) “As remarked, at both trials before the Primary Court – incidentally, before different magistrates and assessors – the case was heard in great detail on the evidence given by the parties and their witnesses, and such evidence as found by both courts was overwhelmingly in favour of the appellant.” (3) Appeal allowed.

(1970) H.C.D.

- 94 –

99. Sasita v. Kiguku (PC) Civ. App. 272-M-69; 29/1/70; Bramble J.

There was a boundary dispute between the parties, the owners of adjoining shambas, in 1956. At first the Village Development Committee fixed a boundary mark which favoured the appellant whereupon the respondent approached the Chief who altered the boundary to increase the Respondent’s land. From 1956 to 1968 the respondent took no action and permitted the appellant to cultivate the dispute portion of land. There was a stream passing through the area in dispute but it was never mentioned when the first two boundaries were fixed. However, those marks were on the same side as the present marks showing that the stream had always flowed through the appellant’s land and was never a dividing line between adjacent shambas.

Held: (1) “For more than twelve years the respondent appeared satisfied with the boundary and seemed to have been inspired to take action by finding that his land is now too small for his needs. The finding by the lower courts that the boundary is the river because it is a natural boundary is totally against the weight of the evidence. The

fact that the appellant has a greater area of land than the respondent is in no way relevant to the issue and cannot be a factor to influence the final decision." (2) Appeal allowed.

100. Abel Rewebogora v. Raphael Mukaja (PC) Civ. App. 166-M-69; 20/1/70; Bramble J.

The appellant was sued in the primary court for redemption of a shamba worth Shs. 3,000/-. The respondent's (fourth child of nine of his father, the former owner of the shamba in question) case was that the shamba was clan land and the appellant had no right to it and that if he had bought it he should produce the receipt and he (respondent) was prepared to refund the money. He also relied on Customary Law, paras 561 563 and 563 of Cory and Hartnoll. The appellant led evidence to show that he had bought the shamba 25 years before when the relatives of the deceased owner had the option to purchase but did not; that the receipt for the money was destroyed when his house was burnt down, that the former owner made a will and did not include the disputed shame in it and that the respondent knew that he was in possession of the shamba for a long time before the action. At the hearing of the appeal the respondent stated that he returned to Bukoba in 1954 and worked until 1960 and that in 1956 he was paying money to redeem another shamba and for this reason he could not start the case in time.

Held: (1) "The respondent's evidence was very nebulous in that he did not prove tat the relatives concerned were not informed of the transaction so as to give him a right to bring the action nor did he say when he, first knew of the transaction so as to show that the action was brought in time. He expressed doubts as to whether or not there had been a sale and sought to throw the burden of proving it on the appellant. The basis of his claim was that there was a sale but that the relatives were not informed so he could not challenge the fact of the sale." (2) "It is clear that he brought the claim more than 12 years after he had knowledge of the transaction. A claim for possession of land is barred if brought after twelve years from the date the claim arose or 1964 whichever is the later. Technically the limitation rules do not bar the claim. The respondent at least had a right to the possession of the shamba if the claim was brought within 3 months of

the date he returned to Bukoba and that would be early 1955. Under the old Customary Law his right would then have lapsed. The new Limitation Rules G. N. 311 could not resurrect a right that had expired and the suit brought in 1967 could not succeed." (3) "All the evidence

As to the sale of the shamba was given by the appellant and this showed that it was legal and that the relatives had notice of it." (4) "The respondent did not make out a case and the trial magistrate was right to dismiss it. I allow the appeal with costs and restore the judgment of the primary court."

101. Charles Oomoso v. Francis Macnde (PC) Civ. App. 280-M-69; 26/1/70; Seaton J.
The appellant claimed refund of the dowry alleged to have been paid for the respondent's sister, Eslida, who had sought and been granted a divorce in civil case No. 8 of 1969. The lower courts found that the dowry was paid by the deceased Ogutu's mother for Ogutu's marriage to Eslida and that though the appellant had given some money towards Eslida's hospital treatment it was because she was his concubine after Ogutu's death in 1966. It was the assessors' view that it would be contrary to Luo custom and absurd for the appellant to have married Eslida independently after the death of Ogutu if he was related to the latter, although he could have inherited her. The lower courts also found that the so-called divorce granted to Eslida in Civil case No. 8 of 1969 was a mistake and that she should have been granted a widow's certificate under clauses 62 and 63 of the Law of Persons (G.N. 279 of 1963).

Held: (1) There was ample evidence to support the lower courts finding of facts. (2) "As to the law applicable, it is that set out in the Law of Persons, which was made binding on persons within the jurisdiction of North Mara District Council by G. N. 604 of 1963. however where the parties are all of the Luo tribe, as in the present case, Luo of Persons as declared in G. N. 279 of 1963." (3) "The rights of widows are dealt with in clauses 62 to 70 of the Law of Persons. According to clause 64, if the widow agrees to live as wife with one of he deceased husband's relatives and consent to this has been

obtained from the family Council, she becomes the legal wife of this relative. Further, according to clause 65, the bridewealth paid by the deceased husband is then considered as if paid by her new husband. I pause here to observe that had Eslida chosen to live with the appellant after Ogutu's death as his legal wife, it would be immaterial whether the dowry had been paid by the appellant or by the deceased Ogutu's mother." (4) "It seems to me that the Law of Persons does not provide for repayment of dowry in case of the death of a husband. What appears to be contemplated is that the dowry remains with the family of the wife (now widow) and, if the family council agrees, she becomes the wife of any of her husband's relatives of whom she may agree to become the wife. Nor is dowry repayable in every case of divorce under the Law of Persons. It is only repayable when the court finds that one of the parties has been guilty of conduct causing the break-up of the marriage. Even then repayment of dowry is not automatic; it is within the discretion of the curt according to clause 38 of the Law of Person. Among other considerations, the court is entitled to have regard to length of the marriage and number of offspring of the marriage." (5) "I am of the view tat the views of the assessors in the present case as to the Luo customary law happily coincide with the Law of Persons and there has been no misdirection by the District Magistrate. The appeal is accordingly dismissed."

102. Bartholomeo Albert v. Mutagobwa (PC) 286-M-69; 26/1/70; Seaton J.

In civil suit in the primary court brought by the first respondent against the second and third respondents for redemption of a clan shamba worth Shs. 2,000/- the court found that it was not a clan shamba but gave judgment for the first respondent on the ground that the shamba had been wrongly sold while he was in possession. The appellant at the time of this judgment was overseas and on his return after some more that five months applied to appeal out of time on the ground that the had purchased the shamba in question for Shs. 3,00/-. The district court dismissed the application for being some five months out of time and also because the appellant was not a party to the suit before the primary court.

Held: (1) Matters urged in explanation of delay must be supported by affidavit. (2) “None of the parties involved in the civil suit appealed from the judgment of the primary court, presumably being satisfied. The appellant now claims in his memorandum of appeal that the shamba, which was the subject of that civil suit, was purchased by him for Shs. 3,000/- which he paid in cash. If this were so, the appellant might have a remedy against one or more of the respondents but he should seek his remedy by instituting a fresh suit against whomever he paid Shs. 3,000/- as purchase money rather than attempting to intervene at this stage in the already completed suit. Had he completed his studies in time, he might have been allowed by the primary court to intervene in the suit before it. Unfortunately, it is too late now.” (3) Appeal dismissed.

103. Benjamin Kisoleka v. Bi. Elizabeth Josephat Civ. App. 168-M-69; 27/1/70; Brambe J.

The appellant and respondent were married under customary law on January 1968 and in July 1968 the respondent gave birth to a child. There being objection to the marriage from the appellant’s religious advisers, the respondent returned to her father’s where she gave birth before the return of the bride-price. The respondent did not deny the appellant’s allegation that he used to have sexual intercourse with her before the marriage but she said that she was impregnated by another man and was with child through him when she got married.

Held: (1) “According to section 175 of the Law of Persons, G. N. No. 279/68 a child born in wedlock belongs to the father. On this the trial magistrate decided in favour of the appellant. While there was no specific finding on who it was that was responsible for the respondent’s pregnancy the balance of the evidence would support the appellant’s claim on the point as it would be most unlikely for him to marry the respondent knowing she was pregnant through another man and pay a bride-price of 23 head of cattle and Shs. 3,000/-. This, however, is not very material since the law is that a child born in wedlock is the husband’s child. There was no doubt that at the time of birth the marriage had not been dissolved. Neither of the lower courts made any finding of fact as to whether or not it was the appellant who was responsible for the respondent’s pregnancy. The latter did not refute the statement that they used to have

sexual intercourse before marriage and on the balance of probabilities I find that the appellant was responsible." (2) "The learned magistrate in the District Court misdirected himself on the law when he sought to invoke sections 183 and 184 of the Law of Persons since they deal only with illegitimate children of

unmarried women. In all the circumstances the child in question was legitimate. I must allow the appeal and restore the judgment of the primary court." (3) "A further question arises and that is the question of custody of the child. Because of its tender age I am of the view that it should remain in the respondent's custody. She claims that she is working and full able to support it while the appellant says that he has a number of children at home. He is a teacher. I will therefore order that custody of the child should remain in the respondent until it is five years old when the appellant will be at liberty to apply to the Court for custody. In the meantime the appellant will pay Shs. 30/- monthly for its maintenance." (4) Appeal allowed.

104. Mrs. Mary Garatakle v. Serini Mroso Civ. App. 9-A-69; 22/1/70; Platt J.

The appellant landlady claimed that the order given by the Vice chairman of the Rent Tribunal, delivered on the 6th December 1969, was given without jurisdiction and therefore null and void. The order in question read as follows: - "The tenant in this case has been moved by trick i.e. to say that the tenant was asked to leave on the understanding that the house was going to undertake repairs. The tenant left and the landlady, the Respondent moved in. it is now agreed that the Landlady should look for a reasonably equivalent accommodation for the tenant. The tenant was paying Shs. 45/-. Per month and the house to be secured must be within that range. The Landlady/Respondent is given up to 3rd January 1970 to secure the said accommodation otherwise the tenant /applicant will be asked to file eviction proceedings. "

Held: (1) "There is no doubt that, since the amendment of the Rent Restriction Ordinance Cap. 479 by the Rent Restriction (Amendment) (No. 2) act of 1966, that the

powers of the Tribunal were confined to matters concerning the fixing, increase and decrease, apportionment, or the inclusion of service charges from the operating date of the standard rent of premises coming within the Act. (See section 7 (b) (c) (d) (e) (f) (g) (n) (o) (p)). It will also be seen that the remaining powers of the old Rent Boards were given to the Court of a resident Magistrate. The Tribunal is not empowered to investigate complaints of other matters of a civil nature outside its jurisdiction which ought to be brought before the court of a Resident Magistrate. At any rate, it is quite clear that the dispute between the parties in this case ere not within the powers of the Tribunal. Accordingly the order of the Tribunal is set aside tin its entirety." (2) "There is the question of costs. Learned Counsel for the appellant claims full costs, since the respondent had commenced the proceedings in the Rent Tribunal and not the court of a Resident Magistrate. On the other hand, the respondent claims that he had gone to the court and was informed that application he should make. I do not know whether he was misled in this matter or not. But it may well be that the respondent is not entirely to blame. It is one of those difficult cases where the landlady has not been at fault and the respondent/tenant has probably not known his rights. In these circumstances, I think it would be fair to reduce some of the appellant's costs. I award her two/third of the costs of the appeal. The fees of the respondent's application to the Rent Tribunal will be returned to him, and in order to facilitate the parties in getting the matter dealt with by the proper forum, the respondent may bring this proceedings in the court of a Resident Magistrate (not District Court) without payment of fees." (3) "I think it will also be of advantage if the proceeding were commenced

By way of complaint under section 11 B of the Act of 1966 which may have the effect of avoiding some delay or involving the respondent in too many technicalities under Civil Procedure Code. the learned Magistrate dealing with the case will follow the procedure set down in section 11 B(3) & (4) as well as 11 0 (2) Having investigated the respondent's complaint, he may give such order as the justice of the case may require." (4) Appeal allowed.

105. Bi Ruth Pemba v. Daudi Mfalingundi (PC) Civ. App. 212-D-69; 12/2/70; Hamlyn J.
The appellant lived with the respondent for about 11/2 years giving birth to a child in the ordinary course of nature. She claimed that she was some months pregnant when she went to live with the respondent and that the father of the child was another man, one Abdi Sasy.

Held: (1) there was no doubt from the evidence that the respondent was the real father and that "the appellant has adopted this subter fuge in order that she may remain in custody of it." (2) "The ultimate consideration before the Court is, of course, the real welfare of the child. The appellant is living in a semi-military camp in the Dodoma District, while the respondent is in permanent employ in Dar es Salaam. From what I can gather from the record, the latter is in a reasonable financial position, whereas the appellant has only Shs. 213/- a month to support herself and the child. It is clear, I think, that the appellant could do little for the child on such a salary, and moreover the respondent has been found to be the real father. In such circumstances, it will evidently be the greatest benefit to this child if it can live with the father and be brought up in a place where financial considerations will have the effect of giving it proper food and environment and a chance of an education later. It would seem that a military camp could hardly supply these essentials to a child of this age." (3) The respondent granted the custody of child.

106. Said Mfaume v. Rajabu Fuko (PC) Civ. App. 74-D-69; 29/11/69; Georges C. J.
The appellant's brother Simba (deceased was either married to or lived in concubinage with the respondent's sister. The appellant's case was that the land on which his deceased brother and the plaintiff's sister lived had been given to his brother b one Gogo, since deceased, and that on his brother's death the land had passed to him. He had, however, gone off to Tunduru leaving one Ramadhani in charge. He returned perhaps 20 years later to find the respondent in occupation of the land. The respondent, on the other hand claimed that the land was clan land and that the appellant's brother had occupied it because he lived with his (the respondent's) sister and that on the sister's death the property had passed on to him. On appeal from Primary Court, the

district court decided against the appellant on the ground that according to Uluguru law anyone given land should have a certificate of title; the appellant did not have one. Furthermore, if the land was clan land then on the death of simba's wife it would be inherited by her relatives and not by his.

Held: (1) "I see no reason for reversing the decision of the District Magistrate which seems well founded on the facts and in law. When a claimant returns after more than 20 years to assert ownership of a piece of land which he has never occupied and which the person against whom he claims has been occupying and improving then he must bring very convincing evidence if he is to succeed. This the appellant has not done." (2) Appeal dismissed.

107. Buskined Fufula v. Nswanzi Fufula (PC) Civ. App. 193-M-69; 22/1/70; Seaton J.

The appellant sued the respondent for a shamba containing palm trees and banana trees valued at Shs. 600/-. The appellant's case was that the shamba was given to her by her late mother, who had cleared and planted the shamba and also built a house there. After the death of the appellant's father the appellant continued to live there as a concubine of one Fufula. On the death of the appellant's mother, some ten years ago, Fufula remained with the shamba, took care of the appellant and her sister and built three houses there. The respondent used to visit the shamba during Fufula's lifetime but was neither a relative nor a son of Fufula. Upon Fufula's death, the respondent chased the appellant from the shamba and remained in possession of it. The respondent's case was that he was Fufula's son, that Fufula had been given the shamba by the elders while it was still a forest. Thus the shamba was lawfully inherited by him. At the primary court hearing the appellant testified and called two witnesses. The respondent did not testify, but called two witnesses. The primary court believed the appellant and decided for her. The District court called additional evidence, without recording any reasons therefore and reversed the judgment.

Held: (1) "An appellate court should not, without good reasons, take additional evidence when the parties have had ample opportunity to call witnesses in the trial

court. Otherwise litigation will be endless. Where good reasons exist for calling additional evidence, they should be noted in the record. In the present case, no reasons were recorded and it is difficult to see if they existed. It seems to me to be unfair to allow the defendant, who chose to remain silent during the trial, to come before an appellate court and adduce his own testimony and that of his witnesses in rebuttal of a case made out by the plaintiff in the court of first instance. Different considerations would arise if the defendant was prevented, through no fault of his own, in calling his witnesses at the trial or if the evidence came to the defendant's notice for the first time after the trial." (2) "There was ample evidence to support the appellant's case." (3) Appeal allowed.

108. Nilila Nsabi v. Dosa Shija (PC) Civ. App. 283-M-69; 15/1/70; Kimicha J.

The appellant Nilila, married the respondent's daughter, failing, however to pay the customary bridewealth for a considerable time. Meanwhile, a daughter, Saana, was born of this marriage. Under customary law, [the judgment does not name the law, but apparently it is Sukuma law] this daughter would have o be redeemed from the respondent, her maternal grandfather, by the payment of the bride- wealth in question. Before this occurred, Saana was married, and the grandfather, the respondent, incurred expenses of Shs. 521/- for her wedding, as follows:- Shs. 120/- the costs for cattle and goats slaughtered for wedding purposes; Shs. 100/-, dowry for the girl's mother, termed "Mkaja". And Shs. 301/- goods, including house holder for the bride. Moreover, the respondent, the bride's grandfather, received the bridewealth paid by Saana husband. Following the marriage, the appellant paid the respondent, his father-in-law, the long overdue bridewealth, thereby redeeming his daughter, Saana, and in turn receiving from the respondent, the bridewealth paid for Saana. The respondent then sued the appellant for the expenses he had incurred for Saana's wedding.

Held: (1) "It is evident from the undisputed facts that had Nilila redeemed his daughter before she was married he would have had the customary obligation of performing and paying for the wedding ceremonies. His delay in paying the redemption fee for his daughter compelled the respondent to fulfill this obligation on his behalf." (2) "As the respondent handed over to Nilila the

Brideprice that he had received for Nilila's daughter, I find it reasonable that Nilila should also pay a reasonable sum to the respondent as his share for his daughter's wedding expenses I find that the District Court gave sound reasons for awarding the sum of Shs. 370/50, to the respondent." (3) Appeal dismissed.

109. Thadeus Chach v. Robi Mkiba (PC) Civ. App. 270-M-69; 23/1/70; Kimicha J.

The appellant had applied to the V.D.C. who allocated him a piece of land which he claimed belonged to nobody and was undeveloped. There was evidence that the land was undeveloped and was planted with cassava, bababas, Arabica Coffee and some eucalyptus trees by Robi after he learnt of is reallocation to the appellant. However, the magistrate ascertained that the land in question had in fact been the subject of dispute between Robi and others in a previous civil case. The District Court decides that Robi (the present respondent) could not be deprived of land he had held for many years under customary land tenure.

Held: (1) "It appears from the facts as recorded by the district court based on the evidence of witnesses and on the magistrate's visit to the land in dispute that the land was allocated by the V.D.C. to the appellant in this court when they knew that the respondent in this Court exercised right of ownership over it recognized under customary law." (2) "There is no evidence to show that Robi committed acts which amounted to waiver of his rights over the land. He resisted the V. D. C.'s action by planting permanent trees on it and he has alleged in this Court that he was locked up for a number of days by the then Area Commissioner for refusing to agree to the alienation of his land." (3) "The district magistrate was, after inspecting the land; satisfied that it was the subject of litigation between Robi and his neighbour Mbanda long before it was allocated to the appellant and judgment was given for Robi." (4) "It is clear from the above facts that the V.D.C. acted above their powers in allocating the land in dispute to the appellant in contravention of Robi's undisputed right over it." (5) Appeal dismissed.

110. Takolize v. Takolize (PC) Civ. App. 287-M-69; 22/1/70; Seaton J.

The appellant claimed inheritance which was denied by the respondent, the daughter of Takolize on the ground that the appellant was not Takolize's son. The appellant alleged that he was the posthumous son of Takolize, who died sometime in 1942 of 1943; that her mother was several months pregnant when Takolize died and that he had been accepted by clan members as Takolize's son. The primary court decided in favour of the appellant relying on Sections 175 and 182 of the Law of Persons, (G.N. 279 of 1963). The District Magistrate reversed this decision on the ground that according to evidence, the appellant must be 20 years of age; therefore, he must have been born in 1949. but his own mother testified that Takolize died in 1942 i.e. seven years before his birth. The district magistrate also cited S. 176 of the Law of Persons that a child does not become a legal member of its step father's family by merely living in the step father's house. On appeal, the appellant challenged the district court's finding on the ground that his mother was illiterate and did not even know the current year, and submitted that Takolize's death should have been proved by documentary evidence.

Held: (1) "Who should have produced such documentary proof? According to Rule I (2) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations, 1964, the complainant must prove all the facts necessary to establish his claim unless the other party admits it. The date of Takolize's death was a fact essential to

the appellant's claim that he was born within such a period of months thereafter as to make him his on. As the appellant did not establish this proof, he was not entitled to succeed in his claim." (2) "It seems to me the district court judgment can also be supported on another round. Rule 5 of the Magistrate's Courts (Limitation of Proceedings under Customary Law) Rules, 1964, given the court power to reject any claim if it is of the opinion that there has been unwarrantable delay in bringing the proceeding and that the just determination of the claim has been prejudiced by the delay. No reason has been adduced for the 20-year delay in bringing the present suit except lack of money to pay court fees. Minority was not pleaded and, even had it been pleaded, might not have sufficed as the suit could have been brought on the appellant

behalf by his mother or guardian. Poverty is no excuse in view of the possibility of obtaining the court's permission to sue in forma pauperis. Had the suit been brought before the lapse of so many years, the documentary proof whose lack is deplored by the appellant might well have been supplied." (3) Appeal dismissed.

111. Jaffari Msafiri v. John Mashenge (PC) 284-M-69; 30/1/70; Bramble J.

The appellant, who admitted that he was not of the same clan as deceased, claimed that the deceased was his grandfather who had made a will bequeathing the shamba under dispute to him. The respondent, who was the decease's brother claimed as a natural heir. The primary court upheld the will but the District court reversed judgment on the ground that there was no evidence from the clan member's showing that the respondent had been disinherited.

Held: (1) "There is, however, the evidence of P.W. 1, a clan member that the deceased had disinherited the respondent because he had refused to assist him and the finding of fact was wrong. In addition ……. A testator must declare specifically in writing his intentions and reasons for disinheriting his heir-at-law in keeping with Clause 34 of Government Notice 436 of 1963. The learned district magistrate could not have read the will, which was put in evidence, since it gave in detail the reasons for disinherited the respondent ……" (2) Appeal allowed.

112. Swalehe Urembo v. Sopia Yusufu (PC) Civ. App. 101-D-69; 10/2/70; Hamlyn J.
The appellant sued the respondent for damages for making his daughter, a school girl pregnant. The trial court awarded damages as follows:-

1. To deflower the girl …….. Shs 400/-
2. To end her lessons in school …….. Shs. 300/-
3. To cause her pregnancy (50/- p.m.) ……. Shs. 450/-
4. To deprive her of ceremonies ……. Shs. 300/-

There was no evidence to show whether the child was already born or whether (if birth had taken place) the child was alive. The District Court, therefore on appeal refused to

allow damages for maintenance of the child and reduced the quantum of damages to Shs. 500/-

Held (1) "While it is clear that the trial magistrate has endeavored to reach a fair figure for compensation, I do not think that this mode of arriving at a suitable sum is the correct one. The suit is one brought by the father of the girl for damages for loss of "service" of the girl. The District Court has taken the

More correct of the nature of the action in arriving at a figure which stated to be "for loss of services". The first appellate court has declined to allow a monthly sum of Shs. 80/- for maintenance of the child, on the basis that nothing is known or on the record as to whether the child was born alive. Had the plaintiff desired such payment to be included, he should have given evidence (either himself or through his daughter who was a witness at the trial) of the facts which might establish this part of the case and ground an Order of the court." (2) "…… I consider that the sum of Shs. 500/- is probably a fair estimate of the damages incurred." (3) Appeal dismissed.

113. John Swagila v. Rubigisa Nyanda (PC) Civ. App. 1-M-70; 6/3/70; Kimicha J.

The respondent sued the appellant for Shs. 400/- being compensation for damage to his cotton crop caused by the appellant's cattle. The trial court was satisfied that the appellant's cattle fed on the respondent's crop and awarded Shs. 200/-. The District court upheld the primary court's decision.

Held: (1) "After examining the record and listening to the parties' submission in this Court I am satisfied that the lower court came to the right conclusion in finding that Rubigisa has established his claim that John's cattle had damaged his cotton crop. I have also no reason to differ with the lower courts in their assessment of the damage." (2) Appeal dismissed.

114. Kitina Gwau v. Mukhuu Gwau (PC) Civ. App. 7-D-67; 6/3/70; Hamlyn J.

The appellant was sued for eleven cattle alleged to be the property of the respondent but given to appellant only for custody. The trial court decided for the respondent and the District Court upheld that decision. The High Court upheld the decision since the appeal had no merits. But is gone on to make the following observation.

Held: (1) “Perhaps it would be of use to the Primary Court magistrate if I made one observation concerning his record of the proceedings. I not that there is nothing on that record to show that the several witnesses who gave evidence before him were sworn or affirmed. I think that I can safely assume that the Court took the evidence on oath or affirmation, for the magistrate has noted on the record before the “statement” of each witness, as to whether he were Christian, Muslim or of no religion. It is however requisite that the Court should include on its record the fact that each of the persons testifying before it had first been affirmed or sworn in the normal manner, for evidence which is not subject to the sanctions of an oath or affirmation is, generally speaking, no evidence at all. However I think that the omission to note this fact on the record in this case does not warrant the matter being sent back for re-trial, as I consider that he proper procedure has evidently been followed. (2) Appeal dismissed.

115. Michael Kombere v. Kone Parosoi (PC) Civ. App. 91-A-68; 16/3/70; Bramble J.
The appellant as original plaintiff was suing on behalf of his brother, who was ill, for the custody of three children. His evidence was that the real plaintiff was married to the respondent’s daughter and had three children. They lived together for some time but later the respondent took away his daughter and the children. Later when he was approached the respondent refused to return them until he was given 20 cows and Shs. 445/- which was

done. The respondent gave somewhat different evidence but the witnesses supported the appellant’s case and the trial court, therefore, decided for him. On appeal to the District Court, the court called for additional evidence. There the respondent set up a

different case altogether and relying on this the District Court reversed the judgment of the primary court.

Held: (1) “There is nothing on the record to show that additional evidence was necessary to clear up any point nor did the magistrate record his reasons in writing for taking such evidence as is required by section 17 (a) of the Magistrate’s Courts Act. He founded his decision on his doubts as to whether there was a marriage by the payment of bride price and whether the appellant’s brother was the father of the children. These facts were never in dispute at the trial. An appeal to a District Court is not a retrial and the appellate court in this case was clearly wrong to act as it did.” (2) Appeal allowed.

116. Thomas Salewi v. Issa Kirari (PC) Civ. App. 6-A-69; 17/3/70; Bramble J.

The respondent sued the appellant for a Kihamba. There was evidence that in 1958, at the instance of the Local Authority some people were removed from a forest reserve and settled in a particular area; the respondent was given a portion but be refused to accept it. In 1964 the appellant planted some bananas. The trial magistrate found that, “If the defendant wrongly occupied the land by himself it was a big mistake contrary to the Local Authority regulations because at that time the land belonged to the Local Authority …. According to the plaintiff’s own witness he refused to accept that land and it would depend upon the Local Authority to sue and not the plaintiff.” The district magistrate held that the respondent had proved that the land was given to him and reversed the judgment.

Held: (1) “The district magistrate held that the respondent had proved that the land had been given to him but this was contrary to the evidence since a gift is not complete until it is accepted. Apart from the clear evidence of the respondent’s refusal there was the fact that he never entered into possession or exercised any act of possession over a period of more than six years. The weight of the evidence was not, therefore, in favour of the respondent.” (2) “I should remark that the order of the district court giving alternatives to the settlement of the issue of possession was not proper in that it did not finally settle the matter. The order was as follows – Either the appellant shall compensate the respondent at once and remove him from the land soon after the judgment or if he is unable to compensate the respondent, then the respondent shall be

allowed some years to remove or exhaust his development. The second alternative was much too indefinite and could probably lead to further litigation." (3) "I hold that the part of the judgment of the primary court which was quoted above rightly summed up the matter. The respondent had no title and so could not succeed against the appellant who was in possession." (4) Appeal allowed

117. Nemburusi d/o Philip v. Iddi s/o Rajabu (PC) Civ. App. 84-A-68 19/3/70; Bramble J. The appellant and respondent were engaged and met regularly until the appellant discovered that she was pregnant whereupon the respondent ceased to visit her. The appellant then applied to the primary court for an order of maintenance against the respondent on account of the pregnancy. The trial magistrate held that there was no evidence to prove (a) that the respondent slept with the

Appellant (b) that the respondent was responsible for the pregnancy and that here was ample proof that the appellant was running around with other boys. The District Court upheld the decision.

Held: (1) "Paragraph 183 of the Law of Persons G.N. 279/63 specifies that – any man whom the woman names as father of her child may not deny paternity unless he can prove that he had no sexual intercourse with her. Since, therefore, the appellant alleged that the respondent was the father of her child the burden was on him to prove that he never had sexual intercourse with her. The defence was a simple denial and the weight of the evidence was against him- the fact that she was his girl-friend; that he used to visit her house and her statements as to the acts of sexual inter course. His allegation that she had slept with another man was not of much weight in that he never put one word of this to her in cross-examination to test the truth of it. In any case, Para 184 of the Law of Persons provides that – Even if the woman had more that one lover at the time of conception, the one whom the woman names may not deny paternity of the child." (2) "In the face of the respondent's denial the appellant gave evidence as to the time and place of intercourse and had witnesses as to her relationship with the

respondent thereby satisfying the requirements of Para 186 of the Law of Person. There was a heavy and perhaps difficult burden cast on the respondent and a mere denial could not discharge it." (3) Appeal allowed.

118. Kemori Makima v. Sabayi Rioba (PC) Civ. App. 4-M-70; 7/3/70; Kimicha J.
After a successful suit for divorce against his wife, the respondent sued the appellant, his further-in-law for the refund of the bride-price being 36 head of cattle and Shs. 40/-. The appellant agreed to pay 25 head of cattle and the trial magistrate after considering the time the married parties had lived together and the cause for the break of the marriage held that the appellant should pay only 25 heads of cattle. The respondent appealed to the district court which allowed the appeal and ordered that the 36 head of cattle be paid back because the appellant's daughter was to blame for the break of the marriage.

Held: (1) "Sections 151 and 153 of the Declaration are only example of common grounds for divorce and in considering the repayment of bridewealth the provisions of sections 52-57 apply. It is my view after examining the primary court record that these provisions were considered by the primary court before delivering judgment. The District Court dealt with the appeal as though the lower court had no made a finding based on these provisions and did therefore not give reasons for differing with the finding of the lower court." (2) "I also do not agree with the district that the behaviour of Kemori's daughter was so bad as not to entitle him to retention of part of the pride price." (3) Appeal allowed.

119. A. M. Kimweri v. Yusufu Athumani (PC) Civ. App. 107-D-69; 20/2/70; Biron J.
A divorce suit was instituted against the appellant by his wife. The appellant consented to the divorce if the wife would under take the maintenance of the children. The parties were married according to Islamic rites. The Primary Court found that the appellant was consenting to a divorce and granted it. The court also ordered that the appellant pay Shs. 450/- per month as maintenance for the three children. The District Court upheld the decision but reduced

the figure for maintenance to Shs. 250/-. On appeal the appellant argued that he had not consented to the divorce and that the maintenance had been assessed in the absence of any evidence as to his means.

Held: (1) "The Primary Court, in granting the divorce, based its decision on the ground that both parties were consenting to divorce, and this is what the District Court upheld in so directing itself. Such a divorce by consent is perfectly proper under Islamic Law and is known as a Mubar'at divorce, though perhaps, to be pedantically correct, as the divorce, though perhaps, to be pedantically correct, as the divorce was originally initiated by the wife, it could perhaps be termed a Khula divorce." (2) "The finding of the Primary Court that both parties were consenting to a divorce, which was upheld by the District Court, is fully supported and justified by the evidence. In so far as the order granting the divorce is concerned, this appeal fails." (3) "It must be conceded at once that this omission to ascertain the appellant's means, that is to say, how much he could afford to pay, before determining a figure is fatal to the award for maintenance. As, I think, is only commonsense – and I have no doubt the respondent himself will agree – before a court can determine a figure for maintenance, it must first ascertain the means of he respondent before deciding how much he can afford to and should pay. The figure awarded by the District Court, that is, Shs. 250/- per month, is accordingly set aside, and the proceedings are returned to the District Court, with a direction to hear evidence and determine what the appellant's means are, and thereafter proceed to determine an appropriate sum for the award of maintenance. (4) Appeal allowed in part.

120. Kanti Printing Works v. Njombe District Council Civ. Case 2-D-69; 5/12/69; Mustafa J.

The plaintiffs Kanti Printing Works sued the Njombe District Council for goods sold and supplied. The Local Government Ordinance (Cap. 333) requires that summons and other authorized documents be served on the Chairman or the Clerk to the local authority being sued. The plaintiffs served the summons on an Executive Officer of the defendant Council which the defendant argued, was irregular. The defendants also

argued that by virtue of section 153 (1) of the Local Government Ordinance a suit commenced against a local authority for an act done in pursuance or execution of an Ordinance or of any public duties or authority had to be commenced within twelve months of the act done in pursuance or execution of an Ordinance or of any public duties or authority had to be commenced within twelve months of the act and therefore because plaintiffs' action was brought twelve months after the cause of action had arisen, the suit was barred by limitation.

Held: (1) "I am satisfied that an Executive officer would be equivalent to a clerk of an authority, and I hold the summons was properly served on the District Council. Similarly, I am satisfied that the notice complied with the statutory requirements as mentioned in section 152 of Cap. 333. In paragraph 7 of the plaint, the plaintiffs have alleged that they have only served notice on the defendants demanding payment, and, is my view, that was specifically pleading service of the statutory notice, if such specific pleading is at all necessary." (2) "I will now deal with the issue as to whether the suit was barred by limitation. Mr. Patel refers to section 153 of Cap. 333. it is not in dispute that among the functions and duties of the Njombe District Council are: (1) to build, equip, maintain or manage schools and educational institutions; and (2) to grant sums of money towards the establishment equipment or maintenance of schools and educational institutions. These are some of the functions of a local government authority, as mentioned in section 52 of Cap. 333, and by Government Notice No. 251 of 1962, as amended by Government Notice No. 379 of 1966, the above two duties (among others) were to be preformed by the Njombe District Council. It has, therefore, been argued that since the

debt was incurred by the Njombe District Council for the purchase of educational exercise books or articles of a similar nature, the defendants in so doing were carrying out – as not done in pursuance or execution or intended execution of an Ordinance or of any public duties or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority," and therefore this suit by the

plaintiffs against the Council is governed by the provisions of section 153 of the Ordinance, and the period of limitation prescribed, therefore, is twelve months, and not the usual three years for a contract fro goods sold and supplied. In my view, the wording of section 153(1) would require careful scrutiny. It seems the wording is very similar to section 1 of the Public Authorities Protection Act, 1893, in England. It will be seen, that the words an act done in pursuance or execution or intended execution of an Ordinance or of any public duties or authority in section 153 are very similar to the words in section 1 of the Public Authorities Protection Act has been the subject of numerous judicial interpretations, and I will refer to a case, Bradford Corporation v. Nyers, reported in 1916 A. C. 242, which went to the House of Lords. In that case, a municipal corporation was authorized by act of Parliament to carry out the undertaking of a gas company and was bound to supply gas to the inhabitants of the district. The corporation was also empowered to sell the coke produced in the manufacture of the gas. The corporation contracted to sell and deliver some coke to the plaintiff, and by the negligence of their agent, the coke was shot through the plaintiff's shop window. The plaintiff commenced a suit for negligence against the corporation more than six months afterwards. The authority pleaded section 1 of the Public Authorities Protection Act. It was there held hat the act complained of was not an act done in the direct execution of a statue or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act afforded no defence to the action. The Lord Chancellor, Lord Buckmaster, in his speech said, inter alia:- …… the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that public authorities enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or is the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. This

distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent …. (3) "Here in this case, Njombe District Council purchased certain educational books or equipment for its schools from the Kanti Printing Works, and in my view this transaction was incidental to the discharge of its public duty to provide education for the inhabitants of its district. In my view, the Council cannot pray in aid the provisions of section 153(1) of Cap. 333 in the circumstances." Preliminary points overruled.

121. Tajdin Allarakhia v. H.H. The Aga Khan Civ. App. 28-D-68; 7/2/69; Biron J.

The respondent landlord who required possession of a flat occupied by the appellant for re-development applied in the District Court for possession. According to the Rent Restriction (Amendment) (No. 2) Act 1966 Section 4, the court competent to make the order for possession is a court of the Resident Magistrate. The District Court which was presided over by a Senior Resident Magistrate granted the respondent possession. On appeal it was argued that the court had no jurisdiction in the matter and therefore the order it issued was ultra vires. The respondent argued that the case had in fact been tried by a resident magistrate because the court was presided over by a Senior Resident Magistrate and secondly, that if objection had been taken at the trial, the plaint could have been returned to be presented to the court of the Resident Magistrate in accordance with Order 7 Rule 10 of the First Schedule to the Civil Procedure Code 1966 and therefore the High Court could return the plaint to be presented to the proper court under Section 76 of the Civil Procedure Code.

Held: (1) "the fact that a court is presided over by a magistrate of a particular grade does not, ipso facto, transform that court into the class of the magistrate's grade. It is expressly provided for in the Act that each class of court shall have its own register and its own prescribed seal. These instant proceedings were heard and tried by the District Court of Dar es Salaam, and the order and decree had issued from that court

bearing the seal of such court. Therefore, in my judgment, despite the fact that the court was presided over by a senior resident magistrate, the trial was in fact held in, and the order and decree made by, the District Court of Dar es Salaam, which court has, as indicated, no jurisdiction to try such suit. This first submission therefore fails." (2) "With regard to the second submission, whilst, with respect, I agree that this court on appeal has similar powers to the trial court from which the appeal has been brought, that is, it could return the plaint to be presented to the proper court, that, however, is a very far cry from upholding an order of a court which had no jurisdiction to make such order. As the district court had no jurisdiction is fatal and I fail to see how this court on appeal could possibly uphold such order made without jurisdiction." (3) Appeal allowed.

122. A. Musaji v. R. Bhagwanji and Tanga Upholsterers Misc. Civ. App. 2-T-69; 27/1/70; Biron J.

The Tanga Rent Tribunal of its own motion decided to determine the standard rent of the premises occupied by the two respondents who were renting rooms on a two-storey building owned by the appellant landlord. They were charged Shs. 200/- and 175/- respectively for each month of rent. Other tenants renting exactly the same type of rooms on the same building ere charged Shs. 150/- each per month. The Rent tribunal, on the ground that this was discriminatory reduced the respondents' rent to Shs. 150/-. On appeal the landlord argued that the tribunal had no right in law to determine the rents which were "standard rent" because they were determined at the prescribed date (the 1st January 1965) by virtue of the Rent Restriction Act 1962.

Held: (1) "It is not in dispute that the respondent, Mr. Bhangwanji, was paying Shs. 200/- per month at the prescribed date, whilst Mr. Parmar, the proprietor of the Tanga upholsterers, was paying Shs. 175/- per month at such date. Pausing there, those

Rentals would constitute the standard rent, and neither court nor tribunal has any right to determine any other figure as the standard rent, unless it finds, as provided for in section 4 of the Principal Act sub-section (2) sub-paragraph (b):- ….. that the rent at the prescribed date was a nominal, fictitious or collusive rent, in which case a Tribunal – and gain I quote from the same sub-paragraph – shall have power to determine a rent at the prescribed date as being of such amount as the Tribunal thinks proper having regard to the rents at which premises of a similar character in the neighborhood were let at the prescribed date. The Tribunal in its ruling has made no finding to the effect that in its view the rent at the prescribed date which either of the two respondents was paying was nominal, fictitious or collusive. (2) "The Tribunal also has a discretion, as provided for in sub-paragraph (a) of the same sub-section, to alter, and again I quote:- whether by way of increase or reduction the amount of the standard rent as ascertained in accordance with sub-section (1). In the case of any premises in regard to which a Tribunal is satisfied that in the special circumstances of the case it would be fair and reasonable to alter, whether by way of increase or reduction etc. again the Tribunal has made no finding that there were any such special circumstances in this case. The only reason behind the determination given is that it was discriminatory to charge different rents for similar shops in the same premises. If that constitutes a valid ground for lowering the high rents, it could equally validly constitute a ground for raising the lower rents." (3) Appeal allowed.

123. Hoho v. Ndoma (PC) Civ. App. 219-M-69; 23/2/70; Kimicha J.

Divorce was obtained by a wife on the grounds of cruelty and the Primary Court ordered that the husband get back 14 of the 20 head of cattle he had paid as brideprice. At the time of the divorce, the parties had four children. The District Court allowed the appeal of the wife against return of brideprice and held that because of the fact that the husband had ill-treated the wife and that they ha children at the time the husband, is in accordance with the Declaration of Customary Law section 52 and 57, was not entitled to the return of any of the animals he paid as bridewealth. The husband appealed.

Held: (1) "It appears that the primary court in applying the provisions of section 57 and in deciding on the question of bride-price had formed the impression that Ndoma

deliberately ill-treated Holo in order to force a divorce. But this is not the impression which one would gather from the record. Ndoma declared before all the courts that he still very much loved his wife and that he assaulted her with the intention of dissuading her from her conduct which he did not approve. She visited pombe clubs and got drunk; she also visited places where he thought she met other men immorally. The root of the trouble would appear to be Ndoma's excessive jealousy over his wife and no more. On the other hand the district magistrate has declared to have applied the provisions of section 52(B) only. But it would appear from his wording of his decision that he used this section in conjunction with sections 53, 54 and 55. Section 52(B0 is absolute when the parties do not give reasons for the divorce but if they give reasons then sections 53, 54 and 55 apply. In this case the parties have given reasons for the divorce." (2) "I am satisfied by the lower courts decision that Ndoma's treatment of his wife justified the grant of divorce but I am of the opinion that the circumstances which led to the divorce were not so serious as to bar consideration for the refund of part of the bridewealth to Ndoma. After considering the dispute in terms

of sections 53, 54 and 55 I am of the opinion that this is a fit case for striking a compromise between the parties." (3) "Acting on this finding, the appeal is partly allowed and it is ordered that Ndoma be refunded half the brideprice that he paid for Holo. According to the evidence recorded in the lower courts this should be ten head of cattle."

124. Bernard v. Asha Civ. App. 7-A-69; 21/1/70; Platt J.

The respondent brought an action in the District Court claiming Shs. 900/- being arrears of rent due from the appellant and possession on the grounds of non payment of rent for nine months. The appellant admitted owing Shs. 600/- being six months rent but denied the balance of Shs. 300/-. He then set up a set-off and counterclaim in the sum of Shs. 4,000/- on the ground that the respondent had been negligent in failing to complete a reconstruction of the premises which resulted in loss of business to the appellant. The

Magistrate found that Shs. 300/- three months rent was due from the appellant and he awarded nominal damages of Shs. 200/- against respondent for the appellant's loss of business owing to the reconstruction. On appeal it was argued that the suit was commenced in the wrong 'court because by virtue of Section 11A (1) of the Rent Restriction (Amendment) (No. 2) Act 1966, all claims, proceedings or other matters of a civil nature arising out of the Act had to be commenced in a court of a Resident Magistrate. The respondent argued that the main claim being arrears of rent, it arose from a debtor /creditor relationship and was not a matter specifically arising out of the Act. He also intended that the counterclaim was separate action concerning a matter not covered by the Act and that therefore at least the counter claim was decided by a court of competent jurisdiction.

Held: (1) "In my view, the plaint must be seen as a whole and the sense of it is that the respondent had asked for possession on the basis of non-payment of rent. There seems no doubt that viewing the plaint in this way, it came squarely within the terms of section 11A (1) (b) referred to above. It follows that the suit was commenced in the wrong court." (2) "It seems to me that one must consider the basis of the claim, which is that the tenant has been put to dis-advantage by the actions of the landlord. It is now generally agreed that contractual tenancy has an implied term as to quiet enjoyment. Thus whether the landlord has entered lawfully but disturbed the tenant, the landlord may be liable on the implied covenant. Where he has entered unlawfully he may be liable for that reason. (See WOODFALL ON LANDLORD & TENANT 26TH Ed. Vol. 1, Para 1448). In the instant case, the land-lord had been required to make alterations by the Land Office, and it was held that the appellant had agreed that he should do so. In as much as the landlord had disturbed the tenant lawfully, she would be liable for damages. In this case it was said that the respondent had caused damaged to the appellant by delay and in leaving the premises in an improper state, in fact, in a state worse than they had been before the re-construction, because of her impecuniosity's. On the terms of the agreement that the appellant had allowed the respondent to carry out the re-construction it must surely have been implied that the respondent was to leave the premises in a proper state of repair, at least equivalent to the state of the premises before re-construction, as soon as possible. Of course, if the

respondent had deliberately disturbed the appellant by altering the building, it might have been a case such as LAVENDER v. BETTS (1942) 167 L. T. 70, quoted by Woodfall. At any rate, as far as the contractual tenancy was concerned, a dispute had arisen as between the landlord and the tenant as a result of the landlord's actions. Section 29 of the Act provides

That it shall be deemed to be the obligation of the landlord to keep and maintain the premises in a state of good structural repair and goes on to make provision for the issue of a certificate given by the local authority as to whether or not the premises are in a proper state of repair. There was evidence here, called by the appellant, that the local authority did not consider that the premises were in a proper state of repair. It is true that section 11A(1) (f) might have been resorted to by the appellant, a provision indeed which the learned Magistrate may have had in mind, but if the basis of the claim was a resort to the provisions of the Act, it would seem that the appellant's dispute equally stemmed from his statutory or contractual position. Had the appellant been a statutory tenant, he still had his contractual rights. (See Magarry the Rent Acts 9th Ed. pp. 186-187).

Section 11B of the Act provides for the investigation of complaints relating to the tenancy, made to the court by either the landlord or the tenant, and this power is in addition to any other powers specifically conferred on it by the Act. Sub section (2) of section 11B, recites that nothing in this section or in other provisions of the Act shall be deemed to preclude the court from taking cognizance of any infringement or alleged infringement of this Act of any dispute or matter likely to lead to a dispute between a tenant and a landlord, although such tenant and such landlord has not made a complaint to the court under the provisions of this Act. The section further provides in ensuing sub section, that where a complaint has been make, the court may summon the parties before it and having investigated the complaint, may make such order as the justice of the case may require. Section 11 B seems to be a new provision giving the court power to deal with any matters arising out of a tenancy; brought before it by

complaint of which it has taken cognizance. It seems to me to have empowered the learned Magistrate to authorize this appellant to carry out the repairs and deduct the cost against the rent, although it was not an issue strictly raised on the pleadings. Equally I think that the counterclaim must be taken as complaint concerning a dispute arising out of the tenancy, which the court decided along with other matters such as arrears of rent and possession, with which the counterclaim was closely connected." (3) "In the result then, the proceedings as a whole must be set aside and both the plaint and the counter- claim must be returned to the court having proper jurisdiction."

125. Manisius Odemba v. Rusabel Aila (PC) Civ. App. 49-M-69; 15/1/70; Kimicha J.
The appellant divorced his wife and the respondent mother-in-law was ordered to pay back the 15 head of cattle that had been given as bridewealth. The respondent had sold the cattle and could not produce the original animals but was willing to pay some other 15 head of cattle. The appellant secured an attachment order against one Johnson whom he alleged was in possession of his cattle. 12 head of cattle were seized and paid to the appellant. Johnson appealed on the grounds that he had lawfully bought the cattle from the mother-in-law and the District Court allowed the appeal. The appellant appealed against the decision. The High Court judge considered the fact that the appellant and respondent's daughter were married for six years and had two children and that during that time the mother-in-law could have sold the cattle.

Held: (1) "I agree with the district court that, after taking all the facts of the case into consideration. Manisius cannot insist on having the original beasts that he had paid to Rusabel and that he should accept other cattle paid to him in the presence of the persons mentioned in the district court judgment." (2) Appeal dismissed.

126. Fredi s/o Nyamu v. Josephina d/o Gabriel (PC) Civ. App. 133-M-69 26/1/70; Kimicha J.
The parties to the appeal were married but due to matrimonial misunderstandings were separated and then divorced. At the time of the separation the appellant believed that

respondent was three months pregnant and when she did not produce the child at the time it should have been born, he sued her for the production thereof. The respondent denied she was pregnant when they were separated. The district court dismissed the suit on the ground that the existence of the child could not be proved. Appellant later traced the child and filed another case for custody. The primary court was satisfied that the child produced before it was conceived while the marriage of the parties was still valid and granted custody. The District Court upset the judgment on the ground of res judicata. The High Court restored the judgment of the Primary Court.

Held: (1) "I am of the view that the district magistrate misdirected himself in holding that the doctrine of res judicata applied – because it was part of the judgment in Shirati Civil Case No. 64/67 that Fredi should institute fresh proceedings on finding the child". (2) Appeal allowed.

127. Rajabu Abdallah v. Azizi Mbusha (PC) Civ. App. 114-D-69, 4/4/70; Hamlyn J.
The respondent separated from her husband with whom she had got married according to Christian rites. She later changed from the Christian to the Moslem faith and got married to the appellant according to Islamic rites. She did not give birth to any children during this union but she later went back to her first husband and gave birth to children. The appellant sought to obtain custody of these children on the ground that he was the real husband of the respondent. The Primary Court allowed the claim but the District Court reversed the decision.

Held: (1) "The claim of the appellant is based on his contention that he is the real husband of the woman AZIZA and it is because of this claim that he seeks to obtain custody of the children born after the woman had left him. His claim is of course based upon a complete misapprehension as to the legal position of the woman, who remained throughout the whole period the legal wife of Patrice. Neither her desertion of her husband, nor her change of religion, nor the fact that she cohabited with the appellant had any effect in altering this legal status nor at no time the woman anything more than the concubine of the appellant – despite the certificate which purports to testify as to a form of marriage between these two people." (2) Appeal dismissed.

128. Hamad Wendo v. Mwangoye and Company Ltd. Misc. Civ. 1-1-69 27/1/70; Birorn J.

The appellant who had been employed by the respondent company was arrested on a charge of stealing the property of the respondent worth about Shs. 20,000/-. He was subsequently acquitted of theft. He then demanded his salary, severance allowance, leave pay and payment in lieu of notice. The respondent rejected the claim on the ground that appellant had not been dismissed or even suspended. The appellant testified that he had approached the respondent company after his arrest and demanded half pay and this had been refused. The respondent company denied the appellant ever visited them at all until after he had been acquitted.

when he came to demand payment in lieu of notice. The issue before the Senior Resident Magistrate was one of credibility who found that on a balance of probabilities the case had not been proved and appellant's claim was dismissed.

Held: (1) "The issue was purely one of credibility. The learned magistrate, who saw and heard the parties and the witness of the appellant, found that the evidence for each side was evenly balanced, and as the onus was on the appellant to establish his claim, which he had failed to do, he dismissed it. It is not without interest to note that learned magistrate directed himself that the appellant probably did not go near the offices at all until his case was finalized and he was acquitted, because he was then facing a charge of stealing the property of his employers." (2) "In arguing this appeal, Mr. Ved, who appeared for the respondent, went even further and submitted that the learned magistrate must have found the appellant's claim frivolous or vexatious. This submission is not without substance as, according to the Employment Ordinance, at Section 143, a court is not empowered to order costs against an employee who fails in his claim against his employer, unless the court considers the claim to be frivolous or vexatious." (3) "I would go further and state that the preponderance of probabilities would appear to be on the respondent's side as, if the appellant really believed that he

was entitled to half salary during the period he was suspended from duty, as according to him he was, it is inconceivable that he would not have complained to the Labour Officer at his employers' refusal to make any payment." (4) Appeal dismissed.

129. Abdulla Haji v. Tanzania Electric Supply Co. Ltd. and Tanganyika National Tourist Board Misc. Civ. App. 5-D-69; 29/9/69; Hamlyn J.

The Dar es Salaam Rent Tribunal fixed standard rent on appellant's premises on the basis that a sum of Shs. 100,000/- had been spent by the first respondent as tenant on improvements to the premises. The appellant argued before the tribunal that the figure on improvements had been misquoted and that it should have been Shs. 400,000/- and asked for additional rent to be fixed on that basis. the Rent Tribunal refused to vary the rent. On appeal it was argued on behalf of the appellant that there had been a change in the size or character of the premises by reason of improvements which had been virtually carried out by the landlord in view of the fact that appellant had accepted rent at a lesser amount as a result of the value of the improvements accruing to him on expiry of the lease. Therefore the Rent Tribunal ought to have held that special circumstances existed within section 4 (2) (ii) of the Rent Restriction Act and increased the rent.

Held: (1) "I do not think that these arguments are altogether valid. In the first place, a change in user; that is to say, that where there is a conversion from one user to another – as from business premises to residential or vice versa. Mere improvement by addition of air conditioners or parquet flooring being laid cannot result in a change in character of the premises. Certainly, they are improved, but the character remains the same. Not do I think that the expenditure has been incurred by the landlord on the argument that he has accepted a lesser rent from the respondent. On the evidence, the respondent himself has incurred the expenditure; it may be (though there is meager evidence on the point) that some recompense will be reaped by the appellant in the future, but I take it that the section must be deemed to mean what it says."

(2) “Section 4(2) (ii) of the Act defines “special circumstances” which may be taken into account in the fixation of standard rent by the tribunal under section 4(2) (a). Even assuming that this Court could find that the expenditure was incurred by the landlord it seems impossible for the tribunal to have made a finding on the evidence before it as to how much of this sum of Shs. 400,000/- consisted of improvements and structural alterations and how much was spent on ordinary or necessary repairs. Had the evidence been somewhat more explicit, the Tribunal could have considered the matter in more detail. What I think happened in this assessment, and this is to some extent supported by the address of the Chairman of the Tribunal at the hearing of the appeal, is that the figure of Shs. 100,000/- was admitted as a basic figure, though with some reluctance. There after, the figure was amended to Shs. 400,000/-, and the tribunal refused to allow such figure to enter into its calculation – partly, no doubt, on the assumption that the premises did not warrant acceptance of such figure, and partly because it had nothing before it to show that the sum of Shs. 400,000/- could properly be an assessment of substantial improvements and structural alterations. In acting thus, it was certainly supported by the evidence of the witness Owen, who referred the expenditure to repairs alone; nor is there anything on the record to enable the Tribunal to ascertain on which party lay the responsibility of carrying out repairs; nor is a copy of the lapse exhibited.” (3) Appeal dismissed.

130. Ibrahim Kazi v. Emmanuel Laurian and Raymond Laurian Civ. App. 27-M-67, 22/11/68; Seaton J.

In a civil case in 1960 judgment was entered in favour of the appellant against the first respondent. The judgment – debt was not satisfied and as a result, the undivided shamba which the first and second respondent and another brother had inherited from their father was seized and sold. After the sale, the second respondent sent a sum of money to the court with a request that the sale be set aside. The primary court then made an order that the shamba be divided into three parts and that of the judgment debtor, the first respondent, be sold. The District Court held that the shamba was wrongly sold and that the auction-buyer was guilty of unreasonable delay in taking steps

o enter into possession of the shamba and that the sum owing having been paid into court, the sale should have been set aside. Appellant challenged the order.

Held: (1) “I am not convinced of the District Court’s jurisdiction to make this order. There was no evidence that the shamba was being run on a partnership basis. Even if the three brothers held undivided interests in the shamba there would be no partnership without their farming it or sharing its profits on a joint basis. However, the District Court, after the hearing of the objection, was clearly attempting to give effect to the primary court’s order that the shamba be divided into 3 parts and that of the judgment-debtor sold. Such an order appears to be reasonable and within the posers conferred by the Rules on primary courts. It is impossible to ascertain from the records available whether an application was made within 21 days as prescribed by Rule 85 of the Rules for setting aside the sale ordered by the primary court. But this Court is entitled to follow the maxim Omnia rite praesumuntur esse.” (2) “As will be noted from the provisions of the Schedule to the Magistrates courts (Limitation of Proceedings under Customary Law) Rules 1964, Ibrahim

has a 12 year period from the date of the decision or order of the primary court in Katerero Civil Case No. 66 of 1960 in which to enforce such order or decision. It is after the expiry of such period that his delay may be deemed unreasonable and proceedings in execution will be barred.” (3) “In all the circumstances of this case, I am of the view that, even if the District Court acted ultra vires, no injustice has been occasioned thereby. I would accordingly uphold its order with the clarification that the sale of the shamba be set aside and Ibrahim be at liberty to apply, as provided by the rules, for enforcement of the Primary Court’s order for sale of the judgment-debtor’s shamba and payment thereafter to him of the decretal amount (including any interest or cost, if such has been provided by the decree).” (4) Appeal dismissed.

131. Empire Electronics Limited v. Lane Printing Works Limited. Civ. Case 2-M-62; 31/1/70; Seaton J.

This was an action for trespass to goods. The plaintiff company claimed that its goods were unlawfully seized by the defendant as a result of which it was unable to carry on its electrical business thereby allegedly suffering damages totaling Shs. 63,107/24 being the value of goods and loss of profits. The defendant admitted having seized the goods but claimed that this was done lawfully by a receiver appointed under powers contained in a debenture executed by the plaintiff company in favour of the defendant and duly registered as a charge. It appeared that just a few days before the appointment of the receiver (one M.S. Shah, who was a partner in a firm of court brokers) warrants for attachment and sale of the plaintiff's goods had been issued in civil cases Nos. 131 and 158/10, to the said firm of court brokers. In original plaint Mr. Shah had in fact been joined as a second defendant but a preliminary objection having been taken, the suit against him was dismissed on the ground that it was time barred, the cause of action being tortuous and not contractual. The agreed issues in the present case were: - "(1) was the defendant indebted to the plaintiff in the sum of Shs. 5,624/30 acts. Or any amount on the 3rd May, 1960 when the defendant appointed Mr. Shs, i.e. the former second defendant as receiver? (2) Even if the defendant was indebted to the plaintiff on 3rd May, 1969, was the appointment of the receiver lawful? (3) If the answer to the first question is "Yes" to what relief is the plaintiff entitled to against the defendant?"

Held: (1) As regards the state of accounts between the parties, the court after reviewing all the evidence found that the defendant was indebted to the plaintiff in the sum of Shs. 1,641/80 by 3rd May, 1960. (2) "Learned advocate for the defendant has submitted that even if the plaintiff was owed some money by the defendant, so long as the debenture was subsisting and an amount owing there under, the appointment of a receiver was lawful. The instrument creating the debenture must be looked at to see under what a circumstance was to be exercised the power of appointing a receiver". [The court quoted relevant clauses of the debenture and continued]. "As a consequence of these clauses, the debenture created a floating charge upon the plaintiff's asset and so long as the security floated, the plaintiff was free to carry on its business. One of the events which would stop the charge floating and cause it to crystallize was the issue of distress or execution against the company which was unpaid for seven days. Once this happened, the principal moneys became immediately payable and the defendant was

entitled to exercise the power of appointing a receiver. I do not find this power to protect its security was

to be lost to the defendant company because it owed the plaintiff company the sum of Shs. 1,641/80". "Learned advocate for the plaintiff has submitted that even if the defendant was entitled to appoint a receiver and manager, he had no power to appoint a receiver alone. With respect, I do not consider this a necessary interpretation of the provisions of the debenture. If the powers granted were less than those which might have been given, I would only consider this an inhibiting factor upon the receiver's activities. This alone would not be an invalidating factor. There is Exhibit "T" dated 2nd May, 1960 to indicate that the defendant had by writing appointed Mr. Shah a receiver of the plaintiff's property as required by the debenture. Exhibit T set out the powers which Mr. Shah would have and there is noting in evidence indicating the plaintiff objected that the appointment was invalid. Was there then anything to prevent Mr. M.S. Shah from acting in relation to the plaintiff's business as a receiver would." (3) "Learned advocate for the plaintiff submitted that the court should refer to the books of equity to ascertain whether the receiver's appointment was valid. On the other hand, learned advocate for the defendant submitted that however wrongful or anomalous may have been Mr. M. S. Shah's conduct, I could not affect the validity of his appointment as receiver. In my view, the position of Mr. Shah in attempting to wear the two hats of receiver and court broker was so inconsistent with his fiduciary duties that his acts as receiver were affected by the conflict of interest between Mr. Shah's two positions. The inability of Mr. Shah to separate his dual capacities tainted the appointment. He evidence is not conclusive on the point whether Mr. Shah could have in his capacity as receiver obtained better prices for sale of the plaintiff's goods which were new at the time. But in my view it does not follow that the appointment of the receiver was wrongful even if Mr. Shah's conduct may have been. I therefore answer the second issue in the affirmative." (4) "As relief, evidence established that the plaintiff company was in financial difficulties from as early as 6th November, 1959, when it was obliged to seek a

loan of Shs. 10,000/- secured by the debenture and these difficulties continued up to May, 1960, when the receiver was appointed. It was also established that Mr. Shah had not delivered abstract of receipts and payments to the Registrant of Companies as required by Section 290 of the Ordinance; that he was in India for last few years and it was not known whether he will return. The plaintiff said that the receiver had "run away with all his books of account and other documents". "Even if this were so, would such act or default of the receiver assist the plaintiff in his claim against the defendant? One must look to the terms of appointment of the receiver as well as the provisions of the debenture. In my view, the defendant's responsibility for the acts or default of a properly appointed receiver is excluded by the provisions in the debenture that the receiver "shall be the agent of the Company", i.e. of the plaintiff. It is precisely to avoid such liability that these words are included in a debenture. Although it is a frequent practice also to include a provision that "the company shall be solely responsible for the acts or defaults of the receiver", it seems to me that even without such additional words, the result is the same." "The Conveyancing Act, 1881 (44 and 45 Vict. C. 41), section 24(2) provided that receiver is deemed to be the agent of the mortgagor, and the mortgagor is solely responsible for his acts or defaults, unless the mortgage deed otherwise provides. This provision has been replaced in England

by the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 109(2); it is in conformity with the 1881 statute that the jurisdiction of this Court must be exercised, under s. 2(2) of the Judicature and Application of Laws Ordinance, Cap. 453. But the provisions of both statutes are similar in this respect. In Central London Electricity Ltd. v. Berners and others [1945] 1 Gel E. 160, the question had to be decided whose agent was a receiver and manager appointed by a debenture holder. The debenture holder relied on a clause of the debenture which stipulated that receiver and manager should be the gent of the company and he relied further on the Law of Property Act, 1925, s. 109. Hallett J. reviewed the cases in which a receiver had been held to be the agent of the company, citing inter alia Gosling v. Gaskell [1897] A. c. 575. He also cited Re Vimbos [1900] 1

Ch. 470 as an example of cases where the receiver had been held to be the agent of the debenture holders. Robinson Printing Co. Ltd. v. Chic Ltd. [1905]2 Ch. 123 was referred to in which Warrington, J. suggested that for some purposes a receiver may be the agent of the company and for other purposes the agent of the debenture holders. Finally, Hallett, J. reiterated what he though was well-known, or certainly ought to known – that whether a receiver is the agent of the company or is the agent of the debenture holders depends upon the terms of his appointment and more particularly upon the terms of the debenture. In the case before him, Hallett, J. held that since by the provisions of the debenture the receivers were agents of the company, their undertaking to pay outstanding and future charges did not amount to a warranty of authority to bind the debenture holder personally.

In the present case, it may be that the receiver was in breach of his duties, statutory, fiduciary or otherwise. Even so, this Court is precluded from giving a remedy against him in this suit, from which he has already been dismissed. It may be desirable to state that had I to give a remedy for the trespass to the plaintiff's goods, I would have awarded Shs. 10,000/- general damages, being in my view the amount lost y the goods being sold by court brokers: no special damages for loss of profits as the plaintiff has not proved at the time he was carrying on a profitable business. It does not appear that Mr. M. S. Shah has rendered any account to the Registrar of Companies as required by s. 290 of the Companies Ordinance ….. "It would seem that the defendant company is entitled to an account from Mr. M. S. Shah as receiver, vide Leicester Permanent Building Society v. Butt, [1943]2 All E. R. 523. Where the receiver is the agent of he mortgagor, he is prima facie liable to account to the mortgagor as his principal but anyone injured by the non-performance of a statutory duty being a person for whose benefit and protection the duty is imposed is generally entitled to bring an action in respect of the breach." "It might be that Mr. M. S. Shah as receiver still retains some of the moneys received by him which he was bound, after discharge of the principal money due to the defendant and in payment of all other legitimate expenses, to pay as residue to he plaintiff. If this is so, the plaintiff's rights should be enforced by application to the court for the granting for an order for an account. No such relief has been sought

and I desire to say nothing further concerning it because to do so is not relevant for the purpose of this case." (5) Claim dismissed.

132. Zalkha bint Mohamed v. Juma Mazige Civ. App. 262-M-69; 20/1/70;
The respondent (original plaintiff), was an African resident of Nansio, Ukerewe District. The appellant, an Arab woman was of the same area. The plaintiff was in possession of house No. 45

on an unsurveyed plot at Nasio until June, 1966 when the defendant got an eviction order in her favour against one Salum Mazige Malima and obtained possession of the property. Where upon the plaintiff claimed a declaration that he is the owner of the house No. 45 and Shs. 1,000/- damages for wrongful eviction. The defendant claimed that she had purchased the house at an auction sale in pursuance of an order in civil case No. 426 of 1957 and that she had obtained judgment and order for vacant possession in civil case No. 432 of 1965; that the plaintiff never claimed ownership of the plot in the aforesaid cases and therefore was estopped from doing so. The defendant also pleaded res judicata in the alternative. At the trial the following issues were agreed: - "(1) was the Plaintiff owner of he unsurveyed plot No. 45 situated at Nansio Ukerewe – during the month of June, 1966? (2) If so was the said property on Plot 45 sold in execution of decree in Civil Case Number 426/57 between Lake Motors Limited decree holders – and Salkha Mazige? (3) If the said property was sold was the defendant the auction purchaser in the Civil Case of 426/57? (4) If so was it done in pursuance to a Court order in the said Civil Case 432/651 (5) Is the Plaintiff stopped in law to claim the ownership now? (6) Who were the owners of the said plot in 1966? (7) What are the reliefs that the parties are entitled to?" "The trial court found that the sale of the disputed house was completed on 16th April, 1963 and that he plaintiff should, under Article 11 A of the Law of Limitation Act, have filed objection within a year. The trial court alternatively found that according to the Code of Civil Procedure, the sale became absolute after the approved bidder paid the last installment. The trial court

noted that the disputed property the subject matter of the suit had been sold by the defendant to a third party and commented that such circumstances "make a court of law decline to reverse the first sale as it would no longer be possible to attain restitution itegrum." Thus the trial court impliedly resolved all issues except the last in favour of the defendant. However, it went on the decide the case against the defendant on the ground that the auction sale of 16th April, 1963 was invalid because it was a disposition of land from a native to anon-native which b virtue of S. 11 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 144) required a written consent of the "Governor/President/Commissioner for Lands." Such consent had not been obtained, hence the auction sale was a nullity and the house should revert to "whosever owned it before the sale." On appeal it was submitted by the appellant that it was wrong for the trial court to decided the case upon an issue not raised by the pleadings, that the suit was barred by limitation, that it was ultra vires to go behind the lawfully executed decree in Civil Case No. 426 of 1957 and that even so, the defendant was a native within s. 11 of Cap. 114. The respondent supported the trial court's judgment and urged that the plaintiff had been too young to bring the present suit earlier and would have no locus standi in court.

Held: (1) "The relevant rules in this case are those set out in the Indian Code of Civil Procedure of 1908, which was Civil Case Nos. 426 of 1957 and 432 of 1965, as well as at the institution of the present suit. (Hereinafter it will be referred to as "the Code"). According to 0.6, r. 2 of the Code, every pleading should contain the material facts on which the party relies for his claim or defence. It is explained in Mulla's commentary on the Code, that the whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what is the real point to be

discussed and decided (Mulla, 3rd ed. p. 397). In the Kenya case of S. H. Shah v. C.H. Patel and others (1961) E. A. 397, a point of defence not pleaded was raised for the first time in defence counsel's closing speech. On this point it was held by the Court of appeal that it was for the appellant (i.e. the original first defendant), as the person primarily liable on the bill or note, to plead that if had been endorsed away by the respondents so that the appellants was liable on it to other parties; if he had raised the matter when he should have raised it, there would have been an opportunity for the plaintiffs to call evidence to show, if this was the fact, that they were in a position, when the suit was commenced to hand back the respondent's promissory notes on payment of the amounts found due; it was too late to rely on it in a final address when the evidence had been closed. The afore-mentioned case was decided on the basis of O.VI r. 5 of the Kenya Civil Procedure (Revised) Rules, 1948, the text of which has not been available to this Court. Nevertheless in support of the decision, Sir, Kenneth O'Connor, President of the Court of Appeal also cited Price, v. Price, 153 E. r. 1174 and Bullen & Leake's Precedents of Pleadings (11th ed.) at p. 762 on the English rules of pleading, on which both the Indian Code of Civil Procedure and the Kenya Civil Procedure Rules are substantially based. I have no doubt that the principle of s. N. Shah v. C.M. Patel is equally valid in this country and that it would have been wrong for the trial court to raise a new issue of its own initiative in the judgment, as the defendant would thereby have been deprived of an opportunity to call evidence in rebuttal of this point. However, with respect, I am of the view that this issue was raised by the pleadings and the court was bound under s. 59 of the Evidence Act, to take judicial notice of all relevant statutes in force, whether or not they had been referred to during the trial ….." (2) As regards whether the defendant was a native the court quoted s. 11 of Cap. 114 and continued: "The learned Resident Magistrate appeared to consider it self-evident that an Arab is a non-native. This matter is not quite so simple and clear although it is less difficult than before, when there were in force two statutes with differing definitions of the word "native". It appears that the question arose for decision in Yahya bin Mohamed vs. Magambeka bin Sinde (1932) IT. L. R. 474. Bates, Ag. J., held that approval of a transaction creating a debt payable by a native within the meaning of the Credit to Natives (Restriction) Ordinance (Cap. 75 of the Revised Edition of the Laws) to an Arab,

given by an administrative officer subsequently to that transaction cannot operate to render recoverable by the lender any interest on the debt accumulated before the giving of that approval. In his judgment, Bates Ag. J. noted that he plaintiff was an Arab and the defendant was a native of the Wazaramo tribe, there had been an admission by plaintiff's advocate that the plaintiff was a non-native for the purpose of the case; it was therefore unnecessary for Bates Ag. J. to concern himself with any question as to the non-applicability or otherwise of the provisions of s. 11 of what was then Chapter 67 of the revised Edition of the Laws and is now Cap. 114. I would add that s. 2 of the Credit to Natives (Restriction) Ordinance, 1931, contained the following definition; "2. In this Ordinance, the expression 'native' means any member of any African race, and includes a Swahili, but does not include a Somali or an Abyssinian". The question arose again before the High Court in Mohamed Raza Suleman and another vs. Sheikh Abdullah bin Suleiman bin Hamed el Harthi and another, (1950) IT. L. R. 547. Sinclair, Ag. C. J. (as he then was) held that Arab in s. 11(8) of the Land (Law of Property and Conveyancing) Ordinance includes all Arabs whatever their

origin. Hence it was ruled that an agreement of sale by the plaintiffs, who were British merchants carrying on business in Dar es Salaam, to the deceased, who was a distinguished Arab resident of Zanzibar, required the approval of the Governor." …….. "I would also refer to Ibrahim Ismail Hasham v. Nasser bin Salim Saad El-Harthi and others (19555) 2 T.L.R. 220. The plaintiff was an Indian merchant of Tabora; the defendants were eight members of a well-known Arab family established in Zanzibar and Dar es Salaam but the first defendant's mother was a Uganda African. By his amended defence, t was pleaded that money lent by the plaintiff to the first defendant was irrecoverable as he was a "native" for the purpose of the Credit to Natives (Restriction Ordinance. Law, Ag. J. held that in deciding whether a defendant is a "native the court must look to the facts of each case; no general principle can be laid down ……. "The Ordinance, Cap. 75, was repealed in 1961. Cap. 114 have survived since 1923, shortly after the Mandate began. Learned counsel for the plaintiff has

argued that the intention of the Legislature in enacting Cap. 114 were that land should not be sold by native Africans to “people who do not belong to this country.” The difficulty with this submission is that in the present case, the defendant had no opportunity of showing whether or not she is one of those who “belong” to this Country. It is not known if she is a “pure” or “mixed” Arab, as those terms are sometimes used. Nor is it known whether she locks like, lives like or holds herself out to be an Arab – because the point was raised after the evidence was closed. In any event, it seems to me that on the authority of Mohamed raza suleman Versi vs. Sheikh Abdullah etc. (above-cited) all Arabs are natives for the purposes of Cap. 114. As the defendant testified that she was an Arab and this was not disputed, I am of the view that it was erroneous for the learned Resident Magistrate to hold that the disposition of land to he by the plaintiff was invalid without the requisite consent under s. 11 of Cap. 114.” (3) on limitation issue the court stated: “From a perusal of the record and “Exh. E”, it appears that an order was made in Civil Case No. 432 of 1965 against Salum Mazige Malima upon an application by the present defendant for possession on the premises being Plot No. 45 at Nanio, Ukerewe. It is clear that Salum would therefore, be bound by Art 11A of the Law of Limitation from bringing a suit such as the present. But Salum is not the plaintiff in the present case; his son Juma is. Juma had denied in his Reply to the Written Statement of Defence, that he was in any way connected with the previous cases, Nos. 426 of 1957 and 432 for 1965, but on this matter the learned resident Magistrate found against him and I have no doubt that the property attached and sold in the previous civil Case No. 426 of 1957 and the subject of eviction order under 0.21, r. 35 of the code in Civil Case No. 432 of 1965 is the same as the subject-matter of the present suit. Juma also submitted that he was not a party to “the objection proceedings. it does not appear exactly when these “objection proceedings were brought; the evidence in the present case of Nyamo Mture, the Plaintiff’s grandmother, P.W. 1, is that it was sometime in 1964 ….. “It would appear that Nyamo Mture was the objector in proceedings contemplated in 0.21, r. r. 99-103 of the Code; as to the year in which objection proceedings were instituted by her, it may have been 1963 instead of 1964, because “Exh. C” shows the auction was held on 16th April, 1963, and the certificate of sale was issued by the court on 5th June, 1964. In any event, any suit brought by

Nyamo Mture to establish he right to the property under 0.21, r. 63 of the Code would be barred under Art. 11 of the Law of Limitation unless instituted within a year of 1964. According to Rustomji's

commentary to the Law of Limitation, Art. 11 does not apply as against a person who was not a party to the proceedings in which the order sought to be set aside was made. However, Rustomji adds – "Where the summary order (contemplated by 0.21, r. 63 and r. 103) is not over-ruled in a regular suit brought within a year, it becomes conclusive and binding on all persons who were parties to it, and also on their successors in title, and they are thereafter precluded from asserting their rights ….." (See Rustomji, the Law of Limitation (1922) pp. 251 – 252). If the plaintiff were the successor in title of Nyamo Mture, P.W. 1, as the later claimed in her evidence, it would seem that the plaintiff also would be time-barred under Art. 11 of the Law of Limitation. But the learned Resident Magistrate disbelieved Nyamo Nture, P.W.1, and found that the house belonged to Salum Mazige, her son, and not to the plaintiff, her grandson. From a perusal of the record, it appears there was ample justification for this finding, including the absence of eye-witnesses to documentary evidence of title or of transfer; and the vagueness of Nyamo Nture, P.W. 1, and Slum Mazige, P.W. 3, as to the date of the alleged transfer to the plaintiff. The submission regarding the plaintiff's minority as justifying enlarging the time limitation does not therefore apply." (4) "I have no doubt that the learned Resident Magistrate was correct in holding that the sale to the defendant became absolute from the date of the auction sale on 16th April, 1963, objection proceedings having been unsuccessful. As there was a legally transfer it by sale to a third party as she has done. The plaintiff, not being the owner of the house on Plot No. 45, Nansio, was entitled neither to a declaration nor to damages for eviction as claimed." (5) Appeal dismissed.

133. Motokov. V. Auto Garage Ltd. and Others Civ. Case 46-D-66; 15/9/69; Georges, C. J.

The plaintiff sued the defendants for the sums due under Bills of Exchange drawn by the plaintiff on the first defendant and accepted by it. The second and third defendants had guaranteed the bills in consideration of the plaintiff's supplying motor vehicles to the first defendant. The defence alleged that the first defendant had been induced to enter into the contract because of some fraudulent is representations made by the plaintiff, and by reason thereof the former had suffered damages. In a counter-claim a sum of Shs. 225,670/- with interest was claimed as damages. The plaintiff filed a summons asking for further and better particulars of the written statement of defence, and in January 1967 obtained an order therefore. Two years later, in February 1969, the plaintiff applied to have a counterclaim by the defence stayed o the ground that the issues raised by the counterclaim ought to be referred to arbitration as stipulated in the contract. The arbitration clause red; as follows: arbitration clause read: "All disputes arising out of this contract will be settled amicably. In default of such settlement, the said disputes will be finally settled under the Rules of the Court of Arbitration of the Chamber of Commerce of Czechoslavakia by one/three arbitrator/arbitrators appointed in accordance with these Rules. The parties to the contract undertake at the same time to execute, without delay, the arbitrator's award." The defence objected to the grant of a stay on the grounds (a) that the arbitration clause was void against public policy as it ousted the jurisdiction of the court; and (b) that within the meaning of section 6 of the Arbitration Ordinance Cap. 15 the plaintiff had taken a "step in the proceedings", and was therefore debarred from asking for a stay. .

Held: (1) Even if there had been a submission to a foreign arbitrator that could not of itself constitute an ouster of the jurisdiction of the Court. Consequently the clause under consideration was perfectly valid. (2) Any application to a court for an order in respect of the proceedings is a step in the proceedings" within the meaning of section 6 of the Arbitration Ordinance Cap. 15. However, the plaintiff had taken the "step" in relation to the defence, and therefore was not barred from asking for a stay in relation to the counterclaim. (3) The plaintiff had not repudiated the contract by not suing under it

because he was the holder of Bills of exchange in respect of which he could sue as well, and consequently he was entitled to plead arbitration clause. (4) “One matter remains for discussion. Section 6 gives the Court the power to grant a stay if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. Mr. Lakha argues that this places the onus on therespondent – that prima facie once the conditions earlier specified are shown to exist it is up to the respondent to show why the stay should not be granted. He urges that the affidavit filed by the respondent discloses no such ground and that accordingly he should have his stay. I do not think the Court is limited strictly to the points set out in the respondent’s affidavit. The proceedings in their entirety are before the court and perusing them, the court is to decide whether or no it is satisfied that the power should not be exercised. The plaintiff has chosen to sue in this Court instead of pursuing arbitration under the agreement which was equally open to him. The defence raises issues of misrepresentation and breach of warranty which form the foundation of the counterclaim. If a stay is not granted there is a substantial risk that two tribunals might reach conflicting conclusions on the facts. The Courts here may hold that the defence of breach of warranty and misrepresentation were established and reject or reduce the plaintiff’s claim while the arbitrators appointed to deal with the matters raised in the counterclaim may hold that misrepresentation and breach of warranty had not been established. The possibility of conflicting decision of fact being reached by different tribunals is a legitimate factor to be taken into consideration in deciding whether a stay should be granted or not. The defences and the counterclaim are so inextricably mixed that it is obviously more convenient to have both of them decided together in one set of proceedings in a forum selected by the plaintiff despite the availability of arbitration. (5) “When there is added to this the long delay of almost two years in making this application I am satisfied that even if the plaintiff is ready and willing to have the matters raised in the counterclaim decided by arbitration a stay should be granted in this case.”

134. Sheik Ahmed El Haj v. Abdulla Saheh Salim Dhiyebi Atwo Salim Dhiyebi and Fatma Ali Salim Dhiyebi Civ. Case 46-D-68 20/2/69; Hamlyn J.

The plaintiff, a widow, sought to recover Shs. 68,000/- and interest hereon by her share of her deceased husband's estate and she claimed in the alternative an order for the distribution of the estate in favour of the beneficiaries. The case proceeded against the second defendant, the administrating of the estate, the plaintiff having reached an agreement with the other defendants. The plaintiff's case was based upon certain documents. In one of these she renounced he rights in the estate in subject to certain cash payments being made and the transfer of a plot of land with a house thereon. Another was an agreement between deceased and second

and third defendants in which a clause admitted that a sum of Shs. 78,000/- was owed to the plaintiff by the estate. The defendant objected to the production of these documents on the ground that no consent had been given to them by the Land Office in accordance with regulation 3 of the Land Regulations 1948 as amended by the Land (Amendment) Regulations 1960. It was not disputed that the land involved in the documents was rights of occupancy and a disposition thereof needed the consent of the Land Office to be operative.

Held: (1) "I was referred by learned counsel to T. H. Patel v. R. Lawrenson and another, 2 T. L. R. 309. That was a case in which the appellant entered into an agreement for the purchase form the first respondent of a piece of land held under a right occupancy. A deposit was paid the balance of the purchase-price being payable when the Governor's approval was given. No approval was obtained nor was the balance paid and the vendor thereafter sold the land to a third party. The court held that the whole agreement was inoperative, no approval having been obtained from the Governor. A similar decision was given by the court in Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and another, (1960) E.A. 1043. It is not disputed by learned counsel for the plaintiff that the plots concerned are rights of occupancy, though he contends that it is the duty of the other party to see that consent has been obtained. I

am not guite sure what this argument is intended to convey, but it seems clear that where consent is an essential and is not obtained; the document concerned simply fails to effect anything and is inoperative. It matters not which of the parties had a duty to obtain consent, for the court will look at the facts and will refuse to move where such consent is not shown upon the fact of the document; neither party can remove such disability by merely blaming the other. That may or may not found a claim different from the present case." (2) Preliminary points upheld.

135. Kanti Printing Works v. Tanga District Council Civ Case 44-D-69 Marh 1970; Mustafa J.

The plaintiff firm filed an action against the defendant council for Shs. 23,756/75 being payment for medical cards sold and supplied to the defendant Council. The plaintiff firm supplied the cards at the oral request of an Executive Officer, of the defendant Council. When the cards were supplied, the defendant refused to accept them on the ground that they had not been ordered officially and plaintiff could not produce a written order or a local purchase order. The plaintiff got a local purchase order from the defendant after the defendant had refused to accept the cards but did not produce it to the defendants when demanding payment. The main issues which the court decided were: (1) Whether the plaintiff delivered to the defendant and the defendants accepted the cards, (2) Whether the suit was premature or maintainable.

Held: (1) "It cannot be said that the plaintiff firm did not know that the reason that defendant Council would not pay or accept thee was a contract was because of the lack of a written order or a local purchase order. Ramesh Patel himself has admitted that the Council only makes payment when the invoice is accompanied by a Local purchase order is produced; the defendant Council cannot make payment. The non-production by the plaintiff firm of a local purchase order which it alleges it received is inexplicable. In

the circumstances it is quite possible that the local purchase order allegedly received by the plaintiff firm may have been a fake, or a blank or may have been a local purchase

order referring to another transaction. If it was a genuine one referring to this matter, I can see no reason why it was not produced to the defendant Council prior to August 1969, especially as Ramesh Patel has said he had the local purchase order with him since December 1967. There has been no evidence at all of the contents of the said local purchase order, nor is there evidence as to who had signed the local purchase order, assuming it was signed, nor that the signatory, if any, was an authorized person who could sign a local purchase order for the defendant Council. I therefore find on the evidence that it was likely that the plaintiff firm had received some sort of local purchase order, but there is no evidence as to what the contents of the local purchase order were, nor is there evidence that the local purchase order was signed by an authorized person. In the circumstances, I am of the view that the plaintiff firm has failed to prove that the defendant Council had issued a local purchase order in respect of this particular transaction for the printing of 100,000 cards. I have already said that there was no acceptance by the Council of the cards when they were sent to the Council by the plaintiff firm, and the plaintiff firm has failed to prove that the defendant Council had issued a local purchase order in respect of this particular transaction for the printing of 100,000 cards. I have already said that there was no acceptance by the Council of the cards when they were sent to the council by the plaintiff firm, and the plaintiff firm has also been unable to produce a note or memorandum in writing of the contract signed by the party to be charged or by his agent in his behalf in terms of section 6 of the Sale of Goods Ordinance, Cap. 214 of the Laws. Ramesh Patel has said he agreed with the District Council orally through Mr. Kasambala for the printing of the 100,000 cards at the agreed price of Shs. 21,000/- he also alleged such oral contract was confirmed in writing by a local purchase order from the defendant Council. The defendant Council has denied that such a contract was officially entered into with the Council and insisted on the plaintiff firm producing a written order or a local purchase order to that effect. The plaintiff firm has failed to produce any written order or local purchase order, and in the circumstances, I am of the view that the plaintiff firm has failed to prove on a balance of probabilities there was a contract or an enforceable contract." (2) "The Council has stated that in any event the suit is not maintainable in terms for section 152(1) of the Local Government Ordinance, Cap. 333 of the Laws. Section 152(1) reads – "No suit

shall be commenced against an authority until one month at least after written notice of intention to commence the same has been served on the authority by the intending plaintiff or his agent." Here, the statutory notice was dated 14th March, 1969, and sent by the plaintiff's advocate to the Council on the same day. The Council received this notice on the 17th March, 1969. The suit was filed on the 16th April, 1969. The month mentioned in section 152(1) referred to above must mean a calendar month – see section 2 of the Interpretation and General Causes Ordinance, Cap. 1 of the Laws. A calendar month will be calculated from any day of the month to the corresponding day of the succeeding month – see Cheleta Coffee Plantations Ltd. v. Eric Nehlson (1966) V.A. 203 at 205. It is true that in the plaint, it was alleged that notice of intention to sue was given to the defendant on the 14th March, 1969, and this allegation was not denied or traversed by the defence. I therefore agree that it is accepted by the defence that notice of intention to sue was given by the plaintiff on the 14th March, 1969. But there is evidence that the defendant Council was served on the 17th March, 1969, and in terms of the provisions of section 152(1) of Cap. 333, no suit shall be commenced against an authority until one month at least after written notice of intention to commence the same has been served upon the authority. So the earliest date the case could have been commenced against the

defendant Council would have been the 17th April, 1969 (the Council was served on 17th March, 1969) not taking into account the computation period, whereas the suit was filed on the 16th April, 1969. in my view, therefore, the plaint was premature and is not maintainable in the circumstances." (3) Suit dismissed.

136. Khatram v. The New India Assurance Co. Ltd. Civ. Case 34-A-68; 24/1/70; Platt j.
It was agreed in a commercial vehicle policy of insurance agreement between plaintiff and defendant that all differences arising out of the policy would be referred to the decision of an Arbitrator to be appointed by the parties. By the same agreement, any claim against the defendant Insurance Company had to be referred to arbitration within

twelve months of the Insurance Company dis-claiming liability otherwise the claim would be deemed to have been abandoned. In an action filed by plaintiff defendant pleaded that there was no cause of action as the plaintiffs had not resorted to arbitration first. After this action had been dismissed, plaintiffs appointed an Arbitrator and informed defendants whereupon the defendants replied that the plaintiffs were no longer entitled to have recourse to the provisions of arbitration. Plaintiff brought this suit and defendants took a preliminary objection that once again plaintiffs had brought their suit prematurely without first referring to arbitration. Plaintiffs argued that by reason of its attitude towards plaintiff's claim, the defendant company had waived the condition precedent of obtaining an award and it was estopped from claiming that such an award is a condition precedent to any right of action. The Defendant's reply was that they had merely pointed out to the plaintiffs that they had no right to go to arbitration, and this did not mean that they need not go to arbitration, and that plaintiffs were not entitled to go to arbitration after having lost their first suit.

Held: (1) "What is really said by the plaintiffs is that there was no possible reason for them to go on to arbitration at all. Therefore it is contended that whatever the plaintiffs did, the defendants would simply object to any stop taken. Although it was not Mr. Vohora but Mr. Lakha who referred me to BARRETT BROS. (TAXIS) LTD. v. DAVIES (1966) 1 W.L.R. 1334. It may be that that authority was more in favour of the plaintiffs than the defendants. Lord Denning (at page 1339) made the point very clearly that he law never compels a person to do that which is useless and unnecessary. So in that case although the Insured ought to have informed the Insurers of the details of the Police investigation and legal action taken against him, the Insurers had received all this information from the Police direct. Therefore they could not complain because the Insured had not duplicated all the information which the Police had provided the. In Lord Denning's view, it would have been useless and unnecessary for the Insured to provide it. In the instant case, the situation was different, but if the defendants were saying that whatever the plaintiffs did with regard to arbitration, they could not go to arbitration at all, what use was it for the plaintiffs to have delayed the matter by trying to get an Arbitrator appointed to whom the defendants would simply object? It is this aspect of the letter of the 26th September which I think is of greatest importance. In these

circumstances I find the following comment in Russell on Arbitration 16th Ed. p. 85 of some guidance. A party will be precluded from setting up a condition precedent in an agreement if he waives his right to insist on arbitration as a condition precedent, "or if by his neglect or default, the claiming party had been unable to obtain an award in spite of taking all proper steps to do so." Several

Cases are then cited of which CIA. PANAMENA EUROPEA NAVIGATION v. LEYLAND (1947) A. C. 428 may be compared, as there a certificate was refused on a misconstruction of the contract. In the instant case, the plaintiffs were going to be met by the wrongful refusal of the defendants to appoint an Arbitrator, on a misunderstanding of the application of the provisions of the arbitration agreement to the facts. I think that was a sufficient neglect or default preventing the plaintiffs from taking further steps in obtaining an award. I would hold that on that ground, as pleaded in paragraph 11 of the plaint, that he defendants are debarred from raising any defence as to the condition precedent." (2) "On the other hand, there are the claims in paragraph 12. Lord Denning in the Barrett Bros.' Case set out his definition of what a waiver consists in, namely that if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon intending that the other should act on that belief, and he does act on it, then the first party would not afterwards be allowed to insist on the strict rights when it would be inequitable for his so to do. On looking at the letter of 26th September, there could be said to be some ambiguity as to what was actually intended. I have already set out Mr. Lakha's interpretation, but on the other hand, it was read by the plaintiffs as meaning that the defendants considered that the parties could not go to arbitration and that therefore the plaintiff could take whatever other steps they pleased. The defendants could have expressed 3rd October saying that as the defendants refused to refer the matter to arbitration, they would take legal proceedings. As fro as I am aware, there was no answer to that letter. It was said that this letter was not pleaded, but I do not consider that of any importance. When one

reads the correspondence together with paragraph 1 of the defence, one discovers that the defendants must have objected because the plaint was brought outside the period of twelve calendar months from the date that the defendants disclaimed liability. Apparently nothing else was in their minds and this view has now been abandoned, it must have seemed a strange defence to the plaintiffs', as it indeed was, and I think it not unreasonable in the circumstances, that the plaintiffs inferred that he defendants were not really interested in arbitration. The defendants certainly knew that the plaintiffs would take legal action if the defendants waived the condition, and their ambiguous letter for the 26th September clearly misled the plaintiffs into thinking that they could do so. Therefore I do not think that the defendants can now rely upon the condition, which I consider was waived by that conduct" (3) Objection overruled.

137. Joseph Mutayoba v. Marealle Civ. Rev. 1-D-70; 15/4/70 Georges, C. J.

The claim was for vacant possession of certain premises and damages for their wrongful occupation at the rate of Shs. 550/- a month from 3rd October, 1968 until deliver of possession. The defendant claimed that he was a protected tenant under the Rent Restriction Act. The resident Magistrate after having heard the plaintiff concluded that property valued at more than Shs. 28,000/- was in disposition collaterally. He ordered that the case be "withdrawn from the Resident Magistrate's Court and filed in the proper court."

Held (1) "The order is misconceived. Section 35(c) of the Magistrates' Courts Act Cap. 537 state that the jurisdiction of a District Court shall be limited – 'in proceedings for the recovery of possession of immovable property to proceedings where the value of the property does not exceed two hundred thousand shillings'. The property here does not exceed that value. The claim for damages will not exceed Shs. 20,000/- unless the determination of the case is inordinately delayed." (2) "Even if the matter is not treated as a Rent Restriction case (when the Court has jurisdiction whatever may be the value of the property – see Rent Restriction (Amendment) (No. 2) Act. Section 10) the Court

would have jurisdiction to hear it as an ordinary action for the recovery of property." (3) "In exercise of the power of revision the Magistrate's order dated 10th December, 1969 is quashed and he is directed to proceed speedily with the hearing and determination of the case".

CRIMINAL CASES

138. R. v. Giliba, Jarmo, Crim. Sass. 57-A-69; 12/2/70; Platt J.

The accused was charged with the murder of Lohay Ami. The deceased's body was not found intact, but, sometime after the deceased was reported missing, some charred bones – said to be human – and some burnt cloths were found in a pit near the deceased's house. The accused happened to be the deceased's nearest neighbour. As a result of suspicion, the accused was arrested by the Village Executive Officer and taken to the police station. While in custody, the accused made an extra-judicial statement to the Administrative Secretary, who had powers of a justice of the peace. The statement was made in a local language and translated into Kiswahili by one Musa, the boma head messenger, and subsequently recorded in English by the Administrative Secretary. At the time, Musa was also a police officer. The statement was to the effect that fifteen days before the bones were discovered on the night he had been asleep at home. He heard some one making a noise near his cattle Kraal. It was in the middle of the night and he opened his door slowly and quietly. He saw somebody lying down near his cattle. When he saw this he beat the person with a stick on the neck four times until he died. When he saw that the man was dead he took his body and put it in a ditch, covered it with firewood and set the wood alight. He had done so because he was afraid. He recognized him after his death and he confirmed that the deceased was Lohay Ami. In his defence statement he continued to admit that he killed the man but in slightly different circumstances.

Held: (1) "Having considered the authorities I held on the strength of OKITU EDEKE v. R. (1941) 8 E.A.C.A. 40 that the use of a police officer as an interpreter would not debar confession. The practice is clearly undesirable and should not be

repeated as R. v. SIDIKI KYOXO &OHERS (1943) 16 E.A.C.A. and GOP S. ONYAKI v. R. (1953) 20 E.A.C.A. 333 both show; nevertheless the authorities do not show that the confession is thereby inadmissible. On the other hand, it must still be clear that the accused was not compelled to make the confession. In the first place section 38 of the Evidence Act states that a confession made by an accused in custody in the presence of a Magistrate. Secondly It was proved that the accused and Musa did not know each other before. When Musa is on duty at the District Office he wears ordinary messenger's uniforms. It did not appear therefore that the accused could have been disturbed by the messenger's other duties. Moreover, the accused had generally repeated in his defence the same story. There seems no reason to doubt that the statement was voluntary and properly recorded." (2) "From these statements and the surrounding circumstances I am satisfied that accused killed the deceased. The defence raised the point that the medical evidence had been impossible to get and that therefore it was not clear whether the deceased had died through the beating or through burning …. But in the circumstances of this case I hope to demonstrate that whether the death was due to beating or burning is immaterial. Suppose that it was the beating which caused his death. The issues would be whether the accused intended to cause, at least, grievous harm without and lawful excuse as the prosecution contends, secondly whether he had acted reasonably in self defence, and thirdly whether it was an intermediated position arising from the excessive use of force in self defence. On this supposition the fact that the body was burnt later would have nothing to do with the case. It would be evidence of other offences. The burning would only be relevant if the death occurred in that way and then the directions in R. v. CHURCH (1965) 49 Cr. App. R. 206 would be relevant. In the absence of any other evidence to the contrary Lohay must be taken as a

trespasser, likely to carry out a theft of cattle at least. He was lying down near the cattle…… as the accused claims in his defence that he feared for his life, and that of his family or property, it seems that he must have known that some person was there to

endanger him. He made the point clear in his statement Ex. A that he knew a man was there. I find therefore that he did see a person lying down in the cattle boma and it was the presence of this person which alarmed him. He would naturally think that his cattle were in danger and he was entitled to use such reasonable force to expel Lohay or arrest him. In a trespass such as this he could justify beating Lohay to cause him to desist from taking the cattle as Lohay was in the cattle boma, but to kill him would be Manslaughter. (In Archbold 36th Ed. Para 2513). Another aspect of the case would be whether the accused used unnecessary force. It is a case very much like Yoweri Damulira v. R. (1956) 23 E.A.C.A. 501 except that in Yoweri's case he did call out as to who was there and there was some conversation during the beating. Even so the use was held to be excessive. In this case the accused simply beat the man he found near the cattle. Moreover, it seems to have been a severe assault, which the accused says caused his death. In that case I think the accused's offence would be manslaughter. He was justified in using force, but the force was excessive. On the other hand, if Lohay had merely been unconscious and then acting on a different impulse altogether, the accused tried to destroy what he thought a corpse, I would follow the view taken in CHURCH referred to above at page 214. The court held: "We adopt as sound Dr. Glanvill Williams' view …. That 'if a killing by a first act would have been manslaughter, a later destruction of a supposed corpse would also be manslaughter'" I do not think that this is a case such as YAKOBO JAMBO s/o NAMBIO (1944) 11 E.A.C.A. 97. Although that was again a case of the disposal of a living body probably thought to have been dead, in that case it was held that the first of assault was all one series of transactions with the disposal of the body, a murderous intent having persisted throughout the transaction. In the present case, I accept that the accused's intent was to safeguard his property but that he exercised unnecessary force in the execution of his plan. Then a different intent accompanied his act in destroying the body. As far as one can judge, the accused had not been activated by the intent to cause grievous harm throughout; therefore following the direction in CHURCH, I would hold that even if the death occurred during the burning, it was manslaughter only and not murder." (3) Acquitted of murder, convicted of manslaughter.

139. Andrea Otieno v. R., Crim. App. 177- A-69; 6/4/70; Platt J.

The appellant was charged and convicted of theft by servant contrary to section 271 and 265 of the Penal Code; it being alleged that as the depot Manager of Backitt & Colman (Industries) Ltd. the appellant stole goods to the value of Shs. 21, 194/09. It was not disputed that the appellant, being solely responsible for the operation of the depot, had to deep records of the stock received and sold, the money proceeds of the stock paid to bank and the physical stock. On the 25th September 1968 the Sales Director of the Company in East Africa visited the Arusha Depot and took part in the monthly check of the stock. Deficiencies were noted.

Held: "There first inquiry to be made is whether the learned Magistrate considered that the appellant had stolen the goods or misappropriated money as a result of the sale of the goods ……it appears that the appellant's fraud was to misappropriate the money proceeds of the sales of the goods and not the goods themselves. If the appellant was entitled to sell the goods

As appears to have been the case …… he cannot he cannot be said to have "stolen" the goods by selling them. He ought then to have been charged with the theft of the money which came into his hands by virtue of his employment. I cannot find any authority to alter the charge or substitute a verdict for the theft of money rather than goods……. In my view there was confusion throughout the trial as to whether the appellant was guilty of stealing the goods or the money. It appears possible that the appellant's defence was embarrassed ….. The defence is technical, but not without importance where a person had charge of another's property with authority to deal with that property. Accordingly I consider that the charge was not made out and that the appeal must succeed."

140. R. v. Halfani s/o Hamisi, Crim. Sass. 35-M-70; 12/3/70; Kimicha J.

The accused in this case Halfani s/o Hamisi has been charged with the manslaughter of one Hussein s/o Magare. The accused and the deceased lived in the same village. The deceased was married to one Ndundu d/o Masao who testified that hey were on 15th July, 1969, returning to their home from drinking pombe at one Selemani Masuka's pombe club. After they were about 400 yards from the pombe club her husband, the deceased, told her that one Mkuya had said that she had committed adultery with one Kubida. She denied the allegation. The deceased did not believe her and he started beating her. He slapped her, kicked her, beat her with a stick and pulled her ears. She did not hit back and only asked him to go back to the pombe club and verify Mkuya's allegations. The accused, Halfani Hamisi, came by and told them to stop fighting; telling them that they were drunk and those they would settle their dispute the following morning. After the quarrel had stopped the accused began fighting the deceased with this fist. He hit him on the form of his trunk. The deceased was hurt in the stomach by the accused's assaults and his stomach got swollen. He stayed at home for two days after the fight but was sent to the hospital when his condition got worse. He died at the Government Hospital. Death was due to internal haemerrhage following on a ruptured spleen. The spleen was enlarged and the rupture could have been caused by some external pressure such as a blow or a fall on a hard surface.

Held: (1) "I find the accuse guilty of the manslaughter of Hussein s/o Magare and convict him accordingly." (2) Sentence: "I take into consideration hat the accused is a first offender and that the deceased had an enlarged spleen. The other factor which has very much influenced my mind is that the accused and his family have agreed on my advice to pay consolatory compensation to the deceased's family. The accused was convicted on 11/3/70 and after his conviction I informed the accused that if he voluntarily made an arrangement with the deceased's family to pay (Kipangusa Machozi) i. e consolatory compensation I would very much consider this in passing sentence. It happened that both families were represented during the hearing of the case and they met to discuss the matter. Sentence was adjourned today in order to enable them to have ample time for consultations. The accused's family offered 16 head of cattle without hesitation. The deceased's family demanded 70 head of cattle. Then the parties referred the matter to the Court for further advice. I advised the parties that

16 head of cattle offered by the accused's family was very reasonable under the circumstances in which the deceased met his death. The deceased's family accepted the offer. A short written agreement was prepared in Kiswahili and the accused and three members of his family signed it promising to pay the cattle within three months period and three members of the deceased's family signed it acknowledging their consent to the arrangement. The

parties were informed by the Court their agreement would be filed and form part of the record and that it would be reduced into an order of the Court and therefore would be binding on them as an order of the Court. They have understood and willingly consented to this arrangement ….. It is therefore ordered that the agreement be filed in this Court and form part of the record. It is also ordered that the agreement be reduced into an order of the Court and it will henceforth be binding on the parties as an order of this Court. I have suggested this arrangement to the parties and I have now accepted it as part of the proceedings on the following considerations: - (a) that the case is in itself a typical case of manslaughter with a lot of mitigating circumstances in the manner in which the offence was committed……. (b) I would not have accepted the arrangement if it had not in the end of their discussion been willingly accepted by both parties. (c) I would not have accepted the arrangement if I had the slightest suspicion that it would create trouble between the parties. (i) In this case the accused and his family gave me the impression that their offer of 16 head of cattle was completely within their means and that they would honour it without difficulty within the three months as promised. But I would have hesitated to accept it if it appeared that there would be difficulty in honouring it or if a very long period for payment were claimed. This would have led to litigation and enmity between the parties and perhaps to further killings. (ii) I would not have accepted the arrangement were many accused involved who had varying standards of wealth and where the circumstances of the case called for equal sentences. In such instances some of the accused could prove difficult in honouring the arrangement and thus defeat the whole purpose of the whole arrangement that is

introducing a conciliatory feeling into the two families. (d) I would not have suggested or accepted the arrangement if the circumstances of the offence were such that a really deterrent sentence was called for. After taking all the above facts into consideration the accused is sentenced to six months imprisonment only."

141. R. v. Severine Tarasio, Crim. Rev. 21-D-70; Georges, C. J.

The accused was convicted by a magistrate of contempt of court under summary proceedings. The record read: "Court: In this present circumstances the court clerk having been aware that his case was to be heard today and having been aware that this case was to be heard today and having been informed that the witnesses present in court, he stubbornly refused the court order to produce the file because it is not on the cause list. Pros: The clerk was aware since Friday that Criminal Case No. 20/70 was supposed to be heard today although it was originally fixed to be heard on 18.3.1970. Court: his behaviour in court was contemptuous and he was still insisting not to produce this file. I them ordered the court orderly to escort the accused (the clerk now) to go and lock for the file and at the same time be charged with contempt of court. He went and took over 20 minutes trying for the hidden file and after sometime he brought the file reluctantly.

In view of this court is of the view that the court holds such behaviour and demeanour is contemptuous to court c/s 114 (1) of the Penal Code. Sentence: I therefore fine the accused Shs. 400/- or one month's jail."

Held: (1) "It is to be noted that the record contains no statement made by the accused clerk from the moment the proceedings began till the sentence was imposed. At no time was he told with what he was being charged or asked to state reasons why he should not be punished. Indeed the particular charge on which he was being punished is not mentioned until immediately before sentence is imposed. It needs no

reflection to relies that such proceedings go contrary to the most elementary rules of a fair hearing which the Court seeks to safeguard. It is distressing indeed that the magistrate should himself be the offender. Assuming that the accused took 20 minutes to bring the file might it not have been that a search was needed which took that long. Should the magistrate not have asked the accused for the reason for the delay and noted his explanation. What reliance can one place on the magistrate's opinion that he accused brought the file reluctantly when the facts on which this observation is based have not been given and any explanation which the accused might have given not called for? Again can one rely on the bald statement that the clerk "stubbornly refused the court order to produce the file in question and insisted that he cannot bring the file because it is not on the Court list" – when the actual words of the clerk have not been recorded as they could so easily have been. Had the words been recorded this Court looking at the file would have been able to form its own impression as to whether the clerk had been stubbornly resisting or whether he had merely been explaining why he had not in fact brought the file." (2) "The proceedings for contempt must be quashed. The sentence is set aside. The fine or any part thereof which has been paid must be refunded to the clerk."

142. Manubhai Patel v. R., Crim. App. 440-D-69; 20/3/1970; Georges C. J. Saidi J. and Hamlyn J.

The appellant was charged in the District Court of Dar es Salaam of theft, c./s 265 Penal Code. Particulars to count 2 read; "MANUBHAI RANCHODBHIA PATEL, on or about the 2nd of January 1965 at Dar es Salaam stole Shs. 10,123/- being the proceeds of three cheques in that total amount drawn in favour of Messrs Ntibwa Saw Mills Ltd." The evidence was that one Jeram Kara was authorized to endorse the company's cheques for deposit in the company's account. Between October 1964 and May 1965 he stole 13 cheques, endorsed them and passed them on to the appellant who deposited them in his own account. The total sum involved was about Shs. 35,000/-. It would appear that where the appellant's account

Showed that more than one cheque had been deposited on a particular day he was charged with stealing the sum total of all the cheques deposited on that day. The appellant did not cash any of the cheques in the sense of obtaining money to the amounts stated on them. They were merely deposited in his account and it may reasonably be presumed that he would have been able to draw from this account as he wished.

Held: (1) The proceeds of the cheques refer to the money which would be obtained if these documents had been converted into cash. They cannot refer to the documents themselves. “It is clear that when the appellant deposited the stolen cheques in the bank, the money which they represented became the bank’s money. Of course as a result of this deposit the appellant’s credit with the bank would improve, either by increasing the amount standing to his account there or lessening his debt if he was in overdraft. The fact is, however, that he never received money for the cheques but merely credit. He could not, therefore, be said to have stolen the money which the cheques represented, although he got the benefit of the credits they produced in the banks books. These principles cannot we think, be questioned and once they are accepted it is of great importance in a case of this sort to make sure that the accused is charged with theft of the article which he has in fact stolen.” (2) “The question is whether or not the appellant should be convicted on this form of count if indeed what he stole was a cheque and not the proceeds of the cheque. In this matter we are bound by authority. In the case of Menzour Ahmed v. R. 1957 EAR page 386 the Court of Appeal held that the words “the sum of Shs. 3,000/-“ used in the particulars of a count for theft, sufficiently described a valid cheque for that amount. In that case the appellant, an advocate, had received a cheque for Shs. 3,000/- on behalf of a client. He had endorsed the cheque over to a commercial concern whom he owed money, thereby obtaining credit for the value of the cheque. At page 388 the judgment reads as follows: - “In our opinion the evidence could not support the conviction for stealing the proceeds of the cheque. This was conceded by Mr. Webber for the Grown. Although the appellant received credit for the amount on the cheque, he did not convert it into money by cashing it and no money as distinct from the cheque itself ever came into his

possession. There must be an actual receipt of money before there can be a conversion of it." This statement of the law is exactly applicable to the facts of this case. The appellant here did not at any stage receive money for the cheques. All he did was to obtain credit in account at the bank. He could not, therefore, be said to have stolen the proceeds of the cheques. This passage from the case of Menzour Ahmed makes it clear that a cheque and the proceeds of a cheque are two separate things, and that if one is charged of the theft of the of the, one may not, without amendment, be convicted of the theft there …… [it is] abundantly clear that he proceeds of a cheque are quite different from the cheque itself, and since the appellant on the evidence in this case could only have stolen he cheques and not the proceeds the convictions cannot be supported." (3) "A number of arguments have been advanced on the issue of case stated. The whole procedure has now been repealed in Tanganyika and no disrespect is intended of the argument advanced by counsel for the appellant, if we do not examine them in detail in this judgment. The difficulties which arise under this form of procedure will no longer be possible since the State is now permitted to appeal directly just as any other

Litigant." (4) "Had the applicant been charged with receiving the cheques themselves, knowing them to have been stolen, it would have been possible to decide this case on its merits without being bogged in the arguments which have necessitated three appearances in this court." (5) "Accordingly this appeal is allowed."

143. R. v. Shilinde Mathew Crim. Sass. 12-5-70; 6/2/70; Seaton J.

Accused on 25/8/69 left his home for Malungulu in search of a job. He left behind in his house decease who was his concubine with whom he stayed for $4^1/_2$ years with one son. Accused returned on the right of 4/9/69 at about 10 P.M. He knocked at the front door of his house but there was no reply. Then he heard his wife say from inside "To-day we are down for it." Accused then heard some sound as if the rear door was being opened. He went around and saw a man coming out of the house through the rear door. The man was running away. Accused chased the man and struck him on the head with

a piece of wood which he had picked up three times. Accused was arrested and charged with grievous bodily harm. Deceased was taken to Kahama Government Hospital where he died few hours after his admission. Post-mortem examination of deceased revealed that the skull had a compound fracture and there were multiple bone fractures. Death was due to the wounds on deceased's head. After deceased's death accused was charged with murder and has been in custody since his arrest.

Held: "It seems that where the parties have lived together as husband and wife, though not regularly married, the defence of provocation may in Kenya be relied upon in the case of homicide to reduce what might otherwise have been murder to manslaughter and in KALUME WA TUIN v. R. (1954) 21 E.A.C.A. 201, where a man found his mistress of two years in flagrante delecto, he was sentenced to two years imprisonment for killing her. In OTENDE OSEJANI v. UGANDA, 1965 E. A. 627, a man and a woman had lived together for two years as man and wife, although they were not lawfully married according to customary law because no dowry had been paid and where the man had found the woman with another man in circumstances which suggest that adultery had taken place or they were about to have sexual intercourse and killed the other man, the killing was considered manslaughter and there was a sentence of five years imprisonment. I have not been able to find any case in Tanzania of a man and woman living together but where there has been no customary law marriage in the sense that brideprice was paid, in which murder has been reduced to manslaughter. Nevertheless in the present case learned defence counsel has submitted that it would be manslaughter and learned State attorney has accepted that this is so. It seems to me that the present case is nearer to the Mganda case than the Kenya case because the accused did not meet his wife and the other man in the act of adultery but they were inside his house in circumstances which suggest that adultery may have taken place or intercourse was about to take place. I bear in mind that the accused in this case had lived with the woman of $4^1/_2$ years and there was a child born which would mean that his relationship with the woman was closer than in the Uganda case. But this deceased man was running away. Accused followed him and struck him 3 blows, 2 on the head, 1 on the legs. It is said that accused was additionally provoked by the other man throwing sand in his face in the hope of taking away his weapon which was a piece of firewood

that the accused had picked up. In all the circumstances, I think a sentence of $3^1/_2$ years imprisonment would be appropriate."

144. Wuthrich v. R., Crim. App. 106-D-70, 7/3/70; Georges C. J.

The appellant was charged with causing actual bodily harm c/s 241 of the Penal Code. When the case was first mentioned the appellant stated "It is true but he hit me and I hit him". This was correctly entered as a plea of not quality. On he new hearing date the prosecution informed the magistrate that the accused wished to change his plea and asked that the charge be read to him again. Thereupon the charge was read over and explained and the appellant is recorded as having said, "Yes, I assaulted him". This was entered as a plea of guilty. The prosecution alleged that the appellant is recorded as having said, "Yes, I assaulted him". This was entered as a plea of guilty. The prosecution alleged that he appellant had become annoyed because the complainant had come looking into the bathroom where he was bathing. The appellant pleaded provocation as an excuse for his act.

Held: (1) "Provocation cannot be a defence to a charge of assault. It can only serve to reduce a charge of murder to one of manslaughter on the basis that it negatives the malice aforethought which must be proved before a charge of murder can be established. In cases of assault, provocation can do no more than serve as a mitigating factor." (2) The defence drew my attention to the case of Wambura Kirangi v. R. (1968) H.C.D. Case 46. "I have since looked at the judgment itself. In reply to a charge of unlawfully causing grievous harm c/s225 of the Penal Code the appellant replied "I admitted to have wounded the person". Cross J. held, and I respectfully agree, that this was not an unequivocal plea ….. Not only was the plea not unequivocal in that case but he facts did not establish each ingredient of the offence. That case is clearly distinguishable from the one under consideration." (3) " ….. The sentence in this case was a first offender, 27 years of age. This appeared to be a momentary loss of temper due to a slight provocation. A year spent in prison would undoubtedly damage him." (4) "The appellant has already spent 31/2 weeks in prison. Taking this into account I shall

quash the sentence and impose instead a fine of Shs. 150/=, in default 3 weeks imprisonment with compensation in the um of Shs. 500/- to the complainant, in default distress. Otherwise the appeal is dismissed."

145. Saidi v. R. Crim. App. 44-A-69; 5/3/70; Bramble J.

This was a second appeal against an order of conviction and sentence in a case of willful and unlawful damage to property. It was alleged that he appellant ordered someone to cut down a tree which the complainant claimed as hers, without informing her. The appellant did not deny that the shamba belonged to the complainant but said that he made use of the trees on that part of the shamba every year without anyone complaining. He claimed, however that he was responsible for the distribution of his father's estate and that he shared the part of the shamba having trees with the complainant.

Held: (1) "It was clear that the appellant cut the trees in the exercise of what he genuinely considered being his right. The exercise of a right reasonably founded with respect to property cannot be the basis of a criminal charge for malicious damage unless it can be shown that the appellant did more than was reasonably necessary to enforce the right he claimed. There was no evidence that his was so …. (2) "The trial magistrate in the primary court also found that "there was nothing to show that the tree belonged to the complainant and that there was no doubt that the accused has been oppressed to be charged with this offence". I cannot see how in such circumstances he found the appellant

guilty. Neither of the lower courts properly directed itself on the facts or the law in this case and for the reasons given I must allow the appeal" "I quash the conviction, set aside the sentence and order the fine be refunded to the appellant if it has already been paid."

146. Hassani v. R. Crim. App. 813-M-1969; 15/1/70; Seaton J.

The accused was convicted on two counts:- 1st Count: House breaking c/s 294 of the Penal Code; 2nd Count; Stealing c/s 265 of the Penal Code. In his appeal he challenged the sufficiency of the evidence. From a perusal of the record, it appeared that the appellant did not cross-examine the witnesses and did not make any statement in his defence because he informed the court that he did not like his case to be heard before the Primary Court, but wished it to be heard before the District court. The District Magistrate had given directions that the case should be heard by the Primary Court notwithstanding the appellant's objections. Therefore, the Primary Court, after considering the prosecution evidence, convicted the appellant charged. It was argued that in ANDREA S/O KIMBULU v. R. reported in 1968 High Court Digest at No. 312 the same court held "that the requirements to transfer under the Magistrates Courts Act, Section 41(2) is not discretionary and if an accused person elects to be tried in the District Court, the primary court Magistrate shall transfer the case. However, the court went on the hold that the irregularities of procedure might not have been fatal to the conviction of the accused had the evidence clearly indicated that he was guilty of the offence charged." On the basis of the case quoted, it was submitted that in he present case, as the evidence was sufficient, the conviction could be upheld.

Held: (1) "The judgment in the case cited happens to be one of my own and I would, with respect, observe that my holding that the irregularities of procedure might not be fatal to the conviction of accused had the evidence clearly indicated that he was guilty of the offence charged was obiter in as much as in the case cited, the evidence was insufficient and the conviction was quashed. I have since had the opportunity of further considering this matter in Salum Issa @Maulidi Kassata vs. Republic (P.C.) Criminal Appeal No. 698 of 1969 (unreported) in which the point was raised and fully argued by the Senior State Attorney on behalf of the Republic that the requirements of section 31(2) (b) of the Magistrate's Courts Act being mandatory, failure to inform the appellant of his right to elect whether or not he wished to be tried by the Primary Court is an irregularity; and when the accused person indicates he does not wish to be tried by the Primary Court is an irregularity; and when the accuse person indicates he does not wish to be tried by the Primary Court, this aggravates the irregularity. As it was impossible to be satisfied in such circumstances that there was no failure of justice, I

held that the proceedings were a nullity and quashed Salum Issa's conviction." (2) "For similar reasons, I must hold in the present case that the proceedings ere irregular because it appears that the magistrate did not inform the accused of his right to elect to be tried by the District Court. Certainly, the accused unless so informed would be unable to know whether the offence carried the sentence or more that 12 months imprisonment, such offences being those which under section 41(2) (b) of the Act. The Primary Court has no jurisdiction to try against the accused's wish. The conviction is accordingly quashed, and the sentence set aside. The appellant is to be tried de novo before a court of competent jurisdiction and before another magistrate than the one who tried him in this case". (3) "Retrial ordered".

147. R. v. Kayanda. Crim. Sass. 268-B-69; 9/1/1970; Bramble J.

The accused was charged with murder c/s 196 of the Penal Code. The house of the father of the accused was broken into a Shs. 2,000/- and other things were stolen. The father of the accused spoke to him and he went to look for the thief. The prosecution's main witness testified that the accused met the deceased in a road with a hand-bag. He told him that he suspected his hand-bag and the deceased asked the accused whether he had lost anything. After reaching near a bush the deceased started to run; he dropped the hand-bag; the accused picked up the hand-bag and ran after the deceased. The deceased stopped and said if you continue to follow me I will stab you'. The deceased had a knife with him. The accused picked up a stick near a camp and followed the deceased. The deceased hid himself in the bush and while the accused was passing he heard the grass move suddenly he turned back and saw the thief holding a knife and was about to stab the accused and the accused hit the deceased with the stick which he was holding. The deceased fell to the ground. He was caught and taken to the road. He later died from the blows.

Held: (1) ……. "The first point for consideration is whether the accused had any right to attempt to arrest the accused Section 32 of the Criminal Procedure Code provides that a private person may arrest any person who in his view commits a

cognizable offence or whom he reasonably suspects of having committed a felony ….. The accused was looking for a thief. He spoke to the deceased and told him that he suspected him. At that stage he made no attempt to arrest. Apparently he walked some distance with the deceased and the deceased ran away in the bush dropping the hand-bag which he had …… The accused was acting lawfully under the provisions of section 32 of the Criminal Procedure Code and if it can be shown that he did not act unreasonably or did not use more force that necessary having regard to all the circumstances then I think the killing of the deceased was excusable." (2) "The fact that the accused was armed with a stick only which he seemed to have picked up on the away when he was threatened shows that he instrument was not unreasonable……." (3) "The question of malice aforethought is removed where the circumstances of provocation or self-defence or in case where a person is acting on the lawful authority and has used only reasonable force. As I have held the accused was acting lawfully and used only reasonable force. I must concur with the general verdict of the assessors that the accused is not guilty of offence charged." (4) "I find the accused not guilt and he is acquitted."

148. R. v. Herzon s/o Magori Crim. App. 905-D-69; 30/1/70. Georges, C. J.

The respondent in this matter was charged with corrupt transaction c/s 3 (10 of the Corruption Ordinance. It was alleged that being a clerical officer in the Immigration department he had corruptly obtained from Daya Lakshman for himself the sum of Shs. 150/- as a reward for doing a favour to said Lakshaman in relation to his principal's affairs, namely the preparation of a passport for Lakshman. In the alternative he was charged with attempting to obtain money by false pretences. The particulars to that charge alleged that with intent to defraud he had obtained Shs. 150/-from Daya Lakshman by falsely pretending that the standard fees for a book passport for a Zanzibar citizen was Shs. 150/- which was not in fact the case. Plans were laid for a trap. Sub-Inspector Adam Limu was in charge. He received Shs. 150/- all in notes. He recorded their numbers. He also had anthrecene put on them. He gave these notes to Lakshman and instructed him to go to the Immigration Office and see whether or not the respondent would accept the money. The respondent did accept the money.

The respondent was not a gazetted Immigration Officer. He was a clerk and was not authorized in any way to sign passports. In cross-examination Lakshman stated that he did not know whether the respondent wanted the 150/- as a bribe, but that Mr. Kubaga had told him that this was what it was. The prosecution witness stated that Lakshman said that the clerk wanted the money to expedite the process of the passport. The trial magistrate held that there was no case to answer on the count of obtaining money by false pretences. From this decision there has been no appeal. He called on the respondent to answer the charge of corruption. The respondent gave evidence on oath admitting having received Shs. 150/- from Lakshman. He agreed that Lakshman had come to him that day and had shown him a receipt for a passport and asked him whether it was ready. Before he could begin looking for the passport Lakshman had told him that the taxi driver wanted Shs. 5/- for the taxi and asked him to help him with change. He asked him to find change for 100/- so that he could pay his fare. He had gone to the cashier to get the change. He had 100/- in his right hand and 50/- in his left. He gave the 100/- to the cashier who asked him to wait and in about a minute the police men came and took him away. He denied having received the money as a bribe or having asked for the money in the first place. The trial magistrate acquitted the respondent.

Held: (1) “I must say at the outset that the judgment of the trial magistrate is unsatisfactory. One cannot stress too strongly the importance of subjecting evidence to analysis before arriving at any conclusion upon it. It is not enough merely to set out conclusions without setting out the process of reasoning which has led to them. There was no analysis of the evidence in this case. The trial magistrate set out the following principles of law: - ‘Corruption cases are some of the cases where police traps are allowed in order to obtain evidence. The reasons for this I suppose is that such offences are easy to commit but difficult to detect. Normally no corroboration is required of the police agent because the agents’ complicity goes only to the actus reus and his only

part is to secure evidence ….” With this statement I entirely agree. Shortly afterwards, however, the magistrate went on to say:- “It can reasonably be believed as I hold that Lakshman was the instigator and used the trap to secure the commission of the offence. His evidence as the defence submitted needed to be corroborated by cogent evidence. In the circumstances it will be unsafe for me to act on the evidence before me. I cannot do otherwise but to acquit the accused and I accordingly do so.” Had the magistrate analysed the evidence before setting out this conclusion he would have realized that there was no evidence at all that Lakshman had instigated the offence. (2) “It is my view also that even in case where it could be said that a police agent has instigated an offence by being responsible for the suggestion that it be committed this agent could not be described as an accomplice, in the ordinary sense of the term, whose evidence needs corroboration. This is so because, as the trial magistrate quite rightly pointed out, the complicity goes only to the actus reus. There is never any intention on the part of the agent to commit an offence…… the agent may be a person who has a direct interest in the success of the prosecution especially in the case in which the suggestion came originally from him. Such a case was Parentis v. R. (1937) 1 Tanganyika L.R. p. 208 in which the two police decoys were paid by results, obtaining only half the wages where there was no conviction. Up to the time they gave evidence in that particular case they had not been paid for their services on that occasion ….. It is clear therefore that corroboration was required in that not because the evidence

Given for the prosecution was obtained by a trap but because of the character of the decoys and their methods of payment. None of these considerations are applicable in this case and I am satisfied that the trial magistrate misdirected himself when he said that there was need for corroboration.” (3) “It is perfectly proper for the police in a case like this where a report has been made by an independent person to plan a trap in order to catch a potential offender. It is also perfectly proper in the case where the police have good reason to think that a certain person habitually commits an offence proof of which is difficult to obtain to send a decoy to him with the view of discovering whether or not

he would respond to an offer and if facts commit an offence. What the police ought not to do is to persuade someone who is clearly reluctant to do so into setting off on a course of criminal conduct. Quite obviously in the process of obtaining evidence it will be necessary for them to participate in the offence. In a case of this nature for example money has to be handed over as a bribe. They should, however, refrain from doing anything more that is absolutely necessary for the purpose of obtaining the evidence required for conviction ….." (4) Appeal allowed retrial ordered.

149. R. v. Saidi Crim. Rev. 31-D-70; 13/4/70; Georges, C. J.

One Saidi was convicted of hunting an elephant without a licence contrary to section 12(1) and 53(1) (a) and (c) (i) of the Fauna Conservation Ordinance Cap. 302 and hunting in a controlled area contrary to section 11(1) (a) and 53 (1) (a) and (c) (i) of the same Ordinance. A pair of elephant tusks found at this house and the gun which he used to shoot the elephant was forfeited to the Republic. A memorandum of appeal then was filed by one Ramadhani Salehe who stated that the gun was his and that he had passed it on to Saudi by way of transfer. He asked that the forfeiture be quashed.

Held: (1) "It is clear on the authorities that an order for the forfeiture of a gun should not be made under the Fauna Conservation Ordinance or any other comparable legislation unless the owner has had an opportunity of advancing reasons why the order should not be made. Where, as in this case, the accused person has stated that the gun was not his, the decision on forfeiture should be reserved until after service of an appropriate notice on the owner to show cause why there should not be forfeiture." (2) "For this reason I shall quash the order for forfeiture of the gun and remit the matter to the District Court Handeni. Notice of a date of hearing must be issued to Ramadhani Salehe and he must be heard on the issue of forfeiture."

150. Jayantlal Hemraj v. R. Misc. Crim. Cause 3-A-70; 31/3/70; Bramble, J.

In an application for bail pending appeal an advocate for the appellant quoted Raghbir Singh Lamba v. R. (1958) E.A.L.R., p. 337 in which it was stated that "bail will be granted in each case only for exceptional and unusual reasons and one of the exceptional reasons is that the appeal would have an overwhelming chance of

success." This was followed by the High Court in Tanzania in R. v. Sakerbai M.A. Gangji (1967) H.C.D. 245 and Hasanali Walji v. R. (1968) H.C.D. 174. In the latter the Chief Justice held that – "But the test is always whether an appeal 'has an overwhelming chance of success' and the test is not met '

Where an argument on the facts needs detailed reference to the rest of the evidence or the judgment to support it.' ……." it was sought to rely on the first ground of the petition of appeal that –"The learned Resident Magistrate erred in finding that the sums of money, the subject for the fourth and fifth counts, were the property of the tenth prosecution witness."

(1970) H.C.D.

- 139 –

Held: (1) "This contention depends on a close and detailed analysis of the evidence and the judgment and from its very nature it cannot be said that this appeal has an overwhelming chance of success; it is the very sort of exercise that the last judgment warned against." (2) "The consideration such as the likelihood of the appellant attending in court at the hearing, the danger of his committing a breach of the peace should his application succeed and he be released, and the gravity of the offence apply to the refusal for granting of bail before trial rather than after conviction. (Jetwa v. R. Cr. App. No. 938 of 1968 High Court of Kenya adopted). (3) "The discretion of this court in applications of this kind has been generally exercised in accordance with the practice of the courts in the United Kingdom and I see no good reason to alter this practice. For these reason I must refuse the application."

151. Mhina Athuman v. R., Crim. App. 3-Tanga -69; 22/1/70; Biron, J.

The appellant was charged together with a co-accused of cattle theft. The co-accused was convicted as charged and sentenced to three years and twenty-four strokes, while the appellant was convicted of receiving stolen cattle c/s 311(1), Penal Code, and

sentenced to three and a half years and twenty four strokes. The facts are that during the night of the 26th/27th of July of last year, the cattle boma of the complainants was broken into. Two witnesses testified that on the very next day they saw the appellant's co-accused leading a bull, which they recognized as that of the complainants. They subsequently learnt from the complainants that two bulls had been stolen. That very same evening that same bull found its way into the cattle boma owned jointly by the appellant hand his father that is, in effect, the stolen bull was in the appellant's possession, though in joint possession with his father, the very day after it was stolen. The doctrine of recent possession would therefore apply, but it was submitted that the appellant had discharged the burden of proof thrown on him on the application of the doctrine of recent possession.

Held: (1) "Before I deal with the facts, in view of the submission made by learned counsel for the appellant and the Republic, I consider it necessary to state the attitude I propose to adopt in dealing with this appeal. That is as laid down in Dinkerrai Ramkrishan Pandya v. R. (1957) E.A. 336, wherein the Court of Appeal for Eastern Africa (as it then was) adopted the submission of counsel for the appellant that – and I quote from the judgment at page 337 – "on the first appeal the appellant was entitled to have he appellate court's own consideration and views of the evidence as a whole and its own decision thereon." (2) "My view of the doctrine of recent possession, for what it is worth, is that it does not really shift the burden of proof from the prosecution. In my view, as in all criminal cases except where expressly excepted, the burden remains on the prosecution to establish its case beyond reasonable doubt. The doctrine of recent possession merely provides a presumption of fact, that when a person is found in possession of recently stolen property a court may infer, in the absence of an explanation of innocent possession which may reasonably be true, that the said person either stole or received the property knowing it to have been stolen. The court may presume that, but that does not mean that the burden of proof has shifted. The court must still be satisfied beyond reasonable doubt that the prosecution has established that the accused either stole the property in question or received it knowing or having reason to believe that it was stolen, as the case may be." (3) "The whole crux of the case is the explanation given by the appellant for his possession. The

Explanation he gave was that it was brought to him by his co-accused, from whom he had on previous occasions purchased cattle, and he did not know that the bull was stolen ……..I consider that the evidence establishes the guilt of the appellant beyond reasonable doubt, that it is impossible to accept his explanation of Innocent possession." (4) "Learned counsel for the appellant, however, has submitted and argued with very great force …… that the magistrate misdirected himself in his judgment: and it must be conceded at once that he has. He says in his judgment:- "Accused's deliberate failure to inform the police ….. of the presence of Exhibit A in his boma from 28/7/69 to 22/9/69 – a period of two months – is a conclusive proof that the accused at the time he received Exhibit A from the first accused he very well knew that it was feloniously obtained or had reason to believe so." That is a gross misdirection, as the stolen bull had not been in the appellant's possession for even twenty four hours before it was taken away by the police, after having been identified by the complainants as theirs. Mrs. Chirwa for the respondent republic has submitted that even if the learned magistrate had not misdirected himself so, in view of all the other evidence, on which he has directed him, he would still have come to the same conclusion that he did, and have convicted the appellant. Mr. Singh for the appellant, however, submits that it is impossible, at lowest, to say he would, in view of the language used by him…… I fully appreciate that it is almost a stereotyped expression of appellate tribunals on first appeal to declare that if the magistrate had not misdirected himself as he had, he might not have come to the conclusion he did, and therefore the particular conviction cannot be upheld. I am by no means convinced of the propriety of that approach. Adhering tot eh approach laid down by the Court of Appeal for a first appellate tribunal, does it really matter so very much, or even at all, whether the magistrate misdirected himself or not, if in the view of the appellate tribunal the evidence establishes the guilt of an accused? If an appellant is on first appeal 'entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon', surely the prosecution is likewise so entitled, particularly so as in this country the prosecution now

has an equal right of appeal from an acquittal by a magistrate as has a convicted person from his conviction. So why should the direction or misdirection of a magistrate, unless it affects the evaluation of he evidence adduced, affect the case one way or the other? But even assuming that this time-hallowed phrase is proper and correct in law as submitted by Mrs. Chirwa, even if the magistrate had not misdirected himself he would have come to the same conclusion he did. In any event, I am perfectly satisfied that on the evidence as a whole this misdirection, which Mr. Singh rather ingeniously attributes to the date the charge sheet was signed, has occasioned no failure of justice. In so far as the conviction is concerned the appeal is dismissed." (5) "In sentencing the appellant and his co-accused, the magistrate said:- "In so far as the first accused [the appellant's co-accused, the appellant being he second accused] is concerned, it is apparent that he would only steal cattle if he finds a person to whom he can dispose of it. Since he found the second accused a suitable receiver, it is the duty of the court to take a [more] serious view on the receiver than the thief." The learned magistrate's direction is only half true – if that – particularly in the case of cattle. Whilst it can be true that a professional receiver should on occasion be dealt with more severely than the thief, there is not the slightest indication on the record that the appellant is a professional receiver. According to the record he appeared in court as a first offender ….. In all the circumstances of this case, I consider the minimum sentenced laid

Down by the Act would be quite sufficient to meet the justice of the case. The sentence imposed on the appellant is accordingly set aside and thee is substituted therefore a sentence of imprisonment for two years and the statutory award of twenty four strokes corporal punishment, which is mandatory."

152. R. v. John Mathias Crim. App. 299-A-69; 30/1/70; Platt J.

The respondent was charged with attempted murder. The Resident Magistrate heard the preliminary inquiry but came to the conclusion that there was not sufficient evidence

to commit the accused to the High Court. He accordingly discharged the accused. The Republic appealed against the ruling. Relying upon the provisions of section 225 of the Criminal Procedure Code, as it then existed, the Republic brought a further charge against the accused based on the same facts and he was brought before the court on the 28th April 1969. On that date the charge was read over and explained to the accused, but he was not called upon to plead. The accused was then released on bail and there were several adjournments. Finally on the 16th July 1969 argument was heard as to the effect of the Criminal Procedure (Amendment) Act upon the proceedings before the court. This Act (No. 10 of 1969) repealed the procedure for hearing preliminary inquiries as it existed under the old Code, and replaced the repealed provisions with new provisions outlining an entirely new procedure. In the course of the repeal, section 225 of the old Code had been repealed, the validity of the proceedings before the court which had been commenced on the 28th April 1969 no longer had any valid basis. Therefore the preliminary inquiry must be considered ultra vires and should be dismissed for want of jurisdiction. With this view, the learned Magistrate expressed himself to be in complete agreement and accordingly dismissed for want of jurisdiction. With this view, the learned Magistrate expressed himself to be in complete agreement and accordingly dismissed the inquiry "and released the accused." The Republic now appeals against that ruling on the ground that the learned Magistrate had erred in law in finding that the prosecution had no right to re-open the inquiry and challenged the view that the prosecution would have to rely on provisions which had been repealed. As a result of these errors, the learned Magistrate had wrongly failed to apply the transitional provisions set out in section 35 of the Amendment Act and prays for an order that the ruling be set aside. It is further prayed that the subordinate court to be directed to hold the preliminary inquiry under the new provisions of the Amendment Act.

Held: (1) "There is no doubt in my mind that the appeal must be allowed. it is not disputed that on the 28th April 1969, the Republic had a perfect right to commence the proceedings afresh. Section 225 of the old Code specifically provided that a discharge under that section shall not be a bar to any subsequent charge even on the same facts. Therefore no objection could be taken to the fresh proceedings brought at that time. It follows that the proceedings brought in April 1969 were validly entertained by the court

and they amounted to proceedings which were caught at an intermediary stage by the Act under the transitional provisions as set out in section 35 of the new Act, any preliminary inquiry commenced immediately before the coming into operation of this Act, is to be continued and concluded in accordance with the provisions of the Code as in force immediately before the commencement of the Act. A procedure for a division of proceedings was then provided by virtue of section 35(2) of the Act describing what was to be

considered as the commencement of proceedings. It was laid down that a preliminary inquiry should be deemed to have been commenced where evidence had been taken; the provisions of the old Code were still to operate. By inference where evidence had not been taken but the preliminary inquiry had been commenced, in the sense hat the accused had been informed of the charge against him in court, then the preliminary inquiry was to continue under the new provisions of the Amendment Act. Therefore the preliminary inquiry brought on the 28th April 1969 having been lawfully commenced but not having reached the stage of evidence having been taken was to be completed under the provisions for the Amendment Act as indeed the prosecution suggested on the 2nd July 1969." (2) "It was then argued that the validity of the proceedings suddenly disappeared with the repeal of section 225. If that argument were to be carried to its logical conclusion, then it would mean that Mr. Mtenga had never had the right to discharge the accused at all. The defence could not have it both ways; it could not be argued that the prosecution's right to bring subsequent proceedings no longer existed because of the repeal of the section without at the same time denying the learned Magistrate's right to discharge the accused because of the same repeal. The only reasonable conclusion could be that the fresh proceedings commenced on the 28th April 1969 were brought under a right which existed at that time and once that right had been exercised, the proceedings were to be considered as any other fresh proceedings, and that the repeal of section 225 as from the 1st July 1969 did not affect the validity of the proceedings commenced in April. In my view, authority for this construction is clearly to

be found in section 10(2) of the Interpretation and General Evidence Clauses Ord. Cap. 1. The prosecution's right and the respondent's obligation under the proceedings brought, is preserved under section 10(2) (c) and further, the continuation of such proceedings is preserved under section 10(2) (e). In my view, therefore the learned Magistrate was in error as the Republic protested and the ruling is set aside." (3) "It is ordered that the record be remanded to the District Court which is directed to continue the preliminary inquiry according to the provisions of the Amendment Act.

153. R. v. Oswald Bruno Kanga Crim. App. 844-M-69; 13/2/70; Kimicha J.
the accused who was a senior police officer was convicted on two counts: (1) Unlawful possession of government trophy c/ss 49 and 53 of Fauna Conservation Ordinance, Cap. 302; (2) hunting game animals without licence c/ss 12 and 53 of Fauna Conservation Ordinance, Cap. 302. He was sentenced to a fine of Shs. 500/- with 6 months imprisonment in default on the first count, and to a fine of Shs. 1000/- with 6 months imprisonment in default on the second count. The State has now appealed against the inadequacy of the sentenced on the grounds that the magistrate should have taken into account the accused's senior and responsible position and the gravity and popularity of the offence.

Held: "I do agree with the State that the accused held a very responsible post and that his offence was grave and prevalent. But it appears from the record that the trial magistrate took these facts into consideration when passing sentence …. Also the accused said in mitigation that he had on the date of his conviction been interdicted for 4 months. In cash terms this means that the offence had on the day of his conviction cost him about Shs. 2,400/- And he completely lost his job and all accrued privileges on his conviction. The sentence appears to be inadequate if considered separately from the material and social losses that the accused

suffered on his conviction. But I am of the opinion that if these other losses are taken into consideration his sentence would appear to be adequate. He is now in financial ruin with no prospects of being re-employed by the Government and parastatal organisation. He has lost all his pension privileges and he has the life long stigma of being a convict of a serious offence. I am of the opinion that the accused has been punished enough for his offence. For the above reasons the appeal by the State is dismissed and the sentence imposed by the lower court is to stand."

154. R. v. Juma Mohamed Crim. Rev. 2-M-70; 11/2/70; Kimicha J.

The accused was convicted on his own plea of permitting the defilement by a husband of a wife under twelve, c/s 138 (2), Penal Code. the charge-sheet had shown the age of the accused to be 50 years and the particulars of the charge were that "he being the father of one Tabu d/o Juma a girl under the age of 12 years did dispose her to be married to one Tutuba s/o Lwayamaho knowing it to be likely that the girl was still under the age of twelve (12) years be carnally known by the said Tutuba s/o Lwayamaho." In answer to the charge the accused said – "I am the father of the girl. She is aged 10 years. I permitted her to get married and she was defiled." This was entered as a plea of guilty.

Held: "The Senior State Attorney did not support the conviction on the ground that the plea of the accused did not refer to any intention on his part to have the girl carnally known by her husband nor did he admit that he knew that it was likely that this would happen. That even in the facts there was nothing alleging that the accused intended his daughter to have carnal knowledge with the husband. It is clear from section 138(2) that "the intention" is an ingredient of the offence which had to be proved by the prosecution beyond reasonable doubt. In arguing this point the Senior State Attorney was not indulging in trivial technicalities because the court is aware of tribes …. Who practice child marriages on condition that the husbands to not have carnal knowledge of their wives until they attain puberty. Usually this happens when a person marries a wife who later proves to be barren. Without divorcing his wife the husband could be allowed to marry his wife's younger sister even if she is under the age of 12 on condition that he does not have carnal knowledge of her until she attains puberty. The

condition is usually observed. The main purpose of such marriages is to preserve the first marriage and for the second wife to produce children on behalf of her sister. It is relevant to not that the accused said in mitigation that –'I warned the husband not to sleep with her until she was grown up.' This statement enhances the doubts expressed above on the accused's plea. For the above reasons, I find that the accused's plea was equivocal and his conviction cannot be sustained. His conviction is, therefore, quashed and the sentence is set aside. He is to be set at liberty unless held lawfully on other charges."

155. R. v. Ansagwile Mwamakula, Inspection Note, Criminal Case 31-MBEYA-70; DAR ES SALAAM, 18/3/70; Georges C.J.

This matter has been sent to the High Court for inspection. The accused, a Primary Court Magistrate, was charged with the offence of Corrupt Transaction with Agent contrary to section 3(1) and (3) of the Prevention of Corruption Ordinance, Cap. 400. The particulars alleged that he "did corruptly solicit and obtain for himself cash Shs. 70/= from Petro s/o Sinkala and inducement to release the said Petro Sinkala in Itumba Primary Court Criminal Case No. 124/69." The

Trial magistrate having heard the case for the prosecution and the defence reserved judgment. At the adjourned hearing he ruled in part as follows: - "From the evidence given it is quite obvious to me that the offence is clearly one under s. 6 of the Ordinance because it is alleged that accused received the bribe in his official capacity as a public servant." He then went out to point out that though s.3 was a general section under which anyone could be charged, section 6 was a general section under which anyone could be charged, section 6 was a specific section for public servants and that if the prosecution was allowed to charge public servants under section 3 the effect would be to enable them to be charged without the consent of the Attorney General. Since the consent of the Attorney General had not been I obtained he felt he should remit the case for inspection.

Held: “With respect I find myself unable to agree with the approach of the trial magistrate. Section 3 and section 6 create completely different offences. Section 3 deals with corruption so such and the maximum penalty is 7 years or a fine of Shs. 10,000/- or both. Section 6 creates the offence of a public servant obtaining an advantage without consideration. The maximum penalty for that offence is 5 years or a fine of Shs. 5,000/- or both. The Legislature could not have contemplated that public servants should never be liable to the heavier penalty even if their acts fell under section 3 but that they should always be charged under section 6. Further under section 3 both the giver and the receiver are liable to the charged. Under section 6 the giver cannot be charged. There is no offence of giving an advantage to a public servant without consideration. A civil servant who receives what is alleged to be a bribe under section 6 can exculpate himself under section B if he can prove that he did not receive the money corruptly. If he is charged under section 6 the issue of corruption does not arise. Once it is proved that the advantage was given and that the appropriate relationship existed between the giver and the public servant the offence is committed. It is because of this I would think that the consent of the Attorney General was made a prerequisite. I would rule, therefore, that a civil servant can properly be charged under section 3 and that the trial magistrate should proceed with the hearing and determination of the matter.”

156. Hasara Sindato v. R., Crim. App. 333-A-69; 7/2/70; Platt J.

The appellant was convicted on the first count of cultivating scheduled crops on Township land without a permit contrary to Rules 16, and 8 of the Township Rules Cap. 101, and fined Shs. 100/- or two months’ imprisonment in default. On the second count, he was convicted of erecting a building without complying with the Township (Building) Rules, namely Rules 4, 12 and 62 of Cap. 101, and fined a similar sum. In addition, he was ordered to pay a fine of Shs. 10/= per day until he removed the building.

Held: “The only difficulty which arises on the appeal, concerns the order of the fine of Shs. 10/= per day for failing to remove the house. It appears that the appellant was unable to pay or did not pay the fine and therefore was in prison for fourth months. I presume that while he is in prison, the appellant cannot remove the house. I agree with

the appellant therefore that the fine for the recurring offence would operate harshly. It is not, of course, a case where the learned Magistrate had no authority to impose the fine, which is sanctioned by the Rule 64 of the Building Rules. But if the appellant is unable to pay the other fines, it is most unlikely that he will be able to pay the recurring fine for each day that he is in prison …. Rule 12(2) provides that where the authority has given notice to demolish, and the notice has not been complied with, the authority may enter the premises and carry out the demolition and removal and recover all costs and expenses

Incurred by it, from the person who has failed to comply with the notice, the proviso to the Rule allows the appellant the right to challenge the notice. Therefore as both parties have their rights in this matter; it would seem more suitable for the authority to exercise its powers that for the appellant to pay a fine for the recurring breach, which would amount to an extremely large sum of money. Accordingly the recurring fine is set aside. The authority may, if it wishes, now serve another notice upon the appellant requiring him to remove the building within a specified time after which the authority may enter and remove the building for him. He should be given a reasonable time after he has completed his sentence of imprisonment within which to comply with the notice. Apart from these variations, the appeal is dismissed."

157. Hamisi s/o Shaha v. R., Crim. App. 868-D-69; 28/1/70; Georges C. J.

The appellant in this case was charged on three counts for offences under the Penal Code – escape from lawful custody c/s 116, resisting arrest c/s 243 (b) and malicious damage c/s 326(1). He was acquitted on the first count, convicted on the other two and sentenced to concurrent term of 6 months imprisonment. The appellant had been under arrest for treasonable felony. On 16th May, 1969, Corporal Albano Mraushi, took the appellant from the lock-up and handed him over to Det. Sgt. Fabiano. Half an hour later the appellant could not be found. On 23rd May, 1969 Corporal Albano saw the appellant in the market square at Mtwara. He followed appellant, told him that he was wanted at

the police station and asked him to accompany him there. Appellant refused and kept on walking away. Cpl. Albino then formally arrested the appellant and held on to him. The appellant went along for a while then refused to go further. He got hold of Albano and began struggling with him, pulling at his shirt in the process. In the struggle they both fell. In respect of this incident the appellant has been charged with resisting arrest and malicious damages to the shirt.

Held: (1) "In Leo s/o Pigangoma (1967) H.C.D. case 131 Platt J. held that where in the course of an assault there was damage to property worn or in the possession or the complainant such damage was to be considered as incidental to the assault rather than a separate offence unless there was evidence of willful damage to the property as such. In Juma Ramadhani v. Rep. (1968) H.C.D. case 147 I followed this view and held that to support a charge of malicious damage there must be evidence that the act was done deliberately and willfully. In that case the appellant while resisting arrest and behaving in a disorderly manner at a police station had torn a policeman's uniform. I see no reason to depart from this line of reasoning. There is no evidence here that he tearing of the shirt was anything other than a consequence of the resisting arrest. Accordingly on the 3rd count or malicious damage the appeal is allowed and the sentence quashed." (2) "I shall, however, make an order on count 2 that in addition to serving 6 months in prison the appellant will pay Corporal Albano Shs. 45/= compensation."

158. Hadija d/o Omari v. R. Crim. App. 1-D-70; 23/1/70; Georges C.J.

The appellant in the case was charged with unlawful possession of moshi, contrary to section 30, Part V, of the Moshi (Manufacture and Distillation) Act, No. 62 of 1966. The particulars alleged that at about 7.30 p.m. on 1st January, 1970, at Pemba Street in Dar es Salaam, she had been found in possession of 29 bottles of moshi. The appellant pleaded guilty – unequivocally – admitting the facts set out in the particulars. The prosecution pointed out that the quantity of liquor found was such that it must have been intended for

sale and not personal consumption. It was suggested also that the appellant quite likely used a secret moshi-distilling plant. On behalf of the appellant, the probation officer urged that the appellant was a woman of 38 with two of her own children and four of her sister's children to look after. She had been divorced 16 months ago. He asked the Court to place her on probation. The trial magistrate stated that the offence was a serious offence – prevalent in both small towns and big towns. He thought a deterrent sentence was necessary and sent the appellant to prison for 2 years. It was pointed out on appeal that in another case decided on 22nd December, 1969, by another magistrate at the Dar es Salaam District Court – Criminal Case No. 1783 of 1969 – an accused person found with 27 bottles had been placed on probation. It was urged that there should be some uniformity. The probation officer appeared. It was enquired from him how probation could be thought appropriate in cases such as this. He appeared to agree that this was not the sort of case in which probation was typically useful. Probation officers did, however, help by stressing the harmfulness of this type of trade and educating the offender so that he or she no longer wanted to engage in it. They also helped by finding alternative income-producing activity.

Held: (1) "An appellate tribunal should not interfere with a sentence imposed by a trial magistrate unless he has misdirected himself in his remarks on sentence, or unless the sentence is so severe that he must have misdirected himself even though this does not appear explicitly on the record. This case falls, in my view, in the second category." (2) "I agree that a serious view must be taken of this offence. Under the old Ordinance, the maximum penalty was a fine of Shs. 1,000/= or 3 months' imprisonment or both. The maximum penalty is now 5 years imprisonment. This change in standards must be reflected in the level of sentence." (3) "Where the quantity of liquor found with the offender is such that he must very plainly have been distributor, a prison sentence would seem to be correct, even for a first offender. This can be regarded as shock treatment to bring home dramatically both to the offender and to the community at large the gravity of this offence. In such cases, however, there is no need for such an extended sentence as one of 2 years' imprisonment – particularly where, as in this case, it necessarily involves the disruption of family life and the possible break up of a

family unit. The mere imposition of a prison sentence on the first offender is itself the deterrent. I am satisfied that a sentence of 6 months would meet the justice of the case. Is hall accordingly quashing the sentence of 2 years and substitute a sentence of 6 months." (4) "I should be stated that this is not the type of offence for which probation should be considered proper. Most people in this country should by now be aware that the sale and purchase of moshi are illegal. Education in this matter should not be needed …. It is an offence which is deliberately committed and hardly ever the result of sudden temptation …. I note that the prosecution did not allege in this case that the offence was particularly prevalent in Dar es Salaam or that it often resulted in crimes of violence as often happens up-country. In areas where these factors particularly apply, a sentence somewhat above the 6 months term in this case may well be imposed."

159. G. Arell & A. Hocken .v. R. Crim. App. 8-D-70; 23/1/70; George C. J.
The appellants in this case are seamen. They were charged with stealing goods in transit, contrary to sections 269(c) and 265 of the Penal Code. The particulars alleged that at 4.15 a.m. in the

Port area, they stole a carton containing 12 bottles of gin valued approximately 432/=, the property of East African Cargo Handling Services. They pleaded guilty and the trial magistrate sentenced then to 4 months' imprisonment. At the trial, it was urged in their favour that they had pleaded guilty and that they were under the influence of drink at the time, as evidence by the clumsy manner of taking. The prosecution stated that thefts from the port were becoming "epidemical". Such thefts damaged the economy of the country. The trial magistrate stated that he would take into account the fact that the appellants were first offenders and that they had pleaded guilty. He commented that thefts from the port area were on the increase and that the courts were concerned with the problem. These thefts, he thought, should be discouraged, and heavy sentences might help. He took also into consideration the fact that the appellants were tipsy. He

considered a prison sentence was appropriate and imposed a term of 4 months' imprisonment.

Held: (1) "In deciding whether or not it should interfere with a sentence, an appellate tribunal must consider whether the magistrate has in fact misdirected himself in any particular, or whether the sentence is so manifestly excessive that it is clear that there must have been a misdirection even though not explicit." (2) "[The defence] points to one particular sentence in the trial magistrate's remarks, which [it] says, is a misdirection. The sentence reads: - "Having considered all these factors, I am of the view that imprisonment sentence is a desirable – at this juncture, I must stress that he emphasis is on the reformative aspect of the punishment." A moment's thought must clearly show that there can be little hope of reforming a first offender by imposing on his a short prison sentence. All authorities are agreed that short term prison sentence may have a harmful effect in that they expose the offender to hardened criminals from whom he might pick up socially dangerous ideas, and in that hey do not allow sufficient time for enlightened prison authorities to teach useful skills or inculcate socially correct attitudes. Had the magistrate imposed the sentence in this case because he thought he was helping in the reform o the appellants, I would have had no hesitation in stating that his was a serious misdirection …. It may be that the trial magistrate slipped in this phrase in an effort, so to speak, to take out insurance against appeal, having regard to a comment of mine in Vernon L. Hatton v. Republic, [1969] H.C.D. n. 234, an appeal from the same magistrate. I said there- "Wherever a first offender is concerned, the emphasis should always be on the reformative aspect of punishment." I see no reason to depart form this attitude, and would indeed re-emphasize it. I went on, however, to add – "unless the offence is one of such a serious nature that an exemplary punishment is required, or unless the offence is so wide-spread that severe punishment is needed as a shock deterrent." As an example, I quoted that of a first offender found picking pockets at a football match. It is clear that the trial magistrate in this case thought that the offence fell into the group of widespread offences where shock –deterrent was necessary …. I cannot say that the trial magistrate erred in placing the offence in that particular category."(3) "Before me …… arguments were geared largely to establishing hat this case and the case of Vernon Hatton cited above wee so similar that he same

principles should apply to produce the same result. I do not think the cases are similar ….. The fact that a sailor the fact that a person is sailor should make any difference in the punishment he should receive, unless the offence for which he is being punished is one peculiar to the particular locality which he may not have known was an offence." (4) "In this case, there

to acquit the accused on all these three stealing counts namely 2nd, 4th and 6th counts."

Held: (1) "With regard to the stealing counts, learned State Attorney has sought to distinguish his instant case from that of Rajabu s/o Mbaruku v. R., which the learned magistrate followed, by submitting that in that case, the passengers did not care where the money they paid to the accused went, whereas here Julius Lyimo intended the monies he paid to the appellant to go to the Government; and also that in that case the accused's employers, that is, the East African Railways and Harbours Administration, did not really suffer any loss, whereas in this instant case, the Government did not really suffer any loss, whereas in this instant case, the Government dis in fact pay out on these forged local purchase orders. However, with respect, I fully agree with the learned magistrate, who did consider these particular aspects and found that this instant case was indistinguishable from that of Rajabu s/o Mbaruku v. R., which he felt bound to follow, and did. It must be said at once that, in my view, the learned magistrate cannot be faulted for this, because he was bound to follow the decision in Rajabu s/o Mbaruku's case. But I am not so bound. In coming to the decision Spry J., (as he then was) in the case cited, very reluctantly followed English authorities on the interpretation of the expression "by virtue of his employment", remarking that the English cases were based, and I quote: "on a very narrow interpretation". To my mind, they are based on too narrow an interpretation, and I do not feel disposed to follow them. Spry J., however, felt constrained to follow the English interpretation because of the wording of section 4 of the Penal Code. However, despite the wording of the section, I do not feel inclined or even constrained to follow the English decisions, particularly now that appeals to the Privy Council have been abolished and English cases have no more that persuasive

authority. In his judgment, Spry J., also considered section 262 of the Penal Code, the relevant part of which reads:- “When a person receives, either alone or jointly with another person, any money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received …..” he was, however, of the opinion that his section could not e called in aid in such cases, presumably on the ground, as stated by him and quoted by the learned magistrate in citing the case, the- “What is relevant is what is in the mind of the receiver, not what is in the mind of the payer.” This last proposition is, I think, arguable. In any event, as sufficiently indicated, I am not persuaded that the narrow construction put on the expression “by virtue of his employment” by the English authorities should be followed in this country. Accordingly with respect, I must differ from the decision of Spry, J., and hold that in the circumstances for this instant case, the appellant received the monies by virtue of his employment as a prison officer, that is, a servant of the Government. He should therefore, have been convicted of stealing as a Government servant, contrary to section 265 and 270 of the Penal Code, as charged.” (2) “The appellant’s appeal is dismissed in its entirety …….. The appeal of the Republic is allowed, convictions are formally entered on the three counts of stealing by a person employed in the public service, as charged.”

161. Masudi Hassani v. R., Crim. App. 41-M-70; 18/2/70; Bramble, J.

The accused was convicted on his own plea of careless driving c/ss 47(1) and 70 of the Traffic Ordinance and of driving a motor vehicle whist efficiency was impaired by drinks c/ss 49(1) and 70 of the Traffic Ordinance. He was sentenced to seven months on each charge and disqualified from holding or obtaining a driving permit for twelve months.

The facts were that the appellant’s driver left the company’ car near the police Station and at 10 p.m. on 28/11/69 the appellant came to remove it. He started off at a speed and struck the Police Station causing damage. He was found to be drunk. He was a first offender.

Held: (1) “Darling while being drunk is a serious offence and the legislature has shown this by the maximum penalty of 3 years imprisonment or Shs. 10,000/- fine or both which it has ordered. Where, however, the legislature gives an option, imprisonment should be imposed on a first offender only where there are aggravating circumstances which point to a total disrespect for the law. There were none here and a fine would more properly have met the justice, of the case. (2) “I, therefore allow the appeal against sentence, and on the charge for driving whilst efficiency was impaired by drink, I vary the sentence to a fine of Shs. 500/- in default 2 months imprisonment. The order for disqualification will stand. As to the second charge of careless driving it is almost contained in the first and I vary the sentence and order that the appellant be discharged absolutely under the provisions of section 38(1) of the Penal Code.”

162. R. v. Kisiwani Sisal Estate Ltd. Crim. App. 280-A-69; 10/2/70; Platt, J.

The respondent company was convicted on its on plea of five counts of failing to pay contributions to the National Provident Fund, c/ss 15(2) and 38(1) (d), National Provident Fund Act, Cap. 564, as amended by Act No. 58 of 1968. In the circumstances, the court decided that an absolute discharge was appropriate, and from this order the Republic is appealing. The Magistrate had been impressed by the overwhelming difficulties which the respondent company had experienced during a drought. That together with the company’s usual punctuality in making payments led the decision that but for the failure of the rains all would have been well.

Held: (1) “The first ground of appeal was that the learned Magistrate was not entitled to employ section 38 of the Penal Code as a matter of law. It was said that section 38(1) (d) of the Act, Cap. 564 provided only three alternatives, a fine or imprisonment, or a combination of both. The phraseology of the section is however no different from any other offences where such punishments are prescribed, and yet the overriding provisions of section 38 of the Code are applicable. It has never been doubted that the general provisions of the Penal Code (or the Criminal Procedure Code) control all trials of a criminal nature unless there is express provision to the contrary. There is nothing in section 38 of the Act which would suggest that the general provisions of section 38 of the Penal Code would be excluded. Therefore on face value

at least I see no reason why the learned Magistrate could not have applied section 38 of the Code. After a careful perusal of the Act as a whole I cannot see any reason why a different conclusion should be reached. The act, no doubt, seeks to build up the National Provident Fund and its terms are stringent and in one case almost a type of taxation. But it surely cannot be said that the Act was intended as an oppressive measure even in the event of overwhelming hardship ….. Altogether I have no doubt that an express provision excluding the general provisions of the Code was not inserted in order that the courts should be permitted to balance the aims of the Act with the individual's circumstances and thus arrive at a reasonable result. The first ground of appeal is therefore rejected." (2) "The second ground was that even if the learned Magistrate was empowered to use his discretion, he should

Not have exercised it in the circumstances of the case and that this court should set aside the order and enhance the sentence. It was not disputed that there had been a serious drought and the respondent company, having a difficult and enough time with the sisal part of its enterprise, had also lost entirely on the cash crops which were a diversification of its main business. It was not disputed that up to the time of the drought, the company had always paid its due to the Fund. During the drought, it had failed for four months to pay its dues to the Fund ….. It is not suggested that the officers of the company had used company's funds extravagantly or improperly. The only fault levied against them was that they did not inform the Compliance Officer of the difficulty. ….. I cannot see that the company was deliberately defaulting, or would have defaulted if it had not been for genuine hardship ……. It may be that the Magistrate could have secured the fund by granting a conditional discharge covering the period during which the instalments were ordered to be paid. But he trusted the company because he noted hat it had already begun making regular payments. if that is so, and nothing has been suggested on appeal that the company has failed to pay any of the instalments ordered as to the arrears, it seems hardly likely that the fund will lose any revenue. Therefore I cannot see any ground on which to interfere with the order made by the learned

Magistrate. I should perhaps not that this was an exceptional case and that section 38 of the Code is only to be used in cases of this nature. Generally speaking section 38 would be inappropriate."

163. R. v. Alias Kisenge, Crim. App. 804-D-69; 23/1/70; Georges C. J.

The respondent was charged, inter alia, with driving a motor vehicle whilst efficiency was impaired by drink or drugs c/s 49(1), Traffic Ordinance. The trial magistrate acquitted the accused on this count, and from this acquittal the Republic is appealing. The evidence presented was as follows. Two police officers stated that while driving in a motor car along Msimbazi Road towards the Nkrumah Street – Pugu Road – Msimbazi Street round-about they saw a car which later proved to be the respondent's car approach the round – about from Nkrumah Street. He failed to give way to their car which was coming into the round about from his right. The car went on to overtake and hit a lorry which was ahead of it. The police gave chase and eventually stopped it. The respondent was the driver. He seemed unsteady and uncertain in speech. They arrested him and took him to the hospital. The doctor who examined him was of the opinion that hi sufficiency had been impaired by drink. The trial magistrate dealt with the evidence on this count in the following manner:- "None of the prosecution witnesses……. Said that the accused's driving was zigzag. The only evidence required to establish such an offence is that an accused's person's driving efficiency should be impaired to such a degree that he is deprived of his ability to control his vehicle. It is part of the prosecution case that accused drove his vehicle without any mishaps for a long distance. I am therefore satisfied that accused was not deprived of his efficiency to drive."

Held: (1) "Clearly there is misdirection here on the standard of proof. The Republic does not have to establish that the accused person's efficiency has been so impaired that "he is deprived for his ability to control his vehicle". One his ability is impaired a prima facie case has been established. If the driver has to be "deprived of his ability to control" before he can be convicted then the safety of other road users would be gravely imperiled before the drinking driver could be dealt with. This misdirection

By itself is in view, serious enough to justify the Republic's appeal being allowed on a question of law." (2) "Appeal allowed and case was remitted to the magistrate for hearing." (3) "On the third count the position could be criticized as uncertain. Evidence was given of two accidents – one with a Bedford lorry and one earlier with a cyclist. The magistrate held that the charge did not make it clear which accident the respondent had failed to report and that the chare was bad for duplicity. In the circumstances of this case I was not prepared to disagree with that finding. Accordingly I dismissed the Republic's appeal on that count." The matter was remitted to the magistrate for finalization in count 2.

164. Olipa d/o Selemani v. R. Crim. App. 179-D-69; 12/2/70; Makame Ag. J.

The appellant was convicted of housebreaking and stealing, c/s 29(1) and 265 of the Penal Code, and was sentenced to concurrent prison terms of two years and six months. The complainant went out to work after locking up her room. When she returned, she found her items of apparel, Shs. 20/80 cash and a notebook missing. The total value of the things was Shs. 45/80. A window was open and the door was locked as she had left it. On the door was an unsigned handwritten note, suggesting that the complainant in this case was a prostitute interfering with the writer. In her defence, the appellant says she did take the things, except the notebook and the cash. She found the door closed and the padlock was on the door, but it had not been locked. She pulled it and opened the door. She is the author of the little note and she did all this because her husband was sexually intimate with the complainant. When the appellant got home with the clothes, she realized she would be in trouble, so she threw them away into a river.

Held: (1) “In law, the house was broken into, even if one accepts the appellant’s assertion that the padlock was not locked. But this is a peculiar case. Especially in view of the note the appellant wrote and left on the complainant’s door, I am inclined to believe that the appellant genuinely believed that her husband was sleeping with ‘the complainant, and it seems certain that she took away the things just to get her own back and annoy the complainant. It was not been established beyond reasonable doubt that the appellant had any of the intents necessary in a charge of theft. I believe that she threw away the things into a river, but it would appear that this act was thought of after the act of taking away the things from the house, when the appellant realized that she had done a silly thing. On the other hand, I have no reason to disbelieve the complainants that among the clothes were a notebook and some cash tied in a headgear, and it seems certain that in her panic, the appellant threw these away with the clothes.” (2) “In the circumstances, it is clear that the appellant opened the door and took away the things with intent to annoy the complainant, which is an offence under section 299 of the Penal Code. I allow the appeal against conviction and sentence, and substitute for them a conviction for criminal trespass, contrary to section 299(1) of the Penal Code and a sentence of a fine of Shs. 200/- or three months imprisonment. I also order the appellant to pay Shs. 451/80 compensation to the complainant.”

165. Ibrahim Karume v. R., Crim. App. 636-D-69; 11/2/70; Makame Ag. J.
Ibrahim Karume was convicted of threatening violence contrary to section 89(2) of the Penal Code, and sentenced to a fine of Shs. 150/= four months’ imprisonment. He now appeals. According

To the prosecution, the appellant went with a panga to the house of the complainant, All Nassoro, where he seized him by the neck, felled him to ground, and sat on him. With the help of two companions, he managed to release himself from the appellant’s grip and went to report the assault to the local TANU Chairman.

Held: (1) “The trial magistrate found that the prosecution story was true, and I am satisfied that on the evidence on record the magistrate was perfectly entitled to do so.” (2) “However, I have searched the record for any evidence of threatening violence and found none …… I accept as true that the appellant went to the complainant’s house with a panga, but I find that there is no evidence that he said he was going to use it, nor did he in any way behave in a manner which would necessarily suggest that he had any intention to use the panga. I cannot hold that on the facts of the case the mere act of carrying a panga, without more, constituted a threat of violence.” (3) “It is not possible to resort to section 181 of the Criminal Procedure Code and substitute for the lower court’s conviction a conviction for creating a disturbance, for which there is evidence because creating a disturbance is not a lesser offence; and there is no other statutory provision to cover a case like this. The appeal must therefore, regrettably succeed.”

166. Joseph s/o Michael v. R., Crim. App. 883-D-69; 11/2/70; Makame, Ag. J.
The appellant was convicted of being in possession of property suspected to have been stolen c/s 312, Penal Code.

Held: (1) Appeal allowed for a variety of reasons. (2) “For the future guidance of the learned trial magistrate, when a person is charged under section 312 of the Penal Code, before the magistrate can properly convict him he must make a finding on the following matters:- (i) that the accused was in fact detained under section 24 of the Criminal Procedure Code; (ii) that when he was detained he was in the course of a journey (whether in a street, in a building or on private land); (iii) that at the time when he was detained he had the particular thing in his possession, that is, with him; (iv) that the thing was of such a nature or the circumstances were such that it might reasonably be suspected of having been stolen or unlawfully obtained; and (v) that the accused has refused to give an account to the court, or has given an account which is so improbable as to be unreasonable, or has given an account which has been repudiated by the prosecution (see Kionda Hamisi v. the Republic: Dar es Salaam Criminal Appeal No. 82 of 1963).

167. Emmanuel Rwejuna v. R., Crim. App. 54-D-70; Hamlyn j.

The accused was convicted in the District Court of Sumbawanga of offences of failing to pay a minimum wage to an employee and of failing to prepare and maintain a record of an oral contract; he was fined Shs. 250/- on the first count and Shs. 100/- on the second. The facts of the case concern the complainant – a girl named Priska Kilemba – who is about fifteen years old. She told the court that she had been engaged by the appellant to work for him as an ayah and that she commenced her duties on 1st October, 1967, at a salary of Shs. 15/= a month. The minimum salary permitted in Sumbawanga for an employee of this sort is Shs. 86/65. the defence of the appellant was that the girl was not working for him at all but that she was in his house "just to learn good character" as he puts it. He maintains that there was no talk about salary at

all, for she had no duties to perform at the appellant's house.

Held: (1) "This Court considers that the evidence before the lower court leaves no reasonable doubt as to the guilt of the accused and that the appeal is without substance. (2) "Sentences are reasonable, particularly in view of the fact that the accused is the Area Secretary of that District. The magistrate has noted this fact and has properly taken it into account in arriving at the appropriate sentence, the accused being a person who must be aware for the law governing matters of this nature and also one to whom others will lock look as to behaviour and conduct."

168. Amiri Hemed v. R. Crim. App. 288-A-69; 10/2/70; Platt J.

The appellant appealed against his conviction and sentence, he having been convicted of causing death by dangerous driving contrary to section 44A of the Traffic Ordinance as amended by Act No. 41 of 1964 and sentenced to twelve months' imprisonment with two years' disqualification. His statement in answer to the charge was that the facts alleged were not true. Although a plea of not guilty was entered, the prosecution outlined the facts which the appellant accepted as correct, adding that his bus had over-turned. This was accepted as a plea of guilty and the appellant's conviction and sentence followed. The main ground of appeal is that the appellant had not admitted the

charge and that even by accepting the facts; he had still not admitted that he had caused death by dangerous driving. The facts were that on the afternoon of 9th May 1969 the appellant was driving on a wet road and having attempted to overtake a vehicle in front of him, discovered that he could not complete that manoeuvre, because of an on-coming vehicle. He turned back to his left but lost control because the surface of the road was wet and his bus overturned. It is quite clear that the issue of dangerous driving was till in doubt, and indeed the prosecutor did not allege in a straightforward manner that it was due to the appellant's dangerous driving that the bust overturned, so catching fire causing one passenger to be turned to death.

Held: "Although the appellant lost control as he admitted, he did not admit that that was due to his negligence, but rather to the misfortune of being unable to turn quickly upon a wet road. Therefore in my view the appellant had not changed his plea, and his admission of the charge ought to have been set out in his own words. Accordingly the conviction was null and void. As it proceeded upon an improperly accepted plea, and it was quashed. The sentence was also set aside, but a retrial was ordered."

169. Peter Protace and another, Crim. App. 835-M-69; 25/2/70; Kimicha J.

The first appellant was convicted on five counts, namely: (1) abuse of office, c/s 96, Penal Code: (2) false assumption of authority c/s 99(2), Penal Code; (3) wrongful confinement c/s 253, Penal Code; (4) corrupt transaction c/s 3(1), Prevention of corruption Ordinance; and (5) corrupt transaction c/s 3(1), Prevention of Corruption Ordinance. The second appellant, who was jointly charged with the first, was convicted on the last two counts only. The facts, in brief, are as follows. On Saturday, the first appellant, who was a primary court magistrate, in the company of the second appellant, made a number of purported "health inspections" of various shops at Kalemera Minor Settlement. In the course of these "inspections", he purported to discover

Violations of health regulations, and, in a number of cases, he threatened the shop-owners with prosecution unless they paid money. The following day, Sunday, he

rounded up three of the shop-keepers in question, and ordered them to be locked up. On Monday, they were brought to court, and the magistrate heard one of their "case", convicting one accused of the offence of not having a latrine and fining him Shs. 500/=. The other "cases" were never heard due to the intervention of higher authorities. On these facts, the accused were convicted as charged. On appeal to the High Court, the convictions were sustained on all counts, after a lengthy discussion of the facts and the evidence, which is not reproduced here. However a number of legal rulings were made which are given below.

Held: (1) "The first question to decide ….. is whether the 1st accused had solicited a bribe from Kalali and or the Somali [two of the shop-keepers whose shops were "inspected"]. The evidence as to such demands by the 1st accused is only that of each of these two victims. It is clear that a victim of extortion cannot be an accomplice and hence his evidence does not need corroboration – SRINIVAS MULL v. E. A. 1947 P.C. 135 – Quoted in Sarkar, on evidence. But it is obvious that great caution must be exercised in founding finding of such solicitation on the word of a single witness – especially in view of the harsh penalties involved. I have upon evidence before me come to the conclusion that is must accept as true the evidence of each for thee two witnesses as to the solicitation ….." (2) "The essence of the offence of Abuse of Authority is doing of an act by a public servant – which act it may have been within his power to do – with motives not of upholding the law or doing his duties as a public servant – but doing it for the prosecution of his own designs and whims – with total disregard to the rights of the victim and denying him elementary justice – and resulting in damage or injury to the victim. An example would be of a Traffic Policeman who every other day detains a taxi, allegedly for "inspection " overnight at the police station because the taxi driver refused to give the policeman's girl friend a fee ride! The policeman, no doubt, has powers t detain vehicles in such manner for the purpose of inspection and he may in fact carry out the inspection on each of the succeeding mornings – but if the motive of punishing the taxi driver for refusing to help the policeman's girl friend could be established then the fact that he did have the lawful power to stop the vehicle will not avail him if he is prosecuted under this section. (I should perhaps say here that neither Archbolld disclose a similar English provision nor

the Indian Penal Code could disclose a similar section nor the N. A. Law Reports seem to report a case under this or similar section). I believe that this is the correct view to be taken of the law in view of the wording of section 96, Penal Code. Of course, in most of these cases it had be possible to see that the limits of lawful authority have been exceeded or that powers not appertaining to that office have been assumed by the accused. But, the minima of proof, that needs to be established is I hold to be as described above. To come to the 1st accused's defenced that he was acting both as a magistrate and a Justice of the Peace in ordering the arrest of these 2 people; I should perhaps quote the relevant legal provisions. By Section 52 (1) of the Magistrates Courts Act, Cap. 537, every primary court magistrate shall be a justice of the peace. By Section 47 "A justice may arrest or may order any person to arrest any person who in his view commits a cognizable offence." It is clear that no offence whatsoever known to the law was committed by either Kaloli or the Somali within the view of the accused – which was a

cognizable offence. A primary court magistrate's powers of ordering arrest are laid down in the Primary Courts Criminal Procedure Code. It is clear that no personal powers of arrest are given to such a magistrate in his capacity as a magistrate like those granted to District and resident Magistrates. It is thus clear that the accused exceeded his authority as a Justice of the Peace and assumed non-existent powers of arrest as a magistrate when he arrested Kalili and the Somali." (3) "now turn to the third count alleging wrongful confinement c/s 253 of Penal Code by the 1st accused of the three complainants – the old Arab, the Somali and Kaloli. The accused No. 1 has admitted having arrested and detained these three persons. He claimed that he detained them because they had been accusing him of taking bribes. He had intended to send them to the police. I have, while discussing the law and facts relating to the 1st count, already dealt with the powers of arrest, the accused possessed and the reasons for the arrest. The conclusions arrived there are applicable in this case. The offence has been declared to correspond to the English offence of false imprisonment – Rep. v. Sefu Said

(1964) E.A. 178. In English It is for the accused to justify the arrest, once the fact of arrest has been proved. The accused has failed to justify the arrest, inter alia for two main reasons: (a) He has failed to show that the complainants had committed any cognisable offence within his presence: (b) he had failed to show that the complainants act amounted to any offence known to the law. For his reason I am satisfied that the prosecution witnesses …. Have told the truth and as I accept their evidence and convict the accused on count 3." (4) Appeal dismissed on all counts.

170. Onyango Okelo v. R. Crim. App. 332-A-69; 10/2/70; Platt J.

The appellant appealed against his conviction of being found in unlawful possession of gemstone contrary to section 3 of the Gemstones Industry (Development and Protection) Act No. 11 of 1967. He had pleaded guilty, and the facts were that he had been found with one piece of smoky quartz of no commercial value. The learned Magistrate nevertheless sentenced him to imprisonment for nine months, which the appellant claimed was too harsh.

Held: "It seems to me to be unnecessarily harsh for the appellant to have been sentenced to nine months' imprisonment for his possession of one piece of a relatively minor gemstone which had no commercial value. No doubt, the aim is to stamp out illicit traffic in gemstones; but hat objective can well be attained without undue harshness. As I have said on earlier occasions, there may be some justification for imposing imprisonment in the case of gemstones which are also "previous stones", but the same cannot be said of tones which are only the "semi-' precious" class, which in any event have no value. As the appellant pointed out the Revenue has lost nothing. In cases of this nature, it would be well to consider imposing a fine at the most. A person such as this appellant is hardly likely to be one of the illicit dealers in gems against whom the act is primarily directed. In the circumstances, as the appellant had already served some part of the sentence, the only course open was to reduce his punishment to such term of imprisonment as would result in this immediate release."

171. R. v. William Haining, Crim. Sass. 295-D-69; 1/4/69; Georges, C. J.

The accused was charged, inter alia, with a corrupt transaction c/s 3(1), Prevention of Corruption Ordinance, Cap. 400. in particular it was alleged that the accused, while he was Regional Engineer of Mwanza, and a public servant, had corruptly accepted for himself a Mercedes Benz Saloon car from Zahir Ahmed, the director of a firm which held a contract with the Ministry of Communications, Transport and Labour, as a reward for showing favour to the Company in the affairs of the Ministry. On the basis of the evidence, the High Court convicted the accused, and this part of the judgment is not reproduced. However the court's ruling on the burden of proof is given below.

Held; (1) "Section 3(1) in as far as it is relevant to the facts under consideration reads: "Any person who by himself ….. Corruptly accepts or obtains ……. From any person for himself …….. Any consideration as an inducement to or a reward for ……. Doing or forbearing to do or having done or foreborne to do anything in relation to his principal's affairs shall be guilty of an offence ……" of particular relevance in this case is section 8 which reads:- "Where in any proceedings under section 3, it is proved that any consideration has been …… obtained by an agent of the Republic or of a public body by or from a person holding or seeking to obtain a contract from the Republic or from any public body, the consideration shall be deemed to have been obtained corruptly as such inducement or reward as is mentioned in section 3 unless the contrary is proved." It is common ground that the onus shifted on to an accused person by the operation of section 8 is not one of proving the contrary beyond a reasonable doubt. If he can show on the balance of probabilities that he did not obtain the inducement corruptly as is mentioned in section 3 he must be acquitted. There would appear to be no East African authority on the point. Advocate for the republic quoted the case of R. v. Howard Bateman Carr Briant 29 Cr. App. Rep. 76. There the Court of criminal Appeal considered the section of an English statute which is in terms almost identical with section 8 of the Ordinance and concluded that the burden resting on an accused person was that of proving the contrary on the balance of probabilities. The reasonable is persuasive and I am content to accept it. It seems to me as a matter of policy that an accused person ought never to have placed on him the burden of proving his innocence beyond a reasonable doubt." (2) "What must the Republic establish before the burden

shifts? In a preliminary /ruling on an objection that the charge did not contain sufficient particulars I held that once the republic had established that the accused was an engineer employed with the Government, that he had received a gift from Zahir Ahmed and that at that time Zahir Ahmed was a contractor or likely to be holding contract from Government with which the accused would be concerned, then it would be presumed that he had received the gift corruptly unless he proved the contrary …. At the very end …… the junior advocate for the defence ……. Urged in effect that section did not throw on the accused any burden other than that of disproving the corruptness" of the transaction and that the burden of proving the consideration and of proving that it had been given as an inducement or reward for forbearing or for having forborne taking some action in relation to one's principal's affairs summarized the defence contends that to establish an offence under section 3 the following must be proved: (i) that the person charged received a consideration; (ii) that he received this consideration corruptly (iii) that he received it as an inducement or reward for doing or forbearing to do or having forborne to do something in relation to

his principal's affairs. There could be situations in which the Republic could establish propositions (i) and (iii) and yet fail because it could not establish proposition (ii) beyond a reasonable doubt in the case of the giver of the consideration this has been illustrated by the case of Mandia v. Republic (1966) E.A. 315. There it was held that a magistrate was not guilty of an offence against a Kenyan enactment corresponding to section 3(2) of the Ordinance where he had given a bribe to a police constable, his motives being to test the constable as he had "heard of these things and wanted to test to know if it was real". The Court of Appeal held that the Republic had to prove an evil intention on the part of the giver. The proposition would apply equally to the receiver. It was evil intention which section 8 presumed statutorily unless the contrary was proved. The Republic still had to prove beyond reasonable doubt the fact that consideration had been given and that it had been given as an inducement or reward. This interpretation

would narrow considerably the effect of section 8 as it could only be in the exceptional case (other than that of the deliberately laid trap for the purpose of providing evidence of the commission of an offence under section 3 (1) and (2) that this issue of motive would ever be relevant. On a grammatical analysis of the section it would seem, however, that the word “deemed” governs not only the word “corruptly” but also the phrase “such inducement or reward ….. “Which follows? The position could be stated thus – (i) “the consideration shall be deemed to have been obtained corruptly; (ii) “the consideration shall be deemed to have been obtained as such inducement or reward as is mentioned in section 3”. There would seem to be no sound reason why the deeming should govern only the word which immediately follows it and not the whole phrase. It could be argued that his interpretation would in effect equate section 3 with section as far as public servants were concerned when the received gifts from persons holding contracts from the Republic. It does bring the two sections very close to each other but hey would not be identical. It would still be possible for a public servant charged under section 3(1) and proved to have received a gift, to show on the balance of probabilities that he was not corrupt where as such an explanation would not avail as a defence to a charge under section 6. This distinction is significant. In the course of considering this matter my mind has wavered between the interpretation which I adopted in my ruling at the beginning of the case and the interpretation put forward by [defence counsel] at the end. I directed the assessors along the lines developed by [defence counsel]. In the final analysis, however, I am satisfied that my original ruling was the sounder, that the Republic has merely to prove the gift and that thereupon the burden shifts to the accused to show on the balance of probabilities that it was not corruptly received and that it was not received as an inducement or reward for doing or forbearing to do or having forborne to do some act in relation to his principal’s affairs …. The prevention and eradication of corruption in a developing society such as this are issues of the highest priority. The foundations of the nation are in the process of being laid and the national ethic formulated. Standards must of necessity be well and truly established. The proposed rule would impose no undue burden on the Civil servant. He ought no tin any event to accept gifts from people with whom he is likely to have to deal in the course of his official duties. If, having taken such a gift, he finds himself obliged to show,

on the balance of probabilities that he did not receive it corruptly as an inducement to take some action in relation to his principal's affairs then there is no injustice done to him and public integrity if afforded further safeguard."

(1970) H.C.D.

- 159 –

172. Gulamali Bhaloo v. R. Crim. App. 822-D-69; 18/2/70; Georges C. J.

The appellant in this matter was charged with and convicted of two offences with respect to breaches of an order made by the National Agricultural Products Board under section 6 of the National Agricultural Products Board Act, Cap. 567. The order was published as Government Notice 328 of 1968. section 2 provides:- "Every dealing in , barter, offer for sale, sale purchase, or hire of any of the agricultural products specified in the Schedule hereto or their derivatives is hereby prohibited except where such dealing in, barter, offer for sale, sale, purchase or hire is by the Board, its agents or persons licence by it, or in the case of an offer for sale or sale by a producer of such product. Provided that nothing in this paragraph shall apply to the retail sale or offer for sale of the processed derivatives of any of the agricultural products specified in the Schedule hereto for the consumption or use of the purchaser, his household or persons under his care." The Schedule lists the following: - Maize, maize flour, paddy, rice, wheat, wheat flour, cashew nuts. The facts are not basically disputed. On 25th May, 1969 A.S.P. Pattani went to the Dodoma Railway Station where he saw a consignment of 13 tons of rice "addressed to the accused". On enquiries he "discovered that the accused was provided with the Arrival Advice Slip of this consignment and also the invoice". The appellant did not apparently call at the Railway to collect the rice and on 28th May, 1969 A. s. P. Pattani visited the appellant "at his shop". The appellant said that he would not collect the rice and eventually the A. S. P. paid the demurrage charges due on the rice and seized it. Mr. Pattani asked the appellant to hand him the documents in connection with the rice shipment. The appellant replied that they were with his lawyer. On this and other documentary evidence the appellant was convicted.

Held: (1) "[The appellant's counsel's] first contention was that the section did not prohibit purchase of the scheduled products from licenced persons if the products

purchased were intended for retail. In effect he was contending that a retailer of these products did not have to be an agent of the Board or licensed by the Board. Unless, therefore, it could be shown that the appellant intended to sell wholesale there could be no offence. The section appears to me to be much wider in its scope than [would concede. It seems quite clearly to ban all dealings in the scheduled products by any person other than the agents of the Board or their licencess. The proviso excepts only retail sale for the consumption or use of the purchaser, his household and persons under his care. I would hold that every shopkeeper who retails any of the scheduled products must be an agent of the Board of its licence to enable him in the first place lawfully to purchase the products which he will in turn retail. The customer purchasing from him is exempted under the proviso, but no other dealing is exempted. It is true that the term "retail sale" has not been defined but clearly a consignment of 13 tons of rice could not possibly be thought of as a "retail sale" "for the consumption or use of the purchase his household or persons under his care." The dealing in these two consignments of rice would, therefore, be in breach of the order unless both parties were the agents or licensees of the Board." (2) "The second major contention deals with the usually difficult question of burden of proof [appellant's counsel] contended that the prosecution had failed to establish that the appellant was not an agent of licencee of the Board and that the burden was on them to do so. [Counsel for prosecution]

Contended that the prosecution did not need to do more than prove that there had been dealing and immediately the burden shifted to the appellant to show that he had the appropriate authority. In support he quoted the Evidence Act 1967 section 114 which states that the burden is on the person accused of an offence to prove "the existence of circumstances is bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged." The burden is also placed on the accused person of proving on "fact especially within (his) knowledge". Neither side quoted any authority on the point. I have not been able to find any direct East African authority but the position is well defined by English authority.

In R. v. Oliver (1943) 2 All E. R. 800 the matter was thoroughly reviewed and the Court of Criminal Appeal held that where a person was charged with having sold sugar as a wholesaler without the necessary licence the onus of proving that he had a licence lay on him because it was a fact peculiarly within his own knowledge. Authorities were cited ranging from Hawkins' Pleas of the crown to Williams v. Russell (1933) 149 L.T. 190 to support the proposition, More recently in Johns v. Humphreys (1955) 1 All E.R. 793 Lord Goddard C. J. stated that the onus lay upon the person charged with driving a motor car without a licence to prove that he had a licence …… these decisions appear to me sound in principal. Applied to this case they mean that once there was proof of dealing in rice in wholesale quantities it was up to the appellant to prove that he was an agent or licencee of the Board. He has failed to do this." (3) On these and other grounds, appeal dismissed.

173. J. A. K. Msanga v. R., Crim. App. 122-M-70; 26/2/70; Seaton J.

This is an application for bail pending appeal. The appellant was convicted by the Resident Magistrate of abuse of office c/s 96, Penal Code, and of wrongful confinement c/s 253, Penal Code. The appellant was sentenced to a fine of Shs. 700/- or 2 months imprisonment on the first count and 5 months imprisonment on the second count. The appeal is to be brought on count 2 only and will be against sentence. Learned Counsel for the applicant has indicated that he will urge on appeal that the appellant should have been given an option to pay a fine and that having been sentenced to imprisonment without the alternative of a fine deprived him of a right to which he was entitled in law and he has further submitted that there are overwhelming chances that the appeal against sentence will succeed.

Held: (1) "Learned State Attorney in opposing this application has pointed out that in the case of JAYANTILAL LAVJI KAR SHAH v. REPUBLIC, [1968] H.C.D. N. 328, Chief Justice Georges held that where all of the counts refer to a single transaction, "the best method of sentencing is to arrive at an appropriate punishment for the entire transaction and award concurrent terms to meet cash separate count taking into consideration the maximum punishment fixed for cash by law." I have also been referred to the case of HASSANALI LALJI v. REPUBLIC [1968] H.C.D. n. 174, where

Chief Justice Georges held “it is only where the strongest possible case for success is made out that he 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 not met “where an argument on the facts needs detailed references to the text of the evidence or the judgment to support it.” In the present case learned State Attorney submitted that the appeal would require detailed examination of the judgment and proceedings before it could be determined whether or not it has an overwhelming chance of success…… I have also referred to the case of LAMBERT HOUAREAU v. R. (1957) E. A. 414 where the Court of Appeal for Eastern Africa observed that the dictum that

Bail pending appeal should be granted only in exceptional circumstances had no relevance where the legislature has imposed punishment by fine, with imprisonment only in default in which case the main relevant considerations on an application for bail pending appeal are: whether the intended appeal is frivolous or vexatious? If not, has it a reasonable chance of success or it the application for bail made merely to delay? Is the applicant wholly unable to pay or unable to pay without suffering loss or damage (i.e. by sale of his means of his livelihood) which cannot be adequately compensated for by repayment of the fine in the event of the appeal being allowed? Does he offer reasonably satisfactory security for the payment of the fine or the surrender of his person in default of payment should the appeal be dismissed?..... now as I understand from learned Counsel for the applicant, the appeal in the present case is to be based on the proposition that where the Legislature has intended that an accused should have an option of a fine, he is entitled in law to be given such alternative. In my view this raises questions of law. The Court would have to consider whether the learned Resident Magistrate in imposing sentence has acted on a wrong principle o over looked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. According to OGALO s/o OWOURA v. R. (1954) 21 H.A.C.A. 270, these are relevant and proper considerations for an appellate court to take into consideration when appeal is brought against sentence. Therefore, in my view, it cannot be said that

the present application is merely vexatious or frivolous and, without wishing to say anything to prejudge the matter, it appears to me the appeal has reasonable prospects." (2) "For these reasons, I believe that if adequate security can be offered by the applicant, he should be released on bail with sureties pending the hearing of his appeal under section 321(1) (a) of the Criminal Procedure Code. it is accordingly ordered that the applicant be released on bail in the amount of Shs. 2,000/- on his own recognizance and two sureties in the like amount."

174. William Maziku v. R., Crim. App. 888-M-69; 3/3/70; Kimicha J.

The appellant was convicted of burglary and stealing. The complainant's house was broken into on the night of 22nd/23rd June, 1967 and property valued at Shs. 628/- stolen. Among the articles stolen were a Hitachi Radio and a grey pair of long trousers. On 29/7/ 69 the appellant's concubine testified that the appellant was in possession of the radio 3 weeks after the burglary. In his defence the appellant claimed that the radio and the trousers were his lawful property. The lower court rejected his defence and convicted him on the two counts.

Held: (1) "I am satisfied from the recorded evidence that the trial magistrate was right in finding that the complainant had established his ownership of the radio and trousers beyond reasonable doubt. (2) Though the appellant was arrested 25 moths after the commission of the offence the lower court found that he was actually in possession of he radio 3 weeks after the burglary and applying the doctrine of recent possession in relation to this period and the article stolen he found that the appellant was in fact the burglar. I have no reasons for disagreeing with this finding." (3) Appeal dismissed.

175. R. v. Lukanfubila s/o Kahema, Crim. Sess. 224-M-69; 6/3/70; Kimicha J.

The accused is charged with murder c/s 198, Penal Code. The deceased was a young girl aged 10 years. Her father was a friend and neighbour of the accused. They lived in the same

Village and their houses were close together. The accused was married. The deceased with another young girl, Tabu, used to sleep in the house of the accused and they did so for a very long time. The sequence of events that culminated in the death of the deceased was as follows. The deceased and Tabu went to sleep to the house of the accused as usual on the night of 10th July 1969. The accused's wife was drunk and went to bed early. She was already asleep when the deceased and Tabu arrived at the house. Soon after their arrival the accused tried to wake her up but she appeared to be fast asleep and id not wake up. Then the accused sent the deceased outside the house to collect some sweet potatoes and bring them in. she did so. He then sent her outside for the second time, this time to collect some cassava and take it into the kitchen. She did so. On her way out of the kitchen she met the accused at the door. He held her by the arms and took her back into the kitchen and raped her. She at first shouted but he shut her mouth with his hands. After he had raped her the deceased felt much pain. She was bleeding profusely and could neither stand nor move from the spot. On seeing this the accused told her to remain where she was and he went and warmed some water and washed her vagina. The washing did not lessen the pain and she kept on bleeding. The bleeding continued for three days, and finally the deceased was taken to Nyakalilo Health Centre on 14/7/69. She complained of stomach ache and was bleeding from the vagina. The hymen was ruptured. She was treated and she spent the night there. She was discharged in the following morning because her father wanted to take her home. She did not get better and died on 16/7/69. The medical evidence was that the cause of death was external haamorrhage due to the tearing of the vagina walls.

Held: (1) "After the summing up the two assessors who sat with me in this case returned an unanimous verdict of guilty to manslaughter. They believed that he accused reaped the deceased but that he did so without the intention to kill her or to cause her grievous bodily harm." (2) "After considering the evidence as a whole I am satisfied that the deceased's statement to her parents and neighbour that she was raped by the accused was true ……I find that the prosecution have established beyond reasonable doubt that it was the act of the accused that caused the deceased's death and that his act was unlawful." (3) "But I am in agreement with the gentlemen assessors that it

cannot be deduced from the accused's unlawful act that he committed it with the intention either to kill her or to cause her grievous bodily harm. Defilement of young girls in not a rare offence in this are but this case would appear to be the first in which the victim lost her life. There is no doubt that the accused expected the deceased to sustain injuries but not of the degree of severity that actually occurred. I therefore find that malice aforethought has not been established against the accused." (4) "For the above reason the accused is acquitted of the murder of the deceased and is instead found guilty of her manslaughter and is convicted accordingly." (5) Accused sentenced to five years imprisonment.

176. William v. R. Crim. App. 253-A-69; 7/3/70; Platt J.

The appellant was convicted of burglary and theft. A building belonging to Ali Kavaria was broken into and some clothing stolen. Three days later the stolen property was found in the appellant's possession. The case depended upon the doctrine of recent possession and the main issue at the trial as on this appeal was whether the appellant had received the property innocently. The learned Magistrate rejected the defence. The appellant stated

that on certain day in the morning (in fact the day following the breaking and theft) two men brought him a bundle of clothes saying that it belonged to his brother-in-law. Later he went to the market and saw his brother-in-law; but the latter did not come home with him. Nor did any other person. Then three days later he was found with the property. It turned out that the bundle contained the stolen property of several people including Ali Kavaria. This was confirmed by a defence witness. But some of he persons alleged to have brought the property to the appellant were called. It was alleged however when first taken to the Primary Court of Ugweno other men were called but were release later. There was no evidence against them of course except what the appellant related.

Held: (1) "It is true as the petition points out that the test is whether the appellant's story could reasonably be true, whether or not it convinces the trial court.

The learned Magistrate reasonably directed himself on the whole as to the principle involved. The argument is that he did not follow the principle in applying it to the facts. There was a good deal said about the principles of logic and the impression is clear that he learned Magistrate did not believe the defence. It was one which could be easily made up; it was possible that the persons who brought the articles could have been imagined. All this is true. But the test is whether the defence could have been reasonably true as well. If one reflects on the mode of proof – mere possession – it is clear that an accused may come into possession in a number of ways. If the appellant had named other people in the Primary Court could he have considered that he was holding property lawfully? Why then were these people not called by the prosecution to disprove the apparent defence. It is usual in cases of recent possession for the prosecution not to run the risk of relying merely on possession which can easily be defended. Normally the prosecution takes a first statement, if make, at face value and follows it up. If it proves false then the case is usually faultless. This was not done in this case, and all that remains is the possibility that the appellant was holding a bundle of clothes for his brother-in-law. A family member may often leave articles with another relative. Does if prove the holder's complicity? It is possibly a silly story but it cannot be said to be unreasonable without other proof. In my view I consider that the petition does raise a valid point that the learned Magistrate did not apply the principle impartially to the facts." (2) Appeal allowed.

177. Jonathan Mwaniki v. R., Misc. Crim. Cause: 3-D-70; 25/2/70.

This is an application for bail pending trial on a charge of personation c/s 371, Penal Code. It was alleged accused was impersonating another person to whom universities had conferred academic degrees. Accuse was alleged to have applied to the National Development Corporation. Learned State Attorney was opposed to ail on the ground accused could again commit similar offences if released on bail.

Held: (1) "I am of opinion accused should not be released on bail, as the likelihood he may commit a similar offence while on bail is high ….. in my view, the likelihood an accused may commit a similar offence to the one with which he is charged while on bail is a matter the Court has to consider on an application for bail. In this

instance, as accused firmly states he is the man to whom the certificates were issued, it is quite likely he will say the same to others if he is allowed out on bail, and possibly commit the same offence with which he is at present charged." (2) Application rejected.

178. Mustafa s/o Msumi v. R., Crim. App. 657-Tanga-69; 22/1/70; Biron J.

The appellant was convicted of stealing a leather pouch from motor vehicle c/ss 269 and 265, Penal Code. On appeal, it was held that the case had been proven beyond reasonable doubt. Incidentally, however, the court dealt with the admissibility of a statement made by the special constable who arrested the appellant. "When arrested the accused told me that he had not stolen but he had picked the pouch from the car."

Held: (1) "With respect, I am inclined to the view …. That the statement is admissible, as although it constitutes an admission in that the appellant admitted that he picked up the pouch from the car, it is not per se a confession to any offence. He may merely have picked up the pouch in order to hand it to its owner or otherwise safeguard it for her. This statement is thus perfectly capable of an innocent construction and explanation …. If admitted, that evidence certainly clinches the case against the appellant beyond a peradventure." (2) Appeal dismissed.

179. Mandila s/o Mwaja v. R. (PC) Crim. App. 15-D-69; 23/2/70; Makame Ag. J.

The appellant was convicted of cattle theft c/ss 265 and 268, Penal Code. His appeal was rejected as without merit. However in the course of its judgment, the High Court commented on the statement by the Primary Court Magistrate that the evidence of two defence witnesses needed corroboration under Rule 15 of G. N. 22 of 1964, as given by children.

Held: (1) "With respect, I think this view proceeds from a misapprehension of the law. The corroboration referred to under the Rule must concern prosecution evidence, for it is the prosecution which has to prove the offence. In the instant case, the evidence of the two children is objected to not because it was not corroborated, but because it was untrue." (2) Appeal dismissed.

180. Inatio Asmani and another v. R. Crim. App. 833-D-69; 4/3/70; Georges C. J.

The two appellants were each charged with eight counts in some cases jointly and in some cases individually – for various offences arising out of a discovered shortage of funds in the Mtwara Cooperative Union. The charges included conspiracy to steal, theft, false accounting and forgery. The magistrate convicted the appellants on all counts, save that of a conspiracy to steal, not making a finding on that count on the grounds that it was not necessary since he had already convicted on the theft counts. The appeals from the convictions were rejected by the High Court as without merit. However, in the course of its judgment, the High Court considered the trial magistrate's failure to make a finding on the charge of conspiracy to steal.

Held: (1) "In support [the trial magistrate] cited Musinga v. R. (1951) 18 E.A.C.A. 211 where the Court of Appeal said: "Counsel for the appellant have referred us to expressions of opinion by this Court and by Courts in England deprecating the joinder of a charge of conspiracy with charges of specific offences based on the same evidence. It is admitted that there is no illegality in such joinder but we agree that it ought not to be done in a case where it is likely to prejudice the conduct of the defence." In that particular case the Court thought that the joinder was perfectly proper and was the only way of establishing the guilt of some of the persons involved in these illegal transactions. I do not think that this authority justifies

the trial magistrate's decision not to make a finding of guilt or innocence on that count, though I agree with his advice that where specific offences can be proved the trial should not be complicated by adding a conspiracy count. The effect of such a count may be to may be to make relevant in the case of particular accused evidence which would not otherwise be relevant and could be highly prejudicial though having very little probative value. This was not the case here. Since the Republic has not appealed against this particular finding I do not think that I have the power to convict the appellant

on that count though the trial magistrate would undoubtedly have done so had he come to a decision." (2) dismissed.

181. Francis s/o Mtunguja v. R., Crim. App. 858-D-69; 18/2/70; Georges

The appellant was convicted of stealing by a person employed in the public service c/ss 265 and 270 of the Penal Code. The evidence was that the appellant was an Assistant Accountant employed with the National Provident Fund. If an employee was not able to draw his salary at the appointed time the appellant was supposed to deposit it to the account of the National Provident Fund at the Bank of Tanzania. This deposit would be made on normal bank deposit slip. A copy would be sent on the Headquarters of the Fund. Apart from the copy of the deposit slip the appellant was also required to send to headquarter a list detailing the individual salaries which had not been paid and which together totaled the amount of the particular deposit. The prosecution at the trial based its case on proof that for the months of August, September and October, headquarters had not received any copies of deposit slips showing that unpaid salaries for those mouths had been deposited, nor had they received any itemised lists showing which particular salaries had not been paid and had accordingly been returned. On scrutiny it appeared that Shs. 6,422/90 had not been paid out to various employees and that this sum had apparently not been accounted for. The appellant did not give evidence on oath but made an unsworn statement which consisted largely of arguments. On the basis of this evidence, the trial magistrate inferred that the appellant must have stolen the money and convicted. In his petition of appeal the appellant urged very strongly that mere non-receipt at headquarters of the Bank Deposit Slip did not mean non-payment into the bank.

Held: (1) "At the first hearing of the appeal adjourned the matter so that further evidence could be adduced as to whether of not the money had in fact been deposited. In so doing I acted under section 322 of the Criminal Procedure Code which stated in part: - "In dealing with an appeal from a subordinate court the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court." I thought such additional evidence necessary because although it is possible, in my view, on the facts to support

the inference drawn by the trial magistrate, it appeared to me to be undesirable to decide an important issue as to guilt or innocence on a serious charge on an inference when there could e available records which could help to establish the matter one way or the other. If the money had in fact been deposited then the appellant would be acquitted and absolutely cleared. If the money had not been deposited then his quilt would be established with certainty. To deprive once self of the benefit of this evidence when there was power to hear it did not appear to me to be in the interests of justice. The authorities in East Africa have tended to narrow somewhat the wide power conference on the courts by section 322. The law would appear to be that additional evidence could not be called for the purpose of "filling"

gap" in the case for the prosecution. More explicitly the Court of Appeal has held that where on a scrutiny of the evidence it is clear at the close of the case for the prosecution no case had been made out against the accused person because there was a gap in the evidence, then on appeal the power to call additional evidence should not be used so as to fill that gap. On the other hand, where all that was required was elucidation of some matter left vague in the case for the prosecution then the power conferred by s. 322 can be used. I am satisfied that this case falls under the category of elucidation. The fact that the evidence was available and could have been called in the court below would seem to be immaterial." (Citing: Mohamed Hussein v. The Price Controller), (1943) 10 E.A.C.A. 72). (2) "For my part I would think it desirable that the powers conferred by section 322 should be given the widest possible interpretation. A first appeal from the subordinate court is in law an appeal by way of re-hearing. In Tanzania it may well be that up to that stage no fully qualified professional lawyer has in ay way been connected with the conduct of the proceedings. Thought lack of experience or negligence important lines of enquiry might not have been followed either

by the police or by the defendant in the course of the trial. If the emphasis is to be on the interest of just, i.e. ensuring the acquittal of the innocent and the conviction of he guilty, there should be little reluctance at the hearing of the first appeal, to have as thorough an investigation of the factual situation as may be possible before arriving at its decision should this appear necessary. It could be safely left to the discretion of the Appellate Tribunal to make sure, without the application of any hard and fast rules, that this power was not used aggressively against accused persons. It might be that the decisions of the Court of Appeal would preclude my taking such view of the section but as I have indicated, even under the narrower interpretation this was a case in which additional evidence could properly be received." (3) Additional evidence called, which fully supported the prosecution case. Appeal dismissed.

CIVIL CASES

182. Mjige v. E. A. Railways & Harbours & Others Civ. Case 4-T-68; 8/4/70; Platt J.

In this case the dependants of a railway guard named Kilio, who died in a motor vehicle accident on the 30th November 1966 sued four persons in damages under section 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360. The dependants were his widowed mother, Mariam Mjige (1st plaintiff) and his minor daughters Mandalwa and Rukiya (2nd plaintiffs), who sued by their guardian Mariam. The first defendant was the General Manager of the E. A. R. & H. and the second defendant Abdallah Juma was a driver employed by the E. A. R. & H. Kilio died as a result of a collision which occurred between the Railways' vehicle, a Peugeot saloon car and a lorry. The Lorry was owned by the third defendant Alli Chiliga and under the control of his driver Hassan Mohamed, the fourth defendant. The lorry was stationary at the time of the collision, facing towards Korogwe, and Abdallah Juma was driving the Railways' vehicle from Tanga to Korogwe. The collision occurred at about 12.50 a.m. just after midnight between the 30th Novembr and 1st December 1966. Juma was conveying Kilio from Tanga to Korogwe in the course of his duties. Kilio had been instructed to board the train at Korogwe on which he was to act as a guard. Kilio,

therefore, was also acting in the course of his employment…. The lorry was hired by third parties to convey their produce to Dar es Salaam and was returning from Dar es Salaam to Lushoto. It left Dar es Salaam at 5.00 p. m on the 30th November and had joined the Tanga/Korogwe road. But as Hassan felt unable to continue driving at that late hour, he, with agreement of the hirers, decided to take a rest. Shortly after 12.30 a.m. Hassan was awakened by the noise of the collision, and saw the car overturning before it came to rest in front of him in the grass off the road on the left facing Korogwe. The police officer, who visited the scene of accident, discovered that the lorry abutted into the tarmac surface of the road about 2 ft. and thereby caused some obstruction. Therefore if the chevrons and reflectors had been somewhat dusty, as the police officer found, and the parking lights had not been switched o, the lorry stood to cause some obstruction for other users of the road traveling towards Korogwe. The plaintiffs had been paid by the first defendant Shs. 24,000/- under Workmen's Compensation Ordinance and Shs. 8,990/- as a death gratuity, which was said to be discretionary.

Held : (1) "It was Hassan's duty to take proper precautions to see that the position of his vehicle was either clear of the road or could easily be noticed by other drivers using his side of the road. This is more especially the case if it was true that there was some mist which had gathered on this otherwise dark night ….. on the other hand, it was Abdallah's duty to drive at a reasonable speed with his lights fully on and keeping a proper lookout ….. It seems clear that there was some fault on both sides. I would apportion the liability for the accident two – thirds on the side of Abdallah and one-third on the side of Hassan". (2) "It was Ali Chiliga's case (3rd defendant) that he was not responsible for whatever his driver Hassan was under their direction ….. it was, no doubt, a case where Ali Chiliga was the general employer while (hirers) had a contractual right to the use of Hassani's services. On Ali Chiliga's part he was responsible for the wages and food allowance of Hassani as well

as the running and the maintenance expenses of the vehicle. As such the manner in which Hassan was to drive the vehicle was, of course, to conform with the traffic

regulations and Alli's interests in preserving the vehicle in good condition, and as Alli says if Hassan committed any wrongful act, it was Alli's right to dismiss him. Hassan was also to return within a specified time; it was not open to (hirers) to give Hassan instruction which would require the lorry to deviate from the route or delay its return. On the other hand, it was open to (hirers) to require the vegetable to be conveyed to markets in Dar es Salaam as they chose, and no doubt they could require reasonable assistance in preserving their produce. But in the final analysis it was Hassan who decided that he must stop and rest and it was up to him to se that the lorry was properly parked because by this time he was simply driving (hirers) back to Lushoto in an empty lorry. At this stage they were largely passengers. In my view, on the facts as presented by the evidence, there can be little doubt but that Alli was in control of the vehicle at the material time through his servant Hassan. In coming to this conclusion I have taken cognizance of MERSEY DOCKS AND HARBOUR BOARD v. COGGINS & GRIFFITHS (Liverpool) Ltd. and MACFARLANE (1946) 2 ALL E. R. 345, the leading English case which received approval in CHURCHER v. THE LANDING & SHIPPING CO. OF EAST AFRICA LTD. (1957) E. A. 118; and I hope that I have sufficiently demonstrated that the proper test, being whether or not the hirer had authority to control the manner of the execution or the relevant acts of the driver, has been properly applied in the circumstances existing. I would therefore hold that as Hassan was somewhat at fault; both he and Alli Chiliga were responsible to that extent." (3) Passing to the situation of Abdallah vis a vis his employer the General Manager of the East African Railways and Harbours: "It will not be disputed that Abdallay being the actual tortfeasor on the basis of his assumed responsibility or partial responsibility was directly liable, and in general circumstances his employer was vicariously liable. But Counsel for the East African Community took a preliminary point that although the suit might well be commenced within three years of the death of Kilio in pursuance of section 4(2) proviso (ii) of Cap. 360 nevertheless, this municipal law was ousted by legislation concerning the High Commission and the Treaty for East Africa Co-operation (Implementation) Act No. 42/67; where by section 93 of the East African Railways and Harbours Act supervened and cut down the period to one of 12 months but within the three year limit. Without going into details which are set out in the ruling on this subject, I held that the suit was

time barred as against the General Manager of the Railways. I do not propose to add anything further to that ruling which will explain why the suit was dismissed with costs against the plaintiffs as far as the General Manager was concerned, and left Abdallah Juma standing by himself as second defendant."

(4) (a) "Part of the difficulty which arose (with respect to Workmen's Compensation Ordinance) in this trial was that Counsel for both sides were not sure whether the principal ordinance applied or whether the amending ordinance being No. 60 of 1966 had come into operation at the date of the accident or could be said to operate at the time when the suit was commenced. Further argument was called for when it was discovered that the amending Act was brought into operation as from the 1st July 1967 by virtue of G. N. No. 159 of 1967. The amending Act therefore came into force after the accident but before the suit was commenced on the 20 the April 1968. There is nothing in the amending Act prescribing that it shall cover

Accidents which occurred before it came into force. I take it therefore that the amending Act affected the employer's liability for the higher payment of workmen's compensation as a result of injuries received in accident occurring after the 1st July 1967. Hence although the compensation paid may have been paid out after the new Act came into force, the amount paid was properly computed according to the provisions of the old Ordinance and that the Railways were not liable to pay the additional sum provided by the new Act. But since the date of payment is not actually known I leave the point open." The court however remarked that "……. When one turns to section 6(a) of the Workmen's Compensation Ordinance, it will be seen that they received the highest award possible in the case resulting from personal injury by accident arising out of, and in the course of the workmen's employment." 4(b) "But then does it also follow that the more stringent provisions of section 23 of the old Ordinance also apply? Section 23 as far as it is applicable provides as follows:- '23. Where the injury in respect of which compensation is payable under the provisions of this Ordinance was caused under circumstances creating a legal liability in some person other than the employer to pay

damages in respect thereof – (a) the workman may take proceedings both against that person to recover damages against any person liable to pay compensation under the provisions of this Ordinance for such compensation, but shall not be entitled to recover both damages and compensation:' there is considerable learning on the history of the English Workmen's Compensation Acts, but suffice it to say that section 23 just quoted stem from the corresponding English act of 1908 which in its day was innovation granting the workman the right to sue for both workmen's compensation and damages. A procedural bar was however instituted whereby he could not recover both. He could commence proceedings for both types of remedy but if he recovered workmen's compensation then he could not pursue his right to damages. In this case as it is admitted that compensation was recovered, then that would be a bar to the suit for damages. The amendment does vary with this procedural bar, and recites as follows: -'23. – (1) Where the injury in respect of which compensation is payable under the provisions of this Ordinance was caused under circumstance creating a legal liability in some person other than the employer to pay damages in respect thereof. The workman may take proceedings both against that person to recover such damages and against any person liable to pay compensation under the provisions of this Ordinance to recover such compensation; but shall not, save in the circumstances described in subsection (2), be entitled to recover both such damages and compensation. (2) Notwithstanding anything contained in subsection (1) – (a) …… (b) when a workman has recovered compensation under the provisions of this Ordinance in respect of an injury caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof and the amount of such compensation is less that the amount of damages so recoverable from such person the workman shall be entitled to recover from such person the difference between such two amounts ….' By setting out the opposing legislation it will be clear that the new legislation merely affect a procedural change rather than one affecting the rights of the claimant. In these circumstances I hold that although the new Act amending the old Ordinance, did not come into effect until after this accident, it did come into effect before these proceedings were commenced. The general principle seems to be that alterations in procedure are

retrospective unless there is some good reason against it. (Maxwell on STATUTES 11th Ed. pp. 216-220). The plaintiffs

were entitled to avail themselves of the new procedure. Accordingly the admitted recovery of compensation did not debar the further suit for damages." (5) "The final question concerns the quantum of damages recoverable by the dependency." ….. "The two girls were his daughters living in the deceased's quarters provided by the Railways and the deceased's mother was living with him and helping to look after the children. The deceased's mother Mariam was a widow herself and had but a small shamba on which to take out an existence. It is clear that she looked to her son to help and support her ….. "The deceased spent about Shs. 500/- per month on his family. This covered their clothing and food and no doubt food for himself when he was at home"…… Deducting something for the deceased's own keep, I find that the dependency figure is Shs. 400/- per month. The deduction would have been greater if the deceased were not away on duty as much as it appears that he was." "I also hold ……. That the deceased must be taken to have been 46 years of age, his mother 60 years of age, and his elder daughter about 10 years and the younger about 4 years of age. As such the deceased had a working life of some further nine years until he was 55 years of age, the age of compulsory retirement. The deceased was reasonably efficient. He was at the top of his grade when he died and was paid Shs. 835/- per month. There was no very great chance of further advancement. It meant transferring to a more senior branch. There is no evidence that the deceased. Intended to do that. It may be that with his considerable overture payments averaging between Shs. 200/- to Shs. 300/-, he was content to stay where he was. I shall take his average monthly earning at Shs. 1,100/- to be constant. From this it will be seen that Mariam's claim could easily be met, as well as keep up his payments to the Provident Fund and other accessory disbursements. After his retirement the deceased would still be able to support his family as the

evidence concerning his Provident Fund show; but these would be some decrease in quantum. While therefore Mariam could expect to be supported during her lifetime, while the deceased would probably remain at work, the girls would look to their father after his retirement. The period left of working with the Railways can be considered as only a part of the period in which the deceased's dependents would look o him. Therefore making some reduction for capitalizing the dependency I would award the sum of Shs. 36,000/- it is now necessary to consider the deduction By virtue of section 23 of the Workmen's Compensation Ordinance Shs. 24,000/- has to be deducted. The question is whether the gratuity has to be deducted as well. As the evidence shows it is a discretionary payment, but I imagine that that discretion involved is not so much whether or no to pay, as to whether to withhold payment which is normally paid for some disciplinary reason. It is payable on death or termination of employment. As such I think it must be deducted. It was Shs. 8,990/-. After deductions the balance is Shs. 3,010/-. I apportion this as to Shs. 1,500/- to Mariam the deceased's mother, and Shs. 755/- each to the deceased's two daughters."

183. Mbarwohi v. Mbarwohi (PC) Civ. App. 15-M-70; 28/4/70; Seaton J.

The appellant/plaintiff was claiming a piece of clan land left to him by his deceased father. His story was that the shamba in dispute had been given to him by his late father; that before his father dies he had chased away the respondent, the appellant's full brother, and had disinherited other brother Paul. However, after the father's death, the appellant brought back the respondent and gave him some land. But the respondent sold this land to Paul. Finally, the appellant had to redeem this land with his own money. The respondent on the other hand, claimed that he had never been

chased away from the shamba. The appellant in support of his claim produced five witnesses, all of them clan members. The Primary Court, on the strength of this evidence, decided for the appellant, but the district court reversed this decision on the ground that the written will which was produced in court and on which the appellant

based his claim was void as failing to satisfy the requirements of paragraphs 1-5, 17, 19 and 20 of the Third Schedule to the Local Customary Law (Declaration) (No. 4), Government Notice No. 436 of 1963.

Held: (1) "The written will was not in conformity with the Declaration of Customary Law and ought not to have been admitted in evidence." "It appears however that the primary court never based its decision on the purported written will. From a careful reading of the judgment of the primary court, it would appear that the will in issue was not a written one but an oral will; the primary court never dealt with the authenticity of the written will. Accordingly, the district magistrate erred in holding that the written will was void while no such written will was in issue." (2) …. I am convinced that even the oral will did not satisfy the requirements of paragraphs 1-5, and 11 to the 3rd schedule of G. N. 436/1963. For although the appellant contends that the oral will was witnessed by five clan members, it did not meet the requirements of paragraph 11 of Government Notice No. 436 of 1963. Paragraph 11 requires no less that four witnesses, two of whom should be clan members and the other two should be non-clan members. As it is only five clan members are said to have witnessed the will but apparently no non-clan member was present. In Deusdedit Kashanga v. Bir. Baite Rwabigene (1968) H.C.D., Case No. 165, Justice Mustafa noted that according to G. N. No. 363/63, schedule 111, section 11 reads: "An oral will must be witnessed by at least 4 persons, 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 recognised witnesses. Since this requirement was not complied with, the learned Judge found the alleged oral will not proved. Similarly, in the present case the primary court was wrong in finding the oral will proven." (3) "No doubt where a testator has died intestate by leaving behind no will, the property of the deceased has to be distributed in accordance with the Law of Inheritance G. N. 436/63 which applied to the jurisdiction of the Buhaya District Council by G. N. 605/63. But the situation in this case does not seem to be governed by the law of Inheritance as set out in the Declaration of Customary Law. The appellant claims that he had been given the shamba while the father still lived. The respondent avers to the same effect, although the appellant brought the will into issue, it does not seem to this Court that the allocation of the shamba derives its validity from that will. If the shamba

was allotted to either party before their father died, it could not be the subject of a will unless to confirm the same or disinherit the allottee. In the circumstances, it is for this Court to decide which of the parties was allotted this shamba, and in doing so must look to the evidence of the parties. As found above, the appellant's claim was supported by the clan members. The respondent could gather no evidence in support of his claim. The appellant must therefore be telling a true story of the transaction with regard to this shamba entered into between him and their father at the time the latter was still living." This Court is satisfied that the appellant has proved his claim and that the shamba with all the property on it lawfully belongs to him. (4) Appeal allowed.

184. Jehangir Emporium v. Teema Garments Civ. Rev. 1-M-70; 20/4/70; Seaton, J.

An application was filed by the Plaintiff/Applicant requiring the Court under its revisionary jurisdiction to ivoke section 79 of the Civil Procedure Code, set aside the order of the learned Senior Resident Magistrate at Mwanza dismissing the suit for non-appearance of the parties and restore the suit. Some interlocutory proceedings between the parties were fixed for hearing on 28th January, 1970, before a Senior Resident Magistrate. The applicant had two simultaneous case on the same morning and, as he stated, 'adhering to a convention quite known, to the Magistrate that the High Court has preference over a lower court, he opted to appear before the Judge in Chambers first. Meanwhile, the Magistrate called upon the parties to have audience before the court and for want of appearance did dismiss the whole current suit. An application under Order I rule 14 for third party proceedings was the only subject-matter before the magistrate and the date for hearing the whole suit was yet to be fixed. Since the Magistrate was only seized with discretion of dismissing the application for want of appearance, the applicant submitted that the order dismissing the suit was improper and irregular and prayed the High Court to exercise its discretionary power of revision.

Held: (1) "The applicant had three courses of action open to him as regards the decree of the Magistrate. Under order 9 he should have applied under rule 4 to set aside the dismissal. Alternatively, he could have appealed against the dismissal order.

Lastly, he could have applied for revision to this Court. He had opted for the last. The power of revision is discretionary which no doubt must be exercised judicially and which must further be exercised on some fixed principles and not according to dictates of sympathy or benevolence …..This Court must therefore look at the competence of this application bearing in mind the provision of section 73 of the Civil Procedure Code which direct that 'no decree shall be reversed or substantially varied ….. in appeal on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.' Counsel for the respondent made no objection to the prayer sought by the applicant but his alone does not render the exercise of this discretion any lighter. It was said in the case of Munshi v. Amin (1955) 22 E.A.C.A. 183 that 'there is no authority for the proposition that a power to review an exparte decision is a principle or rule of natural justice. Rules of Court cannot be used as premises from which to deduce rules of natural justice nor can equitable principles be used for creating a power or review.' (2) "The applicant reasons that although he had three remedies open to him, the reversionary remedy was the most appropriate since it alone could restore the suit. In support of this, there were raised several cogent arguments. First, that appealing against the dismissal would be incompetent since there was no lawful order from which to appeal. As the Magistrate could only dismiss the application in Chambers then pending, and not the whole suit, the order dismissing the whole suit was no order at all, thus it was a nullity and had no effect at all in law. The other alternative would have been to proceed under Order 9 rule 4. This, the applicant considers to be impossible because the suit was irregularly dismissed when only a Chamber Application was being heard. The dismissal was therefore not a valid order which could be set aside. The

Applicant could no doubt have instituted a fresh suit as this was not barred by the decree, but since the second suit would be caught by the Limitation Act, resort to this would only be detrimental to the applicant. This would mean losing some Shs. 15,000/- which he may have obtained had the suit been maintained. It has been submitted by

Mulla in his Code of Civil Procedure Code. 10th Edition, that the high Court may not exercise its reversionary jurisdiction where the alleged irregularity can be tested and challenge on appeal. With respect, I am inclined to accept the submission of the applicant that there was no lawful order to appeal against, even if it were lawful, the order does not appear to be one from which appeal lies under section 74 of the Civil Procedure Code. in any case where a subordinate court exercises a jurisdiction not vested in it, the High Court has power under section 79(a) of the Civil Procedure Code to interfere in revision. I accordingly agree with the submission of he learned counsel for the applicant to the effect that an application for revision to this Court was not only proper but appropriate." (3) "Order 9 rules 3 allows a court to dismiss the suit where neither party appears when the suit is called for hearing. This power is discretionary and that is why the legislature found it safe to use the word 'may' rather than 'shall'. In the present situation there were a number of reasons which would have forced a cautious magistrate not to proceed under this Order. In the first place the hearing was not for a suit but for a third party proceeding. Secondly an order dismissing an interlocutory proceeding could not be used at the same time to dismiss the suit ….. The application which was to be heard before the learned Senior Resident Magistrate was not a suit for the purpose of Order 9 rule 3 ….. in the circumstances the purported order dismissing the whole suit was illegal and therefore no order at all at law. The learned magistrate could only dismiss the application but had no jurisdiction to dismiss the suit. In dismissing the suit he was acting in excess of the jurisdiction conferred on him by law. It is the view of this Court that such an irregularity goes to the root of the matter and is incurable." (4)"Accordingly, I would order as prayed and send the file back to the Senior Resident Magistrate and direct him to proceed with the case. As there was no order regarding the Chamber Application, I direct the same to be heard and settled."

185. Lyimo v. Abdallah Civ. App. 2-D-70; 29/5/70; Georges, C. J.

The plaintiff/respondent was claiming from the defendant/appellant the sum of Shs. 1,040/- being arrears of rent due to the plaintiff for the period 1st April 1967 to 31st July, 1968 at the rate of Shs. 65/- per month. The defendant denied this claiming that he had in fact paid at the rate of Shs. 130/- a month from March 1st 1967 to February 29th 1968;

that since the Rent Tribunal fixed the rate at Shs. 65/- a month with effect from 1st March 1967, he had overpaid the sum of Shs. 780/- which he was entitled to set off against the plaintiff's claim for the months March to July 1968. The suit was filed in the District Court of Dar es Salaam and was decided by a Resident Magistrate in favour of the plaintiff. The defendant appealed on the ground that the District Court had no jurisdiction to hear the case by virtue of s. 11A of the Rent Restriction Act, 1962 which reads: "(1) All claims, proceedings or other matters of a civil nature arising out of this act or any of the provisions thereof and in respect of which jurisdiction is not specifically conferred upon the Tribunal shall be commenced in the court….. And the court shall have owe to do all things which it is required or empowered to do by or under the provisions of this Act, and

Without prejudice to the generality of the foregoing shall have power ….. (b) to make orders, upon such terms and conditions as it shall think fit, for the recovery of possession and for the payment of arrears of rent or mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation or possession of any premises;" …… S. 2 "The 'court' means a court of resident Magistrate of competent jurisdiction." The appellant's counsel contended that a claim for rent with respect to premises which come within the Rent Restriction Ordinance is a claim or proceeding of a civil nature arising out of the Act and that jurisdiction is vested exclusively in the Court of the Resident Magistrate.

Held: (1) "A claim for rent, sympliciter, is not a claim which arises out of the Rent Restriction Ordinance. The claim is founded on the very nature of the relationship of landlord and tenant. The amount of rent payable is controlled under the Act. The recovery of possession is also controlled. All these controls in effect modify the terms upon which parties would be otherwise free to agree in entering into the relationship of landlord and tenant and they arise under the act, but the obligation to pay rent itself does not arise under the Act and is , therefore, not affected. "[S. 11A (1) (b) provides that the Court shall have power to make orders for the 'payment of arrears of rent'. This,

however, if clearly in the context of granting remedies collateral to an order for possession. Where the issue, as here, is a pure and simple issue as to whether the standard rent has or has not been paid owner a particular period this phrase cannot be applicable. There was a further argument based on subsection (g) of section 11A (1). This subsection makes it compulsory for the landlord to seek the permission of the Court before levying distress. The contention was that since distress was a method of enforcing payment of rent and the act imposed an obligation to go to the Resident Magistrate's Court before this was done, then it could not be contemplated that if another method of enforcement by way of suit was used instead that his could be dealt with by ay other court but the Resident Magistrates' Court. In my view this does not follow. There would be need to exercise some control over the landlord's right to use a remedy as harsh as distress to recover his rent. The tenant's possession could be made quite unbearable if the bailiff could be put on him on each occasion that his rent was seven days in arrear – more particular when an arrears of rent for thirty days does not under the Act automatically entitle the landlord to possession. Once the right to levy was being controlled it was the convenient thing to vest jurisdiction in the Court to which other powers had been given. An ordinary suit for rent, unlike distress, is not a weapon which can be used to come possession so uncomfortable that it would be surrendered. There was no reason to control that and I have seen nothing in the act to show that it has been controlled. No doubt jurisdiction was conferred on the resident Magistrates' Court in matters arising out of this Act because it was contemplated that not infrequently matters of law would arise which would require the skills of a professionally trained lawyer. Before the Amendment of 1962 there was a Rent Restriction Board presided over by a professionally trained lawyer which dealt with all the matters now placed under the jurisdiction of the Resident Magistrates' Courts. When this Board was abolished and the Rent Tribunal, presided over by a layman, set up to deal with the assessment of rent, the more complicated legal issues were entrusted for determination by the Resident Magistrates' Court. No complicated legal issues arise where the claim is one for rent alone and the defence is an assertion

that it has been paid. No reference need be made to this Ordinance and indeed in the pleadings none was made except for the purpose of sitting that the standard rent had been fixed at Shs. 65/- a month as from March 1967. This was not in dispute". (2) "If this matter has been one which fell under the Rent Restriction Act, I would have followed the judgment in Allarakhia v. Aga Khan [1969] E.A. 613, and I would have held that from the proceedings as they are it was clear that the matter had been determined in the District Court and that this court has no jurisdiction. Since I am satisfied, however, that the claim does not arise under this Ordinance the case of Allarakhia appears to me irrelevant and I would hold that the District Court did have jurisdiction to hear this case and to determine it." (3) Appeal dismissed.

186. Kassam v. Ghalib Civ. App. 17-D-69; 27/5/70; Georges, C. J.

The decree holder got his judgment on 24th April, 1958. The record discloses that he must have applied for execution on or about 30th September, 1960. On 22nd October, 1960 an order was made for the payment of the judgment debt by instalments of Shs. 500/- monthly with the usual default clause. On 19th February, 1961 a warrant for the arrest of the judgment debtor was issued. On 20th February, 1961 he was committed to prison for six months. The matter then fell into abeyance. On 7th November, 1968 another application for execution was filed. In the normal course a notice to show cause was issued to the debtor. He appeared and argued that the judgment was statute barred since no application for execution had been made within three years of the last application as required by section 182 of the Indian Limitation Act which he contended governed the case. The decree holder contended that the appropriate law of limitation was to be found in section 39 of the Civil Procedure Code 1966 and that once an application for enforcement had been made within three years of the date of the decree a fresh application could be made any time within twelve years of that date. The trial magistrate accepted the contentions of the judgment debtor. On appeal to the High Court –

Held: (1) "The view of the Indian Courts and the view taken by the trial magistrate was that section 182 applied to this case and that since there had been no application

for execution, then the application now under consideration was statute barred. I find great merit in this view. It seems to me to give full effect to both section 182 of the Indian Limitation Act and section 39 of the Civil Procedure Code. Quite obviously under section 182 Clause 5 successive applications for execution could be made ad infinitum provided that each was made within three years of the last. Section 39 of the Civil Procedure Code makes this impossible by providing an absolute limit of twelve years. This seems all the more sensible when it is noted that section 39 of the Code only lays down the period for fresh applications. It envisages that a first application has already been made. Section 182 of the Indian Limitation Act prescribes that this must be made within three years ….. This is not, however, the view taken by the Courts in Eastern Africa. The precise point was considered in the case of Maria Blandina Saldanha de Souza & another v. C. F. Campbell Clause and others (1942) 14 Kenya Law Reports, 56. The legislation there being considered was Kenya legislation but the language of the enactments are such that no distinction can be drawn on that basis. The court there by a majority (Sir Joseph Sheridan C. J. and Law Ag. C. J., Sir Jacob Barth C. J. dissenting) held, to quote the headnote:- “Where an

Application for execution of a decree for the payment of money or the delivery of property is made and granted within the period prescribed by Article 179[Section 182 of the Indian Limitation Act] then the law of limitation as laid down by section 230 [see s. 39 of the Civil Procedure Code 1966] applies and Article 179 has no further application.” “I consider my self bound by the decision of the Court of Appeal for Eastern Africa which is directly in point and not distinguishable.” (2) “ [The Counsel] pointed out that the twelve years limit had now been reached and that I should dismiss the appeal in any event because the decree had in any event become unenforceable. I disagree. The fresh application was not ‘present after the expiration the expiration of twelve years’. It can be dealt with”. (3) Appeal allowed. Matter remitted to the District Court.

187. Machumilane v. Bushambali (PC) Civ. App. 25-M-70; 22/4/70; Seaton J.

The appellant alleged that he married the respondent's daughter under the Marriage Ordinance, Cap. 109 according to Christian rites. That the marriage was Christian has been challenged by the respondent who claims that the marriage was contracted under customary law. The appellant however produced the marriage certificate to support his version of the story. It was accepted as a fact that the appellant and his wife, the respondent's daughter, lived together as husband and wife for about 29 years. There is no issue of the marriage. Sometime in October, 1968 the respondent's daughter parted company with the appellant, allegedly because of the latter's cruelty. Since then the wife has continued to stay apart from the appellant in spite of his repeated requests that she return. In the result, the appellant sued the respondent for the "recovery" of his wife. The issues were: - (a) was the marriage between the parties established and if so, what type of marriage was it? (b) Had the primary court jurisdiction to entertain such a suit? (c) Could it be said that the respondent was a proper party to sue?

Held: (1) "Both courts below found that the appellant had married the defendant's daughter according to Christian rites and the appellant did produce a marriage certificate to support his contention. The respondent sought to prove that the marriage was made under customary law because he gave Shs. 40/- as dowry but it seems he gave this to the priest and the money was really paid for marriage fees. In the absence of express evidence of the customary rites that were performed and in the absence of any explanation as to why the marriage certificate produced in court by the appellant should not be believed, I see no reason why I should not abide by the findings of both courts below. In the result, I am satisfied that the marriage was a Christian marriage under the Marriage Ordinance, Cap. 109." (However) ……. Can it be said that the primary court had jurisdiction to hear it and make any determination on it? The salient characteristics of an African marriage in its traditional form are that polygamy is allowed, that there is payment of bride-price and that a customary marriage is usually capable of being dissolved by an extra-judicial procedure and without the limitations imposed by a rigidly defined set of grounds of divorce: [Arthur Phillips: Journal of African Law, 1959, Vol. 3] A different marriage is provided under the Marriage Ordinance, Cap. 109. The Ordinance marriage is strictly monogamous, a union for life of one man and one woman to the exclusion of all others. This necessarily follows the definition of marriage in the

celebrated case of Hyde v. Hyde (1866) L.R.I.P.D. 130 at p. 133 per Lord Penzance. For reasons that must be discovered from the minds of the legislators, this marriage can only be dissolved by a procedure under Cap. 364. This Ordinance,

However, leaves the courts to provide other forms of matrimonial relief such as judicial separation and restitution of conjugal rights. Section 3 of the Matrimonial Causes Act Cap. 364 provides that:- (j)urisdiction under this Ordinance shall, subject to the provisions of this Ordinance or any rules made under this Ordinance, be exercised by the Court in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.' The interpretation section under Cap. 364, that is section 2, defines 'Court' to mean the 'High Court' provided that in respect of matrimonial causes between Africans it means a Resident Magistrate's Court. Accordingly, only the High Court and a Court of Resident Magistrate have been seized with jurisdiction to offer remedies in case arising out of the Marriage Ordinance. (3) "The Magistrate's Court Act, Cap. 537 lay down the jurisdiction of primary courts. Under section 14 of this Act, a primary court has jurisdiction in proceedings (a) of a civil nature where the law applicable is customary law or Islamic law including those for the recovery of civil debts, rent or interest due to the Republic, Government, etc. it is obvious that as the Christian marriage is not governed by customary or Islamic law but by the general law, the primary court cannot entertain a suit involving such marriage. In any case, as stated above, the Matrimonial Causes act, Cap. 364, which govern Christian Marriages, do not include a primary court as a court competent to offer relief in Christian marriages. There is yet no written law which confers jurisdiction on the primary courts to try case in which a marriage under Cap. 109 is in issue. For the above reasons, I am satisfied that the primary court had no jurisdiction to entertain this suit." (4) "It becomes unnecessary for this Court to look into whether the respondent was the proper party to sue. However, for avoidance of any doubt, it must be made clear that the procedure by which a husband sues his father –in – law for restitution of conjugal rights when in fact such conjugal rights are in respect of the wife is certainly wrong. The procedure open to the appellant

was to petition against the wife in a Resident Magistrate's Court. Thus the respondent was wrongly made a defendant in the courts below." (5) …… Through a competent court can pronounce a decree of restitution of conjugal rights (which rights are unknown to customary law) it cannot force the wife to go back to the husband. In the result, his last hope may be to institute proceedings for divorce or judicial separation." (6) Appeal dismissed.

188. Mtaki v. Mirambo (PC) Civ. App. 289-M-69; 4/5/70; Seaton J.

The Respondent/Plaintiff Mirambo instituted this suit for custody of two female children born of the appellant's mother now deceased. The Appellant /Defendant is living with the two children in question as their half brother. The suit was originally brought in the primary court as civil Case No. 25 of 1969 which the respondent lost. He then brought another case Civil Case No. 36 of 1969 in which he prayed for an order that he might pay to the appellant six head of cattle as dowry for his deceased mother so that he might "redeem" the children which he had begot by her. He again lost in the primary court whereupon he appealed from both cases t the district court which consolidated his appeals and gave judgment in his favour. The respondent's Counsel on appeal to the High Court submitted that the second case in the primary court was incompetent because of res judicata. The court however preferred to deal with the appeal in its merits since it was not at all clear whether the issues in the two primary court cases were the same. The assessors in the primary court in the first case advised the magistrate that the respondent could not have the right of custody of the two children because he is not their father. The primary court magistrate agreed with his

Assessors on the ground that the evidence was insufficient to establish that the respondent was married to the appellant's other; that he had only established that they had love affairs; and that the respondent could not have custody of the children because he did not pay dowry in order to legalise the marriage between him and the defendant's mother. In the second case, the primary court magistrate and assessors

upheld their former decision and in addition the primary court magistrate agreed with the assessors that according to Sukuma Customary Law a person may not pay dowry for a woman who is now dead.

Held: (1) “It appears to this Court in its consideration whether there was sufficient evidence to establish that there a marriage between the parties; the primary court may have overlooked section 5 of the Law of Persons Customary Law (Declaration) G. N. No. 279/63 which provides that the payment of bridewealth is not essential for the validity of a marriage. It would also seem that there is no legal foundation in G.N. 279/63, the Law of Persons, for the proposition that dowry cannot be paid in respect of a woman who is already dead although it may be correct as a proposition to Sukuma Customary Law. In any event in seems that the primary court was not satisfied that the respondent had established that he was the father of the two children. It was on this point that the district court differed from the primary court.” (2) “Assuming that the district court was correct that the respondent was the father of these two children, there was still to be decided the question whether he was their natural father or those children had been born in wedlock between him and the appellant mother. Bearing in mind the evidence of the respondent’s own witnesses that appellant’s mother never lived at his house but he only visited her from time to time in the homestead of the appellant’s relatives, it would seem that at most what the respondent established from the evidence was that the had been the natural father of these two children. But if that were so, it was his right according to section 181 of G.N. 279/63 to legitimize each child by the payment of one hundred shillings to the mother’s relatives before the child was weaned. As he did not do so, it would appear that time has run against him and it is too late to legitimize them at this stage by payment of money.” (3) “It follows; therefore, that the finding of the primary court was correct that the respondent could not have custody of the children and that the appellant as the male heir of his father and of his father’s brother is entitled to retain the custody of these two children.” (4) Appeal allowed.

189. Bwabwa v. Itabu (PC) Civ. App. 186-D-69; 9/5/70; Makame Ag. J.

Appellant and respondent’s father who were nephew and uncle were in dispute over a piece of land after the Second World War. A local chief divided the land and each of the

disputants got a piece. When the respondent's father died the appellant occupied his land. The respondent brought an action in the Primary Court to recover it from the appellant. Appellant alleged that the local chief had in fact found that the land was his and had only allowed the respondent's father to cultivate it temporarily. The Primary Court found for the respondent and both the District Court and the High Court affirmed. The District Court-relying on the Customary Law (Limitation of Proceedings) Rules, 1963 G.N. 311 of 1964 – had found as an additional ground for dismissing the appeal that the suit was time-barred because the respondent and his father had been in uninterrupted occupation of the land for over twelve years before the matter was taken to court.

(1970) H.C.D.

- 179 –

Held: (obitor): (1) "With respect, a less cursory reading of that law would reveal that the District Magistrate proceeded under a misconception. That law provides that, inter alia, with certain exceptions, proceedings to recover possession of land or money secured on mortgage of land may not be instituted – 'after the expiration of the corresponding period shown in the third column of that Schedule, such period being deemed to commence on the day when the right to bring such proceedings has accrued or on the day when these Rules came into operation, WHICHEVER IS THE LATER', and the appropriate period in the Schedule is twelve years. This must necessarily mean that even if the present appellant slept on his rights since immediately after the Second world War he may seek to enforce them within twelve years of the LATER date, which would mean any time from about the 21st of December 1963, when the Rules came into operation, until the 20th of December 1975; so that in fact the suit was not time-barred." (2) Appeal dismissed.

190. Dar es Salaam Motor Transport Co. Ltd. v. Mehta and Others Civ. App. 27-D-69; 22/5/70; Georges C.J.

The appellant a transport company, failed to deliver to the respondents parcels of cloth consigned to them. The trial magistrate found for the respondents. On appeal appellants

argued that: (a) they were not common carriers – i.e. accepting parcels for carriage without reservation since under the "conditions of carriage" they had discretion to refuse to carry goods of an offensive dangerous inflammable or explosive nature or for any reason whatsoever; and (b) they had effectively limited their liability by making special contracts with respondents.

Held: (1) "I cannot say that the Magistrate misdirected himself in holding that the appellants were common carriers. The test has been laid down by Bailhache J. in Belfast Ropework Company v. Bushell (1918) I K.B 210 as follows:- "Did the defendant while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to other engagements.' The clause in the notice does no more than state that the appellant reserved to himself the right to refuse troublesome cargo. They could give no instance of their having in fact refused a parcel – some indication of the manner in which the clause in fact worked. A transporter who behaves like a common carrier cannot remove himself from that category by stating that in fact he is not a common carrier. The conduct of his business must be consistant with description of himself." (2) "On a reading of the whole judgment it can fairly be said, however, that the trial magistrate was of the opinion that the conditions had not been adequately brought to the attention of the plaintiffs or his agents. The receipt does specify that parcel were accepted and carried subject to the conditions of carriage. It did not specify where the conditions were to be seen. In Watkin v. Rymill (18883) 10 Q. B. D. 178 the notice stated that the contract was subject to conditions as exhibited on the premises. There were printed notices prominently displayed on the premises. Here there was evidence of notices on the premises. Accepting that they were prominently displayed there was no evidence that the respondent saw them and the receipt did not specifically draw attention to them as in the case of Watkin v. Rymaill. I would accept as a correct formulation of the law here a passage in Anson on Contract

22nd Edition at page 146:- 'It is not sufficient simply to put up a printed notice containing exempting clauses; the party relying on the notice must go further and show affirmatively that it was a contractual document and accepted as such by the party affected.' The company here should have specifically stated in the receipt that the conditions were exhibited in the premises or the clerk attending to customers should tell them that the conditions referred to were those set out in the notices." (3) Appeal dismissed.

191. In the Matter of an Application by Ahmed Omar a Bankrupt Misc. Civ. Cause 1-M-61; 7/5/70; Seaton J.

The applicant bankrupt applied – under s. 29 (2) (b) of the Bankruptcy Ordinance – for an order of conditional discharge on condition that judgment be entered for Shs. 3,500/- in favour of the Official Receiver to be paid by installments of Shs. 100/- per month. His total proved liabilities amounted to Shs. 116,852/22 and proceeds realized from assets amounted to Shs. 31,295/55. the court was urged to consider the fact that applicant was 50 years of age, was unhealthy due to a heart attack, was earning only Shs. 300/- per month and had two wives and 12 children to support.

Held: (1) "Before making such an order, it is important to note all factors involved in the bankruptcy together with the general condition of the bankrupt himself in relation to his creditors. Although the amount involved in the bankruptcy is fairly big, yet the bankruptcy itself cannot be considered as a bad one. There were combinations of circumstances leading to the bankruptcy. It was due neither to fraud nor speculation in fact. Indeed the bankrupt does not seem to have a good business aptitude save perhaps in butchery. There was a sudden change of events in his business in 1960 and failure in his health due to heart attack. His inability to pay his creditors was largely pure misfortune." (2) "Considering all this, together with the facts that the applicant bankrupt is 50 years old, that he is undoubtedly a sick man suffering from heart attack and he is unlikely to survive long, and he is unlikely to make any substantial payment to is creditors in the near future, this Court is of the opinion that an order for conditional discharge on the terms proposed and agreed would be proper in the circumstances. (3) Application for conditional discharge granted.

192. Bibi Mokongoro v. Issa (PC) Civ. App. 22-M-69; 18/5/70; Seaton.

Appellant made an application a primary court for the appointment of an administrator for the estate for his deceased father an a claim for a share of the inheritance which included a house on a plot of land in Musoma Township and a tractor, the primary court appointed as administrator the person proposed by the appellant and ordered that both the house and tractor be handed over to the administrator. The district Court quashed the proceeding on the ground that a primary court has no jurisdiction to try a case in any proceedings affecting the title to or any interest in land registered under the Land Registration Ordinance. On appeal to the High Court, evidence was adduced proving that the plot, on which the house stood, was held under customary law and was not registered at the time of the trial. It was argued that: (a) on the basis of Georges C. J.'s decision in Mohamed Yusuf v. Tunda Kassim [1968] H.C.D. 447, even if a right of occupancy had been granted after the trial the matter was not justiciable in a primary court; (b) though there was no evidence of registration, the court should take judicial notice of the fact that at present all land in townships throughout Tanzania is registered land.

Held: (1) "The relevant facts of Mohamed Yusuf v. Tunda Kassim [1968] H.C.D. case were that a right of occupancy had been offered to the deceased but she did not take it up. The offer was accepted by the respondent as donee of the land which was then registered under the Land Registration Ordinance. This was done after filing of the suit in the primary court but before that court gave judgment. Georges, C. J. held that once the land was registered, the primary court had no jurisdiction and the proper course was to non-suit the plaintiff and advise her to seek her remedy in the District or the High Court, depending on the value of the property involved. It will be observed that

the last-cited case may be distinguished from the instant case in two respects. In the first place, the respondent Issa has been issued with a right of occupancy but the land is till unregistered, as far as this Court is aware. In the second place, the issue of the right of occupancy occurred after judgment in the primary court." (2) "Section 57 of the Magistrates Courts Act, when read with section 14(1) (a) seems to equate rights, of occupancy that are registered under the Land Registration Ordinance, Cap. 334. but the term "right of occupancy" in the Land Ordinance, as defined in section 2, includes the title of a native or a native community lawfully using or occupying land in accordance with native law and custom". On the other hand, the proviso to s. 27 (a) of the Land Registration Ordinance exempts from registration certain rights of occupancy. Without production of Issa's certificate of occupancy, if he had one, this Court could not be satisfied that his right of occupancy fell within the ambit of the Land Registration Ordinance. At most, therefore, the possession by the respondent Issa of a right of occupancy over Plot No. 27 would have the result of ousting the exclusive jurisdiction of the primary court which otherwise might be conferred by s. 57 of the Magistrates courts Act." (3) "The District Court, holding as it did that the primary court had no jurisdiction in proceedings affecting he tile to or interest in the house on Plot No. 27, failed to try the other issues raised in Issa's petition of appeal to that Court." (4) Case remitted to the District Court for determination of the remaining issues raised in the appeal.

193. The Commercial Bank of Africa Ltd. v. The Commissioner of Income tax Mis. Civ. App. Nos. 16 & 17-D-69; 8/4/70; Georges C. J.

The appellant company now in voluntary liquidation was wholly owned subsidiary of a company incorporated in Geneva and carried on business in Dar es Salaam as Bankers. Between 1961 and 1965, the appellant company incurred operational losses and as a result received grants from the parent company totaling Shs. 3,086,500/-. The Commissioner-General sought to tax these sums on the basis that they were trading receipts. The company contended that the sums were capital grants made in order to protect the capital position of the company and therefore – not liable to tax.

Held: (1) "The fact that the payments may have been made for that purpose does not mean that they were capital payments. Capital could be preserved by providing a

subsidy to meet current trading losses and this; it appears to me, is what was done in this case." (2) "The parent company could have purchased more shares in the subsidiary thus replenishing the capital and making up for the trading losses which had to be met from it. There is no indication that they did this. It seems hardly appropriate in the absence of any evidence to speculate upon a possible arrangement which could have been made which would have avoided the incidence of tax and then conclude that that was indeed the arrangement which had been made…….

On the facts there was an annual grant made- not obligatory in cause – to meet the trading loss. It was a subsidy – though a voluntary one." (3) "The applicant in the first four years of trading when no profits had been made lost nearly Shs. 3,000,000/- more than the minimum capital it would have needed to be granted registration. Unless it had received the subsidies continued trading might have been impossible as the Registrar might well have thought that the interests of depositors would be jeopardised. The subsidies enabled the appellant company to maintain their trading solvency. In British Commonwealth International News-film Agency Ltd. v. Moheny 40 Tax cases 550, a relationship existed not basically dissimilar from the relationship in this case. The appellant company had been set up in North, 1957 by the Rank Organization Ltd and the British Broadcusting Corporation for the purpose of providing a news- film service. The parties agreed to pay half the deficit of the appellant company until the year 1964-5. Rank Organization paid its half of the deficit to the appellant company having deducted the appropriate amount for tax. The appellant company sought to recover the tax deducted. The Special Commissioners disallowed the Company's claim finding that the sum paid to the company was trading receipt. This was upheld on appeal. The appellant company receiving the subsidy in that case was a subsidiary of the company granting the subsidy. The parent company held 50% of its shares not 100%. But the difference in the percentage of ownership does not seem to me to affect the principle involved." (4) "That the payments were voluntary and not made under any legal compulsion appears to be irrelevant once their exact nature has been determined." (5) Appeals dismissed.

194. Simon v. Mpangala (PC) Civ. App. 175-D-69; 13/4/70; Hamlyn J.

The appellant, as original plaintiff brought a claim for loss of the services of his daughter by reason of the respondent having made his daughter pregnant. The Primary Court awarded Shs. 240/- being for the seduction and Shs. 760/- being the amount of school fees paid by the girl's father from the time that she first went to school until the time of seduction. On appeal by the respondent, the District Court disallowed the sum of Shs. 760/- on the ground that it was the duty of a father to educate his child. On appeal to the High Court, the appellant contended that he should be awarded the additional sum of Shs. 760/- because his daughter's further education had been interfered with.

Held: (1) "……. I am in full agreement with the reasoning of the District Court for the past learning of the girl has not been lost by reason of the act of the respondent. Such education as she received during the time that she progressed from Standard I to Standard VII remains with her and the pregnancy has not affected her in this respect." (2) "It is not in dispute that the girl had completed Standard VII and was dismissed from the school on account of her pregnancy shortly before the final examinations took place. It would I think be somewhat speculative on the part of this Court to surmise that she would have succeeded in such examination ant have obtained a place in a Secondary school; that is an assumption which certainly I am not prepared to make, and on such ground this Court cannot increase the sum allowed to the father of the child. I am however prepared to find that the sum of Shs. 240/-for loss of services of the girl is on the low side; it is true that the District Court found that, as the girl was schooling at Matombo in Morogoro while the father lived in Dar es Salaam, there could be no loss of services. It is however unnecessary to show that such services are substantial for the parent to recover, and the fact

that, during the school holidays the girl returned home and rendered such services suffices. I consequently, while upholding the decision of the District Court to dis-allow the sum of Shs. 760/- for school fees for the girl, substitute for the sum of Shs. 240/- for

the father's loss of services of the girl, an amount of Shs. 500/-." (3) Appeal allowed in part.

195. Mlange v. Kipipa Civ. App. (PC) 88-A-68; 14/3/70; Bramble J.

The appellant brought a suit against the respondent for an acre of land. After examining all the evidence, the trial magistrate found for the appellant. But the District Magistrate reversed that decision. His reasons were that at the first hearing of the appeal a man brought a letter dated 3rd July, 1969 stating that the kihamba in dispute was in his hands, having being mortgaged to him by the present respondent for a big sum, and that as the litigants are related he was suspicious that there was a trick to make him lose what he had offered for it. With the agreement of the respondent that the land was not in his hand the court found that the wrong party had been sued.

Held: (1) "While the district court has power to hear additional evidence such evidence must be for the clarification of an issue raised on the record. The respondent never alleged that he was not in possession of the Kihamba. In addition the letter referred to was not admissible evidence. Assuming that the court wished to enquire into the contents of the letter the proper thing would have been to call the writer as a witness and give the appellant an opportunity of cross-examining him. The appellant never had such an opportunity and in these circumstances the admission of the evidence could lead to a grave injustice. Moreover, the fact that the Kihamba as mortgaged did not displace the respondent's claim to ownership since although he may have given possession to mortgagee as a security for a loan he would still be the legal owner. The mortgagee may have a remedy against one or other of the parties but this was never an issue in the present case. There was no foundation in fact or in law for the decision that the respondent was not the right party to the sued." (2) Appeal allowed.

CRIMINAL CASES

196. Ernest Lukali v. R., Crim. App. 731-M-69; 31/1/70; Seaton J.

The appellant was convicted of conversion not amounting to theft c/s 284, Penal Code. The appellant and the complainant were friends and both employed by the Ministry of Agriculture, Food and Cooperatives. As part of his duties involved field extension work, the complainant was issued with a motor cycle by his Ministry. It was alleged by the prosecution that the appellant on 8th March 1969 at 8 pm converted the cycle to his own use but not so as to be guilty of theft contrary to section 284 of the Penal Code. For the prosecution, the complainant testified that he was issued with cycle for his own use and never authorized or consented to its use by the appellant. When not using the cycle, he parked it outside his house but it had no ignition key. On the night in question, he heard a noise and when he looked, saw the appellant going off on the cycle at a distance of about 70 yards from him. Two hours later, the appellant came back and reported that he had had an accident. The defence was that the complainant not only consented to the appellant taking the cycle but accompanied him on the night of 8th March. The accident occurred, according o the appellant's testimony, when he was teaching the complainant how to use the cycle but when confronted in cross-examination, admitted having written to the appellant a letter Exhibit D. 1, thanking him for "your kind co-operation in training me to drive" the motor cycle. There was also testimony of the landlord that he use to see the appellant carrying the complainant on the cycle in the evening time and when he asked where they were going, the appellant said he was teaching the complainant ho to drive. The learned resident magistrate commented in his judgment that even if the appellant was with the complainant (P.W. 1) at the material time, which he doubted, he could not escape criminal responsibility by sheltering behind the consent of the complainant (P.W.1) because the latter had no authority to let anyone else use the cycle.

Held: (1) "With respect, I do not think the learned resident magistrate sufficiently considered the question whether the cycle was taken "without colour of right", one of the essential ingredient of an offence under s. 284 of the Penal Code. whether or not it was against the instructions of the complainant's senior officials to allow others to use the cycle was less material than the issue whether the appellant took the cycle with the complainant's permission. On this latter point, the evidence was at best equivocal. The case of R. v. Burns (1958) E.A. 142 was referred to by the learned resident magistrate

and I would respectfully agree with the learned magistrate that in that case, Burn's conduct was inconsistent with the owner's right and therefore constituted conversion. But in the present case, the relationship between the complainant and the appellant was such that the letter might well have believed his taking of the cycle was authorized. It is this subjective belief, as learned advocate for the appellant has submitted, which deprives his conduct of criminality." (2) Appeal allowed and conviction quashed.

197. Charles Isaboke v. R., Crim. App. 298-A-69, 30/1/70; Platt J.
The appellant was convicted of hunting a game animal without a licence c/ss 12(1) and 53(1) (e) (ii) of the Fauna Conservation Ordinance Cap. 302. The charge concerned a leg of a "kure"

(a waterbuck) found in the appellant's possession. As waterbuck is one of the animals set out in the Third Schedule of the Ordinance, it would therefore be an offence under section 12 to hunt it without a licence. Although the appellant was found in possession of the leg of a waterbuck, as he admitted, the dispute was whether he had hunted and killed the animal. His claim was that he had been given it by the witness Remi denied that, but two defence witnesses supported the appellant. There was no evidence at all that the appellant was seen hunting or had the means to hunt. The learned Magistrate disbelieved the defence and held that the inference to be drawn from the facts was that the appellant had hunted the animal whether or not it was clear what means he had used. He thought that the lack of evidence as to how the appellant had hunted the animal was immaterial.

Held: "The main issue on the appeal was whether the inference drawn was certain beyond reasonable probable doubt. It is of course familiar law that if the prosecution seeks to rely on circumstantial evidence, the inference of guilt must be irresistible and incompatible with innocence. In the instant case, even if the learned Magistrate disbelieved the defence, all that was proved was possession of a leg of a waterbuck. Such possession could be accounted for either by purchase of receipt as

well by hunting the animal. I agree with the learned State Attorney that the evidence did not conclusively point to the fact that the appellant had hunted the animal, and it seems to me that the absence of evidence as to how the appellant had hunted it, was not immaterial but indeed one of the facts which left open a possible inference of innocence." Appeal allowed and conviction quashed.

198. R. v. Joseph Kusekwa, Crim. Sass. 213-M-69, 8/12/69, Kimicha J.

The accused was convicted on his own plea of written threats to murder c/s 214, Penal Code. The accused, who is an 18 year old boy, wrote a letter to President Nyerere abusing the government and TANU and stating "We shall shoot you just like John Kennedy or Lumumba". He did not sign his own name but that of his father. His intention apparently was to get into trouble his father, with whom his relationship was sad and unhappy. The sentence is reproduced below.

Held: "This is a very delicate offence on which to assess sentence …. Because the security of the State is involved. The accused pleaded guilty to the charge but he has pleaded in mitigation that he actually intended to put his father into trouble because he mistreated him and his mother. If his plea in mitigation is taken on its face value then his act could be regarded as a silly act committed by an extremely foolish young man. If this view is adopted a suspended sentence or probation would meet the situation. On the other hand there is the unpleasant fact that Presidents and big political leaders lose their lives in the hands o simple and insignificant assassins for equally insignificant and trivial reasons ….. In this case the accused is a young man who is only 18 years old. He threatened to kill the President because of his Arusha Declaration. But the Arusha Declaration is all in his favour and he has nothing to lose by it. But there is the possibility that his is a genuine grievance to him. Then because of his youth it could be considered that it would in any case be impossible for him to accomplish his threat and adopt a lenient view of his offence. But there is also the risk that if this view is adopted it could be a challenge to him to prove that he is capable of accomplishing his threat. As I have explained above Presidents and big political

leaders are assassinated by persons whose motives for their actions cannot be rationalized. With this view in mind and for the sake of the security of the State the Court is not going to risk undesirable chances and is of the view that the accused should be put away for some time at a place where it would be impossible for him to accomplish his threat. He is however advised to seek the exercise of the President's prerogative of mercy if he thinks his sentence to severe. The accused is sentenced to three year imprisonment."

199. R. v. Jutuba s/o Luyemano, Crim. Rev. 3-M-70, 13/2/70, Kimicha J.

The accused was convicted on his own plea of defilement by husband of a wife under 12 years of age c/s 138(1), Penal Code. He was sentenced to two years imprisonment. The undisputed facts of the case are that the accused who is 45 years old was married to the girl after he had paid her father Shs. 600/- and ten goats as brideprice. He then took her to his home and slept with her and she got defiled. The girl suffered so much pain that she left the accused and ran to her mother who had separated with her father. The matter was referred to the Police and the accused was charged with the offence.

Held: "Taking into consideration, the nature of the offence, the age of the accuse and his locality, it would appear that the accused is an illiterate middle aged man who did not fully appreciate the legal implications of his act. Ignorance of the law is no defence to a criminal charged but I think in this case it could be taken into consideration in assessing his sentence. The conviction of the accused is upheld but his sentence is varied and substituted with one of six months imprisonment."

200. Ali Mohamed Hizam v. R. Crim App. 42-D-70; 18/5/70; Makame Ag. J.

The appellant was charged with another person with having or conveying property suspected of having been stolen contrary to section 312 of the Penal Code. He was found guilty and sentenced o a term of imprisonment for nine months. The evidence was that on the 17th of October 1969, Detective-Sergeant Ramadhani Mohamed went to

the house of the appellant's co-accused, where he found the latter about to get into a waiting taxi. On being asked, the co-accused furnished the sergeant-major with the information that the parcel he was carrying contained 8 pairs of trousers, and when the prosecution witness examined the parcel he discovered that it had indeed 8 pairs of trousers, all of hem Tetron. The co-accused led the Detective-Serveant to the Victoria Hotel, where the appellant was, and the appellant denied all knowledge of the clothes. They went to the appellant's house, where the witness found nothing suspicious. But when he went to the house of one Abadi, the prosecution witness found three bags containing 196 pairs of Tetron trousers which were similar to the ones the witness found in the possession of Salum ally, the appellant's co-accused. Dudu Abdallah, told the court that he was the person who had the taxi which Salum Ally had hired when the Detective-Sergeant stopped them. Not more than five days before the material day he had been hired y the appellant form the Dodoma Township Bus Stand to a house in an area of the town curiously referred to as the Oyster Bay. The appellant had three bags full of certain things, but Abdallah allegedly did not know what the things were. However he was sure that the bags.

Exhibited in court were the same as he had carried for the appellant.

Held: (1) "It is not disputed that the appellant was detained in connection with the alleged offence and the fact, which I find established, that the 196 pairs of trousers were found at the back of the house would make one reasonably suspicious that they were stolen or unlawfully obtained. The appellant had temporary control of the house, and his on is the one who gave the police the key to it. He was thus in temporary possession of the house, and it is evidently a reasonable construction of the evidence as a whole to conclude that the clothes found there were taken there by the appellant and his on. The son was in immediate control and the father in constructive control and legal joint possession of the things." (2) "I am clear in my mind that it is in conveying that an accused person must be in the course of a journey. A section 312 offence can be committed either by having or by conveying the things in the requisite circumstance. It

would be awkward and in my view a wrong interpretation to hold that even in having in his possession he accused must be in the course of a journey. In any case, even in conveying an accused person is in the course of a journey even if his arrest takes place at the terminus of the journey. See the judgment of Mosdell J. in Bakari Bakari v. The Republic (Dar es Salaam Criminal Appeal No. 195 of 1962)" (3) "The appeal against conviction is devoid of merit and a sentence of nine months cannot be sad to be excessive in the circumstances. The order for forfeiture is however improper, because three may be a legal owner of the clothes. The more appropriate order would be to treat the clothes as found property, so that the court or the police can advertise for claimants to them. I accordingly order that the trousers be treated as found property."

Editors' note: This important case apparently relieves s. 312, Penal Code, of some of the highly technical restrictions which have made its application difficult, and which were laid down in their final form in R. v. Msengi s/o Abdullah, 1 T. L. R. 107. See the comments in Charles s/o Mumba v. R., (1967) H.C.D. n. 221.

201. Joseph A. Kashamakula v. R. Crim. App. 321-D-70; 15/5/70; Hamlyn J.

The appellant was convicted in five Counts of obtaining money by false pretences, contrary to section 302 of the Penal Code. The appellant was sentenced to eight months imprisonment on each of the five Counts, such sentences being ordered to be served consecutively. The accused is said to have gone to one of the fathers at the Mission at Katandala and to have represented himself to be the emissary of Fathers at other missions in the locality, stating that he had been sent by them to take monies from Father Joseph to such other Fathers. As a result of such representation (which was proved to have been wrong and unauthorised) Father Joseph paid over the money to the appellant, who thereupon departed. The prosecution case further shows that the Fathers for whom the accused purported to act never received the funds which had been given to the accused to convey to them.

Held: (1) "In so far as sentences are concerned, it is observed that the trial magistrate has passed five sentences of eight months imprisonment on the accused, ordering such to be served consecutively. That is, that he shall serve a total of forty months imprisonment. The Counts on which the appellant has been convicted refer to

acts committed by the accused between 19th December, 1968 and 2nd January, 1969 – very short period indeed, and it would therefore appear that all these offences

Were part and parcel of a single plan of campaign: in such case they should all be concurrent." (2) "I consequently ……set aside the several sentences imposed by the trial Court and in their place substitute sentences of forty months imprisonment on each count, directing that all such sentences be served concurrently."

202. M.M. Hirji v. R. Crim. App. 149-D-70; 18/5/70; Makame, Ag. J.

The Dar es Salaam District Court summarily convicted the appellant of contempt of court and sentenced him to a fine of Shs. 400/- or one month's imprisonment. The facts of the case as found by the trial court, were as follows. This offence took place within the court's view. The accused entered into court informally without taking cognizance of the court and surveyed around. After satisfying himself – all this time still standing right in front of the court – the accused turned around and talked to some other person that was outside the court while the accused person himself was still in court. All this time the court was listening to a witness. The court called on the accused and asked him what the problem was and instead of the accused answering verbally, he just nodded and threw his head up as to question the authority of the person questioning. The counsel for the appellant urged that the magistrate short-circuited the procedure, and argued that a plea of not guilty should have been recorded, evidence heard, and a finding made on the evidence adduced. He suggested that the case should have been heard by another magistrate and said summary proceedings should be used only as a last resort.

Held: (1) "I must say at the outset that I agree with the learned counsel for the appellant that summary proceedings for contempt of court should be rarely employed. The court has power to commit summarily for contempt, but it must always be remembered that this power allows an exceptional, though in appropriate cases desirable interference with individual liberty, so it must be used only rarely and very

cautiously." (2) "However, having said this, it must be remembered that summary proceedings in a situation like the one revealed by the facts set out by the learned magistrate in the instant case is allowed, and the whole point of such a provision is to "short-circuit" the usual procedure, to use the learned counsel for the appellant's apt expression. The law allows the court to "take cognizance of the offence and sentence the offender." As the learned trial magistrate observed, the appellant's conduct was "unbecoming even in an ordinary office". And there can be no argument of an over finding of mens rea. The appellant is not a privileged commentator on his actions. His behaviour was clearly contemptuous, and he cannot be heard to say that he did not mean offence." (3) "The failure to frame a formal charge and set out the particulars cannot reasonably be said to be fatal in the present case. It is a procedural formality which does not affect the justice of the case." (4) "I find that the conviction cannot be faulted, and accordingly I dismiss the appeal against it." (5) "With respect, I agree with the learned counsel for the appellant that the maximum punishment for an offence, which is what the appellant got, must be imposed only in extreme cases, in the present instance for the most contemptuous behaviour, which the present appellant's got, must be imposed only in extreme case, in the present instance for the most contemptuous behaviour, which the present appellant's cannot be said to have been. The fine of Shs. 400/-, which the appellant has already paid, is therefore reduced to Shs. 400/-, which the appellant has already paid, is therefore reduced to Shs. 250/-. The difference of Shs. 150/- should therefore be refunded to the appellant."

203. Petro Kimoani v. R., (PC) Crim. App. 221-M-70; 14/5/70; Mnzavas Ag. J.

The appellant pleaded guilty unequivocally to cattle theft c/ss 265 and 268, Penal Code, and was convicted. However there was an irregularity in that in the primary court case file the charge is shown as killing animal with intent to steal c/s 279 of the Penal Code. The appellant is however recorded as saying: "I admit having stolen a she goat, the

property of the complainant, and that I have slaughtered and eaten it". After this the appellant admitted the facts which stated how complainant's she – goat got stolen and how meat and the goat's skin were found in his house.

Held: "From these facts it is evident that the primary court Magistrate all through the proceedings believed that the appellant was being charged with the offence of cattle theft an offence to which the accused unequivocally pleaded guilty, although for reasons, not at all clear to this court, the primary court case-file shows a charge under section 279 of the Penal Code. This irregularly does not in my view occasion any injustice to the accused. It is certainly a curable irregularity under section 346 of the Cr. Procedure Code as well as under section 32(2) of Cap. 537. The correctness of the finding by the primary court magistrate cannot be impeached." Appeal dismissed.

204. Olotho v. R. Crim. App. 328-A-69; 8/5/70; Bramble J.

This is an appeal against conviction of being in unlawful possession of Piwa c/s 30 of the Manufacture & Distillation Act of 1966. A certificate from the Government analyst confirmed that the liquid in question was Piwa. The main issue, therefore, was where the bottle of Piwa was and the Resident Magistrate found in favour of the prosecution. Advocate for the appellant contended that he was wrong to do so in that although there was another person on the scene he was not called to corroborate the complainant's evidence.

Held: (1) "In a case of this nature corroboration is not required by law or practice. It may be that where there is only one witness on either side it is difficult to find the truth but having seen the witnesses the court is able to judge their credibility." (2) "The other point raised in argument is that the complainant was a constable and had no warrant searching the appellant's premises in accordance with the provisions of section 33 of the Act. It must e conceded that the search was illegal. The question would e whether the evidence of the goods found was admissible. In R. v. Leathm, (1861) 8 Cox. C.C. at 501 Compton J. laid down the principle that "in considering whether evidence is admissible, the test is whether it is relevant to the matters in issue and, if it is relevant, the court is not concerned with the method by which it was obtained." This was followed by Lord Goddard C. J. in Karuma s/o Kaniu v. R. (1955) 1 All E. R. 236 which was an

appeal to the Privy Council against an order of the Court of Appeal of Eastern Africa. On these authorities it is clear that the evidence here was admissible. For these reasons I must dismiss the appeal."

205. Juma Ally & Two Others v. R., Crim. App. 5-A-70; 28/4/70; Bramble J.
The prosecutor made an application to withdraw from a prosecution under section 86 (a) of the Criminal Procedure Code which does not operate as a bar to subsequent proceedings against an accused on the same facts. The magistrate made an order granting permission

to withdraw the complainant under section 200 of the Criminal Procedure Code under which the accused was acquitted and was not liable prosecution on the same facts. The prosecutor appealed

Held: (1) "There seems to be no discretion in the court to decide which of the relevant sections to invoke and while in an particular case it may be of the opinion that there should be an end to the proceedings it can only act on an application made by the prosecutor. In this case the prosecutor did not allege that there were sufficient reasons for permitting him to withdraw the case finally. He sought a withdrawal with liberty to institute fresh proceedings if the circumstances warranted it and the court could only grant or refuse his request." (2) "The learned magistrate had no power to make an order for withdrawal under section 200 of the Criminal Procedure Code and I must allow the appeal, revoke the order and substitute an order for withdrawal under section 86 (b)." Appeal Allowed.

206. R. v. Ramadhani Waziri Crim. Rev. 39-D-70; 16/5/70; Georges C. J.
The accused was charged with a reckless and negligent act contrary to section 233 (e) of the Penal Code. It appears that he had set fire to grass which burnt banana plants, coconut trees, sugar cane and cashew nuts trees being the property of another person.

The Code dealing with offences against the person. On revision the High Court considered whether the charge disclosed any offence.

Held: (1) “Seen in the scheme of the Act, I am satisfied that this section (s. 233) is intended to deal only with reckless acts likely to cause personal injury. The term “harm” in the section is intended to refer only to physical or perhaps mental harm involving the body. It cannot be stretched to include the harm which one can be said to suffer, when one’s property is destroyed.” (2) “The charge which the accused person was called upon the answer makes no allegation that there was any likelihood of “harm” in the sense which I understand it to bear being caused to any person. There is no allegation that human beings were endangered. I would hold, therefore, that it disclosed no offence.” (3) “Had the facts adduced in support of the charge and agreed to by the accused established that there was the likelihood of injury to human beings I would have been minded to amend the charge and support the conviction. The facts, however, do not do this. They allege that the accused set fire to his shamba to prepare it for cultivation and took no steps to prevent the fire spreading to his neighbor’s shamba.”

207. Alfred s/o Jacob v. Republic, (PC) Crim. App. 40-M-70; 12/5/70; Seaton J.
The appellant was charged with and convicted of stealing materials entrusted to him by a customer for making new clothes and repairs. His conviction was upheld by the District Court and he appealed on the grounds inter alia that the Primary Court which tried the case had no jurisdiction because the offence was committed within the local limits of the jurisdiction of another court.

Held: The fact that the offence was committed within the local limits of another court does “not deprive the Primary Court of jurisdiction; s. 19 (1) (b) of the Third Schedule to the Magistrates’ Courts Act (Cap. 537) also confers jurisdiction upon a court within the local limits of whose jurisdiction the appellant (as in the present case) was in custody on a charge for the offence.” Appeal dismissed.

208. Augustino s/o Mtega v. R., Crim. Rev. 38-D-70; 15/5/70; Hamlyn J.

The accused was convicted of two counts of burglary and two counts of stealing. He was sentenced under the provisions of the Minimum Sentences Act to two years and twenty – four strokes of corporal punishment on each of the burglary Counts and to lesser periods of imprisonment on the stealing Counts. It was ordered that all sentences run concurrently. On revision the High Court considered the proper mode of sentencing in such cases.

Held: "The Court should not have imposed two sentences of corporal punishment in respect of the burglary sentences to be carried out "concurrently". The proper mode of sentencing is to pass the statutory minimum sentence (including the twenty – four strokes of corporal punishment) for the first of the burglary counts and to pass sentence of twenty-four months imprisonment only (or any other period which the Court deems fit, not less that two years), in respect of the second burglary Count. All sentences of imprisonment may then be ordered to run concurrently." Sentences so altered.

209. Paulo s/o Mathias v. R. Crim. App. 117-D-70; 17/4/70; Georges, C.J.

The appellant in this case was charged with two offences against the Fauna Conservation Ordinance – being in possession of Government Trophy and failing to report to the Licencing Officer his possession of the trophy. The particulars alleged that on 19th December, 1969 at about 5 p.m. at the police lines the appellant had unlawfully been in possession of buffalo skin. The second count alleged that on the same date at the same time ant at the same place he had failed to report to the licencing officer of the Game Division that he was in possession of the said skin. The record shows that the charges were read over and explained to the accused and that he replied as follows:- "1st count: It is true I was found in possession of a buffalo skin. 2nd count: it is true I did not report my possession of the buffalo skin to the Game authority." This was entered as a plea of guilty on both counts. Thereafter the record continues: - "Fact of the charge. Facts as charged." This note was signed by the magistrate. The following statement then appears: - "Accused has pleaded guilty to his two charges. I therefore convict him on his own pleas of guilty."

Held: (1) "It has been pointed out by this Court that a plea of guilty must contain an unequivocal admission of every ingredient unnecessary to constitute the offence with

which the accused person is charged. It is so simple to comply with this well known direction that one cannot be amazed by the number of occasions in which magistrates, clearly through negligence, fail to give the attention which the matter deserves, with the result that much time and effort are wasted in successful appeals." (2) "The charge alleged that the appellant was in unlawful possession of a buffalo skin. When called upon to plead all that the appellant admitted was that he had been found in possession of a buffalo skin. There was no admission of the unlawfulness of the possession." (3) "The second count alleged an offence against section 48 of the Ordinance. This creates the offence of failing to report to the officer of a Game Division forthwith any Government trophy which comes to one's possession. There is no admission on the part of the defendant that he did not do this. All he admitted was that he did not report to the Game authority." (4) "Quite often an equivocal plea in these terms can be remedied by a full statement of all the facts needed to constitute the offence, and an admission by the

accused person that these facts are true. In this case there was no full statement of facts. Except in the most trivial of traffic offences (and even then the practices is deprecated) the facts should not be entered merely "as charged". They should be set out in full. Even if the facts had been set out in full the plea would not have been proper because there is no note on the record that the accused person admitted the facts as charged. The pleas of guilty are, therefore, clearly equivocal and the appeal must be allowed."

210. Mbeswa s/o Chiloya v. R., Crim. App. 96-D-69; 29/4/70; Georges, C. J.

The appellant was charged with storebreaking and stealing contrary to sections 296 (a) and 265 of the Penal Code. The complainant had a store in his shamba in which he kept his jembe and saucepans for cooking. It was closed by two bolts. Part of the door was made with tin from a "debe". He had closed his store properly on 30th April, 1969. When he returned next day he had found that the bolts had been removed and the tin

part of the door cut. Two saucepans, a jembe and a cup were missing. On 1st May, 1969 Det. Corporal Daudi Mikambo searched the appellant's premises. Under his bed was found a bag containing what was described as a "tin smith snip" and two hangers that appeared to have been taken from a door. The corporal asked the appellant about these articles but he said nothing. According to the Corporal he found out the following day that the hangers had been taken from the door of one Bilali. Bilali himself testified that he identified the bolts but exactly how the record does not state. After the identification of the bolds the appellant's house was searched in his absence. The Corporal testified as follows:- "I went to the accused's house and there the accused wife admitted that accused brought a saucepan but it was at shamba. She went and brought it."

Held: (1) "The evidence as to what the wife had said was clearly inadmissible. It was hearsay since the wife had not been called to give evidence. In any event she was not a compellable witness and may well have refused to testify if called so that her evidence would not have been available in any event." (2) "Bilali said that he identified the saucepan. Again there is no note on the record as to how he had made the identification. It has been said over and over again that trial magistrates should not be content to accept bare statements from witnesses that they identify as their property articles which are of ordinary manufacture commonly used by a large number of people – such as the articles in this case – bolts for doors and cooking pots. The record must give some indication of the method of identification so that the appellate tribunal can form some opinion as to the likelihood of its accuracy." (3) "The identification of the property alleged to have been stolen was satisfactory. There may well have been cause for suspicion but not enough evidence to establish guilt beyond a reasonable doubt." (4) Appeal allowed.

211. R. v. Mohamed s/o Ndowe and others, Crim. Sass. 8-Iringa-70, Pandu Ag. J.

The three accused who were watchmen were charged with murder. On the date in question an unknown number of thieves including the deceased came to steal corrugated iron sheets from a house which the accused were guarding. The deceased himself broke into the house through the window. The first accused person,

Mohamed Mdowe, tried to throw at the deceased a club which the thieves had come with. Then the deceased came at him with a bill-hook which he had at that time, and the first accused struck the billhook with a club but the club was broken. The second and third accused helped the first accused, and they tried to strike the billhook with clubs but these were also broken. It was then that the thief fell down, and the accused persons held the billhook and struck the deceased with it. The accused heard a bullet shot which was fired by the other thieves who had come with the deceased, and they, the accused, ran off into the bush.

Held: (1) "The law is that the accused could defend themselves and their employer's property. All this happened when the accused were on duty and the deceased and his fellow-thieves went to steal. Before this they had already stolen nine times and locked the watchman inside so that they could steal safely. This shows clearly that the place was dangerous, and therefore the employer had to employ several watchmen to guard his property. I must say that a person is not allowed to kill a chief to retrieve his stolen property. He can arrest him and take him before the court. But if the thief uses force so that the property which he has stolen should not be recovered, and in doing so he uses a weapon in a manner which could cause grievous harm to or kill, the owner, the owner or the person who guards the property can defend to the extent of even killing the thief, because he will be defending his life and his property, and I am of the same opinion as all the assessors that none of the accused used more force that was necessary in law, and they were doing so in defence of their lives and their employer's property." (2) "I therefore find that all the accused persons have committed no offence, and I accordingly discharge them all."

212. R. v. Michael Mhuto, Inspection Note; Crim. Case 1123-D-69; 6/5/70; Georges, C. J.

In this matter advocate for the defence failed to appear on the hearing date which had originally been agreed between the prosecutor and himself and fixed accordingly by the

Court. He sent no message explaining his absence. The prosecution witnesses all appeared and wasted a day in Court as a result. They were all Government servants working in Dar es Salaam so that no specific costs were incurred by the prosecution. The trial magistrate was, however, incensed at the apparent discourtesy to the Court on the part of advocate and the waste of witnesses' working time. He forwarded the file to the High Court to have an administrative ruling on the "question of the unliqudated costs definitely suffered by the Republic and the witnesses."

Held: (1) "Costs are expenses incurred by a party to an action and in that sense they cannot be "unliquidated" as for example damages in action for tort which cannot be quantified until fixed by the Court. A party may not recoup all the costs he may have incurred because the Court may hold that they were not reasonably incurred and disallow them in taxation, but costs are always a "liquidated" amount." (2) "If the Republic has incurred no costs then none can be awarded." (3) "The trial magistrate, through the Registrar, can, however, report the discourtesy to the Disciplinary Committee of the Law Society. There appropriate action can be taken against the advocate for his waste of judicial time unless he can produce a satisfactory excuse.

213. Omari s/o Masunguru, Sulemani s/o Ladu, Pius s/o John v. R., Crim. App. Nos. 158, 159, 160-D-70; 17/4/70; Georges, C. J.

The three appellants were convicted of robbery c/s 285 of the Penal Code. the evidence of the complainant was that he was on his way home having bought some groceries when he saw the three appellants, neighbours in the same village, standing beside the footpath. They asked him where he was going. He asked them why they wanted to know. Thereupon the first appellant slapped him, the other two pulled his legs and he fell dropping all the items he was carrying. He got up and ran away to the house of Simba – the grandfather of the third appellant – to complain. Simba's evidence was that the complainant was very drunk when he came to make the report.

Held: (1) "I think that there was evidence to support the magistrate's finding. The complainant's goods did drop as he was attacked. They were not seen thereafter. The

appellants admitted having taken them and offered to return them. Once this evidence was accepted the conclusion that the appellants had taken the goods was quite justifiable." (2) "The conviction is, however, unsatisfactory for another reason. To constitute the offence of robbery there must be evidence that violence was used for the purpose of taking the property or retaining it. The trial magistrate did not consider this aspect of the matter. He assumed without examining the evidence that it had been. There were clear indications that this may not have been so. The complainant was drunk. There was evidence of some abuse between himself and the appellants before the attack. It may well have been that the appellants attacked him because of this and not to rob him. His property having fallen during the attack the appellants decided to seize it. The taking of the property followed the attack but the attack was not for the purpose of getting the property. In Sayale s/o Seliani v. Republic, (1968) H.C.D. n. 243 the accused was in the process of beating the complainant when the complainant's watch fell. The accused pocketed it and ran away. Platt J. allowed an appeal against a conviction for robbery and substituted a conviction for stealing. He pointed out that the taking of the watch was incidental to the assault. The situation here seems analogous." Conviction for robberty set aside, and conviction for theft substituted.

214. Athumani Ally Nyabayi v. R. Crim. App. 154-M-70; 21/5/70; Seaton J.

The appellant was clerk in the office of the Regional Police Commander at Musoma, where his duties involved inter alia the processing of applications for permits to possess firearms. It was alleged by the prosecution that in July, 1969 he had corruptly obtained Shs. 30/- from one Gibago Kahumbe as an inducement to be issued with a rearm licence, and swallowed the Shs. 30/- in Tanzania Currency notes when about to be apprehended for the first mentioned offence. Accordingly he was convicted on two counts; of corrupt transaction with agent and defacing bank notes.

Held: (1) "The main ground of appeal was that the conviction on the first count was based on the uncorroborated evidence of the complainant, Gideion a police spy ….. In support of his submission regarding the evidence of a police spy, the appellant referred to Mrs. Alexandra Parentis v. Rex, (1937), T.L.R. (Revised) 208. In

that case, it was held by Dalton C.J. that the evidence of a police trap or decoy given in support of a charge of committing an offence is not in law the evidence of an accomplice and does not therefore in law require corroboration. In practice, however as a general rule, the evidence of such witness should not be acted upon, unless the evidence pointing to the guilt of the accused is corroborated in some material particulars. Learned State Attorney has drawn this Court's attention to two more recent cases involving police spies or decoys. In Petro s/o Sang'undi v. R. (1968) H.C.D. n. 40, Cross J. held that the fact that complainant may have been acting as a police decoy did not require that her evidence be corroborated. The Parentis case (above-cited) was distinguished on the ground that that case involved professional decoys employed by the Police. Cross J, also distinguished Petro s/o Kasembe v. R. (1967) H.C.D. n. 338, an earlier decision by Georges, C.J., on the ground that the ruling in the last-cited case was based on its particular facts. Learned State Attorney pointed out that Georges C.J. had held in Kasembe's case that 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. Georges C.J. went on the state as follows: "Though corroboration would not be required as a matter of law, it would hardly ever be safe in practice to convict unless there was corroboration". As there is already a wealth of judicial opinion on this subject of police spies or decoys, I am loath to add to it. In the present case, the complainant Gidion was a foreman at Buhemba mines who had sent in his application to the Regional Police Commander's Office for a firearm permit and when it was delayed, went in person to inquire. He testified he saw the appellant at the office, who told him on each of the two occasions he went that he had too much work and was hungry. This the complainant interpreted as a solicitation for a bribe. He reported the matter to the Officer-in-Charge of Police who arranged with him a trap for the appellant. It is clear that the complainant is not professional decoy as was said to be used in the Parentis case (above-cited). Nevertheless at the very least, the learned Resident Magistrate should have directed himself that the evidence of the complainant, as he was not a

disinterested witness, should be examined closely. He failed so to direct himself. In fact nowhere in his judgment does it appear that the learned Resident Magistrate was aware of the need for any particular care in regard to the evidence of police decoys, whether professional or amateur. In this respect, he was in error" (2) However, from a perusal of the record, it would appear that there was some corroboration of the evidence of the complainant that he handed the Shs. 30/- in two currency notes to the appellant who put them in his pocket. "The handing over of the notes was seen by Detective Inspector Maurice who said the appellant took hem out and chewed them in his mount when he saw the Detective Inspector following him on his bicycle". (3) "From the evidence as a whole, I am of the view that despite the failure of the learned Resident Magistrate to direct himself on the evidence of a police spy or decoy, there was ample evidence to support the conviction. The sentence can certainly not be said to be excessive ……. The appeal is accordingly dismissed."

215. Ramadhani Ally v. R. Crim. App. 328-D-69; 15/5/70; Bramble, J.

The accused was convicted of Robbery c/s 285 and 286 of the Penal Code. The facts are that between 3rd and 6th April, 1969, the appellant stayed at the complainant's house and was afterwards

chased away. The evidence directly related to the charge was that, whilst the complainant was guarding his shamba from pigs and buffaloes during the night, the appellant jumped on him, seized his rifle and said that he would shoot him. The complainant ran to his house, closed the door and the appellant fire a shot at the wall of the house and demanded money; he ran away with the rifle when the neighbours came.

Held: (1) "The charge of Robbery was in relation to the rifle. The Penal Code defines robbery as follows: "Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed

“robbery”.” The learned trial magistrate did not direct his mind to the essential ingredients of the offence, that is, whether force or a threat of force was used to obtain or retain the thing stolen. The jumping on the complainant and seizing the rifle was not sufficient evidence of force used to obtain it. The statement may mean that he suddenly came up and snatched the rifle and does not necessarily mean that any assault was committed on the witness. The nature of the force used must be clearly proved. Whatever threat that was made after was a threat to obtain money form the complainant and not for the purpose of retaining the thing stolen. The Republic for the reasons did not support the conviction.” (2) “The trial magistrate found the facts as proved by the prosecution and even though, having regard to the relationship between the parties, this court may have come to a different conclusion there are no grounds for disturbing its findings ….. I will alter the conviction for Robbery to one of Staling contrary to section 265 of the Penal Code and vary the sentence to 12 months imprisonment. The order for corporal punishment is set aside”. (3) “The appeal is allowed to the extent indicated above”.

216. R. v. Mbegu s/o Saidi (P.C.) Crim. Rev. 41-D-70; 20/5/70; Georges, C.J.

The accused person in this matter was charged before the Mbeya Urban Primary Court with stealing by a servant contrary to sections 265 and 21 of the Penal Code. The assessors thought he was guilt of the offence. The Primary Court Magistrate thought not. He was not satisfied in particular on the question of the identification of the property alleged to have been stolen. The facts can be briefly related. The accused had been employed by Alibhai Star Service as spanner boy. He lived in a house owned by one Selemani. He left the house owing rent. After he had gone the landlord discovered spanners and other garage implements which remained behind. The landlord took them to the ten-cell leader seeking permission to sell them. This official thought it was unlikely that the accused could own such tools. She called the police who began enquiries. Feroz Haji, the owner of Alibhai Star Service identified as their property the whole lot of articles – 11 spanners, 3 screw drivers, 1 wiper motor, 8 box spanners, 3 pliers and one self starter. He said the spanners had numbers he had printed on them; one of the pliers had a red mark. The accused gave an explanation which can fairly be described

as not convincing. He said that he had got the spanners at Kilosa from a man with whom he had learned his trade. The self starter motor had been brought to him for repair by a man whose name or face he could not remember. The person who gave him the spanner was Athuman Matiko, a foreman at a sisal estate. The accused, however, said he had no witnesses to call.

Held: (1) “The Primary Court Magistrate should note that once there was enough evidence of identification to justify his calling upon the accused to answer under section 206 then he was under an obligation to accept the assessors’ opinions on the facts and convict the accused. The assessors are, in the final analysis, the persons in whom is now vested power to decide upon the facts of a case. Where the prosecution fails completely to make out a case the position will be different. The magistrate can then direct the assessors that in law there is no case to answer and discharge the accused. Here there was evidence of identification of the exhibits. The assessors thought it was adequate. Their view cannot be said to be unreasonable though persuasive arguments can be put up against it. The Primary Court Magistrate and the District Magistrate have done so convincingly. But the District Magistrate ought not to have substituted his view for those of the assessors unless it was clear that their view could not be supported by the evidence. In this case it is clear that their view can be supported though the other view may well have been taken”. (2) “The District Magistrate was clearly wrong in ordering the accused be convicted under section 312 of the Penal Code. A reading of this section will make it clear that an accused person can only be convicted of this offence when he is arrested under section 24 of the Criminal Procedure Code. This is the section authorizing a police officer to arrest anyone fount conveying property which he suspects to have been stolen. Here the accused was not found carrying anything nor was he arrested then. Property known to be his was taken to the ten-cell leader and from that point investigations began. Quite apart therefore from any question of the lack of jurisdiction of the Primary Court Magistrate to enter a conviction under section 312 there is the basic question that no offence under section 312 has been made out since

the essential prerequisites have not been established". (3) "I would order that the file be returned to the Primary Court Magistrate with a direction that he proceed with the matter and pass sentence upon the accused, explaining to him his usual rights of appeal which the accused is still entitled to exercise".

217. Damiani Grevas v. R., Crim. App. 79-M-70; 28/4/70; Kimicha, J.

The accused was convicted of unlawful possession of moshi c/s 30. Act No. 62 of 1966. he was sentenced to 9 months imprisonment. The facts are that on 24th November, 1969 at about 10.30 p.m. the accused was found with ¼ bottle of moshi. The evidence produced in the court showed that the accused was dead drunk of moshi ad was in danger of death. Prosecution witnesses asserted that the accused was drunk because he smelt of moshi, and that there were two empty bottles on the table and a glass contained moshi. The moshi and the empty bottles were given to a messenger by the one of the witnesses with instructions to send them to Police the following day. The Police Captain concerned received the empty bottles and the glass with moshi at 2 p.m. the following day. The witnesses for defence stated that on the material day the accused was sick and as a result was sent to hospital. They could not say whether the accused was drunk or sick. The doctor who attended the accused did not say that the accused was drunk, he stated that the accused was suffering from a fever of unknown origin, headache and he was depressed. The accused was admitted in the hospital for a few days. The trial Magistrate found him guilty. He appealed on the following grounds: (1) There was no evidence that the bottles of moshi found on the table of appellant were in the conscious possession of the appellant; (2) There was no evidence that the bottles belonged to the appellant;

(3) There was no sufficient evidence that the smell was conclusively of moshi or that the appellant had consumed the contents in the bottles which were found in his house; (4) There was no medical evidence as to the drunkenness of the appellant; (5) The learned trial magistrate did not give reasons for rejecting the defence case and this is fatal in

law; (6) The sentence is excessive. During hearing of the appeal the Counsel for defence argued that the police officer seized the bottles from a messenger, and that the messenger was not called to give evidence. He argued that the evidence of the police officer was hearsay. He maintained that hearsay evidence was inadmissible and the exhibits were not identified. Besides, there was no medical evidence whether the fever and headache might be the result of drunkness. The Counsel for prosecution did not quarrel with the grounds of appeal raised by the appellants Counsel. He conceded that there was a lot of inadmissible evidence. In his view the magistrate based the conviction on erroneous grounds and he therefore did not support the conviction.

Held: (1) "The appellant was charged with unlawful possession of moshi and not with drinking it. Therefore, the only exhibit which was material in this case was the ¼ glass of moshi which was found in the appellant's house. I have also no hesitation in agreeing with the defence counsel that this exhibit was not properly produced in court by Corporal Ismail because the messenger from whom he received the exhibits did not give evidence in court to the effect that the exhibit was the one which was handed over to him by the ward executive officer. This defect was not cured by the ward executive officer because although he gave evidence in court he was not asked to identify the exhibit. So, so far as legal technicalities are concerned, Corporal Ismail's evidence was hearsay and inadmissible. This was the only exhibit, as far as the charge is concerned, which incriminated the appellant. So up to this stage of considering the case, and taking the evidence as a whole common sense rules that the appellant was undoubtedly guilty as charged but legal technicalities are equally vehement and demand the appellant's immediate acquittal and release from custody." (2) "I am of the view that such a situation can be resolved by the application of section 32(2) of the Magistrates Courts Act that substantial justice to be done without undue regard to technicalities in considering the application of this section the evidence has to be considered as a whole and then decide whether the undue application of technicalities would result in injustice being done or not. This means that it is also important to decide hat the justice of this particular case is." (3) "I also find that the substantial justice of the case in this particular case is that the appellant did possess the moshi as charged and that to acquit the appellant on the ground that the glass of moshi was improperly admitted in evidence

would be acting contrary to the provisions of section 32(2) of the Magistrates Court Act. This section if very important in our present system of our courts. It takes into account that justice has to be administered justly to all citizens and that the majority of the magistrates are laymen. The section has been created in order to balance the situation. It is also serving another important purpose and that is it fosters good understanding between the citizens and the court because it enable them to understand the law under which they are administered. It is important for the masses to have some understanding of the functioning of the forces of law and order. They must feel that they are there for their benefit and not mere abstract conceptions imposed on hem. An acquittal, for example, in such a clear case of guilt as the one under consideration because of undue regard to technicalities would have resulted in a very bad understating of

the courts by those members of the public conversant of the facts of the case. They would have wondered whether the courts were for them or for invisible human beings" (4) "For the above reasons the appeal is dismissed in its entirety".

218. R. v. Syakisya s/o Mwambengo, Crim. Sass. 39-Tukuyu-70; Saidi, J.

The accused is charged with killing his wife. On the material day, the accused had retuned home after grazing some cattle, and he found his wife had gone to a neighbour. He sent his son to call her and told her to prepare stiff porridge for his young brother. His wife refused because the younger brother was not helping to cultivate. There was an argument, and, since the accused was angry, he ordered her to go out. The accused further states, as does his daughter that his wife started to choke him, and it was then the accused stood up and slapped his wife three times. His daughter Queen who tried to intervene was also slapped twice. Had his daughter not intervened his wife would have been slapped more. The wife went to report to the ten-cell leader who later came to reconcile them. The wife was found to be suffering, and she lay down and ordered her children to pour water over her. Later they arranged to take her to the hospital. When the assistant medical officer examined the deceased her found no injury, but he

suspected that she was suffering from malaria. He treated her with doses, but she died the following day. He did not find any marks of injuries externally or internally.

Held: (1) “The accused and the deceased had been married for a long time. The eldest daughter is fourteen years. They had a happy married life. It is possible that the wife was shocked due to this unprecedented act on the part of her husband. The Republic advises that it cannot prove the charge of murder or manslaughter ……” (2) “However the accused is guilty of slapping his wife more that once. I therefore find him guilty of common assault c/s 240, Penal Code.” (3) “The true position is this, that neither a husband nor a wife has the right to beat the other. Both of them are equal with each other. But it appears it has been a tradition all over Africa for husbands to beat wives, and this also was he practice in Europe and America as well as Asia ……. The TANU Constitution and the Interim Constitution of Tanzania in its Preamble both declare that all human beings are equal. That means men and women are equal and as such a wife shares equal rights with her husband. Even the Arusha Declaration repeats the same that all human beings, i.e. men and women, are equal, and neither of them should be allowed to exploit the other …. I take this opportunity to say that a husband has no right to bat his wife. If she annoys him he can complain to her parents or local elders. If a husband beats his wife he will be charged and be sentenced accordingly. The Government is keen to see that women take part in the administration of justice as court assessors. This year we will start selecting female magistrates, and they will decide cases, and so if a husband beats his wife and is brought before a woman magistrate I think he will be punished accordingly”. (4) “The offence of common assault contrary to section 240 of the Penal Code carries a maximum sentence of one year’s imprisonment. As the defence counsel has already stated that the accused has been in custody since December last year that is, almost three months, we can consider this ….. As I have already stated, husbands are not allowed to beat their wives, because in human relations all persons are equal, and no person is above another. In 1968 about 860 people were killed in this country. Last year, 1969, about 1,000 people were killed in

Tanzania ……. Very often ……. Husbands beat their wives seriously and as a result the wives die. In this case also the wife died, but the doctor could not find the cause of her death, otherwise the accused would have been convicted of murder or manslaughter ….. the accused is sentenced to nine months' imprisonment".

219. Kasian Yanda v. R. (PC) Crim. App. 193-D-69; 4/5/70; Hamlyn, J.

The appellant was convicted of stealing a goat, contrary to sections 265 and 268 of the Penal Code, and sentenced to three years imprisonment and to receive twenty-four strokes of corporal punishment in terms of the Minimum Sentences Act. The appellant, who had been entrusted with a goat belonging to another, claims that he was suddenly the object of a demand for the payment immediately of his local Tax; having no means of raising this amount of money demanded by the authorities, he sold the goat and paid off his debt.

Held: (1) "In reaching a decision to convict the accused of the offence charged, the trial magistrate ……. Found that the appellant had no authority from the complainant to dispose of the animal. That is perfectly true and section 258 of the Penal Code appears to cover the circumstances of the case. But I do not think that a decision of that point alone can determine the whole matter, for the trial magistrate should have gone on the decide the question of "claim of right". That phrase does not merely signify that the accused must have believed that the property which he took was his own; it must further include a claim of the accuse person to deal with the property in the way which he did. There is no doubt in the present case that the accused at no stage believed that the goat with which he was entrusted was his; he has never claimed this. His real defence was that, while he disposed of the goat without the direct authority of the complainant, he did so under the assumption that the complainant would sanction such act had he known it. Now if this really is the case (and neither of the magistrates in the Courts below considered the facts in this light) then here can certainly be said to have been a claim of right made in good faith. In support of this aspect of the matter put forward by the appellant, there is the uncontested fact that these persons are close relatives. The case would be quite different if such relationship had not existed and substantial

evidence would then have to be adduced to prove the existence of such claim on the part of the accused". (2) "In the event therefore this appeal will have to be allowed for I am not satisfied that the accused's defence was considered in any way in the Courts below. I consequently allow the appeal ……."

220. R. v. Jacob s/o Kayombo, Crim. Sass. 209-Mtwara-69, Preliminary Ruling; 17/4/70; Makame Ag. J.

This is a trial within a trial. The accused stands charged with murder. When the trial had stared, the advocate for the accused objected to two extra-judicial statements the accused is alleged to have made to a Justice of the Peace being admitted in evidence. The accused contends that he did not make the statements as alleged, and that if he did make them he does not recollect having done so. Mr. Eric Mkemwa, who was an ex-officio Justice of the Peace stationed at Songea, says in his evidence the accused made two extra-judicial statements to him, the first one on 11th October, 1968, and the second one ten days later, on 21st October, 1968. He detailed to this Court all the formalities he satisfied as a justice of the peace on the first occasion. Before recording the accused's statement, he had sent away the Police and made sure that

there was no-one else within eye-sight or earshot. The accused gave his statement clearly in fluent Kiswahili, which language Mr. Mkemwa understands well. He recorded the statement in English as the accused was giving it. He then read it back to him in Kiswahili. The accused said he understood it and that he was satisfied it was a faithful record of what he had told the Justice of the Peace. Both the accused and the Justice of the Peace signed and dated the statement. Ten days later, the accused was brought to him again. Again he sent the Police out of earshot and eye-sight, and remained alone with the accused, and complied with all the necessary formalities. The accused told him the first statement he made was lies and that he now wished to tell the truth. He said he wanted to have the first statement cancelled and have the second statement he was going to make used in evidence. He then went on the make a statement which was

different from the first, which statement Mr. Mkemwa recorded, observing the usual formalities. After the statement was read to him, in Kiswahili, the accused said it was a correct record of what he had stated and he duly signed it. The accuse gave evidence on oath. He says he sometimes suffers from loss of memory for about three days when there is a full moon. He does not remember making a statement to the Justice of the Peace on 11th October, 1968. He does remember the second occasion he went to the Justice of the Peace and he does remember making a statement there on that occasion. The Justice of the Peace did not read back the statement to him, but he told the accused to sign it, which he did. The statement he made was in fact a series of answers he was giving to questions the Justice of the Peace was putting to him. He does not remember the questions the Justice of the Peace was asking him, but does remember he told the Justice of the Peace the deceased's son had given him Shs. 1,000/-. This was because the Police had assured him three or four times that he would be released and gives evidence for the Republic if he said that.

Held: (1) "The onus of satisfying the court that extra-judicial statements are admissible rests with the prosecution." (2) "Mr. Pardhan, learned advocate for the accused, has submitted that during this trial within a trial, the alleged statements should not have been read at all, and he quoted the case of Ibrahim Ntende v. R. (1953) 20 E.A.C.A. 185. Unhappily, this particular volume does not appear to be available anywhere in Mtwara, so the Court has not been afforded the opportunity of reading the full report and gauging in their context the words learned counsel for the defence quoted from Rosen & Stratton's Digest of East African Criminal Case Law, 1897-1954 at page 324, which read: "Where extra-judicial statements are challenged by the accused as to their voluntary character, they are not to be read until a definite finding of fact as to their voluntary character has been reached." However, I have no doubt in my mind that the rule barring such statements from being read "until a definite finding of fact as to their voluntary character has been reached" must refer to a trial at large and not to a trial within a trial. Otherwise, it is difficult to see on what basis a Court would, in a trial within a trial, determine whether or not an extra-judicial statement was voluntarily made, especially when an accused person proposes to deny parts and admit parts of the same statement. I think I am fortified in this my view by the case of Kinyori Karidutu v. R.

(1956) 23 E.A.C.A. 480, which fully sets out the procedure to be followed in a trial within a trial. The issue is not specifically mentioned in that case, but the case clearly explains the procedure in so far as it is at pains to ensure that the statements should not be read before

the assessors leave, but it does not say that even after they have left the alleged statements should not be read". (3) "The first statement is admissible, since it is clear, on the evidence, that it was voluntary." (4) "Now, the second statement: I can say at the outset that some objections leap to my mind about this second statement, and I shall say what they are. The accused had made a statement on 11th October, 1968, in which he gave a version of the crime, and then ten days later when he was in remand prison, he says he was taken by the Police who told him what they thought was the true version of the crime, and that if he went and furnished the Justice of the Peace with this other version, he would be released and become a witness for the Republic. He was not particularly clear in this court about this, and at times he was conspicuously and deliberately evasive. However, the first thing he says when he gets to the justice of the Peace, and this according to the Justice of the peace himself, is that his first statement was untrue and that he now wishes to tell the truth. Then, and I think it is significant, the first thing he is recorded as saying in the body of the statement itself is, and I quote: - "The death of the three deceased persons was planned by the elder son of the deceased". This is the one 'important' thing he had to say, which would seem to accord with, and lend some credence to, his claim that he was induced by the Police to go and say this. Then in Court, more significantly still, the Justice of the Peace said the accused asked him to cancel the first statement and that he would wish to have the second statement in evidence instead. Is it possible that he had been promised or made to understand, before he went to the Justice of the Peace, that he would escape from the charge if he told either the 'truth' or at least something different from what he had told ten days earlier, when probably the Police had not yet gone far in exploring other possible avenues of investigation? I must hasten to add that I am not for one moment

saying hat I believe the accused's story that he was induced by the Police to change history. What I am saying is that, having regard to the evidence on record in this trial within a trial, I am unable to feel certain that the possibility suggested by the defence can safely be dismissed …. If there was such an inducement, as I am satisfied there might have been, the accused would still have been in its comfortable grip when he reached the office of the Justice of the Peace, especially as such inducement might have been the 'soft' inducement of release, and not one of physical violence. And one cannot safely say that the formal assurances the Justice of the Peace gave to he accused an the satisfaction of the Justice of the Peace that the accused was free agent would have necessarily, n the circumstances, removed the effects of such inducement". (5) "But, in my opinion, there is yet another reason following close on this, why I think this statement should not be admitted ….. As I have already said, and shall repeat again, I am clearly satisfied that Mr. Mkemwa, the Justice of the Peace, did not act with any impropriety, and his honesty cannot be impugned. But what could have been the effect of this nice little request by the accused to the Justice of the Peace on the second occasion – that he wished his first statement to be cancelled and have only the second one admitted in evidence? In examination-in-chief, Mr. Mkemwa said, and I quote:- "He said he wanted to made a statement different from the first one. He said he wanted to do this because the first statement was untrue and that now he wanted to make a true statement. I was satisfied that the accused was a fee agent and that this statement would be voluntary." In cross-examination, Mr. Mkemwa says: - "I did ask him why he wanted to make another

statement. He said the first statement was not true and that he now wanted to tell the truth. He said he was canceling the previous statement and that he wanted the second one to be used in evidence ……" Mr. Mkemwa's action was quite alright as far as it went, but cannot one reasonably argue that in the circumstances the accused was under the erroneous impression that Mr. Mkemwa was able and willing to grant him his little request – that the first statement would be cancelled and only the second would be

used in evidence? I think one can, and for that reason it can successfully be contended that Mr. Mkemwa was in that sense, albeit unwittingly, inducing the accused, or rather allowing the accused to continue to be in the state of inducement, that he might have got from the Police. I am aware that under section 29 of the Evidence Act of 1967, unlike under the laws of other countries, this statement could still be admitted, but in view of the evidence, the admission of guilt contained in the second statement might well have been untrue. Now, in what sense might such admission be untrue, if the accused had already made another statement admitting complicity in he crime? I think it is in this sense that the first admission relates to the accused's complicity in the crime in a different degree from the degree in the second alleged admission. I therefore find the second statement is not admissible in evidence".

221. Daudi s/o Othiambo v. R., Crim. App. 167-D-70; 29/4/70; Georges, C.J.

The appellant in this case was charged with stealing contrary to section 265 of the Penal Code. the particulars alleged that on 21st December, 1969 at a village in Kilosa he had stolen a Gazele bicycle, a pair of trousers, a coat, a necktie, a cloth belt and a pair of socks, all valued Shs. 671/-, the property of Humphrey Ravate. Humphrey testified that he had gone to a pombe shop and there had met the appellant. Humphrey invited the appellant home and there they had food and rinks. The appellant sad that he was a Kenya policeman investigating a case in the area and he would be there for a few days. He asked Humphrey to lend him some clothes as he wished to wash his. Humphrey gave him a pair of trousers, a coat, a necktie and a pair of socks. The appellant then asked Humphrey to lend him his bicycle to go to the village to buy cigarettes. He then rode off and failed to return as expected. After a search he was apprehended. He was charged with theft, and at the close of the case for the prosecution the following not appears:- "Charge read to the accused who pleads:- (1) I did not steal; (2) I agree I had no right to take it to Mzangasa. Entered as a plea of not guilty to 1st count; guilty to 2nd count". The original charge sheet had only one count for sealing. The count to which it was noted that the appellant had pleaded guilty was one of conversion not amounting to theft contrary to section 284 of the Penal Code. The record does not show the power

under which the trial magistrate was purporting to act when he added this new count to the charge sheet.

Held: (1) “There is power under section 209 (1) of the Criminal Procedure Code to amend a charge…… There are two provisos to this subsection, the first requiring the Court to call upon the accused person to plead to the altered charge and the second giving the accused person the right to demand that witnesses who had already given evidence be recalled to give evidence afresh or to be further cross examined. I think it can be presumed that he magistrate was purporting to act under this section when he added the count to the charge sheet. There was, in my view, no need for him to have done this. If he was

Satisfied at the close of the case for the prosecution that a charge of stealing had not been made out but that a charge of conversion not amounting to theft had been made out he could have called upon the appellant to answer such a charge without any amendment of the charge sheet. This is made possible by sections 181 and 206 (1) of the Criminal Procedure Code ….. Stealing and conversion not amounting to theft are offences which fall within the category defined in this section [s. 181(1)]. Conversion not amounting to theft fits into the definition of theft as set out in section 258(1) of the Penal Code except that the person converting cannot be held to have done so fraudulently because none of the intents set out in section 258(2) can be established. A person charged with stealing can, therefore, be convicted of conversion not amounting to theft under section 181(1). Section 206(1) of the Penal Code (as amended by Act 48 of 1963, to add the words underlined) reds:- “At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 181 to 189 (inclusive) of this Code, he is liable to be convicted, the Court shall again explain the substance of the charge to the accused and shall inform him that he had the right to give evidence on oath from the witness box …. To make a statement

not on oath from the dock … and the Court shall then hear the accused and his witness's ad other evidence if any". The law has thus been specifically amended to make it clear that the Court does have the power to call upon the accused, without amending the charge, to answer a case made out not on the original charge, but on a charge on which the accused could be convicted on the original charge. The amendment in the case was quite unnecessary and the conviction on the substituted charge is sound since it is quite firmly founded on the evidence". (2) "In his submissions advocate for the Republic contended that the addition of the charge was bad in law because it was a prerequisite of the exercise of the powers conferred by section 209(1) that the charge originally laid must be defective and this charge was not defective. It was a perfectly sound charge for stealing. The evidence led by the Republic had not been sufficient to establish it. The evidence had tended to establish another charge but this failure could not make the original charge defective. In view of the reasons I have given above for supporting the conviction it is not strictly necessary to examine this argument but it may be useful to do so for future guidance. When there is a variance between the charge and the evidence le in support of the charge, it can be said that the charge is for that reason defective. This view was adopted by the Court of Criminal Appeal in England in the case of Rex v. People [1951] 1 K.B. 53. Humphreys J. reading the judgment of the Court (which had been reserved) stated: - "The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore, was bad on the face of it. We do not take that view. In our opinion any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person." The emphasis has been supplied. This view retains the flexibility which section 209 seeks to provide so that matters of form need not be unduly stressed once essential justice is done – the discretion resting with the trial court which can be trusted to evaluate the situation impartially bearing in mind both the interests of the public as represented by he prosecution and those of the accused. There

have been two cases decided in East Africa in which amendments to bring in a new charge have been disallowed on appeal. In Mbithi and 7 others v. Reg. (1955) 22 E.A.C.A. 484 the appellant, Mbithi, was charged on count I jointly with the fourth appellant for administering an unlawful oath. On count 2 the other appellants were charged with being present at and consenting to the administration of an unlawful oath. The trial Judge found that there was no evidence on which to convict the appellant, Mbithi. He amended count 2, however, by adding Mbithi's name and convicted him thereon. The trial judge in that case was acting under section 260(2) of the Criminal Procedure Code. this deals with the powers granted to the High Court to amend in formations and appears to be somewhat narrower in scope than section 209(1). This is not surprising since it would be expected that in trials in the High Court the information would be expected that in trials in the High Court the information would have been subjected to some professional scrutiny while in the subordinate courts this was far less likely …. It will be noted that [in s. 260] there is no clear specification of a power to amend by way of "substitution or addition of anew charge". The word "defective" is, however, used in both sections and the view expressed by the Court in the Mbithi case could be said to be relevant to section 209(1). The Court there stated: - "Mr. Summerfield, for the Crown, sought to rely on the provisions of section 260 of the Tanganyika Criminal Procedure Code, but this section has no applicability to what happened here. That section confers in subsection (2) discretion on the court of trial to order on its own motion the amendment of defective information must be one in which the accused person is named or on which he has pleaded. In the present case the appellant was not charged on the information with the offence specified in the second count. He was not arraigned on this count and never pleaded to it". These reasons seem cogent enough to support the conclusion that section 26(2) did not apply to an amendment of the kind ordered by the trial judge in that case. The Court went on, however, to add: - "In fact this is not a case of defective information at all. The defect was not in the information but in the prosecution evidence which could not support the charge that the appellant had administered an unlawful oath at the oath taking ceremony. The Crown might have entered a nolle prosequi on the second count an filed

a fresh information charging this appellant with being present at and consenting to the administration of an unlawful oath but his course was not adopted. As it is the proceedings against the appellant on the second count were clearly incompetent ….." this clearly suggests that a variance between the charge and the evidence led to support it does o made the charge defective so as to made amendment possible. This decision does not seem to me to have been necessary for the purpose of the case as it would have been enough to hold that the section did not contemplate amending a charge by adding thereto the name of an accused person not originally charged there under – a contention which seems eminently reasonable. The other case, Maulidi Chengo v. Republic [1964] E.A. 122, is a decision of this Court, and is clearly quite correct. The appellant there was charged with stealing by a servant. The evidence led supported the charge but could also have supported a charge of housebreaking and stealing, which attracted a stiff minimum sentence. The trial magistrate at the close of the defence amended the charge to one of housebreaking and having complied with the proviso to section 209(1) he convicted the appellant. Windham C.J. rightly held that the charge was not defective merely because the evidence led in support could also have established another charge. He did not hold that variance between he charge ad the evidence

led to support it did not make the charge defective. He quoted, without dissenting from it, the passage from Rex v. Pople (supra) set out above. I would hold, therefore, that variance between a charge and the evidence led in support o it can make a charge defective under section 209(1) so as to justify the exercise of the power to add or substitute another charge if it appears in the interests of justice so to do". (3) "As I have already indicated it was unnecessary in the circumstances of this case to make any amendments at all. The appeal against conviction is dismissed".

222. Salum Issa v. R. (PC) Crim. App. 698-M-69; 8/1/70; Seaton, J. The appellant was convicted in the Primary Court of housebreaking and theft c/ss. 294(1) and 265 of the Penal Code. He was sentenced to two ears imprisonment and 24 strokes corporal

punishment on the first count and four months imprisonment on the second count, the sentences of imprisonment to run concurrently. On appeal to the District Court, the conviction and sentence on the first count were upheld but, on the second count the conviction was quashed and the sentence set aside. The appellant now appeals to this Court against conviction and sentence on the first count of house-breaking.

Held: (1) “At the hearing of this appeal, learned Senior State Attorney on behalf of the Republic did not support the conviction as it appears from the record that the provisions of s. 41(2) (b) of the Magistrates’ Courts Act, Cap. 537 were not complied with. The section provides as follows: “41. (2) A primary court - ….. if the accused person so elects, shall transfer to the district court of the district for which it is established any proceeding of a criminal nature in which the accused is charged with an offence punishable in the primary court by imprisonment for more than twelve months or, in the case of an adult, by corporal punishment. An election under this section shall be exercised before the accused pleads to the chare”. I will be observed that the above-quoted section provides that in cases falling under that section, the primary court magistrate shall transfer such case to a district court if the accused person so elects. The section further provides that this election by the accused person shall be exercised before his plea is taken. According to paragraph 40 (b) of the Primary Court Manual, the primary court magistrate must inform the accused of his right to elect before his plea is taken. The appellant in this case was not informed of his right as to election. This, it was submitted by learned State Attorney, was an irregularity because it was in direct violation of the procedure set out in the Magistrate’s Courts Act. It was further submitted that such irregularity is fatal because the requirements as laid down in section 41 of the Magistrates’ Courts Act appear to be mandatory because of the use of the word ‘shall’ in section 41 (2) (b). Hence the Republic did not support the conviction. The effect of this error in the present case appears to have been aggravated when during the trial, even though he was not informed of his right, the appellant applied for a transfer of the case to another court, and the magistrate refuse ….. As a result of being refused that application, the appellant declined to cross-examine prosecution witnesses and he also declined to defend himself after the close of the prosecution case.” (2) “I would, with respect, agree with learned Senior State Attorney that in these circumstances it is

impossible to be satisfied that failure to comply with section 41(2) (b) of the Magistrates' Courts Act did not occasion a failure of justice. The irregularity or

error of the trial court is not therefore curable by invoking the provisions of s. 32 of the Magistrates' Courts Act. Accordingly I hold that the proceedings were a nullity, set aside the conviction and sentence and order that a retrial beheld at the earliest opportunity before another magistrate".

223. Peter B. Dugara v. R. Crim. App. 818-M-69; 23/1/70; Kimicha, j.

The appellant in this case was convicted of failing to pay his 1967 personal tax c/s 36 (1) Personal Tax Ordinance, Cap. 355, and was sentenced to Shs. 100/- fine or 21 days imprisonment in default. He has now appealed to this Court against conviction and sentence on the ground that he was charged under a wrong section of the law and that it was his employer who was required by law to deduct his personal tax from his salary and pay it to the appropriate authorities. The demand note was in fact sent to his employer.

Held: (1) "I have considered the relevant law on his employer. And I am satisfied that the appellant has good ground of appeal. In the first place section 36(1) of Cap. 355 under which the appellant was charged and convicted has nothing to do with the alleged offence. Also section 24(1) of the Personal Tax Act, 1967 supports the appellant's other grounds of appeal that it was the duty of his employer to deduct the tax from his salary. (2) "What should have been done in this case is that the prosecution or the Treasury should have reminding the appellant's employer that the appellant's tax was not deducted from his salary as required by the law. The employer would not have had difficulty in rectifying the position. And if the Treasury or the prosecution were of the opinion that the employer was deliberately refusing to comply with the law they could have proceeded against him immediately. The facts as they stand do not reveal a criminal offence against the appellant". (3) "The appeal is for the above reasons

allowed. The conviction is quashed and the sentence is set aside. The appellant is to be refunded the fine that he has paid".

224. Samson Msiba v. R. Crim. App. 135-D-70; 23/4/70; Mustafa, J.

Appellant was convicted of threatening violence contrary to section 89(2) (a), common assault contrary to section 240, and using abusive language in a manner likely to cause a breach of the peace contrary to section 89(1) (a), of the Penal Code. He was sentenced on the threat to violence count to nine months' imprisonment, on the assault count to a fine of Shs. 50/- or one month's imprisonment, and on the abusive language count to a fine of Shs. 50/- or one month's imprisonment. Appellant at the material time was the officer in charge of Sumbawanga Police Station and an Assistant Superintendent of Police. He was alleged at about 8 p.m. at a bar at Sumbawanga to have pointed a pistol at an administrative officer from Dar es Salaam, threatening to shoot him. Appellant was also alleged to have kicked the complainant with his foot and to have obscenely abused him.

Held: (1) "The first count reads:- "Statement of offence section and law:- Threatening to violence, contrary to section 89 (2) (a) of the Penal Code Cap 16 of the Laws. Particulars of offence:- That Samson E. Musiba charged on 28th August 1968 at about 20.00 hours at Muungano Bar, Mazwi Minor Settlement, in Sumbawanga District, Mbeya Region, Tanzania Republic, with intent to intimidate or annoy one John s/o Malombola, did threaten to shoot the said John s/o Malombola by pointing a pistol at him".

The evidence adduced, which was accepted by the trial magistrate, would support the particulars of offence as alleged …. However, section 89(2)(a) with which appellant was charged on this count in the Penal Code reads as follows:- "Any person who with intent to intimidate or annoy any person threatens to burn, break or injure any premises ….." it is clear therefore that the particulars of offence do not comply with what is stated in the Penal Code. learned State Attorney has argued that this error is curable under section

346 of the Criminal Procedure Code because there could have been an error in the quoting of the section, and that in fact it was an offence contrary to section 89(2) (b), which reads:- “Any person who with intent to alarm any person discharges a fire-arm or commits any other breach of the peace ….” Learned State Attorney states that the fact that appellant had pointed an instrument which looked like a pistol at complainant caused fear in the mind of complainant and also in the minds of the other witnesses who were nearby, and could therefore be an act which would be covered by the words “or commits any other breach of the peace.” The appellant in this count was charged:- “with intent to intimidate or annoy one John s/o Malombola did threaten to shoot the said John s/o Malombola by pointing a pistol at him.” “There was no averment or evidence that he discharged a firearm or committed any “breach of the peace.” I would agree with learned State Attorney if the particulars of the offence had accurately set out what appellant was alleged to have done. The wrong quoting of a section is curable, but here appellant was charged with something which is completely different from the provisions of the section in the Penal Code. In my view this is not curable under section 346 of the Criminal Procedure Code, and I think the appellant’s appeal on this count should be allowed.” (2) “As regards the third count of using abusive language, it was conceded by learned State Attorney that the conviction cannot stand. The maximum sentence for such an offence is six months’ imprisonment and the provisions of section 214 of the Criminal Procedure Code lay down that no offence the maximum punishment for which does not exceed imprisonment for six months and/or a fine of one thousand shillings shall be triable by a subordinate court unless the charge relating to it is laid within twelve months of the time when the matter of such charge or complaint arose. This offence was alleged to have taken place on the 28th of August 1968 and the complaint was not made until the 1st of November 1969, after a period of more than twelve months. The appellant’s appeal on this count should also succeed.” (3) “As regards the second count of common assault, there is sufficient credible evidence to show that appellant kicked the complainant with his foot while in a bar at the time he was alleged to have been pointing an instrument like a pistol at complainant ….. However, learned advocate for the appellant has argued strongly that appellant was severely prejudiced by not being granted an adjournment for him to brief counsel.

Appellant was summoned to appear in court at Sumbawanga by summons dispatched from Sumbawanga on the 3rd of November 1969. At that time appellant had left Sumbawanga and was posted at Kilimanjaro. There is no evidence as to when the summons was served on appellant. The case did not commence on the 6th of January 1970 as originally arranged but was first mentioned before the court on 13th January, when appellant was absent. However, by the 14th of January he was present and when charged with the three counts pleaded not guilty to all three of them. Appellant then said he wanted an adjournment. …. The magistrate held that since the summons was dispatched at Sumbawanga on the 3rd of November 1969 the appellant must have been served with it some tie in 1969, and as he had a copy of the charge.

He must have known all the particulars, and had plenty of time if he had wanted to engage an advocate. He also said witnesses had come form Dar es Salaam at great expense and that since appellant was from Kilimanjaro region an adjournment would also occasion the appellant further expense, and he therefore refused the application for ran adjournment an proceeded with the case, intimating at the same time that the court would look after the interests of the appellant; and the case then proceeded. At the end of the prosecution case appellant again made an application for an adjournment in order to employ the services of an advocate. The trial magistrate again ruled, for the reasons he said he had given earlier, that the case had now reached its end and he saw no reason why it should be adjourned at that stage for appellant to employ an advocate …. Learned counsel for the appellant states that appellant had been deprived of his right to be represented by counsel. He said the reasons given by the trial magistrate for refusing an adjournment were insufficient and unreasonable. He referred me to two case, Jafferali Abdulla Haji v. King, 1 T.L.R. 299 at page 300, and Magema and another v. Republic, (1967) E.A. 676. He says the criterion is whether a refusal by the trial magistrate was unreasonable and caused the appellant injustice or prejudice. He says Sumbawanga is a very remote area and no resident counsel lived there at the material time. He said even if the trial magistrate was right to have refused an adjournment at

the beginning of the trial he was certainly wrong to have refused an adjournment after the close of the prosecution case because the reasons he gave for the first refusal would no longer have applied. The trial magistrate did consider the reasons advanced by the appellant for an adjournment, but he was of the view the appellant had plenty of time to have made up his mind whether he wanted to engage counsel before he appeared. It is not an unreasonable assumption on the part of the trial magistrate. Appellant was officer in charge of the police station at Sumbawanga and a senior police officer and would have known the court procedure. The magistrate took into consideration the expenses and inconvenience of witnesses being called to Sumbawang from Dar es Salaam, a factor which he could reasonably take into consideration, and then he exercised his discretion in refusing the adjournment. I my self would perhaps have come to a different conclusion and granted the adjournment in the circumstances existing at that time. However, as regards the second count of common assault, there were no questions of law or complicated facts involved. It was a straight-forward allegation of assault …. There is very clear evidence which has not been seriously challenged that appellant did kick the complainant, and whether there was an advocate or not would not have made any difference so far as this particular count is concerned. Bearing in mind that appellant is a senior police officer and not a person who is unaware of court procedure and uneducated or illiterate, I think although the trial magistrate refused an adjournment when he perhaps should have allowed it, no prejudice or miscarriage of justice has been occasioned by his refusal in this instance, at any rate as far as this count is concerned". (4) "In the result the appellant's appeal against his conviction on the first count of threatening violence and on the third count of using abusive language is allowed, the convictions on these two counts are quashed and the sentences thereon set aside. The appellant's appeal against conviction on the second count of common assault is hereby dismissed".

225. Mikidadi Abdullah v. R. Crim. App. 899-M-69; 22/4/70; Seaton J.

The appellant is the former Officer-in-charge of the Tabor Prison. As such, he was ex-officio Chairman of the Prison Officers Staff Club. The appellant was convicted on two counts of stealing by a public servant under sections 265 and 270 of the Penal Code and obtaining money by false pretences under section 302 of the Penal Code. He was sentenced to 3 years imprisonment with 24 strokes corporal punishment on each of the two stealing counts and to 18 months and 6 months imprisonment on each of the two counts of false pretences.

Held: (1) With respect to the first count of stealing by public servant, there is adequate evidence to show that the appellant stole Shs. 334/30 from funds of the Prison Staff Club. "As, however, the money belonged to the Prison Staff Club and not to the Government, the offence does not fall within section 270 of the Penal Code and the Minimum Sentences Act is inapplicable. Accordingly, I quash the conviction under section 270 while upholding that of simple theft under section 265." (2) "As regards …… the second count of stealing, the appellant did not dispute that on or about 14th July. 1967, he took Shs. 400/- from the Club's treasurer but he maintained that this was a loan to him which was taken in good faith. The Commissioner of Prisons (P.W.6) referred the trial court to section 305 of the Prisons Standing Orders which he said lay down that a chairman of the Prison Staff Club may authorize loans from its funds not exceeding Shs. 100/- to his subordinate staff. If, however, the chairman himself wished to borrow money, he had first to apply for a loan to the Commissioner of Prisons for approval which the appellant had not done. The Prisons Standing Orders were put in evidence …. From a perusal of these Orders, it appears that they are silent as to the procedure to be followed should the Chairman of a Staff Club require a loan. The failure to follow the procedure outlined by the Commissioner was not, therefore, ipso facto proof of theft. In my view, it was necessary to inquire further before proof of the appellant's fraudulent intention could be found. It appears from the record that the appellant did not take the Shs. 400/- secretly or in an underhand way. He informed the Club treasurer Mr. Nondo (P.W.5) that he was taking a loan and would repay it by subsequently giving a cheque of his for this amount. He failed to do so before the present proceedings were instituted by that does not necessarily prove he never intended to do so …. The learned State Attorney, who appeared for the respondent at

the hearing of this appeal, urged in support of the conviction that the law under section 258(e) of the Penal Code is very strict and referred to the case of Ali s/o Iddi, v. Republic [1967] H.C.D. n. 219. [Also reported more fully at (1969) H.C.D. n. 263]. The section reads as follows:- "(e) in the case of money, and intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount o the owner." In the last-mentioned case, Chief Justice Georges upheld the conviction because the evidence established that the alleged borrower used the complainant's money for his own purposes without permission to do so; thereafter the appellant kept avoiding the complainant, who finally brought the matter to the attention of the police. It seems to me that a crucial distinction between that case and the present case is the knowledge of the appellant in Ally Iddi's case that he did not have the owner's permission to use his money for a loan. In the present case, there is no evidence to that effect except the verbal statement of the Commissioner of Prisons (unsupported by the Prisons Standing Orders) that loan applications by chairmen of Prisons Staff Clubs had to be approved by him. The appellant

When cross-examined on this point denied that he was conversant with Standing Order 305. With respect, I would agree with learned counsel for the appellant that if there were a breach of the Prisons Standing Orders (which appears to be doubtful) the appellant may have rendered himself liable for disciplinary action. But the prosecution failed to prove that the appellant fraudulently and without a claim of right converted the Shs. 400/- to his use and the conviction on the third count cannot be sustained. Of course, this money may be recovered by the Prisons Staff Club by civil action if appellant has not by now repaid it." (3) "The two remaining counts [of obtaining money by false pretences]…. May be dealt with together. The prosecution alleged that between the months of May and June, 1967, the appellant with intent to defraud obtained from the Prison Officers' Staff Club, Tabora, two sums of Shs. 1,000/- and Shs. 100/-by falsely pretending that he had sufficient funds in his personal account in the bank and issued cheques for these amounts knowing well that he had not sufficient funds in his personal

account in the Bank. The learned resident magistrate found that on 18th May, 1967, the appellant issued his cheque to the treasurer of the Club, Mr. Nondo (P.W.5) and post-dated it to 31/5/67. The Club presented tit on the date shown on it and the cheque was dishonoured. When the appellant was told about this, he replied that the cheque should be kept by the club and presented to the bank again at the end of June. On 30th June, the Club presented the cheque to the bank but again it bounced. At the time, according to Mr. Mathew (P.W.4), a supervision of the National Bank of Commerce in Tabora, the appellant had a balance of Shs. 20/75 only. When the appellant's cheque for Shs. 1,000/- was dishonoured the second time, he went to the Bank and checked his account. Despite the small balance which was revealed, the appellant on 4th July, 1967, issued a cheque for Shs. 100/- to the Club and against this took Shs. 100/- cash club money. When the Shs. 100/- cheque was presented it also was dishonoured. The learned resident magistrate directed himself that a post-dated cheque, in the absence of other evidence, is a promise to the future and cannot be pretence as to an existing fact. In the circumstances of the present case, however, he held that the appellant knew very well he had no funds in his account to meet the cheques and hence by obtaining cash from the Cub's treasurer, he falsely pretended to an existing fact. Accordingly, he convicted the appellant of obtaining money by false pretences. Learned counsel for the appellant has submitted that the dishonoring of a post-dated cheque gives grounds for a civil liability, not criminal. Alternatively, he submitted that the appellant's crime could only be that of obtaining credit by fraud, contrary to section 305 of the Penal Code. In support of his submissions, he referred to Gulamrasul Shabandin, [1934] 21 E.A. 29 and Rex vs. C.J. Heigl [1934] 1 E.A. 185. If I do not refer to those cases in detail, it is not through lack of respect for learned counsel, who has argued this appeal with clarity and restraint. I am satisfied, however, that the learned magistrate did not misdirect himself as to the law or as to the facts. The appellant used his subordinates as mere tools in making use of the staff club's money because of his dire financial straits. The evidence amply supports the conviction on counts 5 and 6." (4) 'As to sentences, that on count 1 under the Minimum Sentences Act is quashed and there is substituted a sentence of 12 months imprisonment for simple theft. For the reasons stated regarding count 3, the conviction is quashed; the sentence thereon is set aside. The sentences on

counts 5 and 6, i.e. of 18 months and 6 months imprisonment will remain, as also the order that all sentence will run concurrently."

Editor's note: The second holding in this case appears to be in conformity with Yusuf Salim Mkaly v. R., (1969) H.C.D. n. 264, with which it should be compared.

226. Breida Nowaso v. R. (P.C.) Crim. App. 192-D-69; 30/4/70; Georges, C.J.

This is a second appeal from a judgment of a Primary Court Magistrate convicting the appellant for cattle theft contrary to sections 265 and 268 of the Penal Code and imposing on him the minimum sentence of 3 years imprisonment and 24 strokes corporal punishment. The District Magistrate's judgment reads:- "The appellant in this case had been charged with cattle theft c/s 265 and 268 of the Penal Code. He was convicted and sentenced to 3 years imprisonment plus 24 strokes. He now appeals to this Court. There is no merit in this appeal which is hereby dismissed.

Held: "It is clear that the magistrate was exercising there a power akin to that of the High Court to dismiss appeal summarily. A District Magistrate has no such power and it is not surprising that he should not. He should review the evidence, consider the points raised in the memorandum of appeal and come to a conclusion. The slipshod method of work here has created problems because the original Primary Court file is now reported as lost. It is not available for scrutiny by the High Court. In the circumstances this Court must order that the conviction be set aside and the sentence quashed. The appellant shall be tried again by another magistrate ……"

227. Vincent Mapunda v. R. Crim. App. 85-D-70; 29/4/70; Georges, C.J.

The appellant in this case was charged with four counts – one for stealing by public servant contrary to sections 270 and 265 of the Penal Code and three for offences against the Fauna Conservation Ordinance Cap. 302, unlawful hunting without licence, failing to report possession of Government trophy and unlawful possession of Government trophy. He was acquitted of filing to report possession of Government

trophy and convicted of all the other counts. The facts are that one day Sita Lyimo, saw a dead elephant as she was on her way to fetch firewood ….. She sent news of her discovery to the village and in due course the report reached Hussein Mwanjuli, who went there that very day with his brother Salimu Mwanjuli, a 10-cell leader. Such was the state of discomposition of the dead elephant that the party was able to remove one of the tusks that very day merely by pulling it out. It was left at the home of the 10-cell leader, Salimu Mwanjuli. A messenger was sent to notify the Assistant Divisional Executive Officer, Omari Mhemji, he testified that he received the new on Monday 16th June, from which it can be concluded that Sita had discovered the elephant on Sunday, 15th June, On Tuesday, 17th June, the ten-cell leader and his party removed the other tusk from the dead elephant and both tusks were kept at his home. The Game Warden, Mr. Mgegye, testified that the appellant came to his office on 17th June, 1969 and asked whether he had received the letter in connection with a pair of tusks which had been taken from an elephant which he, the appellant, had shot at Isuwa. The appellant wanted that he could not authorize this unless he knew something more of the matter. On that very day, according to Hussein, the Assistant Divisional Executive Officer, the appellant came to his village and demanded that the tusks be given to him. Hussein was unwilling to part with the tusks be given to him. Hussein was unwilling to part with the tusks unless authorized to do so by the Game Warden. The appellant who was a Primary Court Magistrate insisted that he had the Game Warde's permission. He seemed bent on creating a

disturbance unless he got the tusks and accordingly Hussein gave them to him in exchange for a chit acknowledging their receipt. Having got hold of the tusks the appellant took them to the Inland Revenue Officer in Singida to have them registered. Mr. Mhegye, the Game Warden, received new of this and issued instructions to the officer not to issue a certificate until further investigations had been make. The appellant

called on the Game Warden on that very day and explained that he had shot the elephant on 4th June, as it had gone to drink water. He had wounded it but the animal had managed to escape and he had not been able to track and kill it. Later he had heard that a woman had found the dead elephant and he had then gone down and claimed the tusks. The Warden pointed out of him that if his story was true he had already committed three offences against the Fauna Conservation ordinance – shooting at a drinking place, wounding an animal without reporting that he had done so, and obtaining the tusks from the villagers. He advised the appellant to surrender the tusks at once and thus avoid further investigation. The Warden testified that this advice greatly annoyed the appellant who accused him of attempting to convert the tusks to his own use and demanded a receipt from him certifying that the tusks had been detained. The Warden refused to do this unless the appellant showed his game licence. The appellant would not do this. The Warden ordered him to leave the office whereupon he became violent and slapped one of the porters who was attempting to eject him. The Warden called the police who arrested the appellant and took him to the police station. On 20th June, the Warden traveled to see the carcass of the dead elephant. He formed the impression that it may have been shot as long ago as two months before the date on which he saw it. The appellant had not in fact been issued with a game licence to shoot an elephant until 17th June. His story was that he had shot the elephant on that very day, that the villagers had found it on 17th June, and removed the tusks, and that he had collected the tusks on 19th June. The prosecution called a witness, Susid Rajabu, who stated that he had gone hunting with the appellant and Jonnathan Paulo, sometime in June, 1969. The appellant had shot and wounded an elephant but had not managed to kill it. At first Sudi agreed that the date on which this had happened was 4th June, but later had changed this to mid-June, 1969. The trial magistrate accepted the evidence establishing that the elephant had been in an advanced state of decomposition when found. He accepted also the evidence of the Assistant Executive Officer that the report of the finding had been made to him n 16th June. He concluded, therefore, that the animal had been shot before that date. Since the appellant's licence had been bought on 17th June, the Magistrate held that he must have been hunting without a licence when he shot the elephant.

Held: (1) “The trial magistrate also convicted the appellant on the fourth count for stealing by a public servant. I am satisfied that he was correct in coming to the conclusion that the appellant was guilty of stealing the tusks. The appellant had obtained possession of them from the villagers by tricking them into believing that he had permission from the Game Warden to do so. He was seeking to have them registered in his name as an essential step towards disposing of them as his own. It could be argued that he might have thought that he had a claim of right to the tusks. I cannot, however, accept this contention. On the magistrate’s finding the appellant would have known that he had shot this elephant when he had no licence to do so. He would have known that under these circumstances the tusks would become Government trophy. His awareness of this was established by the fact that he sought to establish that the shooting had taken place

after he had obtained the licence. He knew that he could not make a claim otherwise. There could be no question, therefore, of his having a claim of right.” (2) “All the ingredients of stealing have been established. The appellant was also a public servant. He could not, however, be convicted of stealing by a public servant unless the theft had taken place in the course of the performance of his duties as a public servant or unless the opportunity for theft ha arisen because he was a public servant. Neither of these circumstances has been established here. The fact that he was public servant was quite unrelated to the theft except in the sense that the villagers might not have accepted his word and given him the tusks had they not known him to be magistrate. This connection was not such as to support a charge of stealing by a public servant. On this count the appeal must succeed, but by virtue of the powers vested in the Court by the provisions of section 181 of the Criminal Procedure Code, a conviction for theft contrary to section 265 will be substituted as this has been amply proved.” (3) “Once the appellant had been convicted of theft he ought not to have been convicted on the third count of unlawful possession of Government trophy. The facts constituting the unlawful possession were the same as those which constituted the theft. The offences should

really have been charged in the alternative. In such cases an accused person found guilty of one of the alternative charges ought not to be convicted also of the other. No finding need be recorded on that other charge. In the event of an appeal the appellate tribunal would then be free to change the conviction if it though fit. Accordingly, as regards the third count the conviction must be quashed and the sentence set aside." (4) "The appellant sought to raise two legal defences. The first was based on section 44 of the Fauna Conservation Ordinance. This is one of a series of sections beginning at section 42 dealing with ivory and rhinoceros horn. Section 42 provides that anyone who kills an elephant or a rhinoceros shall produce the ivory or the horn to a licensing officer within thirty days together with his game licence. Section 43 provides that the officer shall, if satisfied after such inquiry as he thinks necessary that the ivory or the horn belongs to the person who has produced it, because it to be marked in the appropriate manner and then issue a certificate of ownership to that person. Section 44 states: - If the officer is not as satisfied as in section 43 he may retain the ivory or rhinoceros horn pending further investigation. Provided that if no proceedings are instituted within three months of the production of the ivory or rhinoceros horn it shall be dealt with as prescribed in section 43. The appellant argued that this section created a limitation period of three months which barred any action against him under the Fauna Conservation Ordinance. The section does not, in my view, create a limitation period for criminal offences. It could not in any way bar charges for unlawful hunting, nor could it bar a charge for stealing under section 265 of the Penal Code. it is aimed at preventing undue delay by the licensing officer in making up his mind on the question of whether or not he should issue a certificate. The relevant date also is the date on which the tusks are produce to the licensing officer. In this case the appellant produced the tusks for registration on 20th June, 1969. The charge was laid on 9th September, 1969, so that in any event the proceedings were commenced within three months of the date of production of the tusks." (5) "Accordingly, the appeal is dismissed as regards count 1 and the sentence of six months is confirmed. On count 3 the appeal is allowed, the conviction set aside ad the sentence quashed. On count 4 the conviction for stealing is substituted for that of stealing by a public servant. As the property stolen in this case was Government trophy stated in the particulars to be the property of the Government

of Tanzania, the Minimum Sentence Act still applies. The sentence of two years imprisonment and 24 strokes in respect of this offence must therefore be confirmed

CIVIL CASES

228. Saidi v. Msamila (PC) Civ. App. 159-D-69; 13/5/70; Makame Ag. J.

This was a suit by the appellant, unmarried mother for maintenance of a child. The Primary Court held that respondent was the father of the child and ordered maintenance at the rate of Shs. 150/- per month until the child was eighteen years old. Custody was awarded to the child's maternal relatives. The District Court held that ss. 181 and 182 of the Law of Persons (G.N. 29/63) were not applicable so that the mother could only have proceeded through the Affiliation Ordinance (Cap. 258). On further appeal to the High Court:

Held: (1) "I am satisfied that the circumstances revealed by the evidence on the record warrant the application of Chapter IV (111) B section 181 and 182 of the Law of Persons, G.N. 279 of 1963." (2) "Respondent was responsible for the maintenance of the child. However the figure the primary court magistrate fixed, Shs. 150/- per month was arbitrary in the absence of any knowledge of the respondent's salary." (3) "The child is illegitimate within the meaning of the law, and section 181 B provides: 'If a man wishes to legitimate his child without marrying its mother he can do so before the child is weaned by paying Shs. 100/- to the girl's father'. In this case the child was weaned a long time ago but legal provisions must be interpreted in the broad spirit in which we must apply them in order to achieve justice, and not be allowed to fetter us dogmatically. The child's mother went to court, and, before that, to the probation office, as she was of course entitled to do. Before that she admits that the respondent had been looking after both her and the child, if rather inadequately. In view of the fact that what mutual affection there still was between the a parties obviously had waned when matters were taken to others, it would be unrealistic to expect the respondent to have taken the necessary steps to legitimate the child in what must have been by then a

charged atmosphere. I am satisfied that the justice of the case and the welfare of the child demand that the respondent be now afforded the opportunity of legitimating the child by paying the necessary Shs. 100/- to the appellant's father." (4) On the question of custody – "the welfare of the child must be the paramount consideration. I shall therefore need to have some idea of the parties' living conditions, their surroundings and ways of life. For these last matters we shall have to retire to chambers." (5) Appeal allowed.

229. Bakari v. Kalumuna (PC) Civ. App. 285-M-69; 30/5/70; Seaton, J.

The appellant, original plaintiff in a suit in the Primary Court claimed a piece of coffee shamba and a forest worth Shs. 600/-. He based his claim against the respondent, his father, on a grant made to him inter vivos by his sister Furnella, to whom the shamba and forest originally belonged. The respondent denied the claim on the ground that the shamba was inherited by him from his father and that he had once given it to the appellant's sister but recently reclaimed it because of the bad conduct towards him of the appellant and his sister. The Primary Court found that the appellant was entitled to the shamba since inherited by his sister and validly given to him. The District Court on appeal reversed the decision and dismissed he suit on the grounds that in a previous suit C.C. 100/67 the appellant had successfully sued the respondent for a shamba given to him by his sister. The same witnesses had testified in the earlier case, which was also based on will/inheritance although it concerned different property from the shamba and forest involved in the present suit. The District

Magistrate referred to Sadik Rwiza vs. Felician Alfred (MZ) (PC) Civil Appeal 232/68 and held that the appellant could not separate the issues and bring two separate actions each; else there would be no end to litigation. On appeal to the High Court the appellant submitted that the doctrine of res-judicata was not applicable in this case as the respondent only recently trespassed of the coffee shamba and forest and gave the appellant a reason to sue.

Held: (1) “I am of the view that there is merit in this submission which is borne out by the respondent’s own admission. The law permits a fresh action for trespass every time one is committed. This right to sue is not displaced by Rule 12 of the Civil Procedure in Primary Courts Rules, (G.N. 310/64) not withstand its purpose, which is to prevent the same matters being litigated again and again by the same parties.” (2) “The appeal is allowed with costs to the appellant in this Court and in the lower courts.”

230. Re: Amirali Meghji – the Debtor Bankruptcy Cause 1-D-69; 15/6/70: Makame, Ag. J.

This was an application by the Official Receiver for the approval of a Scheme of Composition submitted by the debtor, Amirali Meghji. The total proved indebtedness of the debtor was Shs. 311, 455/60, and it was proposed that the debtor should pay 40% of this. More than a three-quarter majority of the creditors and all the creditors, who attended a meeting of creditors, accepted the proposed Scheme. The Official Receiver, however, felt that though the proposed Scheme was reasonable and for the benefit of the general body of the creditors, the proposed two guarantors were not suitable security because they were themselves indebted to the debtor. It was, on behalf of the debtor, submitted that the Composition should be approved, and it was also pointed out that a substantial sum of Shs. 80,000/- which represented 75% of the total sum to be paid under the Scheme, had already been deposited with the Official Receiver. Of this sum Shs. 44,000/- remained to be paid. Of the two proposed guarantors one had already paid some Shs. 14,000/- and another one was a particularly sold business man

Held: (1) “I find the Official Receiver’s contention that the fact that the creditors have accepted the Scheme should not carry too much weight correct. But it is my considered opinion that the unanimous acceptance of a proposed Composition by creditors must be a strong persuasive factor ….. The acceptance by creditor is not the only reason why the Scheme should be approved. It does no mean that it is not a good reason. Acceptance is one of the factors but not the only one. In the present matter the Composition proposed is well above the prescribed minimum of 25% and the money already deposited is a lot more than the 25& of the 40% proposed to be paid within thirty days from the date of approval. One of the proposed guarantors has also

reasonably reduced his debt to the debtor, and he continues to pay by regular monthly instalments. I must also take into consideration the factors which seem to have led to the debtor's unhappy reversal of fortune, which include ill health." (2)Taking all these matters into consideration I find it reasonable and just in the circumstances, and in the best interests of everyone involved, that provided the financial interests of the Official Receiver are taken care of in full, the proposed Composition should be approved, and I hereby approve it".

231. The United Africa Company of Tanzania Ltd. v. Manji's Ltd. Civ. App. 7-D-70; 10/6/70; Georges, C.J.

This was an appeal from the judgment of the magistrate, Dar es Salaam rejecting a plaint on the ground that it disclosed no cause of action and that it did not set out facts to show that the Court had jurisdiction. An application amend the plaint by inserting words, the absence of which had made it defective was not allowed. The relevant paragraph stated that: "On or about the 24th day of May, 1966, the Plaintiffs agreed to buy from the Defendants by way of trade in and the Defendants agreed to sell to the Plaintiffs a used Bedford Tipper motor vehicle, Registered No. TD 338, for the sum of Shs. 13,500/-. It was an express condition of he said agreement that the said motor vehicle was in good mechanical and general condition and immediately ready to take the road and capable of traveling on the roadway from one destination to another'. The amendment sought was to add the words "at Dar es Salaam" immediately after the words and figures "May, 1966" and before the words the Plaintiffs". In paragraph 4 of the plaint there was an averment in the alternative, of a warranty of roadworthiness in respect of the lorry. Paragraph 5 stated that the plaintiff had delivered a new lorry to the defendant- part of the consideration for this being the trade in. paragraph 6 alleged that the vehicle traded in was defective and gave particulars of the defects. Paragraph 7

stated that the new lorry had been handed to the defendant at Mbeya about the end of May 1966. Paragraph 8 alleged that the traded in lorry was eventually sold for Shs. 2,000/-. Paragraph 9 claimed as damages the difference between the trade-in price of the old lorry and the eventual sale price and incidental expenses for towing and storage. Paragraph 10 stated that the cause of action had arisen in Dar-es-Salaam. The value of the suit for jurisdiction was stated at Shs. 12,200/- and the formal claim followed. The issues for decision were (a) Whether in order to disclose a cause of action in contract one must plead facts showing where the cause of action arose; (b) Whether failure to plead facts on which to found jurisdiction must result in a rejection of the plaint or whether this can be remedied by amendment; (c) and whether a plaint ought not to be rejected; where it did not disclose a cause of action but there was an application to the Court for amendment and the amendment, if granted, would remedy the defect.

Held: (1) "I do not think that one has to plead facts to show where a cause of action arose in order to show that one does have a cause of action. Sub-rule (e) of Order VII rule 1 specifies that the plaint must contain particulars of "the facts constituting the cause of action and when it arose." It does not specify an obligation to particularize the place where it arose. I do not think that on general principles the place where a cause of action in contract arose can be said to be an essential ingredient of the action. The Law of Contract Act Cap. 433 do not specifically define the term contract. It does give some guidance in section 10 which states: - "All agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void." Paragraphs 1,2,3,4 and 5 of the plaint clearly allege an agreement between parties, apparently competent to contract. He consideration alleged was apparently lawful as was the object of the agreement. It did therefore disclose a contract. Paragraph 5 alleged breach of that contract and gave particulars of the breach. Paragraph 9 alleged the damage. These disclosed a complete cause of action in contract and the plaint should not have been rejected on the ground that no cause of action had been disclosed." (2) As regard the second issue: - "Order VII rule 1 (f) states that the plaint shall contain the

facts showing that the court had jurisdiction. Order VII rule 11 sets out the case in which a plaint shall be rejected: - where no cause of action is disclosed, where the relief claimed is undervalued and the plaintiff refused to correct the valuation and where the suit appears from the statement in the plaint to be barred by law. None of these apply to the circumstances of the case. It is not, therefore, laid down in the Civil Procedure Code that a plaint should be rejected if it does not disclose facts to show that the Court has jurisdiction. On the other hand Order VI rule 17 specifically empowers the court at any stage of the proceedings …. (to allow amendments of the pleadings)." "Reading the judgment of the learned Resident Magistrate it would appear that he did not consider by itself this issue as to whether the plaint should be rejected because it did not plead facts showing jurisdiction. He dealt with it together with the question of failure to disclose a cause of action and he considered himself bound by authority to reject a plaint once a cause of action had not been disclosed. Had he concluded that there was a cause of action and that the only question was one of jurisdiction I am satisfied that he would have held that this was a proper case in which to exercise the powers contained in Order VI rule 17 and allow the amendment so that the substantive issue between the parties could be determined. These reasons are sufficient for the purpose of allowing the appeal with costs which I do." (3) As regards the third issue: (Obiter) "It has always seemed to me unfortunate that there should be rigidity in a procedural matter when the basic purpose of any procedural rule is to facilitate the prompt and total determination of substantive issues between parties. Why should it have been intended that a plaint should be rejected because it disclosed no cause of action when a minor amendment could remedy the defect and enable the Court to proceed with the important business of determining the real dispute? Except in cases where there s no cause of action no matter how pleaded, failure to disclose a cause of action in a plaint is the result either of oversight or incompetence on the part of the advocate preparing it. The Legislature could not have seriously intended that the client should suffer for his choice of advocate or at best have his claim converted from what it was to one for negligence against his professional adviser for whatever loss he may have suffered as a result of the rejection

of the plaint." The court's attention was drawn to a comparatively recent decision in India – Ahmed Hossein v. Mt. Chembelli and others A.I.R. (38) 1951 Calcutta 262 in which Sarkar J. concluded, convincingly, that the provisions of Order VII rule 11 were not mandatory and that the Court could, by virtue of the power conferred by Order VI rule 17, amend a plaint where it disclosed no cause of action in order to remedy that defect. However, in Hassanali Dharamisi Hasmni v. National Bank of India (1937) 4 E.A.C.A. 55 it was held otherwise. In that case "the trial Court dealt with an application to amend and granted it. On appeal this ruling was reversed. The Appeal Court's decision could have been based on the finding that the amendment would have altered the nature of the suit from that of a summary jurisdiction suit to one which clearly could not be brought under that Rule. It does not appear to have been based on this. I must, therefore, decline to accept …. (an) Invitation to hold that it is open to me to grant the amendment prayed even if I held that the plaint disclosed no cause of action. In the even that this matter is taken further it will no doubt be possible for the Court of Appeal itself to review its earlier decision if it thinks fit." (4) Appeal allowed – Amendment granted.

232. Chimala Stores v. Zambia-Tanzania Road Services Ltd. Civ. Case 15-D-69; 17/6/70; Georges, C.J.

The plaintiff trading under the name of Chimala Stores was a sub-contractor and a member of the Association of sub-contractors employed by defendants who were transporters of general cargo, oil and fuel from Tanzania to Zambia and copper from Zambia for export through Tanzania. Acting on information from one of their servant defendants wrote a letter to the drivers of two vehicles and to the Association stating that two sub-contractors' vehicles had been found near Mikumi "stealing copper from our truck". At defendants' behest the letter was posted on the notice board of the

Association to serve “as a strong warning to the two sub-contractors concerned: Chimala Stores ….. and …for the information of the members of the Association.” In a suit for libel the plaintiff by way of innuendo pleaded that “By the said words, the defendants meant and were understood to mean that there was a theft as alleged and that the plaintiffs were dishonest and were involved in the alleged theft either as principals or as accessories – criminal offences punishable by imprisonment.” It was agreed that the issues in this case were four: (a) were the words used capable of being understood in a sense defamatory of the plaintiff, and were they in fact so understood? (b) Were the words published on a privileged occasion? (c) If the occasion was privileged, was there malice? (d) If the plaintiff was entitled to damages, in what sum should they be assessed?

Held: (i) …. I find that the innuendo pleaded is quite plausible on the letter drafted as it was …… (The) emphasis on the sub-contractors does create the impression of their involvement in the incident …. (One official of the company) made it very clear when he spoke to the plaintiff that he thought he was dishonest and that he was involved in the theft. This established, in my view, that the management of the defendant company did not exclude the possibility that the sub-contractors were involved and that action should be aimed at them …. As I have attempted to show, the entire emphasis of the letter is that a criminal offence has been committed, that sub-contractors’ vehicles are involved, that the sub-contractors must consider themselves warned and that their money had been stopped. To deduce from this involvement of the sub-contractors themselves, even though the drivers may have been the persons actually carrying out the theft, is quite reasonable …. On the first issue, therefore, I find for the plaintiff.” (2) “The second issue raises the question of privilege. There are many classes of statement which can be held protected by qualified privilege. They are set out in Gatley on Idbel and Slander, 5th Edition, at page 190. I understood advocate for the defendant to fit this case under class 2: ‘Statements made on a subject matter in which both the defendant and the person to whom the statements are made have a legitimate common interest. ‘ The general principle was defined by Lord Fsher in the case of Hunt –v- Great Northern Railway Company [1891] 2Q.B. 189, at page 191 thus: ‘A privileged occasion ….. Arises if the communication is of such a nature that it could be fairly said

that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them ….. When those two things co-exist, the occasion is a privileged one ….. In other words, there must be reciprocity of interests.' ….. (The counsel for the plaintiff) argues that this reciprocity cannot be found in this case, that the Association would have no interest in the matter published if it were true. He points out that the Association had no disciplinary powers and could do nothing about a delinquent member. Finally, he contends that the case ….. discussed above deal with a special relation- ship of master and servant, which has fiduciary connotations, and that it is only in that relationship that a publication of that nature can be privileged. To extend it to an association like the

one under consideration would be spreading the privilege too wide. I do not find these arguments convincing. If, in fact, the plaintiff was a party to the theft of copper by his servants from the defendant company's lorries, every member of the Association would have an interest in knowing this – not only from the point of view of the action which the defendant company was likely to take against them as sub-contractors, but also in their own interests to protect their freight from possible theft. If it could happen to copper bars belonging to the defendant company, it could happen to cargoes being carried on their Lorries which broke down on the route. I would hold, therefore, that the occasion was privileged and that the area of publication was not too wide. There was no evidence that persons other than the members of the Association and their agents visited the office maintained by the Association." (3) "The third issue is whether or not there was malice on the part of the defendant company so as to destroy the privilege. The concept of malice is clearly defined in the judgment of Brett, L.J., in Clarke -v- Molyneux [1877] 3 Q. B. 235, at page 246: …… if the occasion is privileged, it is for some reason, and the defendant is only entitled to the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect or wrong motive. …. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. ….So, if it be proved that out of anger, or for some other

wrong motive, the defendant has stated as true that which justifies it, but for the gratification of his anger or other indirect motive. …….. The only (test is) whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it ….' Directing myself in accordance with these principles, which I accept as correct, I am satisfied that the plaintiff has not succeeded in showing that there was compress malice in this case. …. None of the Officers of the company knew him, and it cannot be suggested that they would have had any reason for wanting to get at him personally. The area of publication was not unduly wide. The method of communication used was the normal method between the defendant company and the sub-contractors. The report of the alleged theft had come from a responsible officer …. Copper bars had indeed been taken from the company's Lorries which met accidents on the road. The company was concerned with the problem which caused financial loss and wished to do something. The element of protecting its own interests was strong. There was motive to get at the plaintiff personally or to use him as a victim for working off a deep prejudice, irrespective of the circumstances ….. it has been suggested that the subsequent conduct of the defendant company's official confirms the idea of malice. The notice was never taken down from the Association's notice board until the office was closed. There is nothing to indicate that this was on the orders of the defendant company. The indications are that it was left three because it had been forgotten. Perhaps the strongest evidence in favour of the plaintiff is the fact that the defendant company did not terminate their sub-contract. It could be argued that this indicated that they did not really believe that there was any complicity on the plaintiff's part in the alleged theft. If they did not believe their allegation to be true, then clearly there would be malice. Viewing the situation as a whole, however, I am not convinced that the officials of the defendant company did not believe in the allegation. …. On the third issue, therefore, I hold that the plaintiff has not established malice and that the action must fail." (4) (Were the defendants to be held liable) … The evidence would be admissible to show the nature of the loss the plaintiff could have suffered as a result of the libel and it would be helpful in assessing general damages. There was no evidence of widespread circulation of the

libel. The vindication of the plaintiff's character and a solatium for his sense of injury because of an unjust attack are, in my view, the important factors in assessing damages. An award of Shs. 5,000/- would suffice." (5) Claim dismissed.

233. Walji & Others v. United Africa Corporation (T) Ltd. & Others Civ. App. 5-D-70; 16/6/70; Georges C.J.

This is an appeal from a determination by the Rent Tribunal of the Standard Rent of four shops at the corner Makungany and Upanga Streets in Dar –es-Salaam. The premises had not been let on the prescribed date. In this application advocate for the landlord stated before the Tribunal that the suit premises had not been let on the prescribed date and he asked that he rent be fixed under section 4(1)(ii) of the Rent Restriction Act 1962 as amended by the Rent Restriction (Amendment) (No. 2) Act 1966. The Chairman then said that ruling would be delivered after visit to the suit premises. Advocate for the applicants did not indicate that he wished to be heard after the visit nor did he indicate any intention to lead evidence. No one is noted as appearing for the tenants. The Tribunal delivered a short ruling fixing the standard rent at Shs. 279/50 per month after 'ascertaining the rent of similar premises in the same building and adjoining buildings on the prescribed date." [The Counsel's] argument was that the Standard Rent has been fixed arbitrarily and that the applicant had had no opportunity to challenge what the Tribunal used as its knowledge.

Held: (i) "With his general argument I have much sympathy but on the facts of these cases it has no relevance. The applicants made no effort to lead any evidence before the Tribunal to help in the assessment. They did not indicate that they wished to be present at the visit or to have a further hearing after the visit. They merely applied to have the standard rent fixed and were content to leave the matter thus. Where the Tribunal is thus left to its own devices in reaching an assessment the parties cannot complain afterwards that it has arrived at the assessment arbitrarily on information which it procured for itself. The Tribunal wishes to arrive at a decision based on facts other that those presented by the applicant there is a duty then on the Tribunal to

indicate its likely basic for decision so that the party can have an opportunity of leading evidence in that regard should he wish." (2) "Here the tenant did not appear. The landlord presented the application and did no more. There was no indication that they wished to do any thing else but await the decision of the Tribunal after its visit." (3) Appeal dismissed.

234. Kaderali v. Iceland Milk Bar Civ. App. 3-D-70; 16/6/70; Georges, C.J.

This is an appeal from a decision of the Rent Tribunal fixing the Standard Rent of a shop at the corner of Makunganya and Upanga Streets at Shs. 250/- a month from 1st February 1969. The tenant of the premises, Iceland Milk Bar, did not appear and was not represented at the hearing before the Tribunal. Only one witness, landlady's husband, testified. He stated that the premises had been let to a Mr. Dharamshi at a rent of Shs. 400/- a month. He produced a receipt book showing the duplicates of receipts issued to Dharamshi and other tenants. Cross-examined by the Tribunal he denied ever having received rent from Ismail Ali Meghji at the rate of Shs. 300/- a month. He also produced his ledger book showing entries for rent to corroborate his testimony. It was not suggested to him that the receipt book and the ledger were forgeries made up by him for the purpose of the case. In their ruling the Tribunal held that they

were "not prepared to accept the evidence that premises were let at Shs. 400/- per month on the prescribed date. From the condition of the receipt book it is clear all originals have been destroyed and duplicate copies produced. As for the ledger it is only a notebook and not a regular book of account and can easily be prepared at any time. Thus in absence of any concrete evidence Tribunal rejected evidence of rent Shs. 400/- on the prescribed date. Moreover Mr. Ismail the previous tenant was paying Shs. 300/- a month, raising presumption that the tenant paid lesser amount to the landlord. Moreover other adjacent shops were let at Shs. 250/- per month in the same building on the prescribed date making it highly unlikely for this one to fetch Shs. 400/-."

Held: (i) “I should begin by stating that the Tribunal count not on the evidence before it hold that there had been a previous tenant Mr. Ismail who had paid Shs. 300/- a month for the premises. I agree that the Tribunal is entitled to use facts within its knowledge in assessing the standard rent of premises. This cannot, however, extend to using its own knowledge of the rent on or near the prescribed date when that is itself the fact to be determined. It breaks the most elementary rule of fair play which is basically what justice is all about. If the Tribunal has already made up its mind on the basis of information given by a third party who is not to be called or questioned then the actual proceedings before the Tribunal would be a sham and this should never be the case in proceedings such as those before the Tribunal which by virtue of section 9 (10) of the Act are deemed to be ‘judicial proceedings.’ To use one’s knowledge of rents in an area is an entirely different thing from using specifically information as to the rent of certain premises on a particular date to make a finding as t the rent on that date of those premises.” (2) “[The Act – s. 28] clearly contemplates that both sides to the dispute are to be heard and to be given an opportunity of dealing with facts before the Board and contraverting them. If the Tribunal intended to act on the basis that there had been a tenant called Ismail Ali Meghji in the building and that he had been paying a rent of Shs. 300/- evidence to that effect should have been led so that the person testifying could have been cross-examined to enable his truthfulness to be assessed.” (3) “It is clearly stated in the Act that appeals from Tribunals lie to the High Court only on points of law or mixed law and fact – section 11 subsections (1). The High Court cannot substitute its own evaluation of facts for that of the Tribunal even though the High Court may think differently. Where, however, the whole basis of the evaluation of the evidence by the Tribunal is faulty it is the duty of the Court to intervene. It is surely no criticism of a landlord’s receipt book that it contains no original receipts. It must be expected that the originals would be removed and issued to the tenants. The ledger is described as a note book and not a regular book of accounts and it is stated that it could be prepared at any time – clearly implying that it was. The appellant should have been told that the Tribunal regarded his books with suspicion and that in the absence of any other evidence they would not accept them. As the proceeding show the evidence was completed on 3rd February and ten months later, 2nd December, without any intervening activity recorded,

the ruling quoted above was delivered. I am satisfied that the tribunal acted on wrong reasons in rejecting the receipt book, and in using the information about Mr. Ismail Ali's tenancy when there was no evidence on the record to support this. (4) Appeal allowed. Application remitted to the Tribunal.

(1970) H.C.D.

- 223 –

235. Karimjee Properties Ltd. v. Khaki and Cameraprix Civ. App. 10-D-70; 12/6/70; Georges, C. J.

The appellant landlord sued the defendants for possession of premise on the ground that the first defendant had without permission assigned the tenancy to the second defendant. The plaint averred that notice of termination had been served on the first defendant who failed to hand over possession at the expiration thereof. At the hearing, preliminary points were raised that the plaint disclosed no cause of action because no allegations had been made that: (a) Defendant had been served with a notice to quit, (b) It was reasonable making an order for vacant possession, and (c) the rent claimed was the standard rent. The trial magistrate accepted contentions (a) and (b) and rejected the plaint.

Held: (1) "One can only hope that at some non-too-distant date, the rule that a plaint must be rejected when it fails to disclose a cause of action will be reviewed, so that these fruitless and dilatory investigations into the minutiae of pleadings will abate, at great savings in costs, and, I would think, enhanced appreciation for the legal processes, which one would assume are intended to resolve the problems of those who seek such solutions without being begged in arguments over matters of form". (2) "….. I am satisfied that an averment that a tenancy was duly terminated by notice expiring on a stated day necessarily involves an averment that the notice was served. This does not have to be spelt out. The defendant has been informed of the effective date of termination of the tenancy. This is stated in paragraph 7 to be 31st March, 1969. On this point, therefore, I hold that he pleading is not defective." (3) "The Rent Restriction Act makes it clear that a court is not to make an order for possession on the ground of sub-letting or assigning premises without consent, unless it is reasonable in all the

circumstances of the case to make an order. The argument is that since all matters must be pleaded which are necessary to make the granting of an order possible, there must be an averment that it was reasonable in the circumstances to make the order. …. Section 19(2) of Rent Restriction Act places squarely on the court the question of deciding whether or not it is reasonable to make an order. This is a decision which it will make on such facts as the plaintiff and the defendant can adduce. The plaintiff may very well not intend to adduce any special facts. He may merely seek to convince the court that it is not reasonable for a tenant of controlled premises to deprive the landlord of the right of selecting his new tenant by sub-letting the premises without consent and then himself departing. There can be little point, surely, in merely stating in the plaint that I t would be reasonable to make the order. This is a question of argument, not a statement of fact. If no new facts are to be adduced to support that argument, other than those already set out in the plaint, then none need to be pleaded. If, as I think, the question of reasonableness is a question of argument and opinion, then it does not have to be pleaded. This was in essence the view taken by the learned Senior Resident Magistrate in the earlier case, and I find it far more convincing that his conclusion in this case, that a plaint is defective if it does not state that it would be reasonable to make an order." (4) "If the plaintiff wishes to rely on facts other than those necessary to establish the ground itself, then he should do so. Failure to do this will not make the plaint defective, but he should be made to apply for an amendment of his pleading, setting out the facts; the defendant should be allowed to amend his written statement of defence. If he wished to do so, and the plaintiff should be made to pay the costs thrown away as a result of the adjournments and the amendments. This course would enable of the adjournment and the amendments. This course would enable fundamental justice to be done, while still placing due emphasis on the need to define the issues as sharply as possible in the pleadings." (5) "Before the (trial) Magistrate, no argument was offered on the third contention that the claim for rent could not succeed because there was no averment that the rent claimed was the standard rent. I am satisfied that this contention is totally without merit.

If the defendant wishes to allege that the rent is not payable because it is not the standard rent, then she should so aver. There is no need to plead the legality of a rent which the plaint makes clear has been paid and received from the inception of the tenancy. (6) Appeal allowed.

236. Tanzania Tailors v. Keshvaji Lalji Civ. App. 4-D-69; 18/6/70; Makame, Ag. J.

The applicant sought leave to appeal to the Court of appeal for East Africa, and out of time, from the judgment of the High Court which reversed the decision of a resident magistrate who held that he had no power under section 19(5) of the Rent Restriction Act to vacate the order for possession made in Dar es Salaam District Court Civil Case No. 3159 of 1966. It was submitted by the applicant that the reason for the delay was that when the judgment of the High Court was delivered on the 5th of September 1969 [the counsel] for the application informally applied for leave to appeal, and instead of granting or refusing the application the learned Judge directed that the application should be made to another Judge of the High Court. About a week later [the Counsel] was informed by a registry clerk that on the day following the delivery of the judgments the learned Judge had directed that all the relevant files should be placed before him so that he might record that he had granted leave to appeal. As the result of this the counsel assumed that leave had been granted. So he did not formally apply for leave within the prescribed period. About a month later he discovered that in fact leave had not been granted by the learned Judge. The respondent argued that the appellant lacked in diligence and vigilance otherwise he would have known the true position before the expiry of the time limit and in any case the affidavit did not disclose the nature of the case, and furthermore the application should have been filed before a Judge of the High Court rather that before a single Judge of the Court of Appeal.

Held: (1) “Before an application like this can be allowed it has to be shown that there was a sufficient reason for failing to do what ought reasonably to have been done.

Prudence and vigilance should have alerted the learned advocate, and ordinary diligence should have made him seek confirmation from the registry officer that the Judge had indeed changed his mind. I take judicial notice of the fact that the learned Judge, who was Duff J., left the country for good on 6th September 1969, the day he is supposed to have changed his mind and granted the application. When (the counsel) visited the Registry a week later he must have known that Duff J. had finally left the country so that if he had granted the application and duly endorsed the file, perusal of the record then would have confirmed the clerk's claim. Instead the learned advocate assumed that all was well, and it was not until after the prescribed period had expired that he discovered, by accident as it were, that leave had not been granted. Quite clearly it cannot be said that the Court was to blame, and, with genuine respect, I feel certain that if the learned advocate had been less indolent and defervescent he would have easily discovered the true position and avoided the unhappy delay. As it is, time having expired, the successful party must have assumed that the fight was over, and unless sufficient reason is shown, which it has not been, it would be unfair to dislodge him from his seat of victory." (2)"….. I am unable to agree with (the counsel for the respondent) that the application does not disclose the nature of the case. I am satisfied that paragraph 9 and paragraph 10 [the] affidavit, read together with, and in the context of, this application, sufficiently set out the nature of the case such as is necessary to assist the Court in reaching a decision. As to the submission that the notice has been filed before the wrong Judge, or, rather, before the Judge in the wrong capacity, I think [the counsel] proceeds under a misapprehension. Section 23 deals with application for leave to appeal only. This does not cover the present situation in which

he seeks an extension of time as well. I am clear in my mind that section 9 is the law applicable and that 'the Court' mentioned therein must refer to the Court of Appeal (and so to a single Judge) as opposed to 'the superior Court' which must mean the High Court. In my case I frankly would not hold that the procedural distinction would be

material enough to affect the substance and merits of the application." (3) Application dismissed.

237. Rajabu Mwalimu v. Hadija Mawulidi (PC) Misc. Civ. Cause 3-D-69; 17/6/7P; Makame Ag. J.

The appellant commenced proceedings in the primary court seeking the return of his wife/respondent who in turn alleged that she had been divorced. The district magistrate found that the parties were divorced by 'talak' but resumed cohabitation the applicant having exercised his Islamic right of recall (rejea). The High Court (Duffs J) declared the marriage to have been dissolved. The applicant then applied for leave to appeal to the Court of Appeal for East Africa arguing that the High Court had failed to consider the issue of rejea. The application was opposed on the ground that the district court's finding that there had been a rejea had been reversed by the High Court so that in the absence of a point of law of general public interest, leave should not be granted.

Held: (1) "After carefully reading the judgment of my brother duff, and after considering the submissions by the learned counsel for the respondent, I feel certain, and with genuine deference, that it can be successfully argued that there is a point of law of general public interest involved." (2) "With great respect Duff J. seems to have been unduly influenced, if I may use the expression, by the fact that the respondent had acquired a new "husband". In the opinion of the learned Judge the fact that the wife had remarried is some indication hat the first marriage had lapsed. In my view this is arguable. I would have thought that that was merely a strong indication that there were marital vicissitudes and that the marriage had practically no chance of continuing. It is questionable whether in circumstances such as are revealed in this case a court is entitled to hold that a wife in an Islamic marriage is entitled to remarry without going into the question of whether or not there had been a "rejea". (3) "Rejea in this context refers to the husband's right to recall the wife. Where she has not physically returned to the matrimonial home it cannot necessarily be held that there was no "rejea" that is the exercise of the right to recall her." (4) Leave to Appeal to the Court of appeal for East Africa granted.

238. Lekansio v. Lekasio (PC) Civ. App. 135-A-68; 3/6/70; Bramble, J.

The respondent sued his second son and another person for a portion of a kihamba. His case was that he gave his son this kihamba to use in 1956 until he had got another shamba for him; that as the second son he could not claim it as his last born child was entitled to inherit; he sought possession as the appellant had pledged the crops to the person without his permission. He offered his son another shamba which he has refused to accept. The appellant's defence was his father had given him the portion of kihamba as a gift and absolutely; that it was he who developed it and planted coffee trees and that he had pledged the crops for eight years as of right. Both the assessors in the primary (trial) court were of the opinion that he respondent was entitled to possession of the kihamba. The trial magistrate found otherwise stating "That shamba belongs to the grandfather of the plaintiff and Mwao is a member of that family ad he has a right to have hat shamba according to this father Lekasio. There is proper evidence that plaintiff is the

one who gave him there and he has not yet closed him. As he said Mwao will stay there till when he finds another shamba, therefore, Mwao is in the shamba with the permission of his father." The district court held for the respondent. On appeal to the High Court.

Held: (1) "The question of whether there was a gift was a question of fact and the trial magistrate ought to have given reasons why he differed from the opinion of the assessors". (2) "(The trial magistrate) has clearly misdirected himself on the facts since the respondent said that the appellant was not entitled to inherit that portion of land. In any case the possession and use of it was conditional. On the trial magistrate's own findings there was not an outright gif. He did not direct his mind to the fact that another shamba had been offered to the appellant and he refused to accept it. This was a valid reason for the respondent to take back the kihamba. Add to this the fact that the appellant had pledged the crop without his father's consent, as the assessors held, there was more than enough justification for the latter's claim." (3) "The learned district

magistrate held for the respondent for equally good reasons and they are:- (a) This case comes under Chagga customary law and according tot eh evidence defendant Mwao being the third son cannot fight for a portion of the kihamba where he was born like the first and last sons. (b) Even the first and last sons of a man, although hey have the right to fight for portions of a kihamba where they have been born cannot claim full right before their father dies – they can only sue any portion of the kihamba by permission of their father, which they cannot sell or given in pledged as has been done in this case. (c) Even the written Customary Law Rules G.N. 436/63 (Second Schedule) does not permit a son to inherit his father (before) he dies and under paragraph 30 of the third Schedule a testator may change intention as he likes. (4) Appeal dismissed.

239. The Commissioner-General of Income Tax v. Dr. Noor Alli Vellani Misc. Civ. App. 22-D-69; 23/6/70; Georges C.J.

In 1966 the collection of Income Tax in East Africa from salaried employees was switched to the Pay as you Earn system. Previously tax for each year became due and was paid in the year following. The change-over would have created hardship if employees were expected to pay tax for the current year under the new system and for the previous year under the old system all in one year. To prevent this section 121B was passed which provided as follows:- “Not withstanding anything to the contrary in this Act, where the Commissioner has assessed any individual for either or both of the years of income 1965 and 1966 and the income so assessed included emoluments, the Commissioner shall, subject to subsection (3), remit tax at the standard rate on chargeable emoluments to he extent specified in subsection (2) of this section.” Subsection (2) set out the quantum of remission and ended with this proviso which reads_ “Provided that an individual shall be deemed to be continuously in liable employment notwithstanding such temporary periods of unemployment as the Commissioner may determine to be reasonable and not inconsistent with the claim of such individual to be continuously in liable employment.” The respondent/tax payer was self employed husband of a doctor, employed at the Aga Khan Hospital, earning £4045 a year from her employment there during the relevant period. The respondent claimed

remission of tax at the standard rate on the wife's income under section 121B. The Commissioner ruled that he was not eligible for remission since he was not an

individual within the meaning of section 212B. The contention was that the employed wife living with her husband was not a taxable entity. The taxpayer who had claimed the exemption was not the individual who had been in employment as contemplated by subsection (2) of section 121B and who had earned the emoluments. He could not, therefore, be granted remission. The Local Committee ruled against the Commissioner, hence this appeal.

Held: (1) "It is very likely that the draftsman, in wording this section did not have in mind the employed wife with a self employed husband and the section has to be interpreted to see what results are produced to govern the case.: (2) "My view is that the remission on tax is not made in respect of an individual as such but rather in respect of a category of income when this category forms part of taxable income of an individual. Quite obviously an individual must benefit since income must accrue to an individual and tax be paid by an individual. In my opinion the taxpayer fell very squarely within subsection (1) of section 121B. He was an individual on whose income the Commissioner had assessed tax for the years of income 1965, 1966 and the income so assessed did include emoluments, being emoluments earned by his wife which are deemed to be part of his income for tax purposes by virtue of section 64." (4) "The counsel for the Commissioner has argued, however, that when one reads subsection (2) it becomes clear that the individual assessed must also be the individual employed if remission is to be made available. It is argued that the individual there referred to must obviously be the same individual referred to in section I, and, therefore, clearly unless the individual is the person who has earned the chargeable emoluments the remission is not possible. Although there is much force in this argument I think that in interpreting the section, the governing purpose must be borne clearly in mind, that is, the remission of tax on certain emoluments. It is possible to effect this particular purpose within the meaning of the word "individual" s is used under subsection (2) of the section. The use

of the word in that subsection cannot be taken as restricting the wider meaning which is possible in subsection (1). It means the individual in respect of whose emoluments remission is claimed by the individual who has been assessed by the Commissioner on income which includes these emoluments. There is no reason inherent in logic why these two should be the same person physically once they can be considered one for purposes of tax." (4) Appeal dismissed.

240. Mwamusiku v. Kanyibi (PC) Civ. Application 14-D-69; 3/7/70; Saidi, J.

This is an application for leave to appeal out of time. The application involves two cases. In the first case Mwaikama obtained divorce against his wife under clause 134, Customary Law Declaration, on the grounds of desertion by his wife Gwantwa. The fact, as recorded in the additional evidence, shows that Gwantwa deserted her husband five months after their marriage and she could not be traced for almost a year. Consequently divorce proceedings were commenced by Mwaikama. Thereafter Gwantwa was discovered in the house of the respondent, Tabu Kanyiki, and as a result Mwaikama filed the second case claiming "ugoni", that is compensation for committing adultery with he wife of another. He filed this case on the 8th April, 1969, after he had been granted divorce on 9th May, 1968, about a year before. He lost the claim in both courts below and now appeals t this Court out of time with a petition that he should be granted extension of time to enable him to appeal.

Held: (1) "If there were prospects of success in Mwaikama's appeal I would have granted him leave to appeal out of time but on the facts, as they are, it does not appear to me that he can succeed in his claim against Tabu for 'ugoni'. I think the Primary Court rightly rejected the claim for 'ugoni'. The additional evidence taken on my instructions shows that the marriage of Mwaikama to Gwantwa was dissolved on 9th May, 1968 and that she was married to Tabu, with whom she had then been living, in the month of August 1968. It was after Gwantwa's marriage to Tabu that her where about came to be known by Mwaikama and thereafter he decided to sue Tabu for 'ugoni'. Although I feel

sympathy for Mwaikama in the way Tabu managed to take his wife, at first illegally and later on legally by marrying her, it appears that Mwaikama rushed the matter by seeking divorce rather early, and he cannot now complain against Tabu. Has he been a little patient and discovered his wife living with Tabu, the claim for 'ugoni' would have been successful and thereafter he could also have obtained divorce on the grounds of adultery. But he elected to start in the other way round and Tabu was clever enough to wait until the marriage of Gwantwa to Mwaikama was dissolved and then married her." (2) "Both courts below advised Mwaikama to receive the bride price of five cows, one goat and Shs. 200/-, he had paid to the father of Gwantwa and drop the claim for 'ugoni'. This Court agrees with this direction. There should not, however, be a fresh suit for recovery of the dowry. On the dissolution of the marriage on grounds of desertion by the wife followed by her marriage to another person who had already paid dowry, the order for refund of the full dowry to the first husband should have been make by the trial court and is accordingly made now by this court. The father of Gwantwa is ordered to refund the full dowry to Mwaikama within six months form the date this judgment is read to him." (3) Application dismissed.

241. Shuma v. Kitaa Civ. App. (PC) 49-A-68; 18/6/70; Bramble, J.

The appellant's case was that he was given the land in 1947 by the proper authority and that in 1955 respondent's father entered upon it and drove away his employees: that in 1950 thirteen people had wrongly taken possession and they were ordered to vacate by the chief; the respondent had claimed that he bought the kihamba from one of those people. The appellant had taken no action for over twelve years because of illness and political activities. He did not bring any witness to prove that the land in question had been allocated to him although there was some evidence that he was in possession sometime in 1950. The respondent, in possession at the present time, claimed that he inherited the kihamba from has father, who bought it from one Kiboko in 1953. Kiboko confirmed that he had sold it to the respondent's father more than 14 years ago. He said that the land had been allocated to him by the headman. Both the assessors in the primary court were of the opinion that the appellant had not established his claim. The trial magistrate was in agreement and held that: - 'The law is that the claimant or this

plaintiff bears the burden of proof and has to establish his case beyond reasonable doubt by producing evidence. Plaintiff in this case has not discharged his burden.'

Held: (1) "There is a misdirection is holding that there must be proof beyond reasonable doubt in a civil case. A civil case is decided on the balance of probabilities and proof beyond reasonable doubt applies to criminal cases only. This misdirection is not, however, fatal in that on the evidence the appellant did not discharge the burden as required in a civil case." (2) Appeal

(1970) H.C.D.

- 229 –

242. Kitundu Sisal Estate and Others v. Shingo Mshuti and Others Court of Appeal, Civ. App. 54-D-69 (1970) Duffus, P., Law and Lutta, J. J.

The respondent's employees filed a suit in the district court against the appellants' employers claiming damages for alleged termination o service without notice. Section 28 of the security of Employment Act 1964 reads: "No suit or other Civil proceedings … shall be entertained in any civil court with regard to the summary dismissal …. Of an employee …." The appellants urged that by reason of s. 28 the court had no jurisdiction to entertain the suit. The district court gave a ruling that s. 28 did not oust court's jurisdiction since, it held, the respondents were not summarily dismissed. The appellants applied to the High Court for revision of the order of the district court the High Court held that the ruling giving rise to the order did not constitute a "case decided" within the meaning of s. 79 of the Civil Procedure Code, accordingly, it had no jurisdiction to revise the order, and dismissed the application. The appellants appealed to the Court of Appeal.

Held: (1) "The termination of services without notice can only be construed as summary dismissal thus ousting jurisdiction of the courts under s/ 28 pf the Security of Employment Act, 1964." (2) "An objection to jurisdictions, tried as a preliminary issue separately from the suit, with the decision made the subject of an order, is 'a case which has been decided' within the meaning of s. 79 of the Civil Procedure Code and is subject to the High Court's revisionary powers." (3) Appeal allowed.

CRIMINAL CASES

243. Kimbuga v. R. Crim. App. 255 & 273-D-7; 12/6/70; El-Kindy, Ag J.

The two appellants were jointly charged, and convicted of shop-breaking and stealing c/s 296(1) of the Penal Code. The evidence which was accepted by the trial court showed that the shop of the complainant was broken into and various items were stolen. On information received, the two appellants were arrested, and when searched, were found in possession of some new items which the complainant suggested that they resemble the ones stolen from his shop. The appellants claimed the items were there and a witness was called forth to testify. The trial magistrate did not accept the evidence of the appellants, or that of the witness. Retrial Magistrate after reviewing the evidence also found as a fact that one appellant was the guest who was housed by one Adrian in whose house a suit case containing items of new clothing was found.

Held: (1) “It will be seen therefore that the case against the two appellants depends on the identification evidence of the goods alleged to have been found in possession of the two appellants. The learned trial magistrate was well aware of the problem, but in considering the conflicting claims to the property, he preferred the evidence of the complainant to that of the two appellants because, to quote him, “I choose to be lieve the complainant”. I think this is misdirection. It is not a question of choosing to believe one side as against the other, as if it were a case of determination of right in civil cases. It was a question of the prosecution proving beyond reasonable doubts that the goods found with the appellants were those of the owner. It appears that the leaned magistrate was equalizing the burden of proof – something which he could not do in a criminal case. He was well aware that the complainant could not have any marks on which he could substantiate his claim to the goods, as he claimed them merely on the basis that they “appeared” like those stolen from his shop …… (2) “If such was nature of evidence for identification, then the case against both appellants had not been proved beyond reasonable doubt. I may interpose here and say that it does not appear from the record that the proper procedure for identification of shop

goods was followed as it was laid in the case of NASSORO s/o MOHAMEDI v. R. 1967 H.C.D. No. 446. If this procedure had been followed, it might have assisted the prosecution to make up their mind, on the evidence of the complainant, whether it was worth at all to continue with their case in this case where the appellants were also claiming part or all of the goods ….." (3) Appeal allowed. Convictions quashed and sentences set aside.

244. R. v. Phillipo, Crim. Sass 239-M-69; 15/6/70; Seaton, J.

The accused was charged with the murder of his sister-in-law. The accused did not dispute the killing: the only question for consideration was with what intent had he done it? The accused was a peasant aged 42 years and until 1959 a member of the armed forces stationed in Dar es Salaam. He was discharged after an illness known as "Chembe moyo", which appears to be essentially a condition of the heart but has some effect on the mental state as well. After leaving the army, the accused lived in Usanda village in Shinyanga District together with his wife and 7 children in a homestead which was shared with his brothers, their wives and children. The accused was supposedly cured of his former illness when he came from the Army. He performed the usual duties of life, cultivating as others did. Yet his

Disposition seemed changed. The accused never quarreled with his family, nor was he in the habit of getting angry without reason. On the day on which his sister-in-law met her death, the accused had been herding the cattle, including a motherless calf which belonged to him. About a month before, his elder brother Paul had advised that that calf should not get out grazing but should remain within their homestead. But the accused nonetheless took out the calf with the other cattle on that day because as he testified, the calf was not getting water. When the accused returned with the cattle to their boma about 3 p.m., he was met by Paul who asked him if he had driven out the motherless calf to graze. The accused replied in the affirmative Paul asked him "why?" and the accused explained: "so that it might drink water". However, Paul kept on asking the

accused why he had taken out the calf and the accused repeated his explanation. When Paul persisted with his questioning, the accused lost his temper and struck him with a stick on the left temple. Paul fell down and lost consciousness. Paul's wife, Jeovera, was cooking at the time. She came out of the house shouting that he had killed someone. Jenovera made as if to catch hold of the accused who was angry still and he struck Jenovera also with his stick three times. She also fell down. According to his testimony, the accused thought he would return to assist them later after drinking some water and resting a bit. After observation and interviews, Dr. Pendaeli found the accused not abnormal in thought, content or mood and his impression was that the accused was of sound mind and fit to stand his trial. The doctor noted that the accused had apparently had a previous history of psychiatric disorder and generally people who have suffered from mental disorder are easily irritated and may do impulsive action. Nevertheless, Dr. Pendaeli was of the opinion that the accused was of sound mind when he committed the act of killing his sister-in-law.

Held: (1) "I have carefully considered the evidence in this case and the demeanor of the accused. I do not think he is or was insane (at the time of committal of offence). Nor do I doubt that the accused knew what he was doing was wrong." (2) "I have borne in mind the objective element of the "ordinary person" which section 202 of the Penal Code requires for consideration on the issue of provocation. I have also considered the subjective element which section 200 of the Penal Code requires in determining the intent of the accused. I am convinced that the accused had not the necessary mens rea for murder and I am satisfied that the advice of the assessors is reasonable and just in the present case. (3) "I accordingly acquit the accused of murder and find him guilty of manslaughter."

245. R. v. Mayunda Crim. Rev. 4-D-70; 2/5/70; El-Kindy Ag. J.

The accused was charged for stealing by public servant in that as a head teacher responsible for collecting school fees on behalf of Newala District Council he collected a sum of Shs. 1,221/- which he did not remit to the Council. The District Magistrate convicted him of simple theft on the basis that at the time when accused received the money, it was still the property of those who handed it to him and not the property of the

Council. He relied on Joseph Suleman v. R. [1968] H.C.D. 484. On revision by the High Court.

Held: (1) “It seems to me to be obvious that the learned magistrate had misconstrued the decision of this Court in the case of Joseph Suleman v. R. H.CD. 484. Clearly, that was a decision on its own facts. I accept, and that is easily discernible, that Suleman’s case is distinguishable from the present case where the

accused had the authority to collect school fees on behalf of the Council, while in that case he was found to have none. (2) “Again, it appears that the leaned magistrate failed to consider the second limb of section 270 of the Penal Code. Had he done so, he would not have come to that conclusion when he accepted that he collected the school fees from parents in the course of his employment. The material section reads: - “270. If the offender is a person employed in he public service and the thing stolen is the property of the Republic, or comes into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.” In other words, a public servant would be found guilty under this charge if the money he stole was (a) the property of the Republic, or (b) money which came into his possession by virtue of his employment, irrespective of whose property it was. I am satisfied, therefore, for these two reasons the decision of the lower court should be revised as it was erroneous. It is accordingly done and the conviction for simple theft is set aside and therefore a conviction for theft by public servant, contrary to sections 270 and 265 of the Penal Code, is entered.” (3) “As I have said, he was sentenced to a term of twelve months. He is a married man with nine children, some of whom are in various schools. He has aged dependents. Additionally, I find that he has been teaching since 1947, he is 45 years old. He says he was born in 1925, and I accept it. He admitted having spent the money for his own private affairs, alleging sickness in the family and that for prestige reasons he could not borrow money from his staff or friends, and that although he had offered to refund the money to the Council, he was not granted this opportunity. He appears to be earning a good salary – Shs. 640/- per month. He claims that his record had been clean

until this matter came up. He also pleads that the sentence should in fact be reduced to alleviate the suffering of his family and dependents. I find as a fact that the accused is 45 years old and that corporal punishment would apply." (4) Sentence enhanced to two years in prison and twenty four strokes.

246. Nyani v. R., Crim. App. 332-D-70; 28/5/70; Georges, C.J.

The appellant was charged with being in unlawful possession of gemstones c/s "3 Cap. 123 of Act 1967." The Act was wrongly cited. It is Act 11 of 1967. The appellant's defence was that the Area Commissioner knew all about his mining activities and that he had almost a year before reported to that official his discovery on his shamba of a patch which yielded gemstones. According to his story the Area Commissioner had given him implements to help in digging and had once allowed him the use of a Government vehicle. There was no evidence to show that the appellant was an "authorised miner" or a "licenced dealer" under the Act.

Held: (1) "I do not think the wrong citation has caused any miscarriage of justice and it is quite clearly curable under s. 346 of the Criminal Procedure Code. (2) "In the circumstances his conviction was inevitable and cannot be disturbed." (3) "Area Commissioners cannot authorize persons to break the law. If what the appellant alleged could be established the Area Commissioner may well have been charged for aiding and abetting." (4) "The sentence of 18 months imprisonment is severe for a first offender and indicates that the trial magistrate did not accept the appellant's story. It is not, however, so severe as to be said to err in principle." (5) Appeal dismissed.

247. Masale v. Republic Crim. App. 149 & 150-M-70; 9/5/70; Seaton J.

The appellant, with a third co-accused Gulam Rasell who was acquitted were jointly tried for theft of five bicycle chains and two bicycle brake stirrups. The trial court convicted the second appellant Omari of theft of two bicycle chains and the first appellant Shabani of receiving the two chains knowing hen to have been stolen or unlawfully obtained. It was alleged by the prosecution that the first appellant purchased

from the Cosmopolitan Store on 30th October, 1969, three bicycle chains but that the second appellant delivered to him five chains, the additional two having been stolen. There was no evidence that any bicycle chains were missing from Cosmopolitan Store. The first appellant testifying at his trial claimed to have purchased six bicycle chains and six "kasuku" from the Cosmopolitan Store but claimed that he had lost his receipts. The second appellant testified that he delivered five bicycle chains to the first appellant on the instructions of the shop assistant, the co-accused, Gulam. The third co-accused, Gulam stated that on 30 October, 1969, he only sold three bicycle chains and brake stirrups to the first appellant, where upon the magistrate was led to the conclusion that the additional two chains were stolen by the second appellant and received by the first appellant with guilty knowledge. On appeal to the High Court it was submitted that the statement of an accused person may be used against his co-accused only if there is otherwise a substantial case against the latter. (Uganda v. Enyesa Mberi and another E.A.C.A. Cr. App. 68 of 1969 – unreported – cited).

Held: (1) "It appears that the statement involved in the case cited was a confession by a co-accused while in the present case, the statement of Gulam, the third co-accused, was exculpatory. In this country, S. 33 of the Evidence Act provides that a confession may be taken into consideration in a trial of accused persons jointly for the same offence only against the person making such confession." (2) "S. 130 (3) of the Evidence Act provides that every person charged with an offence is entitled to testify "for the defence." Commenting on a similar provision in English Law (Criminal Evidence Act, 1898), Archbold suggests that each accused is free to give evidence which may exculpate or indulpate a co-prisoner (35th Edition, paragraph 1306) Free he may be, but I would think that a trial court would be very cautious before basing a conviction solely on the evidence of a co-accused. In the present case, the only evidence contradicting the appellants was that of Gulam, their co-accused. In my view, it would be unsafe to sustain their convictions." (3) "Appeals allowed, the convictions quashed and the sentence set aside."

248. John v. R. Crim. App. 55-A-70; 8/6/70; Bramble, J.

These are appeals against conviction and sentence on each of two charges of Burglary and Stealing and they are consolidated. The facts not in dispute are that the complainant's house was broken into at night time and several articles were stolen; this took place on the 13th September, 1969 and later that month the Police searched the appellant's house as a result of information received; there they found several items which the complainant claimed as his but could only point out two shirts having satisfactory marks of identification. The other clothing he described by the colour only.

Held: (1) "There was no evidence to connection the appellant with the offence apart from the fact that the complainant's two shirts were found in the appellant's room. While the trial magistrate said that he was satisfied that the complainant identified the

Other things found, there is no evidence on the record to show what satisfied him. The record must state from what facts the conclusion was drawn so that an appellate court can say whether such conclusion could or could not be supported. The only evidence of identification was colour and this was not conclusive or satisfactory." (2) "The case against the appellant was that he was alleged to have been found in recent possession of two shirts which had been stolen in the course of a burglary. His possession was inferred from the fact that the articles were found in a room in which the appellant lived. The search was carried out in his absence and the prosecution did not say whether the room was found locked or not. The police received information that there were stolen articles in it and they went and found the articles. If the room was open anybody would have access to it and could plant the articles there. It was the duty of the prosecution to shut out this possibility and it did not. The next point would be whether the appellant claimed the goods as his own so that possession could be inferred. The appellant said that his room was never locked: that he was in another village and when he returned home he found his things missing and was told that the police had taken them. He did say that he had no stolen property in his house. If the appellant was in the house at the time of the search he would have been presumed to have possession and control of everything in the house and would have had to account for the stolen items. As it was,

on the evidence no such presumption could be raised. There was no evidence of possession in the appellant." (3) "The trial magistrate misdirected himself in holding that the accused failed to account as how the shirts came to be in his house. The misdirection was such as would occasion unjustice ….. Appeal allowed.

249. Jacob v. R. Crim. App. (P) 107-A-70; 21/5/70; Bramble, J.

The appellant was charged in the Machame Primary Court with an offence under Section 233 (d) of the Penal Code. The section reads as follows:- Any person who in a manner so rash negligent as to endanger human life or to be likely to cause harm to any other person omits to take precautions against any probable danger from any animal on his possession is guilty of a misdemeanor.' The facts admitted were that cattle, which the appellant was grazing, strayed and damaged some maize plants. The appellant denied that the maize was the property of the complainant. The trial magistrate wrongly accepted this as a plea of guilty.

Held: (1) "The main facts did not disclose the offence for which the appellant was charged, the essence of which was endangering human life or creating the possibility of causing harm to a person. Harm here has a specific meaning. It is defined by the ordinance as "bodily hurt, disease or disorder whether permanent or temporary. Damage to property is not, therefore, harm within the meaning of the section" (2) "Assuming that the appellant had made a plea of guilty the court should not have accepted it after the facts were given since they did not disclose any criminal offence. An order was made for compensation and this was wrong from the fact that the ownership of the maize was not established and that no offence had been committed." (3) "The conviction cannot be supported and I allow the appeal, quash the conviction and set aside the sentence and the order for compensation. The complainant may properly claim damages in a civil action."

250. R. v. Mberesero Crim. App. 49-A-70; 8/6/70; Bramble, J.

The appellant was inter alia charged and convicted of Carrying passengers for hire or reward c/s 27A (i) of the Traffic Ordinance. The prosecution alleged that the appellant was carrying twelve persons, six of whom escaped when the vehicle was stopped. The appellant contended that he had only six, that he had a permit to carry fifteen employees and that at the material time he was carrying employees only. He called two witnesses who supported the fact that the passengers were employees. The law placed the burden on the appellant to prove that he was not carrying passengers for hire or reward. In deciding the matter the trial magistrate said:- "I fail to see how the accused has discharged this mandatory obligation which put simply, accused cannot shelve off hic shoulders upon which the provision of the law just cited, so squarely placed."

Held: (1) "The trial magistrate did not examine the defence to see whether it was true or whether it raised any reasonable doubt and seemed to have implied that the defence could never discharge the burden placed on it in cases of this kind. From the time the appellant was stopped he said that he was giving his employees a lift. This would shift the burden back to the prosecution and it did nothing to show that what the appellant said was not true or that, in fact the passengers were paying. (2) Appeal allowed on that count.

251. Amon v. R. Crim. App. 53-A-70; 19/6/70; Bramble, J.

The appellant was convicted of shop breaking and stealing c/ss 296 and 265 of the Penal Code. at about 3.15 a.m. one morning a watchman heard as though a glass window was being broken and he raised alarm; another watchman from neighboring premises hastened to the spot and saw 5 persons running in different directions, one of whom was running towards where he was; he told him to stop and when he failed to do so he struck him twice on his head with stick, but the person escaped. By following the blood stains they found the appellant with fresh injuries on his head. The appellant's story testified by a prosecution witness – appellant's relative, was that on the night of the incident he had attended a dance and as he had to go on safari the following morning he decided to go to his relative. While he was passing in a path where he was stopped by an unidentified man and he refused whereupon the man struck him on he fell down. He managed to escape and went to his relative, who gave him a change of

clothes; the latter suggested that they should make a report to the police and while they were on the way they met the police and he was arrested. It was established beyond doubt that the appellant was the person to whom the watchman referred and the only question was whether he was a party to the breaking. On this point the trial magistrate held that:- "It is clear that none of the prosecution's witnesses testified as to the accused's identify at the time the offence was committee, but the over-all evidence particularly the clothes ….. Irresistibly connects the accuses with the said crime. The accused in his defence …… said that he was attacked by an unknown man for an unknown reason. This I am unable to accept as truthful."

Held: (1) "The only irresistible conclusion that could be drawn from the clothes found is …… that the appellant was the person whom (the watchman) had attacked. The evidence should then have been examined to see whether there was anything connecting the appellant with the crime. If the prosecution's case is believed he was seen running away from the scene together with four other men. At its highest there was very suspicion but

A person cannot be convicted of crime on suspicion alone. Presence in the neighborhood of crime does not necessarily make a person a party. It must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them. There was no evidence to support any of these facts." (2) "The defence ought to have been carefully examined. It is not enough to say "I am unable to accept it as truthful." Some reasons must be given as to why it was rejected so that an appellant court can say whether or not the conclusion is justified from the evidence. As I see it, the appellant's story could possibly be trued and as such it should have raised a reasonable doubt." (3) Appeal allowed conviction quashed.

252. R. v. Tarasha Crim. Rev. 30-A-70; 29/5/70; Bramble J.

The accused, a driver of a Public Service Vehicle, was convicted of failing to comply with conditions of road service in that he failed to carry in the vehicle the time table respecting the running of the said vehicle. When the charge was read to the accused he said 'it is true' and this was accepted as a plea of guilty. No facts were given by the prosecution to establish the offence and the trial magistrate recorded a conviction and proceeded to sentence.

Held: (1) "There is no short cut to a trial and in every case where there is a plea of guilty the prosecution must give the facts. It often happens that the facts given do not establish the offence and a plea of guilty cannot then be accepted. This is a case in point assuming that the facts are as stated in the complaint. Moreover 'it is true' cannot be an unequivocal plea of guilty by itself." (2) "Section 26 of the Transport Licencing Ordnance under which the accused was charged provides that:- Subject to the provision of this section any person who fails to comply with any condition of a licence held by him shall be guilty of an offence under this Ordinance …. This section speaks of a breach of conditions of a licence held by a person and makes that person liable to a penalty. The driver of a vehicle could not be and more often than not is not the holder of a Transport licence with respect to it. In order to succeed on the charge it must be alleged and proved that the accused is the holder of the relevant licence. From the record there is nothing from which this can be even inferred in this case ….. " (3)Conviction quashed.

CIVIL CASES

253. Karti Printing Works v. Tanga District Council Court of Appeal Civ. App. 18-D-70; Duffus, P., Law and Lutta, JJ. A.

The plaintiff firm filed an action against the defendant council for Shs. 23,756/75 being payment for medical cards sold and supplied to the defendant council. The plaintiff firm supplied the cards at the oral request of an Executive Officer of the defendant council.

When the cards were supplied the defendant refused to accept them on the ground hat they had not been ordered officially. After the initial refusal a local purchase order for the same purchase was issued to the plaintiff by the defendant. However, the plaintiff failed to adduce

L.P.O. when demanding payment as it was lost by then. At the hearing the following issues were agreed:- (a) Whether the plaintiff sold and delivered to the defendants goods as per plaintiff's invoice; (b) Whether the price was agreed and reasonable; (c) Whether the price was payable within seven days of the end of the month of invoice; (d) Whether the plaintiff was entitled to interest out-standing account and if so at what rate; (e) Whether the proper prescribed procedure was followed by the defendant in placing the orders with the plaintiff and with what effect; and (f) whether the suit was premature or maintainable . The High Court of Tanzania at Dar es Salaam (Mustafa, J.) [1970] H.C.D. 135 held for the defendant. On appeal to the Court of Appeal – Overruling [1970] H.C.D. 135:

Held: (1) per Lutta, J. A. "Acceptance is defined in section 37 of Cap. 214 and the question here is whether on the facts of this case there was acceptance of the goods within the meaning of that section. .. The (defendant) did not deny that the goods were delivered to it and did not explain why, for two months, no action was taken to intimate to the plaintiff that it rejected the goods ….. "In my view if the defendant had not received the goods, it is reasonable to expect, after receiving demand letters, to have written within a reasonable time, wither denying having received the goods or rejecting them. It was not until 30th May, 1967, when it wrote rejecting the goods. In my opinion the defendant had reasonable time within which to reject the goods and failure to do so constitute acceptance within the meaning of section 37 of Cap. 214". (2) (Per Lutta. J. A.) "With regard to the question of note or memorandum in writing of he contract [the Counsel] submitted that the oral agreement between Mr. Rameshi Patel and Mr. Kasambala [the Executive Officer] was enforceable as an L.P.O. was subsequently issued. In my view it sounds highly improbable that the Executive Officer of a district council like the defendant would arrange with a firm like the plaintiff, with whom, as the evidence indicates, it had dealings previously, to supply goods unless there was an intention that their agreement should be attended by legal consequences. As this was a

matter of business, it must be assumed that the parties intended legal consequences to follow – see Rose and Frank Co. v. J.R. Crompton and Bros. Ltd – (1923) – 2 K. B. 261 at page 282. However, the proposition would not apply in the instant case unless the requirements of section 6 of Cap. 214 are complied with. In my view once there has been acceptance within the meaning of section 37 of Cap. 214 the requirements of section 6 have been complied with and it is not necessary to consider the provisions of subsection 3 of the latter section. In other words there is no need to consider the question of a note or memorandum in writing of the contract. It seems to me that section 6(3) of Cap. 214 provides for en-for cement of a contract if the requirements contained in it are complied with, even though there may be no acceptance within the meaning of that word as defined in section 37. Reading the two sections together, that is, section 6(3) and 37 of Cap. 214 my opinion is that if there is acceptance within the meaning of section 37 then the requirements of section 6 have been complied with and if there

Is no acceptance within section 37 there may be an act which amounts to acceptance within section 6(3) which will render an oral agreement enforceable. In these circumstances I am of the opinion that there was a contract which was enforceable and the plaintiff was entitled to be paid for the goods ordered by and delivered to the defendant". (3) (Per Law, J.A.) "The note or memorandum relied on by the appellant is a local purchase order …. Issued by the respondent …. About 9 months after the verbal order for the goods had been placed. But it would seem that the note or memorandum need not be contemporaneous with the contract, so long as it was in existence before the suit was filed, see Chalmer's "Sale of Goods", 12 Ed., page 30. The difficulty which lies in the way of the appellant is that the local purchase order has been lost and cannot therefore be produced for examination as to whether it constituted a sufficient note or memorandum for the purposes of section 6 of the Sale of Goods Ordinance. To be sufficient, a note or memorandum must contain a description of the parties and of the goods sold, the price (if agreed) and all other substantial terms of the contract, and it must be made and signed by or on behalf of the part to be charged, in this case the

respondent. The first question to be decided, where as in this case the note or memorandum has been lost, is whether secondary evidence can be given of its existence and contents. Strangely enough there seems to be no authority on this point. In my opinion, section 67(1) (c) of the Evidence Act applies to a not or memorandum which has been destroyed or lost and secondary evidence of the contents of such a document can be given …. The vital question in this appeal now arises – where the contents of this document proved by secondary evidence, and if so did it constitute a note or memorandum for he purposes of section 6 of the Sale of Goods Ordinance …. But failure to produce (L.P.O.) which has been destroyed or lost cannot, in my view, operate so as to deprive the seller of goods to a local authority under an otherwise valid and enforceable contract of the right to be paid for those goods. Such a proposition would in my view, be contrary to elementary principles of equity and commercial morality. That a local purchase order was issued by the respondent cannot be doubted, it is referred to in the respondent's telegram of 17th February, the authenticity of which is not disputed, as my L.P.O. No. 92022 of 13/12/67. As it was sent to the appellant, it must have sufficiently described the appellant. …. (Therefore) the existence of a sufficient not or memorandum …. Was established by secondary evidence in this case." (4) (Per Lutta, J.A.) ……. "The next question in the appeal concerns notice under section 152(1) of Cap. 333. The learned judge held that the plaint was premature and was not maintainable on the ground that the suit was commenced before the expiry of at least one month after written notice on intention to sue was given, as required by section 152(1) of Cap. 333. {The Counsel] submitted that as the defendant had failed to plead non-compliance with section 152(1) of Cap. 333 and admission of service of the notice of intention to sue amounted to a waiver of the requirement under that provision." (5) (Per Lutta. J. A.) "The next issue in the appeal was interest claimed by the plaintiff from the date when demand for payment was made till the date when the suit was filed at the rate of 12% per annum. The learned judge held that no usage, agreement or custom of market has been proved. I agree with the learned judge." (6) Appeal Allowed.

254. Commissioner General of Income Tax v. Diamond Corporation Tanzania Ltd. Mis. Civ. App. 21-D-69; 31/12/69; Georges, C.J. and Court of Appeal Civ. App. 12-D-70; 9/6/70; Duffus, P. Law and Mustafa, JJ. A.

Under and agreement the respondent company would sell all the gemstones it purchases from Williamson Diamonds Ltd. Williamson Diamonds Ltd. and its associated companies mine and produce diamonds in mainland Tanzania. Williamson Diamonds Ltd. market the gemstones though an organisation known as the Central Selling Organisation which operates in London and which controls about 85% of the diamond trade in the world market. The Central Selling Organisation is composed of the Diamond Corporation Ltd. and its connected companies. The respondent company is registered as a limited liability company in Tanzania and is a fully owned subsidiary of the Diamond Corporation Ltd. which is a United Kingdom based company. The respondent company buys diamonds from the Williams Diamonds Ltd. At a price $7^1/_2$% below the price it obtains from its parent company in London. The $7^1/_2$% commission is retained as deposits with the parent company on a seven day call basis at a low interest rate. At the end of December 1969 it had a balance of £1,249, 346- 19-5 sterling with the parent company representing commission on its sales during 1967. Respondent company's tax liability was computed in Tanzania currency. It claimed a loss of Tan. Shs. 3,579,140/- on its sterling holding as a result of the devaluation of sterling in 1967. The appellant disallowed the claim. The respondents successfully appealed to High Court. On appeal to the Court of Appeal the appellant argued that (a) the deposits with the parent company were of a capital nature, (b) loss on devaluation was not a trade loss, and (c) the respondents were not justified in keeping the deposits in London and the loss on devaluation could have been avoided.

Held: A – per Georges, C. J. "I am satisfied that the appellant company did suffer a loss. It traded in sterling and when devaluation came its sterling holdings produced fewer Tanzanian shillings on conversion. It is true that no actual conversion took place but the fact is that had the company sent its sterling accounts to the Income Tax authorities here they too would have converted to shillings to calculate the appellant's tax liability ….. The deposits with the parent company was trading capital, and in no sense part of the fixed assets of the company. I find that there was a loss on this

deposit as a result of devaluation …… accordingly this appeal succeeds." Court of Appeal: B – (1) Per Mustafa, J. A. "In my view the sums credited to respondent company by the Diamond Corporation Ltd. were trading receipts – profits earned in diamond trading ……. The respondent company was justified in keeping that money in sterling in London during each yearly accounting period, as all its dealings and transactions in respect of the diamond business were in sterling. The respondent company has certain legal and financial obligations in terms of the agreements entered into by it, although in practice it may never be called upon to perform them." (2) "I believe the respondent company was using the Diamond Corporation Ltd. as a banker, but because of the special relationship and arrangements between it and its holding company, the respondent company was paid interest at a rate 2% less than the normal bank rate on its deposit. I do not think the money, by being deposited with the Diamond Corporation ltd. in the way it was, has been converted into an investment of a capital nature. The money, which incidentally was of a large amount, was placed on a seven day call basis, and would retain its character of a current and liquid asset. Such a deposit with its holding company has always been regarded by the respondent company as a current, not a fixed asset, as all its balance sheets, both for 1967 and prior to 1967, show.

These balance sheets were never questioned by the appellant." (iii)"….. the accounting period is from 1st January to 31st December each year. The devaluation of the pound sterling took place in November 1967, before the end of the accounting year. The respondent company could not finalise its accounts until the end of December 1967, and profits and losses can be computed only at the end of the accounting period, when the sum total of all the transactions can be worked out. It was in order for the respondent company to keep open and current its assets and liabilities until the end of the accounting year, and during such accounting period the respondent company deposited its money on a current basis with company Diamond Corporation Ltd. …… if the deposit was held over to the following year, after the end of the accounting period,

say into 1968, I would have been prepared to agree with the proposition put forward by learned counsel for the appellant. But here devaluation took place at a point of time within the accounting period, and affected the respondent company' profits earned during that period. The loss, if any, would be a trade loss. It means the profits earned by the respondent company do not represent that much in terms of Tanzanian shillings at the end of December 1967. The sum earned, which was in sterling, by the fact of devaluation, represented a lesser sum in terms of Tanzanian currency. The leaned Chief Justice found the respondent suffered a loss on devaluation. I am not sure if the loss is not merely a notional as opposed to a real loss. The sum earned in sterling has not decreased, only its convertibility value in terms of Tanzanian shillings has." (iv) Appeal dismissed.

255. Mathew v. Emil (PC) Civ. App. 24-M-70; 30/6/70; Mnzavas, Ag. J.

The appellant was defendant in the primary court in which the respondent sued him claiming a piece of land. Judgment was entered in his favour. The present respondent appealed to the district Court where he won the case. The appellant appealed to the district Court where he won the case. The appellant appealed to the High Court. In the lower courts the appellant argued that the respondent could not have inherited the land in dispute from one Mathew, deceased, because respondent was not the son of Mathew. The appellant in support of his claim produced to the lower court a lengthy document which he alleged was the will of Mathew, his late father

Held: (1) "From the evidence it is true that Emily, the respondent, was born after an illicit association between Mathew and respondent's mother who was at the time a widow. But in spite of the respondent being born out of wedlock there was evidence that Mathew legitimized the respondent according to Haya customary law and this is in accordance with paragraph 154 and 155 – Corry & Hartinol. I may also add that in accordance with Section 42 Law of inheritance G. No. 436/63 and Section 181 of Law of Persons G.N. 279/64 the respondent had become a legitimate son of Mathew and was entitled to inherit part of Mathew's property." (2) "The document produced by the appellant as the Will of Mathew was properly rejected by the learned magistrate as it was (a) not signed by the testator (b) It showed alterations and (c) there was every

reason to suspect that the thumb-prints alleged to be of witness to the Will were not genuine." (3) "Having carefully considered and evaluated the evidence, and having tested the conclusions of the district court drawn from the demeanour of the witnesses who testified before him, I am satisfied that the district court could not have come to any other finding than the one it came to. The appellant who appeared before this court did not at all impress me as a truthful witness. The district Court judgment is sound and fully supported by the evidence. (4) Appeal dismissed.

256. George Vincent and Another v. Yusufali Chakera and Others Civ. App. 3-D-70; 23/6/70; Georges C. J.

The landlord – respondent successfully brought an action for possession on the ground that the tenant had unlawfully sub-let the premises and had moved completely out of occupation. Here was evidence that the tenant/first appellant had given the sub-tenant/second appellant a power of attorney to look after the premises and to pay rent on his behalf though the respondent was not informed of this. The second appellant testified that he had been a sub-tenant for 5 years and that the landlord had known this. It was contended by the appellants that the Landlord had accepted the subtenant as his tenant. There was also a preliminary point whether a notice of termination stuck to the outer door of the premises is adequate to determine a tenancy.

Held: (1) "My view is that the landlord must begin by leading facts to show that there has been a sub-letting and that he had not given his consent. If he does this, he burden shifts on to those asserting the contrary. The landlord in this case did lead such evidence. The evidence to the contrary was not believed and rightly so. …… Even if a rent collector for the landlord had seen the sub-tenant on the premises while he collected rent from the tenant that of itself could be no reason for thinking that there was a sub-tenancy. When the landlord became aware that there may have been a subtenant he made his position quite clear in his letter of 13th June, 1967. The tenant last paid rent

for the month of May. When the suit was filed three months rent were due up to the 31st August – the date the notice terminated. This was claimed in the suit. Thereafter the landlord ceased to accept rent. The sub-tenant paid the monthly rental into the landlord's account. None of these matters can be said to indicate any waiver on the part of the landlord, or an intention to accept the sub-tenant as his tenant." (2) The sub-tenant was a trespasser and "It would be quite unreasonable to protect a person unlawfully let into the possession of premises when provisions exist by which a landlord who unreasonably refuses permission to sub-let or assign can be compelled to give his consent. Persons who do not follow the methods provided by law to ensure the protection their rights can hardly complain if they suffer thereby. In this case, particularly, the tenant and sub-tenant had full warning of the landlords' attitude and the tenant clearly had the benefit of legal advice. I agree with the leaned Senior Resident Magistrate that no question of reasonableness arose in this matter." (3) The service of the notice affected in the way it was, was proper and adequate to determine the tenancy because the sub-tenant had a power of attorney from the tenant to do all acts in relation to the premises and on the facts of the case he must have seen the notice. The principle that notice must be served on the tenant personally in order to determine the tenancy [Hogg v. Brooks (1185) 15 Q.B. D. 256] would be inapplicable. ….. In the case of a monthly tenancy such as this where security of tenure is dependant on the operations of the Rent Restriction Acts which are geared to protecting the tenant in occupation. If the tenant could disappear and thus make personal service or service on an agent impossible then anyone whom he left in possession would be protected quite apart from the Rent Restriction Act since the original tenancy itself could not be terminated once the tenant could not be found. None of these considerations could arise in Hogg-v- Brooks where the landlord had created a 212 year term in any event – terminable at the end of 14 years on certain conditions. Since he could not perform the conditions, it was held that he could not terminate the lease. In 7 years, by the effluxion of time, the tenancy would in any event terminate." (4) Appeal dismissed.

257. Gamaha v. Lwavu (PC) Civ. App. 173-D-69; 10/7/70; Georges, C. J.

The plaintiff, who has failed in both courts below, now presses his appeal to this Court in his claim for a parcel of land at Kondoa.

Held: (1) “Having carefully read the evidence led before the Primary Court, I am satisfied that the decision reached by the Magistrate and the assessors was correct. “ [However, the court went on to make the following comments as regards the procedure followed during the trial]. (2) “When the plaintiff closed his case the suit was adjourned to enable the defendant to attend with his witnesses. On the adjourned date the defendant duly attended but the plaintiff did not. Thereupon the magistrate purported to dismiss the plaintiff had already made out his case. If he failed to turn up the proper course was to hear he defendant’s case in his absence and decide the issues. A plaintiff’s case can be dismissed for non-appearance only when he had led no sufficient evidence to justify the defendant’s being called upon to answer. This is the position provided for by rule 24 of the Primary Court Civil Procedure Rules.” (3) “….. On a visit to the scene the magistrate questioned neighbours who were not witnesses at the hearing. I appreciate that valuable information may be obtained this way but it is desirable that some proper procedure be followed. The Primary Court Civil Procedure Code lays down that evidence must be given on oath – Rule 46(2). People who give answers to Magistrates on the scene have not been sworn. Perhaps all this should be changed but once it remains as it is, the procedure should be followed. There is no indication that the defendant was allowed to cross-examine their persons who made statements adverse to this case. Again the right to cross-examine an opposing witness has always been regarded as basis to the process of administering justice. Well directed questions will often show that a witness’ evidence is not as accurate or as unbiased as it might, at first hearing, appear to be. If a neighbour on the scene can give useful evidence the better course is to summon him to the Court and have his evidence recorded there as would be the evidence of any other witness.” I am satisfied, however, that this irregularity, though serious, has not resulted in a failure of justice.’’ [Considering all the evidence properly taken] “the assessors could have come to no other conclusion than that to which they did come.” (4) Appeal dismissed.

258. Yoel Harmani v. Said Harmani (PC) Civ. App. 106-D-69; 10/7/70; Georges, C.J.
The appellant in this action claimed in the Mwanarumango Primary Court that he had pledged his shamba to the respondent to secure a loan of Shs. 300/- made to him by the respondent and that when he offered to redeem the shamba by repaying the loan the respondent would not accept. The respondent's defence was that the shamba never was the property of the appellant but had always belonged to the respondent. The Primary Court Magistrate found for the appellant although both assessors though that the shamba did all along belong to the respondent. The appellant had three witnesses to support his claim that the shamba had been his ……. There was evidence also that he had had a quarrel with a neighbour over boundaries which had been reconciled by neighbors. On appeal the District Magistrate reversed this decision. He held, in effect, that the Primary Court Magistrate had misconceived the point in the suit and had been concentrating on the issue of ownership rather than on the issue of pledge. He held that there was no evidence of the pledge or its terms and that once the appellant failed to establish the pledge then he could not succeed. On appeal to the High Court

Held: (1) "I agree with the Primary Court Magistrate rather than the assessors …. With respect, I think this approach is misconceived and that the view of the Primary Court Magistrate is preferable. The defence ….. realised that if he could establish that the shamba always belonged to him, then the appellant's contention that there had been a pledge could not possibly be true. On the other hand if the appellant had always been in possession of the shamba and then later the respondent was seen in possession, then the change of possession could be accounted for b the explanation of a pledge – particularly as the respondent was not himself putting forward any other explanation – as for example that he had purchased it. (2) "The District Magistrate was much concerned over unexhausted improvements which the respondent may have effected to the land during his term o occupation. I do not think this should be a problem. No person to whom land is pledged should put permanent structures on it. He should keep it in good order – planting annual crops from which no doubt he could

make a profit on the money he had advanced. …… In this case the respondent has built a pombe club on the land. There is no evidence that the appellant warned him not to do so when he began building." (3) "The appellant has long delayed in redeeming the property and the respondent may well have felt he had no further interest. I shall allow this appeal and restore the judgment of the Primary Court Magistrate. The appellant shall be put in possession of the shamba on paying to the respondent the sum of Shs. 300/- and the value of the club to be assessed by the Primary Court Magistrate after hearing evidence from both sides in the matter."

259. Felalon (Father) v. Kalinga (PC) Civ. Rev. 4-D-7a, 14/7/70; Hamlyn, J.

These proceedings originated in the Primary Court of Kilolo. The contract was the basis of the claim for the sum of Shs. 1,350/- which concerned payment for bricks made by the plaintiff for the use of the mission at Kilolo. The judgment was given in the Primary Court in favour of the plaintiff in the sum of Shs. 200/- only. Thereafter the dissatisfied plaintiff appealed to the District Court of Iringa which allowed the appeal and "somewhat surprisingly gave judgment for the appellant in the full sum claimed," though there seemed to be the very slightest evidence to support such a finding. Therefrom the matter was considered by the High Court in its Revisional capacity.

Held: (1) "In so far as the parties of the case are concerned it would appear that the Mission would have been the proper party to have been the defendant and not one of the Fathers of the Mission, who himself could hardly have been personally responsible for the sum claimed." (2) "…… It is quite clear that the whole of the proceedings in the Primary Court were not maintainable there. I have already noted that the claim was in contract in the sum of Shs. 1,350/-. Section 14 of the Magistrates' Courts Act (Cap. 537) as amended by the first schedule of the Written Laws, (Miscellaneous Amendments) Act, 1968, provides jurisdiction of Primary Courts in matters of contract up to a maximum of Shs. 1,000/- and it is consequently apparent that the Primary Court lacked jurisdiction to try this action, which should have been filed in a Court of superior jurisdiction. The proceedings in this case are consequently in excess of jurisdiction and are ultra vires the powers of the trial Court. The proceedings in the Primary Court of Kilolo are void and must be and are hereby ordered to be

quashed." (3) "As a consequence of such order, the appeal to the District Court also had no validity, there being no original proceedings which can support an appeal to a higher Court." (4) "As a result of this Order the matter is remitted to the Primary Court where it shall be explained to the original parties- should the plaintiff desire to institute fresh proceeding , they should be filed in a Court of competent jurisdiction, where the matter can be tried de novo."

260. Mzizima Transporters v. Alimohamed Osman Civ. Case 113-D-68; 20/6/70; Makame Ag. J.

This is an application by the plaintiffs, Mzizima Transporters, who had sued Alimohamed Osman, now deceased, on some promissory notes. Unconditional leave to defend was granted shortly after that the defendant died. The present application is for, inter alia, the Administrator-General to be granted Letters of Administration so that he may be brought on record as the deceased's legal personal representative and defend the suit.

Held: (1) "It s a misconception to make this application under section 6 of the Administrator-General's Ordinance, Cap. 27, which provides for an application of this nature only if "danger is to be apprehended of misappropriation deterioration or waste of such assets ….." As Mr. Rahim for the Administrator-General rightly pointed out, hat has not been averred, and I would add that there is nothing on record to suggest that such is the position in this matter. The application under section 6 of Cap. 27 must therefore fail." (2) "The requirements of section 40 of the Probate and Administration Ordinance, Cap. 445 (under which this application is alternatively made) have not been strictly complied with. It is not enough to aver that no members of the deceased's relatives are unable or unwilling to act, which is not the same thing as just not having applied for the Letters." (3) "But taking into consideration the chequered history of this suit and the particular circumstances, I feel, and so decide, that it is just and fair that this application should be allowed."

261. Mohamed Hamisi v. Car and General (T) Ltd. Civ. App. 11-D-70; 10/7/70; Biron.

The appellant filed a suit for the recovery of a Motor Scooter the subject of a hire-purchase agreement which gave the owners/respondents aright to repossess the vehicle on the hirer failing to pay any of the instalments or any sums due under the agreement; or to observe any of the terms of the agreement, or on his being convicted of a criminal offence. The respondents repossessed the vehicle when the hirer defaulted in payment of instalments because he was serving a sentence of two years in prison. Appellant had paid a total of Shs. 1,435/- of the agreed hire-purchase price of Shs. 3,347/- and his contention was that he was willing to continue the payments now that he had been released from prison. The trial magistrate on the evidence before him which he fully examined and evaluated found that the respondent company was perfectly justified in seizing and repossessing itself of the Scooter as the appellant had defaulted in the payment of the instalments due. On appeal to the High Court the appellant alleged impropriety in the proceedings in the lower court and argued that the respondent company "had broken agreement."

Held: (1) "With regard to the first ground of appeal, that the learned magistrate refused the appellant's request to call witnesses, this is manifestly false, as it is recorded in the proceedings, the authenticity of which I have not the slightest hesitation in accepting, that after the evidence of his two witnesses had been recorded, the appellant is recorded as saying "I have no more witnesses". In any event when asked by this Court what evidence these witnesses could give, the appellant stated that they were company officials who could give evidence as to the directions given for seizing the vehicle, which I do not consider would have been material to the case. (2) "With regard to the second ground, that there was an agreement that the appellant would be given three months grace to pay instalments due, as expressly stated in the Hire Purchase Agreement, the company was entitled to seize the vehicle immediately and without notice, on the failure to pay any instalment due." (3) "With regard to the last

Ground, “that the defendant later promised to give back the Scooter but before it was so done the case was dismissed” which incidentally, hardly makes sense; there was not a shred of evidence to support such allegation. As demonstrated, it is not disputed that the appellant was in arrear with the payment of the monthly instalments and according to his own letter written from prison, even if he was allowed time, he could not pay such instalments until April, 1968. the respondent magistrate, in seizing and repossessing itself of the vehicle. (4) Appeal dismissed.

262. Duncan v. Zanfra DRA. Civ. App. 1-A-70; 1/7/70; Bramble, J.

The applicants sought for an extension of time to file a Record of Appeal. The substance of the application lay in paragraphs 8 and 10 of the affidavit which read: “Para 8:- That by my firm’s letter dated 26th November, 1970 a request was made to Mr. H.K. Vohora to obtain an uncertified copy of the judgment which he obtained on 31st December, 1969 and forwarded it to my firm on the same day. The copy of the judgment was received by my firm on 2nd January, 1970. after my firm had studied the judgment on 15th January, 1970 it was forwarded with out comments to our client in Nairobi who received the copy of the judgment on 20th January, 1970 and they in urn sent this copy to the Head Office of the Insurance Company involved in this matter in Bombay, India, who in turn instructed our clients by their letter of 5th February, 1970 to obtain further advice for filing the appeal. These instructions were received by my firm on 23rd February, 1970. Para 10 – that the record of the said case is extremely long and considerable time ant work is required to make copies of the said record.” The affidavit ended with a statement by the deponent that “what is stated above is true to my information, knowledge and belief.” The advocates for the respondent opposed the application inter alia on the grounds that: (i) the affidavit in support of the application was defective and no action could be taken on it; and (ii) the applicants were too dilatory to warrant the court’s exercising its discretion in their favour

Held: (1) “It is a settled principle that where an affidavit is made on information it should not be acted on by any Court unless the sources of the information are specified. It is clear that in portions of the affidavit above that the deponent was stating acts which were to his knowledge and facts which were from information and since the sources of

the latter were not given those facts would not be considered by the court. In the case of the National Bank of Commerce v. Shankerbhai Desai and others (1969) H.C.D. 206 it was held that, although an affidavit was defective, where there are facts properly deposed to on which the court could act it should do so. The facts relevant to the matter in issue, which are admissible, are that judgment in the case was delivered on the 24th November, 1969; an application for an uncertified copy of judgment was made after a Notice of intention to appeal was filed and this was obtained on the 31st December, 1969; that advocate's comments were forwarded to the applicants on the 15th January, 1970 and they gave instructions to appeal on the 23rd February, 1970." (2) "It is apparent that there has been so far no application to the court for a copy of the proceedings. From all indications the Record of Appeal will take some time to prepare and there is no guarantee that a copy of the proceedings could be obtained within any reasonable extension of time that could be granted. Assuming that he time taken to get the copy of the judgment and that taken by advocate to advices can be counted in the applicant's favour there is no explanation for the delay between 15th January and 23rd February, 1970. A further 15 days were taken to file this application." (3)" I have been reminded that "the object of including r. 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rule shall not result in a manifest denial of justice."

The question of a possible denial of justice is therefore one of the considerations in applications of this nature. Where, however, an applicant is seeking the count's indulgence he must show sufficient reason. I am not persuaded that a refusal to extend the time will result in denial of justice and the applicants have not shown sufficient reasons to warrant the court's exercising its discretion in their favour." (4) "The application is dismissed with costs."

263. Abdalla El-Kuneity v. Abriya Civ. App. 24-D-69; 30/6/70; Biron, J.

This was an appeal from the judgment and order of the District Court of Dar es Salaam dismissing a claim for possession of a house brought by the appellant. The appellant was or had been the husband of the respondent and he left fro Arabia sometime in 1965 taking with him five children of the marriage ad leaving the sixth child with the respondent here in Dar es Salaam. At the hearing there was produced a document in Arabic purporting to grant Mr. Abdalla Hemed El-Lemky power of attorney. It was asserted on behalf of the appellant that he had divorced the respondent before he left for Arabia and that he had not given her the house, the subject matter of the suit, as provision for the maintenance of herself and the child. The respondent's case was that the plaintiff had in fact given her the house in question as provision for the maintenance of herself and the child of the marriage left with her. In his judgment the magistrate inter alia, declared that he was not satisfied that El-Lemky was the properly constituted attorney of and appellant- that the parties had divorced, stating that possibly they had only separated – that the appellant had made provision for his wife and child before leaving for Arabia. He therefore dismissed the claim for possession.

Held: (1) At the hearing of his appeal, I referred [the Counsel to the case of TAJDIN ALLARAKHIA v. H.H. THE AGA KHAN: Civ. App. 28-D-68, reported in volume IV of the Tanzania High Court Digest, 1969 as case No. 121 at page 107 where in I rule that a District Court has no jurisdiction to entertain claims for possession of premises, the proper Court for such a claim, as provided for in the Rent Restriction (Amendment) (No. 2) Act 1966, Section 4, being the Court of the Resident Magistrate. That ruling of mine …. Has …. Been strengthened by a ruling to the same effect by Platt, J. delivered on the 21st January, 1970 in the case of BERNARD v. ASHA: Civ. App. 7-A-69 and reported as case No. 124 in the same volume of the High Court Digest referred to above." "(The Counsel) agreed that the District Court in this instant case had no jurisdiction to deal with the claim for possession and he further expressed agreement with the Order I proposed to make." (2) "….. the appeal is dismissed … (a)and the proceedings of the District Court are formally declared a nullity, which in effect, restores the status quo of the parties before the suit was filed." (3) "It should be made clear that as the District Court proceedings have been declared a nullity, there can be no

question, if the a plaintiff should file a fresh suit in the proper Court claiming possession, of the defence that the case is re judicata being raised." (4) Appeal dismissed.

264. Berril & Co. Ltd. v. Lakhani and Other Civ. Cases 63 & 68-D-67; Georges C.J.
These were applications for leave to execute judgments in Civil Cases Nos. 63. And 68 of 1967, being suits for sums due on Bills of Exchange drawn in London for amounts expressed in Sterling. In the plaints the amount for which the Bills had been drawn were expressed in Sterling though in the pages they were stated in shillings as well the conversion rates being 20/- to the £. The conversion rate became 17/- Tanzanian currency to the £ after devaluation of the sterling in November 1967. It was argued by the defendant that payment in the Sterling equivalent

Of the judgment in Tanzania Currency would satisfy the obligation; that since the Bills were set out in Sterling in the plaint and advice the judgment was given "as prayed", it must be presumed that the judgment was recorded in £Sterling and not in Tanzania shillings.

Held: (1) "On the facts I do not think that this submission is tenable. In suit No. 63/1967 the prayer set out the sums claimed in shillings alone. There was no mention of Pounds. In suit No. 68/1967 although the sum claimed was set out in £, its equivalent in shillings was set out in brackets immediately thereafter. I see no reason to think that in either case the Court intended the sum set out in shillings to be English shillings rather than Tanzanian shillings." (2) "A Tanzania Court ought to give judgment in Tanzania Currency only. "Mr. Singh argues that there was no reason why this should be so and that there were countries which permitted their courts to give judgment in currency other than the national currency. He did not cite any particular jurisdiction but he had some support form the judgment of Lord Denning M.R. in The Hu [1969]3 W.L.R. 1135. ….. the rule in England has always been that English Courts can only enter judgment in £ sterling ….. (See Manners v. Pearson & Son [1898] 1 ch. 581) ….. [His Lordship then set out the terms of s. 2(2) of the Judicature and Application of Laws Act Cap. 453

which empowers the High Court to exercise its jurisdiction in conformity with English practice and continued] ……"I am satisfied that on the 22nd July 1920 the practice of the courts in England was that judgment should not be entered in any currency other than the national currency. It was a settled principle about which there was no controversy. The effect of the Judicature and Application of Laws Ordinance as quoted above is to make this procedure applicable to the High Court of Tanganyika. There is nothing in local circumstances which make it inapplicable and indeed it is a principle widely accepted in most domestic jurisdiction. Accordingly I find that the Court of this country can enter judgment only in Tanzanian shillings." (3) His Lordship set out Section 33(1) of the Exchange Control Act and continued) ….. "Because of this section Mr. Singh contended that payment of the judgment debt was not possible until such time as Exchange Control permission had been obtained and that that date should be taken as the date on which conversion from pounds sterling to Tanzanian shillings should take place. He cited in support Cummings –v- London Bullion Co. Ltd. [1952] 1 A.E.R. 383. In my view that authority is totally inapplicable in this case. …… There is no doubt now that the English rule as to conversion is that the appropriate now that the English rule as to conversion is that the appropriate date is the date on which the liability to pay arise. …. The section of the Exchange Control Ordinance cited above made treasury permission an implied term of the contract and for that reason the liability to pay did not arise until the date on which permission to remit was given. Accordingly that date was the appropriate date for conversion date is concerned when a suit is filed before permission to remit the money is obtained. Once a suit is filed here in Tanganyika the plaintiff can be taken to have opted to accept the shilling equivalent of his debt deposited in Court. Questions as to having this sum remitted to England would still depend on Treasury permission and it would then be the business of the plaintiff to seek and obtain such permission." (4) "For these reasons I would rule that the judgment debt would not, by payment of Tanzanian shillings to the equivalent of the sterling value of the Bills of Exchange, be satisfied, and that leave to execute value of the Bills of Exchange, be satisfied, and that leave to execute should be granted. The exact amount due is a matter for calculation and the parties can no doubt among themselves and inform the Court so that it can be recorded by consent."

265. Gupta & Company v. Ecta (Kenya) Limited Civ. App. 3-A-69; Platt J.

The appellant bought from respondent a truck manufactured by a German firm (M.A.N.) and fitted with Continental tyres. The tyres were found defective and were returned to the respondent. The respondent sued for the balance of the price of the truck and tyres. The trial magistrate found that Continental tyres had guaranteed their products to M.A.N.; that M. A. M's rights against Continental tyres had been transferred to the respondent and that the respondent had transferred its rights to the appellant. It was also found that respondent had orally agreed to help the appellant were the tyres to be defective and had negotiated a 60% set off on a new tyre with Achelis the dealers in Continental tyres in East Africa. On appeal it was argued that (a) whether the assignment of guarantee on tyres from 'Continentals' to M.A.N. to ECTA (respondents) to Gupta & Co. (appellants) in seriatim could be valid without assignees' knowledge of assignment and consent to the terms thereof and (b) what were the terms of the Oral contract between the appellant and respondent with respect to tyres.

Held: (1) On the question of assignment – "It was stated by Gupta that the had never seen booklet put out by M. A. N. declaring what booklet did state clearly that M. A. N. would only guarantee parts of the truck manufactured by them not parts sub-supplied. (The sub-supplier Continental tyres by a contract guaranteed M.A.N. the tyres they supplied) … the contract was between Gupta (and Company) and Buck (representing ECTA) M. A. N. and Continental tyres had nothing to do with their contract. Achelis had not been spoken of. Privity of contract existed between the parties of this suit, and Gupta had not agreed to an assignment of ECTA's rights against Acheli's if any." (2) There was no assignment, as the appellants did not in fact know the terms of the guarantees between Continental tyres and M.A.N. and had not agreed to an assignment. (3) The fact that respondent tried to help the appellant by negotiating a 60% reduction on the purchase of a new set of tyres does not prove an agreement for the assignment of respondent's uncertain rights to the appellant. To assign a chose in action which is not definable, there must be clear evidence of such an agreement. The

events were consistent with a conclusion that appellant was looking to respondent for some sort of satisfaction on the tyres being found defective. (4) On the question of tems of oral contract between the parties “It was an oral sale of specific goods of a trade name. Gupta had expressed misgivings of he tyres as being suitable for is purpose and Mr. Buck does not dispute that. Gupta really wanted Michelin tyres. He evidence was – ‘They told me not to worry about the tyres and that I will not get any trouble about them and that if I got trouble they will exchange them. On this assurance I agreed to keep the tyres on.’ …. The evidence as to the terms of the contract was disputed and the findings of fact somewhat of a compromise without much meaning”. (5) The exchange of the defective tyres on the basis of a 60% discount on the price of a new set of tyres was made without a view to further compensation for breach of agreement. The appellants could not now sue for breach of agreement after having relied on the exchange which was a reasonable offer in particular since the appellant “did not get it clear that he would expect compensation for his case say under s, 16 of the Sale of goods Ordinance.” (6) Appeal dismissed.

Editor’s Note: The case has been decided on the privity of contract, the court, it seems, was not invited to address itself on the issue of the tortuous liability of the manufacturer and his agent in East Africa.

266. Georges Jayo v. Mohamed Hamisi (PC) Civ. App. 217-D-69; 27/7/70; El-Kindy, Ag, J.

This case involved an inherited shamba. On 20th August 1968, the respondent filed this suit against the appellant at Gambero primary court claiming ownership of the shamba and was awarded judgment. However, the appellant took his appeal to the District Court of Tanga. The District Court in its judgment said that had it not been for material technical irregularities which were found to have been committed during the trial, it would have dismissed the appeal as the appellant magistrate was satisfied that there was sufficient evidence to support the respondent’s claim. He quashed the proceedings and ordered retrial de novo. One of the irregularities at the original trial was that the

case record failed to show that any of the contesting parties had been given the opportunity to cross- examine each other's witnesses as provided for in rule 47(2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules G.N. No. 310 of 1964. The retrial was conducted by the same magistrate sitting with the same assessors and hearing the same witnesses and the judgments given were also identical. This was made one of the grounds of the present appeal. It was also argued on appeal, by the appellant that the evidence that the shamba belonged to him was that there were 19 members of his descendants and relatives who were buried in that shamba.

Held: (1) "It seems to me that the learned district magistrate was quite right in considering that such procedural breach was of material nature. One of the purposes of cross examination is to test the evidence of the witnesses and if this is not done, the evidence goes untested. Testing such evidence is important as it might affect he credibility of the witnesses and hence the weight to be put on such evidence. Where the evidence is weakened or destroyed by the cross examination, the weight to be given to such evidence is affected, and where it is not affected then the weight given to such evidence is not affected either. It was therefore necessary for the witnesses in that case to be cross examined as it is provided for in Rule 47(2) of the Magistrates Courts (Civil Procedure in Primary Courts) Rules G.N. 310 of 1964. I would agree that such defect would be fatal and would be sufficient to cause the proceedings to be quashed and, where suitable, a retrial ordered." (2) On the issue of the identity of judgment of the primary courts, the learned district magistrate said: I see no reason that there should not be the same judgment if the witnesses for both sides were the same and they all gave the very same evidence as before – there fore the judgment must be the same. I feel that the magistrate gave it in good faith and no miscarriage of justice done. With respect I would agree that the judgment in such case would be expected to be same, unless it can be shown positively that the trial court did not in fact consider the evidence, but merely copied down what it had said previously in the decision which had been set aside. Careful examination of the record, would show that the cross examination carried out would appear not to have affected the credibility of the witness." (3) "And in respect of the complainant that the same magistrate and assessors heard the same case, and therefore justice was not seen to be done, the learned magistrate said that: there is no

provision in law or procedure which I know of which debar the same people not to hear it again and further more, there was no directive from this court that the case be retried by another magistrate with new assessors … I would respectfully agree that his complaint had no merit, for the reasons stated. In any case the complainant if it was worth consideration should have been raised at the first earliest moment i.e. at the retrial. Apparently the appellant had no objection to having the same people trying this case, and he did not suggest any here, at any stage, that

he has been prejudiced by having the same people hearing his case. It may well be, in some cases, retrial should be done by either a different magistrate sitting with a fresh panel of assessors or by the same magistrate sitting with a fresh panel, in order to establish the principle that justice was not only done but was seen to be done. But this in my view is not sanctioned by any rule or procedure, and each case must be considered in the circumstances of the case and its own case. In this case, as I have already stated, the course taken did not cause any injustice to the appellant. (4) "….. there was more than enough evidence from the respondent's side to show that the property in dispute in fact belonged to the respondent. The primary court, in a unanimous opinion, held that the shamba is the property of the respondent, and they accordingly gave judgment in his favour. I am satisfied that three was sufficient evidence before the trial court to justify this finding. The fact that a person has buried his ancestors in that piece of shamba does not necessarily mean that the shamba belonged to him. There was no evidence to show that in the custom of the appellant that dead people can only be buried in the shambas of the clan, and at no other place. I find, therefore, the lower courts came to the right conclusion." (5) Appeal dismissed.

267. Manyara Estate Ltd and Others v. The National Development Credit Agency Court of Appeal Civ. App. 27-D-69; 13/10/69; Newbold P., Duffus, V-P., and Law J. A.

In 1960 the Land Bank of Tanganyika, a predecessor to the respondent, The National development Credit Agency (The Agency) advanced a loan of 126,000/- to the one

Coulter, a farmer who held a right of occupancy over certain land. More loans were secured by mortgages on the land. In October 1964 Coulter's right of occupancy was revoked by the President and by section 14 of the Land Ordinance (Cap.113) he became entitled to compensation for any ":unexhausted improvements" existing on the land. In this case, the value of these improvements was 123,940/-. Section 14 also provides that this compensation is to be paid to the President, acting on behalf of the expropriated occupier, by any subsequent holder of a right of occupancy. In June 1965 the Agency obtained judgment against Counter for the balance of the loans made in 1960. The four appellants in the case being other creditors of Coulter also obtained judgments against him. In November 1965, the Treasury, as a matter of policy, lent to the Agency some £ 120,020 to provide a fund for the payment of compensation for unexhausted improvements in respect of all revoked agricultural rights of occupancy, including Coulter's. this sum was to be paid by the Agency on behalf of actual or potential new occupiers to the Commissioner of Lands, who was in turn to pay it to the former occupier, but, according to the agreement between the Treasury and the Agency, subject to deduction of debts owing by the former occupier to the Agency and to the Tanganyika Farmer's Association. In this case, the issue was whether the Agency could claim to have its debt in respect of the loans paid out of the compensation money, held by the Commissioner of Lands on Coulter's behalf, paid in priority to the sums due to the four appellants.

Law J. A. summed up the arguments of the respondent Agency as being: "(a) That the Agency was entitled to recover the balance of its judgment debt, that is to say Shs. 123,940/-, from the Commissioner of Lands by virtue of the terms and conditions under which the money was made available by the Treasury to compensate former holders of rights of occupancy in respect of the value of unexhausted improvements on their revoked rights of occupancy. (b) That the Agency, by reason of its mortgages, had stepped into the shoes of Mr. Coulter and was entitled to receive from the President, or his representative the Commissioner, so much of the compensation as would satisfy its judgment debt by virtue of the security provided by the mortgages.

(c) That, if the moneys in the hands of the Commissioner represented moneys impressed wit a trust in favour of Mr. Coulter, the Agency by virtue of its mortgages was entitled to recoup its judgment debt from those moneys, on the application of the equitable doctrine of conversion, defined in Snell's Principles of Equity (24th Ed.) at p. 234 as follows 'The effect of conversion is to turn realty into personality, or personality into realty.'"

Newbold P. generally agreed with this formulation of the issues in the case, but he saw two separate arguments involved in the third point as stated by law, J. A. Newbold P. stated that the respondent argued "that under an equitable doctrine the Agency can trace the money it lent to Coulter into the improvements and thus into the compensation", and separately "that the charge created by the mortgage attaches to the compensation into which the right of occupancy has been converted". However, the holding in the case will be related to the issues as stated by Law J. A.

Held: (1) That the terms of the agreement between the Treasury and the Agency could not be impressed on the money in the hands of the Commissioner of Lands received by him, as representative of the President, from new occupiers on behalf of previous occupiers in payment of compensation Per Law J.A. (Newbold P. concurring): "The question is whether, under the arrangement agreed to by the Treasury, these intentions could be carried into effect, or whether the full amount representing compensation, when received by the commissioner, became money impressed with a trust in Mr. Coulter's favour and thus attachable at the instance of Mr. Coulter's judgment creditors at large ….. the Treasury advanced the compensation money to the agency impressed, in my view with a trust in its favour which remained effective until the object of the loan had been carried out. That object was to provide loans to the new occupiers of revoked rights of occupancy to enable them to discharge their statutory obligation of paying compensation for unexhausted improvements. When the Agency paid the amount of the loan to the Commissioner, this was in effect a payment on behalf of new occupier should apply the money to which he was legally entitled, and any trust in favour of the Treasury in relation to that money ceased to exist. For these reasons, I am of opinion that when the sum representing Mr. Coulter's entitlement to

compensation reached he hands of the Commissioner, it became money paid "on behalf of the previous occupier", that is to say Mr. Coulter. It ceased to be impressed with any trust in favour of the Treasury, and was attachable by Mr. Coulter's judgment creditors." The Agency therefore it was held had no prior right to obtain payment of the debt owed to it by Mr. Coulter over any other creditor of Mr. Coulter who was also a decree holder. (2) That the Agency's position as mortgagee of the land did not entitle it to compensation for unexhausted improvements due to the mortgagor:

Per Newbold P: (Law J. A. concurring and Duffus V-P dissenting "I do not accept that section 57 of the Land Registration Ordinance entitled the agency to related as if it had been the occupier of the land and thus receive the amount payable as compensation. All that section 57 does is to give to a mortgages the powers and remedies it would have had it the right of occupancy had been transferred by the mortgage to the mortgagee subject to the equitable right of redemption; and these powers and remedies are quite different from the right of the mortgagor to receive money for unexhausted improvements. Even if the mortgagee were to be regarded as a mortgagor so as to receive the money so due, that money would

be received by the mortgagee qua mortgagor and not qua mortgagee; and the money so received would thus be liable to the claims of the creditors of the mortgagor and the mortgagee would have no priority".

Per Law J.A. "As to these matters, Mr. N.M. Patel argued that any security provided by the mortgages was secured on the land, and not on the improvements, and that this security was destroyed with the revocation of the right of occupancy. As to the learned judge's decision that the compensation payable to Mr. Coulter represented a conversion of the security on the land into money, Mr. Patel submitted that what was converted into money was not the land, but the unexhausted improvements on the land, and that the mortgages were secured on the land, and not on the improvements. One has only to refer to the deeds of mortgage to appreciate the force of these arguments. The security in each case was the right of occupancy and nothing else, and when the

right of occupancy was revoked, the security was destroyed. It seems strange that the forms of mortgage prescribed under the Land Registration Ordinance (Cap. 334) in respect of land held under rights of occupancy do not provide for additional security in the event of the revocation of the right of occupancy, for instance by the inclusion of a covenant that in the event of the right of occupancy being revoked, the mortgage debt shall be secured additionally on any compensation payable to the mortgagor on such revocation in respect of unexhausted improvements. I find myself in agreement with Mr. Patel's submission that the compensation payable on the revocation of a right of occupation in respect of unexhausted improvements cannot be regarded as a conversion or transmutation into money of he land itself." See dissenting opinion of Duffus V-P. [1970] H.C.D. 268. (3) That neither the equitable doctrine of tracing nor he equitable doctrine of conversion had application in this case; per Newbold P. (Law J.A. concurring). "…… the equitable doctrine of tracing the assets arises only in certain special circumstances arising out of a fiduciary relationship, and those circumstances do not include the ordinary position of mortgagor and mortgagee. In any event, there is no evidence as to what was done with the money lent to Mr. Coulter and thus there is no ground whatsoever for considering that the money lent by the Agency can be traced to the money received by Mr. Coulter as compensation….. (It was argued that right of occupancy has been converted into the money received for un-exhausted improvements and that the charge over the right of occupancy has become a charge over the money into which the right of occupancy has been converted.) ….. I accept that there may be circumstances in which the charge is not destroyed by the mere transmutation of the subject matter of the charge; but that is a very different thing from saying that a charge continues to attach to something into which the subject matter of the charge; but that is a very different thing from saying that a charge continues to attach to something into which the subject matter of the charge has been transmuted. The equitable doctrine of conversion is very much more limited in its effect than the trial judge seems to imply. I find myself unable to agree with him that under English Law the doctrine applies to the circumstances of this case. For example, a charge over property which is insured does not, in the absence of any special statutory or contractual provision, become a chare over money payable under the policy of insurance on the

destruction of the property. Moreover, the law of Tanganyika in relation to rights of occupancy is, as I have already said, so different from the law of England that equitable principles should be applied with the greatest caution. I consider that he charge created by the mortgage of a right of occupancy is a charge over the right to use and occupy public land. This is a purely usufructuary right; thus the charge ceases to exist when the subject matter of

The charge ceases to exist, as there are no res to which an action in rem can apply. As the charge ceases to exist when the right of occupancy is revoked it cannot continue to apply to anything. Finally, is I do not consider that the right of occupancy on revocation can be said to be transmuted into money payable for the unexhausted improvements as this money may vary from little or nothing to a very considerable amount and bears no relation to the right to use and occupy the land. Thus the doctrine in relation to transmutation could not in any event apply. Accordingly, the trial judge was wrong in holding that the charge created by the mortgage attached to the money in the hands of the Commissioner of Lands on behalf of Mr. Coulter." (4) Appeals allowed.

Judgment and order of the High Court of Tanzania (Biron. J.) set aside, and direction made that the money pad into court by the Commissioner of Lands be distributed rateably amongst the judgment debtors including the Agency.

268. Manyara Estate Ltd. and Others v. The National Development Credit Agency Court of Appeal Civ. App. 27-D-69; 13/10/69; Dissenting Opinion of Duffus V-P.

Per Duffus V.P. dissenting: "An "unexhausted improvement", is therefore the extent to which the owner of the right of occupancy has during the term of his tenure permanently improved the land it has to be an improvement that attaches to the land itself and that goes with the land. In fact it represents the value of the occupier's interest in the land once his right of occupancy has ceased. The question is, has a mortgagee of a right of

occupancy any right or interest in the value of this unexhausted improvement? The mortgages in this case are both made under the Land Registration Act and follow the form provided by that Act. (L.R. 11 as set out in the second schedule of the Act). There are special provisions for registered mortgages under the Act and in particular Section 57 provides inter alia that: 'A mortgage shall, when registered, have effect as a security and shall not operate as a transfer of the estate thereby mortgaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a transfer of the estate subject to redemption:' A mortgagee is therefore once default has been made placed in a position similar to a purchaser of the right of occupancy. In this respect a right of occupancy can be sold but only with the approval of the President. It is clear that the purchaser of a right of occupancy and would, there fore, in my view, be entitled to a charge on any proceeds that may be found payable to the mortgager. This charge would, of course, only be to the extent of the amount secured by the mortgage and any surplus would be payable to the mortgagor and would be liable to attachment by the un-secured creditors. I am of the definite view that this must be the correct interpretation of Section 57. it is certainly he most equitable and common sense point of view as otherwise the mortgagee's security over a right of occupancy would be of little value, as a dishonest mortgagor could cause the Government to forfeit his right of occupancy and then collect his compensation for the value of the "unexhausted improvement and then as in this case, leave the country and leave the mortgagee without any security holding only his bare rights against the mortgagor personally; this, even though the mortgagor might have used the

entire loan covered by the mortgage to carry out the very "unexhausted improvements" on the land for which the mortgagor has collected the compensation." For majority opinion see [1970] H.C.D. 267.

269. A.P. Hirji & Co. v. A.N. Panjwani Civ. Case; 94-D-70; 12/8/70; Georges, C.J.

This was an application for unconditional leave to defend. The plaintiff sued on 9 Promissory Notes falling due on various dates for a sum totaling Shs. 26,000/- all of which had been dishonoured on presentation. The affidavit in support of the application for leave to defend was sworn to by Hussein Moledina Jaffer. He described himself as a former partner of the defendant A. N. Panjwani in the business known as Jaffer Soap Factory and at the time of the suit a shareholder and director in Jaffer Soap Factory (Tanzania) Ltd. a limited liability company incorporated in Tanzania in which the defendant is his fellow shareholder. Paragraph 2 of the affidavit recited that the defendant was then in Kampala, Uganda, undergoing medical treatment. The affidavit set out that the Promissory Notes sued on were given in payment of the purchase price of a business known as Jaffer Soap Factory sold by the plaintiff to the defendant. In paragraph 5 the deponent stated that in order to induce the defendant to make the said bills the plaintiff falsely and fraudulently represented orally to the defendant and warranted certain things which representations were false. However, the defendant continued to be in occupation of the premises and was apparently operating as a soap manufacturer there. The Counsel for the plaintiff argued inter alia that under Order 35. R. 3 an affidavit supporting a leave to defend must be sworn by the defendant himself or his duly constituted attorney; that there was nothing in the affidavit to show that the deponent had been authorised by the defendant to make it and in any case the affidavit did not disclose a defence since it involved the setting up of an oral contract which appeared to contradict the terms of the written agreement subsequently signed by the parties.

Held: (1) “I can see nothing in the language of the rule itself which makes it necessary that the defendant should himself be the deponent. Had it been the intention that there should be so, one would have expected to see added after the word affidavit the words sworn to by the defendant. There is no good reason why such a gloss should be added to the section”. “The affidavit sets out a sufficient number of facts from which a clear inference can be drawn that the deponent was authorised to swear on behalf of the defendant. He is a former partner in the business which has now been transferred to a limited liability company. He is a shareholder in that company and co-director of the defendant. The business they operate is the business the purchase price of which is the

subject matter of the suit. The connection is close enough to support an inference of authority in the absence of any evidence to the contrary". (2) "As I have indicated the main plank of the defence is an allegation of fraudulent oral representation made in order to induce the defendant to enter into the contract. It is clear from paragraph 8 of the affidavit that this allegation has been made by the deponent on information given to him by the defendant. It is true that in paragraph I the deponent also states that he is personally conversant with the facts of the case, but since there is no statement in the affidavit indicating that he was present during the course of negotiations. I can only infer that his only source of knowledge as to fraudulent oral representation

Was information from the defendant It appears to me that the whole purpose of Order 35 R. 3 is to compel defendant to set out his defence on oath. If he is able to evade this responsibility by allowing someone else to swear the affidavit in support of the application setting out information obtained from his, then the sanction of the oath which is clearly intended to bar frivolous and false defences would be completely removed. Where, as in this case, the allegation is one of fraud the necessity for n affidavit from a person able himself to substantiate that allegation seems even more vital". "For reasons which will appear later I do not think that I ought to give leave to defend in this case, but had I thought that I should, it would have been necessary to grant an adjournment and give leave to the defendant to file a supplementary affidavit so that the position could be regularized." (3) "The (other) ground of objection was that the affidavit in fact, even if taken as sound, did not set up a defence to the action but rather set up matters which could be the basis of a counter-claim for damages and no more. The damages which the defendant has suffered by reason of the alleged fraudulent representation were not in any way quantified. They would have to be assessed. As I have indicated the agreement itself was made in April 1969, and payments were made under it as late as September 1969. The defendant made no efforts to file suit to have the contract rescinded. He is still in occupation of the premises carrying on business with the assets

which he obtained under the agreement. To ask the plaintiff, therefore, to wait for judgment on his promissory notes while there is an investigation as to what damages, if any, may be due to the defendant, would not be reasonable. Accordingly the application for leave to defend is refused and there will be judgment for the plaintiff in the sum claimed. Execution, however, will be stayed until 31st August, 1970. if the defendant by then has filed suit for damages for the alleged fraudulent false representation the stay will continue until the final hearing and determination for the suit." (4) "The question as to whether or not oral evidence may be admitted to vary the terms of a written agreement is one of some complexity. In May cases some evidence may be necessary before this issue can itself be determined. I would myself prefer to hold that final decision of such an issue should not e reached on an application for leave to defend but rather that leave should be granted and the question of the admissibility of the evidence determined at the trial. A defendant ought not to be shut out of his right to a defence except in the clearest circumstances. But as I have already indicated this matter does not directly arise since in any event I do not think that the defendant has made out his defence in this case." (5) Application dismissed.

270. Rajabu Athumani v. Issa Mdohi (PC) Civ. App. 190-D-69; 13/4/70; Mustafa J.
This is a dispute between the parties about ownership of a piece of land. Issa Mdohi claimed the shamba in question belonged to him, but the primary court found for Rajabu Athumani. Issa then appealed to the district court, which allowed his appeal, and now Rajabu appeals to this Court. It appears that the shamba in question was a part of land used from time immemorial by Africans in the area, and adjoined forest land. In or about 1951 the land was declared to be public land, and all the parties who were cultivating there were asked to move out. Among the parties were the forbears of both the respondent and the appellant.

In 1961 the Government re-opened the land for use, and the executive officer and the district forest officer at that time

demarcated the boundary between the forest reserve and land to be used by the Africans, and then the land was opened again for cultivation by the villagers. Issa claims that he was given the subject piece of land, whereas Rajabu claims that the subject piece of land was part and parcel of the land he was granted. Issa called seven witnesses in the primary court, and Rajabu called three. It does not appear that the witnesses in the trial court knew the boundaries between the parties as demarcated by the district forest officer and the executive officer, but Issa's witnesses have said that the land belonged to Issa, whereas Rajabu's witnesses said that it belonged to Rajabu. Rajabu produced a document signed by the district forest officer. Morogoro, one N. Grevatt, dated 22/8/61, which would indicate that his land was bordered on one side by Boya 237, a 'boya' being a marking stone. The primary court magistrate and his assessors visited the site. Both the assessors in the primary court gave as their opinion that he land in question belonged to Issa, but the primary court magistrate held otherwise. He accepted Boya No. 237, as the boundary mark for Rajabu's land. The district magistrate on first appeal at first sat without assessors and visited the site before the assessors were appointed. He found that Issa had at no stage cultivated the land, but that Rajabu had since 1961. After he had visited the land and the assessors said the River Mahangwe was the boundary which divided the land of the parties. He accepted this opinion and decided in favour of the plaintiff Issa.

Held: (1) "In my view the primary court magistrate was right to hold as he did on the evidence and on the basis of the document which was submitted by Rajabu and which on appeal he again submitted before me. In that it is stated that this mark 237 was a demarcation mark of Rajabu's boundary. It is true that the district forest officer and the executive officer were more concerned with separating the forest reserve from land reserved for the villagers. However, I take note of the fact that since 1961 when the severance was made the appellant Rajabu began cultivating the land in question until he was prevented from doing so by Issa when he began litigation. Rajabu has said that there are 6,000 coffee trees, 1,500 banana plants, and yams, now growing on the land, which he had planted, and there is evidence that Issa had at no stage cultivated this piece of land. In these circumstances I am of the view that since Rajabu immediately the land was opened took possession of it an cultivated it he has a greater right to

possession than has Issa." (2) "Rajabu has rightly complained that in the district court on first appeal the assessors had never visited the site but nevertheless gave it as their opinion that the Mahangwe River was the boundary between the shambas of the litigants. Such an opinion, not being based on what they had seen, is not of much worth. I therefore allow the appeal of Rajabu, set aside the judgment of the district court, and restore that of the primary court, and declare that the land in question belonged to Rajabu." (3) Appeal allowed.

CRIMINAL CASES

271. Joseph Hawksworth and another v. r. Crim. App. 253-D-70; 17/6/70, Georges, C.J. The appellants are Englishmen. On 3rd March, 1970 they crossed the Songwe River, from Malawi to Tanzania walked to Kyela and reported there to the police station. There they were arrested and charged with unlawfully entering into Tanganyika contrary to section 23(1) (i) of the Immigration Act, Cap. 534. The particulars alleged that they had entered into Tanganyika by way of Songwe River which is not an official port of entry. Section 25(1) (e) of the Immigration Act vested in the Minister power to make regulations prescribing the place or places where entry into Tanganyika may be made. The Minister exercised this power by Government Notice 32 of 1969 published on 14th February, but to become effective on 1st March. In those Regulations – "The Immigration (Prescribed Places of Entry Regulations 1969" – Songwe River is not listed as a place of entry. The record states that the charges were read over to the appellants and explained to them. The first appellant is recorded as saying: - "I realise my mistake now. I entered unlawfully into Tanzania. I was misled by customs officials in Malawi to come this way". The second appellant is recorded as saying: - "I admit this offence. I did not follow the official port of entry into Tanzania". This was entered as a plea of guilty. The record continues: - 'Facts are as charged and as admitted by accused". The accused were convicted and fined Shs. 3,000/- each.

Held: (i) "This Court has said on more than one occasion that it is not proper to record the facts merely as charged. The prosecution should state the circumstances of

the case as fully as possible. If the appellants had walked into the police station at Kyela in order to report their presence and to ask for some sort of immigration status the prosecution should have so stated. This would have been as relevant in considering punishment as would have been the fact that they had been found wondering in some completely different area without having made any efforts whatsoever contact the authorities. If the facts are not going in any way to amplify the particulars set out in the statement of offence then there can be very little point in laying down a procedure which prescribes that they should be stated ad admitted by the accused". (2) The appellants advanced as a mitigating circumstance the fact that they had been misled by an official at the customs post on the Malawi side of the border. On this basis Mr. Moisey submitted that the trial magistrate should not have entered a plea of guilty since mens rea was an essential prerequisite for the commission of this offence. He quoted in support the case of Lim Chin Aik –v- Queen [1963] I All E.R. 223. In that case the Privy Council was asked to interpret certain sections of the Immigration Ordinance of Singapore. Section 6(2) provided:- "It shall not be lawful for any person other than a citizen of Singapore to enter from the Federation to remain in Singapore after …… (b) Such person has been prohibited by order made under section 35 of this Ordinance from entering Singapore". Sub-section (3) of this same section provided "Any person who contravenes the provisions of sub-section ….. 2

of this section shall be guilty of an offence against this Ordinance". Under section 9 of the Ordinance the Minister had made an order prohibiting the appellant from entering or re-entering Singapore. This order would have come into force as soon as it was made. It had been received at the Immigration Department but there was no evidence that it had been served on the appellant or had otherwise been brought to his notice prior to his arrest on this charge. The appellant argued that he ought not to have been convicted since he did not know of the order and had not intended to break the law. The issue was clearly whether or not an intention to break the law- mens rea – was a

necessary ingredient for the commission of the offence. The Privy Council held that it was. They accepted as a correct formulation of the law a dictum of Wright J. in Sherras –v- De Rutzen [1895] 1 Q. B. at p. 921:- “There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating he offence or by the subject matter with which it deals, and both must be considered … they agreed that where the subject matter of the statute was the regulation for the public welfare of a particular activity, for example. The sale of food and drink, strict liability was often intended irrespective of guilty knowledge. They went on to state further, that it was always pertinent to enquire whether or not putting the defendant under strict liability would assist in the enforcement of the regulations. If there was nothing which an accused person could do in order to promote observance of the regulations, then there would be no point in imposing strict liability as the effect could only be to find a luckless victim. Their Lordships then held that there was noting which the appellant could have done I this case. Indeed if the test of strict liability were applied a person who had been in Singapore lawfully would commit an offence under the Ordinance immediately on an order being made against him under section 9, prohibiting the entry of person into the colony even though his intention was to leave as soon he possibly could. The result would be that his mere passive conduct in remaining, which would be the mere continuance quite unchanged of his previous behaviour, hitherto perfectly lawful, would become criminal. Their Lordships felt that his could not have been intended and accordingly they allowed the appeal and quashed the conviction. Their Lordships did note, however, if the courts of Singapore had been of the view that unrestricted immigration was a social evil which it was the object of the Ordinance to control most rigorously their Lordships would hesitate to disagree since that was a matter peculiarly within the cognizance of the local courts. Mr. Moisey pointed out that his case had been cited with approval by Biron j. in Hamed Abdallah –v- R [1964] E.A. 270. That was a case dealing with a breach by the holder of a public service vehicle licence of a condition of his licence. The leaned judge quoted the case in order to support the view that strict liability could be contemplated because there was much that the licence holder could do in the organization of his business to ensure compliance

with the law. On the facts, with respect, I agree entirely with the decision in the case of Lim Chin Aik but is do not think it

strict applicable on its facts with the case under consideration. There a prohibitory order was made which was not published and was not in any way brought to the attention of the person whom it affected. The relevant regulations made no provisions for publication or notification. The person affected could not have complied with the law until the notice had been brought to his attention. In these circumstances it is difficult to conceive that he Legislature could have intended that an offence be committed. In this case, however, the regulations prescribing ports of entry were published. They were available if proper enquiries were made and this fact seems to me of vital importance in arriving at a decision as to whether or not the Legislature could have intended a breach of the regulations to be an offence even though there was no mens rea. I would also hold that at the present time the regulation of entry into Tanzania through proper ports is a subject which the Legislature did intend to control rigorously. Would think that the legislature is well aware that law enforcement officers do have a discretion which they can exercise in a proper case as to whether or not they should prosecute. I would also think that the Legislature is also well aware that Courts can impose nominal punishments in cases in which the element of blameworthiness on the part of an accused person is minimal. These discretions are a vital part of the entire process of law enforcement. In a field like immigration regulation where the stigma of criminal conduct, as the term is generally understood, would not apply to any breach, the Legislature could very well intend to impose strict liability knowing that the factors which I have already mentioned will be taken into consideration so that there would be no undue harshness in the application of the law. In this type of case also it would be extremely difficulty to prove in most instances that the person charged did intend to break the regulation. The defence that one was misled by authorities on the other side of the border or by one's ravel agents or by an Embassy or High Commission abroad would either e impossible to refute or else expensive if legally admissible evidence had

to be led. Accordingly I would hold that mens rea was not a necessary ingredient of the offence in this case and that on the facts admitted by the appellants the charge was proved. (3) “I think that the sentences imposed in this case were excessive. I am well aware that the security of this country along its southern border is a matter of concern. On the other hand, it seems highly unlikely that “infiltrators of European origin”, to use the magistrate’s words, could be effective instruments of subversion in the area. It would, indeed, be far too simple matter to spot such person and there would be little point in sending them across this way when they could be introduced unobtrusively through the regular points of entry at the regular times. The likelihood is that the appellants were that they said they were, persons traveling on a world tour to broaden their experience and working from time to time to get money for their expenses. It is not denied that immediately on entering Tanzania they reported to the nearest police station at Kyela. As I have already pointed out, although the Immigration Ordinance became effective on 14th April, 1964 no regulations prescribing

ports of entry were made until March, 1969. Up to that date it would appear that it would not have been an offence to have entered Tanganyika across the Songwe River. It is possible that word of the Regulations had not yet reached the Malawi side of the Border as a result of which there had been a number of instances of illegal entries beginning sometime in December last year. It is hoped that the publicity attendant on these cases will make the position clear so that there is no recurrence of these instances. A fine of Shs. 500/- would adequately meet the justice of the case. Accordingly I quash the sentence imposed on each of the appellants and order that they each pay a fine of Shs. 500/-“

272. Jayantilal Hemraj v. R. Crim. App. 64-A-70; 29/6/70; Bramble, J.

The appellant was an employee of the National Bank of Commerce. He was entitled to have a shamba boy at the expenses of the Bank. During the months of September and October 1969 appellant claimed and obtained from the Bank Shs. 200/- per month as

wages for his Shamba boy-complainant – whereas e paid him Shs. 90/- for reach of these months and retained the balance. Appellant was convicted on two counts of stealing cash, the property of his gardener. On appeal the High Court the appellant argued that the charge was wrongly conceived since the property was of the Bank and not of the garner. (b) that the complainant was short-paid because it was agreed that the appellant should retain the balance as savings for the complainant e.g. to pay dowry.

Held: (1) “All the facts show that the complainant was an employee of the bank with the right given to the appellant to hire and perhaps to fire him and as such the appellant as an agent of the bank. Since the vouchers were made out in the complainant’s name and the appellant signed and received the salary he acted for and on his behalf and the money became the property of he complainant. Section 262 of the Penal Code provides that: When a person receives either alone or jointly with another person, and money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received unless the money is received on the terms that it shall form an item in a debtor and creditor account, and that the relation of debtor and creditor only shall exist between the parties in respect of it”. “The above section contrasts with section 260 where if money it received with a direction to apply it to any purpose or pay to any person specified in the direction the money is deemed to be the property of the person from whom it was received. The evidence in this case shows no such direction”. (2) “It was further argued that, if it was held that there was a contractual agreement between the appellant and he complainant for Shs. 90/- per month, the extra 110/- could not be the complainant’s property. The appellant had the right to hire but no authority to fix the conditions of service. This was fixed by the bank and as soon as the complainant was employed he became subject to those terms and conditions. He may not have known all

his rights but it cannot be said that he was not entitled to them. Under these terms the bank paid him Shs. 200/- and it was not material that the appellant received the money.

If he told the complainant, that he received the money. If he told the complainant, that the received less he could properly be convicted of larceny of the balance." "The complainant denied making any admission but agreed that he went to the appellant to borrow Shs. 600/- before he started to work to pay bride price and the appellant old him that he could not give it before he started to work. A witness testified that complainant had told him that his employer was saving for him to make up Shs. 600/- but this he also denied". (3) "The prosecution", therefore, give two versions of an incident, one of them supporting the defence …. Taking the prosecution's case at its highest it must be said that it raised doubts on the point in issue. It will not have then discharged its burden and the doubt must be resolved in favour of the appellant. The finding that there was no arrangement between the appellant and the complainant for the payment of dowry is against the weight of the evidence." (4) Appeal allowed.

273. R. v. Kundasari Crim. App. 89-A-70; 29/6/70; Bramble J.

This is an appeal by the Republic against a decision dismissing four counts of Stealing by a person employed in Public Service contrary to section 270 and 265 of the Penal Code and five counts of Forgery contrary section 337 of the said Code. The respondent was a tax officer employed by the East African Community. It was alleged that he forged five cheques which he obtained as refund of income tax by signing certain forms in the name of ficticious persons and in the course of his employment and received the benefits from them. He was charged with stealing the sums stated on the cheques. The evidence shows that except in counts 2 and 6 the cheques were deposited toward respondent's account in the bank. In the case of count 2 it was proved that the appellant paid it in the course of the purchase of a pair of shoes. The witness, who testified to this fact said that he gave the respondent change but did not remember the amount. Nothing could be presumed against the respondent and there was no satisfactory proof that he did receive any change. As to count 6 there was evidence that the relevant cheque was paid towards the purchase of maize and that the vendor was holding Shs. 77/- change for the respondent. He had not delivered it when investigations started and the charge was brought. On the counts of forgery the court below examined the

question as to whether the handwritings on the forms were that of the respondent. There was confusion over the point of handwritings and no expert was called.

Held: (1) “While the learned Resident Magistrate did not specifically find that the respondent had not received any cash, this is supported by the record and it was upon this he based his decision. Two cases were cited by respondent’s advocate. The first was R. v. Davenport (1954) A. E.R. 602. In that case the facts were that he appellant received cheques signed by the directors of the company in which he was employed to pay to the company’s creditors and he used a number of cheques to pay his own creditors by making the cheques payable to

the creditors’ bankers and handing them to the creditors. It was held that the money which the appellant was charge with stealing was not the money of the company, but that of the company’s bankers and the convictions were quashed. A distinction was made in cases where the appellant had cashed cheques and the convictions for stealing were sustained. The second case Shir Kumar Sofat v. R (1957) E.A.L.R. p. 840 followed these principles. This was decision of the Supreme Court of Kenya but more recently a Full Court here cited the principles with approval in the case of Manubhai Patel v. R. (1970) H.C.D. 142. As a matter of Law, therefore, no case was made out against the respondent in any of the stealing charges and the dismissals were sound. The appeals must b and are accordingly dismissed”. (2) “As to the necessary ingredients of Forgery, that is the making of a false document and the intention to defraud or deceive, the learned trial magistrate did not make such findings facts as is necessary. He said “I think there is sufficient evidence to support all five counts.” This is not the sort of language that would have any meaning a criminal case, the finding of facts ought to be specific. There was proof that the names on the forms were fictitious; that money was paid out by cheques on the basis of the forms and that the respondent received the benefits of those cheques. In his unsworn statement the appellant admitted issuing the forms in question. I hold that the documents were false and that there was

an intention to defraud". (3) "Section 49 (1) of the Evidence act make admissible opinion evidence of handwriting by anyone acquainted with another's handwriting. Subsection (2) provides that: - For the purpose of subsection (1) a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when in the course of ordinary business, documents purported to be written by that person have been habitually submitted to him. The learned Magistrate rightly pointed out that none of these conditions were apparent from the evidence of either of the witnesses and he could not rely on the testimony of [first witness]. Moreover, he added that the handwriting differed from one claim form to another which would make it difficulty for a person inexperienced in the art of handwriting differed from one claim form to another which would made it difficulty for a person inexperienced in the art of handwriting to give conclusive evidence. He had reasonable doubt as to whether the respondent was the guilty party and resolved that doubt in his favour. The decision is fully justified from the evidence. This was a fit case in which a handwriting expert should have been called. In any case there should have been alternative counts of uttering". (4) "The appeals are accordingly dismissed".

274. Senge v. R. Crim. App. 82-D-70; 26/6/70; Makame, Ag. J.

The appellant was convicted of stealing from a motor car c/s 269(c) and 265 of the Penal Code and sentenced to six month's imprisonment. The complainant in this case was at the material time the Regional Commander for Singida. He told the trial court that on the 5th of November, 1979 he went into the Lucky Bar, leaving his

oar outside, unlocked and unattended. In it was a hunter's torch he had bough from one Walji, on the 18th of October, 1969. He saw the appellant as he the complainant was leaving the lavatory, and he recognised him because he had seen him several times before. The complainant drove home and on arrival there he discovered that his torch

was no longer in the car. The following day he reported the loss to Detective-Corporal Zeno, who went to a beer-hall in the evening of the same day and found the appellant in possession of a hunter's torch which answered the description the complainant had given to him. The appellant refused to say anything when asked about his possession of the torch. In defence the appellant make an unaffirmed statement in which he gave no explanation as to how he came to possess such a torch, which is normally used for game hunting. He merely told the court that he challenged the arresting officer to tell him how he could be sure the torch belonged to the Regional Police Commander. The State attorney did not support the conviction because he submitted that although the charge was laid under sections 265 and 269 the appellant was convicted under section 312, and the State Attorney felt that the alternative conviction would have been all right (under section 187 of the Criminal Procedure Code) but for the fact that there was no evidence that the appellant was first detained under section 24 of the Criminal Procedure Code, which is one of the conditions to be satisfied before a trial magistrate can properly convict under section 312. I searched the record

Held: (1) "The trial magistrate clearly convicted the accused under sections 265 and 269. he noted when passing the sentence:- "The offence has a maximum of 7 years' imprisonment" which is indeed the maximum sentence for a section 269 offence, whereas the maximum imprisonment for a section 312 offence is unspecified under that section and therefore is two years as provided for under section 35 of the Penal Code. I must therefore, with respect, disagree with the learned State attorney". (2) "I think it is opportune for me to observe, with genuine respect and that I have noticed the disquieting tendency of some learned State attorneys to be, or to appear to be unduly inhibited by the brief notes Judges make on admitting cases for appeal. These notes are useful in that they give an indication of the impression a Judge has formed on a first reading of he record and the petition of appeal. Such notes indicate one possible angle from which the appeal can be locked at, but they are not meant to prejudge the issues or to limit the learned State attorney's horizon of thought." (3) "This appeal must succeed, but for a different reason. It must succeed because in his judgment the learned resident observed "Although I am not quite satisfied as to the identity of the torch ….." in my view the whole case hinged on the question of identity, especially so in

view of the fact that the complainant did not obtain from the dukallah a receipt for he purchase of this torch until after it had been allegedly stolen. As the magistrate was not sure that the torch had been satisfactorily identified, he should not have convicted the appellant".

(1970) H.C.D.

- 264 –

4. Conviction quashed, sentence set aside. Torch returned to the appellant.

275. Yusuf s/o Issa V. R. Crim. App. 12-D-70; 17-6-70, Makame Ag. J.

Appellant was convicted on two counts of robbery c/ss 285 and 286 of the Penal Code, and sentenced to three years imprisonment on one count and to four years on the other, the sentences to run concurrently, and to twenty-four strokes of corporal punishment. After midnight on 23rd April, 1969, the appellant terrorized two barmaids after the closing of a bar at Temeke. He assaulted the first causing muscular strain all over her body, and took her sweater and her purse containing Shs. 40/-. Later, he assaulted the second, causing muscular strain stratches, abrasions and contusions to various parts of her body; attempted to have sexual intercourse with her against her wish; told her that he was "the Spear" and that he was not afraid of the police; and took her coat and Shs. 40/-. For the defence it was submitted (a) that the trial magistrate had no power to impose or sentence of more than two and a half years without confirmation by the High Court, (b) that the appellant's age (22 years) was such that a long term imprisonment in the company of hardened criminals would corrupt him, (c) that this was a first offence, and (d) that the value of the items was small. Appeal on sentence only.

Held: (1) "The Criminal Procedure Code (Amendment) Act of 1963 notes after the new Seventh Schedule that the old sections 7, 8 and 9 of the Criminal Procedure Code are amended so that, among other things, a subordinate court may pass up to five years for a scheduled offence, but: - "Notwithstanding the provisions of subsection (1) of this section, a sentence of imprisonment for a scheduled offence which exceeds the minimum term of imprisonment prescribed in relation to that offence by sub-section (2) of section 4 of the Minimum Sentences act, 1963, by more than six months ….. etc. (unless it is awarded b a senior resident magistrate) shall not be carried into effect ….

Etc. unless the sentence or order has been confirmed by the High Court". The trial magistrate in he present case was not a senior resident magistrate and the minimum term of imprisonment prescribed for robbery is two years. The maximum term the trial magistrate could impose without confirmation, therefore, was in each case the two years minimum plus six months, that is, two and a half years …. (However), since the matter has now come up on appeal the point would seem academic." (2) "Whether or not the substantive term of four years in this case is manifestly excessive must depend on the particular circumstances. I confess myself unimpressed by Mr. Kanabar's submission about the smallness of the value of the items stolen. In my view the more important consideration must be the force used to over-come the resistance the victims put up when they were assaulted. [His Honour then referred to the facts surrounding the robberies]. Behaviour like this has to be discourage, but four years is over-corrective,

taking into account the age of the appellant and the fact that he is a fist offender. I leave the sentence of three years on the first count undisturbed, but I reduce the second term of imprisonment by one year." (3) "The trial magistrate imposed the statutory minimum of twenty four strokes, but, with respect, he erred by attaching it specifically to the second count only. Section 10 of the Corporal Punishment Ordinance, Cap. 17, reads: - "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". Therefore I vary the award of corporal punishment so that the appellant shall suffer a total of twenty four strokes in respect of both counts. (4) "The end result is that the substantive term of imprisonment will be three years and the corporal punishment will be the same twenty four stokes".

276. R. v. Muller Crim. Rev. 20-D-70; 12/6/70; Makame, Ag. J.

The accused and the complainant were at one time business associates. Later they disagreed, the complainant alleging that the accused was not giving him fair share of

the proceeds from their milling machine. The complainant and his wife left the village and went to live elsewhere. On the 1st of August, 1969 the accused reported to the police that his store had been broken into on the 31st of July, and it is common ground that the store was indeed broken into. He said that a saw blade, drills and other carpentry tools were stolen. The police asked him if he suspected anyone, and the accused said it might be the complainant because they were on bad terms and also because he, the accused, had been informed that the complainant had been seen in the accused's village around the material time. The police investigated and found a saw blade in the complainant's workshop at Magamba. The complainant said the saw blade was indeed the accuseds, but that the accused himself had lent it to his niece, the complainant's wife. The complainant was none-the less arrested and detained for five hours. The accused was later convicted of giving false information c/s 1222 of the Penal Code and because he was fined only Shs. 50/-he was unable to appeal. On revision:

Held: (1) …." (I)t is not an offence to give false information to a person employed in the public service even if such information leads to any of the consequences set out in sub-sections (a) and (b) of section 122 of the Penal Code: It is not enough that the information is false. It has to be established that the person who furnished the information knew or believed it to be false. That has not been done in the present case. The accused did not volunteer the information nor did he say that he was sure the complainant was the culprit. The police asked him if he suspected anyone and he said he suspected the complainant, and gave reasons which in the circumstances were not unreasonable". (It has not been clearly established in the evidence that the information the accused gave to the police was false. The accused's assertion was not challenged in cross examination ….. I hasten to add

that I am not saying that the information the accused gave to the Police was true. What I am saying is that it was not satisfactorily proved to be false". (3) Conviction quashed, sentence set aside.

277. Nazir and Zulfiker V.R. Crim. App. 344-A-70; 16/2/70; Patt. J.

The appellants were convicted of rape. The complainant Miss Lyckstedt, came to Tanzania on 25th June, 1969 with a travel group shortly after her arrival she struck a friendship with one Liaquant and then both of them visited Moshi where on the first night they stayed at Y.M.C.A. They found the charges expensive, left their baggage at one Mission and began search for cheap accommodation. The appellants offered to assist them, and became close acquaintance of Miss Lyckstedt out, and drove her to the outskirts of the town near Karange Bridge. She in red where they were going, as there seemed to be no street lighting and they assured her that it was a road to the Mission. The vehicle stopped near the bridge and the appellant Nazir got out, as Miss Berit supposed, to see his uncle. But the engine was still running and the appellant Zulfiker drove the vehicle down a turning near the river in a bushy place before he stopped. Miss Berit was now sitting on the left front seat and Zulfiker got out and came round to her door which he opened. He had removed hi trousers and was naked from waist down. He then pushed Miss. Berit towards the steering wheel and a struggle ensued during which he pulled away her underwear. He was saying 'come on' but she did not, she says, agree to sexual intercourse. However Zulfiker overcame her and carried out the act. When he had finished he left the car and Miss Berit was arranging her clothing when the appellant Nazir came back and asking her what she had done, she explained that the appellant Zulfiker had raped her. Nazir asked if he could help her as she was crying and she replied she wanted to return to town. Nazir then said he would help her if she allowed him to have sexual intercourse. She refused but he then pushed her down drawing her legs out of the car. Nazir un-dressed and Miss Berit said he pulled her skirt off. She was at that time wearing a sweater and blouse, a skirt and a pair of stocking with knickers attached. The latter had been removed by the appellant Zulfiker and although she was crying, Nazir then completed his lust. Miss Berit alleged that during the second intercourse the two appellants had been communicating with each other in their own language. She had then collapsed and was crying. The appellants dressed and then took her back to the Mission where the Rev. Father gave them the luggage of Miss Berit and Liaquant. This appears to have been consisted of three smallish bags

which belonged to Miss Berit and one large bag which belonged to Liaquant. The appellants spoke well to the Father and although Miss Berit came out of the car ad greeted the Father, she did not make any complaint. At the Y.M.C.A. Miss Berit explained to Liaquant what had happened either in his room or outside and they decided to go to the Police Station. However at the petrol station the two appellants were seen again and as they called Liaquant over to talk to them,

Miss Berit returned to Y.C.M.A. Then Liaquate phoned the Police and the report was made. The Medical Officer found no marks of violence on any part of Miss Berit's body but took a swab which proved the presence of spermatize. The appellant Zulfiker denied having had sexual intercourse with her while appellant Nazir averred that he had intercourse with Miss Berit with her consent.

Held: (1) "The first ground of appeal was that the charge was improper for duplicity or misjoinder. The argument was that on any view of the case there had never been a joint rape. From the point of view of the defence, there could not have been a joint rape. Even if the defence facts had been established, but the issue of consent had been determined against Nazir, they would both have to be acquitted on the authority of R. v. SCARAMANGA (1963) 2 All E.R. 852. on the other hand, if the prosecution's case was accepted, then it was said that as Zulfiker had had remained alone in the car during the first alleged rape and then Nazir had returned and committed a second alleged rape, there were still two independent rapes which could not be jointly charged together. The point was not taken at the trial and therefore the learned Magistrate did not give his opinion whether the appellants had formed a common intent to commit rape when they drove Miss Berit to an isolated area near Karanga Bridge. From the evidence that Miss Berit understood that the aim of her journey was to collect the luggage and as the appellants knew where the Mission was, to drive her to such a place, would only appear consistent with the intent to be intimate with Miss Berit unobserved, in view of what took place. Possibly, however, they had hoped to achieve their purpose with her consent, but had gone too far when consent was refused. Assuming therefore that the

fact that hey drove Miss Berit to this place did not necessarily prove that they intended rape, (although of course it was highly suspicious), then it could be argued that possibly Zulfiker's first act was not carried out, with common intent. Nevertheless, when Nazir returned, he found Zulfiker half undressed and then according to Miss Berit forced her to have intercourse with him at a time when Nazir had finished, Zulfiker then wished to have a further act. Taking all these facts into account, it is difficult to see that Zulfiker was a mere by stander but a person who had joined in and formed the common intent with Nazir to rape Miss Berit on he second occasion. The charge did not particularize which act the prosecution relied upon. It simply said that he appellants "jointly and together (had) unlawful carnal knowledge of Miss Berit Lyckstedt without he consent". That sufficiently covered the least that could be said about the prosecution's case, if it was accepted." "All that I need say here is, that the conviction could be supported as a joint rape, at least from the time that Nazir returned to the car, an on this basis I need only say that no objection was taken to the two appellants being tried together ad I cannot see that there could be any embarrassment to the defence as a result of the nature of the charge." (2) "The issue between consent or force was narrow. She carried no mark of violence on her body … the burden of the appeal really attacks the finding that Miss Berit was a truthful witness, and the question of corroboration. The a background of the

Case did not allow any clear view that Miss Berit would certainly not have agreed to sexual intercourse with the appellants. She was a woman of 27 years of age, and on her own admission used to having sexual intercourse, at least in Sweden…. Although she had another "boy friend" at the time, she agreed to meet Liaquant. She had put herself in the hands of young men both Liaquant and Nazir being 21 years of age, and Zulfiker still younger (although I find it a little difficult to understand how Zulfiker was driving motor cars around Moshi in the way which he did if he was not yet 17 years) However that may be, all three men were much younger that Miss Berit. From these facts, it could well be suggested that she was as likely to have consented to sexual

intercourse as that she had not, and the learned Magistrate's point that she came from "a Permissive Society" does not seem wide of the mark. Miss Berit was asked in cross-examination about her sexual experience, but the learned Magistrate ruled that she need not answer the question if she did not wish to. Accordingly she did not. I agree with defence Counsel that that was an improper ruling as R. v. COCKCROFT 11, Cox, 410 illustrates. The questions were proper and in Miss Berit case the defence would be bound by her answers, without being able to call further evidence. It was a necessary point for the defence to illicit if they could how promiscuous Miss. Berit was. After all, if it had turned out that she had a tendency to nymphomania, the learned Magistrate might well have taken a different view. On the other hand, nothing very much may have come of her answers, and as she admitted that she had had previous sexual experience, and as the learned Magistrate describe her as coming from a "permissive Society", it does not seem that the answers must have taken the case much further. However, the possibility cannot be ruled out that when asked how many men she had had intercourse with, that if she had admitted a considerable number, the learned Magistrate might have entertained more doubt. The evidence then appears to me to have been equivocal as to the likelihood of her consent. She did not make any complaint when help was first at hand at the Mission." In my view the evidence relied upon by ….. the learned magistrate concerning her report and later antagonism towards the appellants did not necessarily show that her allegations were true. The learned Magistrate directed himself following the observations in ZIELINSKY v. R. (1950) C.R. App., and ALAN REDPATH v. R. (1962) 46 C.R. App. 319. The circumstances, in which a report is made, which general goes only to consistency, may also go to corroboration in certain cases. But on the facts of this case, it is my view that the nature of Miss Berit's report and her condition did not afford corroboration sufficient to show that her allegations were true. I do not say that they were not true, and the leaned Magistrate's view may well be right. But the evidence was in my opinion insufficient to prove beyond reasonable doubt that the charge had been made out. It was not a case where Miss Berit's allegations could safely be accepted without corroboration." (3) Appeals allowed, conviction quashed.

278. Musa and Ngozi v. R., Crim. App. 148-M-70; 11/6/70; Onyiuke, J.

The appellant were convicted of stealing by persons in public service c/s 270 of the Penal Code. 1st appellant, a juvenile, was sentenced to 2 years imprisonment and the 2nd appellant, an adult, was sentenced to 2 years imprisonment and the 2nd appellant, an adult, was sentenced to 2 years imprisonment and 24 strokes. The appellants were employed in the Electrical & Mechanical Division of the Ministry of Communications, Transport & Labour, Mwanza. When the appellants decided to steal, they approached the watchman to facilitate their access to the yard and bribed him in order to secure his cooperation. On 21st November the appellants told the watchman that they proposed to visit the yard at 9 p. m that day. The watchman contacted the police. Two policemen were detailed to the yard to lie in wait for the appellants. When the appellants emerged the watchman opened the gate for them. They entered the yard. When they returned to the gate they were challenged and searched by the policemen. Three spanners and a torch light were found with the 1st appellant. Both appellants were taken to the police station. Later the 2nd appellant accompanied by the 1st appellant took the policemen to the spot from which they hauled the items over the wall. The Ministry spokemen testified that "there was no procedure which would require the accused to go back to duty after office hours". However there was some discrepancies in the testimony given by the watchman and the policemen with respect to discovery of some items. On appeal to the High Court the defence agreed that (a) the magistrate failed to direct his mind to the material contradictions in the evidence of the two policemen, (b) The Magistrate having disbelieved the watchman's testimony in respect of how the starter and the propeller shaft came to be discovered, erred in relying on the remainder of this witnesses' testimony, (c) the magistrate misdirected himself in concluding that the appellants were the one who pointed out the place where the exhibits were found; and (d) the magistrate failed to apply the provisions of the Children and Young Persons Ordinance, Cap. 13 Supplement 56 in the interest of the appellant.

Held: - (1) "I agree that the purpose of pointing out contradictions in the testimony tendered by the prosecution is to weaken their case and to create doubts as to the guilt of an accused person. The effect of such contradictions would depend on their

seriousness and materiality. In this case 5 witnesses tendered evidence as to where and how the stolen items were recovered ….. it was only ….. the watchman who testified that the items were found in the possession of the appellants and were recovered from them. The position then is that all prosecution witnesses concurred that it was the appellants who pointed out the place….. the appellants admitted in their evidence that the items were recovered behind of the wall of the yart. Furthermore, there were other factors which pointed irresistibly to the guilt of the appellants. In these circumstances the guilt of the appellants. In those circumstances the discrepancies or contradictions in the testimony tendered by the prosecution were neither material nor capable of raising any doubt as to the guilt of the appellants.

The rejection of part of the testimony of the watchman does into necessarily make his whole testimony suspect, or discredited……. (2) "For purposes of sentence the 1st appellant must be regarded as a person under 16 years. Section 2 of Children and Young Person Ordinance, Cap. 13 define a young person as a person who is 12 years of age or upwards and under the age of 16 years ….. I am of the opinion that the purpose of s. 22(2) of Cap. 13 are to make prison sentence an inappropriate and unsuitable method of dealing with a juvenile delinquent. It permits the imposition of prison sentence, only as a last resort. I think that there must be something on record to show that the sentencing court has considered the provisions of s. 22(2) of Cap. 13 and its reasons for imposing a prison sentence instead of some other method authorized by law. In the instant case there is nothing on record to show that the learned magistrate considered the provisions of s. 22(2) of Cap. 13 and it cannot be assumed that he did so ….." (3) Only appeal against sentence by 1st appellant allowed.

279. Abdullah Hassani v. R. Crim. App. 237-D-70 24/6/70; El-Kindy Ag. J.

The allegation against the appellant was that while employed by the National Food Distributors he made a false entry on a cash sale receipt. He was charged with and

convicted for fraudulent false accounting c/s 317 (b) and (c) of the Penal Code and stealing by public servant c/ss 270 and 265 of the Penal Code. the case was tried by two magistrates one doing the prosecution case and the other the defence case as well as delivering judgment. During the trial the prosecution was granted leave to file a fresh charge against the appellant on appeal, the charge for fraudulent false accounting was held to have been misconceived.

Held: - (1) "I would respectfully agree with the learned State Attorney that the charge was misconceived. As the appellant was alleged to have made false documents with intent to defraud or deceive, the facts if proved would have mounted to forgery contrary to sections 333 and 335 of the Penal Code. it appears that the difference between forgery and fraudulent false accounting is that, in he former the document itself if forged, while in the latter it is the entering or omission to enter forged document in account books which is an offence. In this case, if the charge alleged that the appellant had entered or omitted to enter the details contained in the duplicate and triplicate in the account books, that would have been fraudulent false accounting. But here the charge alleged that the duplicate and triplicates were false documents then made with intent to defraud or deceive." (2) To file a fresh charge during a trial is permissible by section 209 of the Criminal Procedure Code but the accused must be told that he has a right to have the previous witnesses recalled. (3) It does not appear that the second magistrate complied with the provision of section 169 of the Criminal Procedure Code as amended by the Criminal Procedure Code (Amendment Act No. 10 of 1969. "This provision makes it mandatory for the

Taking magistrate to inform the person on trial not only that he was taking over the case but that the person on trial is entitled to ask the Court to recall all the witnesses who had given evidence previously. This court has held in the case of DAUDI RAPHAEL & MASANJA V. R Cr. App. No. 77/69 that the prerequisite to the second magistrate's exercising jurisdiction is the informing of the accused of his right and that if this is not complied with the second magistrate would have nor jurisdiction and the trial would be a

nullity. In this case, as the second magistrate had not complied with this provision, he had no jurisdiction to try this case and therefore the trial was nullity." (3) Appeal allowed.

280. Nderekeba and Mbogo v. R. Court of Appeal Crim. App. 64-D-70; July, 1970; Spry, V.P.; Law and Lutta, J.J.A.

The two appellants were charge with murder, convicted and sentenced to death. The deceased, Masurube, had a house on the land of his father, the second appellant, Mbogo. Mbogo wanted him to vacate the property and brought a case against him in the local court. They attended the court one day, but the case was not heard. After leaving the court, Mbogo with another of his sons Nderekeba, the first appellant, went to the market and drank pombe. The deceased also drank pombe, but not in their company. All three would appear to have been under the influence of alcohol. On the way home, the deceased met his daughter Ndayavungwa, who had been cultivating. They continued together and met Mbogo. He was unarmed, as was the deceased. A quarrel developed between them an they began struggling. Nderekeba arrived and struck the deceases twice on the head with a rungu. There was some discrepancy in the evidence. One of the discrepancies between the medical evidence and the evidence of the prosecution witnesses. According to the doctor who performed a post-mortem examination, the deceased sustained two injuries, either of which could have caused his death. One was a deep cut wound on the head caused by a sharp weapon and the other a fracture of the skull. The fracture of the skull is consistent with a blow from a rungu, but not one of the prosecution witnesses speaks of any sharp weapon having been used by anyone. On the other hand, Nderekeba said in his evidence that the wife of the deceases struck him (Nderekeba) with a hoe and then tried to strike him again but missed and accidentally struck her husband on the left side of the head. The appellants' counsel submitted that, Nderekeba came in answer to a call for help and found his father struggling with his brother, who was a bigger and stronger man; that his was not merely enough to constitute provocation but was enough to invoke the principle of self-defence: that a person is as entitled to kill to save, the life of his father as he would be to save his own life.

Held: (1) (a) [Regarding the defence of self-defence "As a general proposition, we would be disposed to agree but we do not think this argument is valid in the circumstances. It might have been different had the deceased been threatening Mbogo with a lethal weapon. As it was, both were unarmed. It should have been possible for Nderekeba to have separated the struggling men with

a minimum of force. We think the force actually used was clearly grossly excessive. (b) "We have considered Nderekeba's position also in the light of the medical evidence. The learned judge found as a fact that it was the injury caused by club that had caused death. With respect, the evidence did not justify that finding. We think the evidence would have justified a finding that Nderekeba struck a blow or blows when the deceased was alive and that blow or blows would, on the medical evidence, have resulted in death, whether, or not the deceased had also sustained the cut wound. In these circumstances, we think Nderekeba was guilty of manslaughter." (2) [As regards the case against Mbogo]. "The learned judge found that he had intentionally aided Nderekeba in assaulting the deceased and that he must have known that the use of the rungu would either kill the deceased or cause him grievous bodily harm. He based this finding on certain pieces of evidence. The first of these was a statement by the ten cell leader that when it was learned that the case could not be heard that day, Mbogo had made a remark suggesting that the deceased and himself should fight the matter out with spears. We think this is relevant evidence, as indicating a willingness to resort to force, but we think the weight to be attached to it is small, because when dispute flared up, Mbogo not only had no spear with him but was, b all accounts, unarmed. Secondly, the judge accepted the evidence of the deceased's daughter that Mbogo lay in wait for the deceased when he returned from market and then attacked him without any provocation. With respect, this is a serious misdirection. The daughter never said that Mbogo lay in wait; what she said was that they found him sitting under a tree – a very

different matter. Also, she never said that Mbogo attacked the deceased; what she said was that he threatened him. Thirdly, the judge accepted that Mbogo not merely called to Nderekeba for assistance but specifically asked him to bring a rungu. He was entitled to reach this finding, because it is based on the evidence of the daughter of the deceased, but he made no comment on the fact, which is surely significant, that the widow of he deceased was present and heard Mbogo calling for Nderekeba, but made no mention of any request for a rungu. Finally, the judge drew an inference from the fact that Mbogo was said to have driven back the peopled who wished to separate the fighters. With respect, think this is inferring for too much. If Mbogo had intended to ambush the deceased, it is surprising that he had no weapon. There is evidence that he abused and threatened the deceased, and it will be remembered that both were in drink, but none that he attacked him. When he was overpowered by the deceased, a more powerful man, he called in Nderekeba for help and he may have asked him to bring club. There is nothing here to suggest any premeditated plan, indeed the indication are all to the contrary. The only basis, then on which the conviction of Mbogo could be sustained is that he failed to dissociate himself for what Nderekebia was doing and, on the contrary, tried to prevent interference. We think it would be carrying the doctrine of common intention much too far to hold that it applies here, when Mbogo had called for help and in the course of a brief drunken brawl incidentally rendered Nderekeba some assistance. There is nothing, however, to show

That Mbogo had any reason to anticipate the violence with which Nderekeba struck the deceased and it will be remembered that the assault by Nderekeba was not a sustained beating but two blows struck quickly. We are not satisfied that the evidence shows Mbogo to have been quality of any offence. (3) Accordingly, we allow the appeals of both appellants quash their convictions of murder and set aside the sentences of death passed on them. In the case of Nderekeba, we substitute a conviction of manslaughter and imposed a sentence of five years' imprisonment. In the case of Mbogo, we substitute an acquittal." (4) Appeals allowed.

281. Sebastian Gilbert v. R. Crim. App. 209-M-70; 23/7/70; Mnzavas, Ag, J.

The appellant was charged with and convicted of unlawfully causing grievous harm c/s 255 of the Penal Code and was sentenced to 3 years imprisonment. The facts alleged that he had punched, pulled and kicked the complainant fracturing her rib and rendering her unconscious for 3 days. When the charge was read out to him the appellant said - "It is true I injured her unlawfully". This was entered as a plea of guilty. The appellant was recorded as having said – "Facts are correct" after the facts were presented by the prosecution. The issues raised on appeal were: (1) whether the words of pleas as recorded amounted to a plea of guilty of an offence under section 225 of the Penal Code; (2) If not, whether the position was remedied by the facts stated by the prosecution and admitted by the accused and whether these do constitute an offence under section 225 of the Penal Code.

Held: (1) "The appellant is charged with a special category of assault i.e. assault which has caused the complainant grievous harm. His plea of 'It is true I injured her unlawfully' can only be interpreted to mean that the appellant admitted having unlawfully assaulted the complainant and causing her to suffer some injury. The appellant did not, from the above words, admit to have caused the complainant a specified type of injury leave alone grievous bodily harm. Her plea was clearly equivocal". (2) "The next question I have to decide is whether the facts as adduced by the appellant constitute the offence of assault causing grievous harm under section 225 of the Penal Code. if they do, does this necessarily remedy the equivocal plea? As I have already stated above the appellant admitted that h assaulted the complainant who fell down …. Grievous harm is defined under section 5 of the Penal Code as 'any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense' are the facts in this case compatible with the above definition? ….. "As the definition of grievous harm shows, a harm to be classified as grievous 'it must amount to a maim or amount to a dangerous harm or' …… in the present case the facts which were admitted by the

appellant show that the complainant, over and above sustaining fracture of her right 8th rib,

She remained unconscious for 3 days and remained in hospital for a total of 28 days. The attack clearly endangered her life and in my view amounts to dangerous harm and the therefore within the definition of grievous harm. The facts clearly constitute an offence under section 225 of the Penal Code" (3) "It is not for the medical officer to decide whether the harm s grievous harm. This is the duty of the court." (4) The appellant having admitted the facts the final question to be decided is whether admission of the facts remedies the equivocal plea of guilty. In Paul s/o Mathias vs. R. [1970] H.C.D. 209 Georges, C.J. when dealing with the question whether accused's plea was unequivocal said: Quite often an equivocal plea ….. can be remedied by a full statement of all the facts needed to constitute the offence, and an admission by the accused person that these facts are true. [See also R. v. bison s/o Mwanga 2 T.L.R. 31]……. "From the above authorities, and having found that the appellant admitted the facts which constitute the offence: I find that the equivocal plea of guilty to causing grievous harm was remedied by the facts". (5) Appeal dismissed.

282. Chacha v. R. Crim. App. 247-M-70; 10/7/70; Mnzavas, Ag. J.

The accused was charged with and convicted of cattle theft c/ss 265 and 268 of the Penal Code and sentenced to 3 years imprisonment. The complainant's 16 head of cattle were stolen from his kraal. The appellant was one of the suspects. His kraal was inspected and one cattle was identified among his herd as one of the sixteen cattle stolen from the complainant. In his defence he admitted that the cattle was not his property and that he did not know how it came to be in his boma. This was as stated above 5 months after the theft. In his judgment the learned Resident Magistrate said – "The accused has not explained as to how he came into possession of the head of cattle which was identified as belonging to Soka, the complainant. This fact of possession would certainly be within the special knowledge of the accused who is

required to give some explanation as to how he came into possession of the cow belonging to Soka. Of course the accused not been persuaded by accused's denial that he is telling the truth".

Held: (1) "From the above it is evident that the learned resident magistrate convicted the appellant because, as he said in his judgment, he was not persuaded by accused's denial that he did not steal the head of cattle. This was clearly misdirection as to the burden of proof in a criminal charge. In a criminal case the magistrate does not have to accept the word of the accused as truthful before he acquits him." "The learned magistrate did not have to be persuaded by accused's denial that he did not steal the cattle before he found him not guilty of the offence. If he entertained some doubt the doubt should have been resolved in favour of the accused. As it is not clear that the magistrate would have come to the same conclusion had he not misdirected himself as to the burden of proof the conviction cannot be

supported". (2) "As to the alternative verdict of receiving suggested by the State Attorney it is in evidence that the appellant who admitted that the head of cattle was not his property, told the court that he did not know how the cattle came to be in his kraal. This explanation cannot, by any standards, be said to be a reasonable explanation taking into account the fact that the cattle had been in the accused's kraal. This explanation cannot, by any standards, be said to be a reasonable explanation taking into account the fact that the cattle had been in the accused's kraal for about 5 months. The charge of cattle theft is under section 187 of the Criminal Procedure Code, reduced to receiving stolen property c/s 311 of the Penal Code". (3) "The conviction and sentence for cattle theft is therefore set aside. So is the order for compensation. The appellant, a first offender is to suffer 12 months imprisonment only".

283. Makambila v. R. (PC) Crim. App. 202-M-70; 6/7/70; Mnzavas Ag. J.

The appellant was charged with house breaking c/s 294(1) of the Penal Code. The complainant gave an account as to how he left his house to visit a friend and how, while

absent, the appellant entered his house and took away one bucket, one cooking-pot and one panga and three tins of potatoes. The appellant on being asked whether he admitted the facts said: “The facts he has stated are true”. There after the primary court magistrate proceeded and convicted the appellant as charged on his own plea of guilty. In mitigation the appellant said that some of the things belonged to him and some to his father …. And agreed that he did make a mistake in taking the things without the permission of his father. After this the court sentenced the appellant to 2 years imprisonment and 24 strokes corporal punishment. Over and above the Appellant’s defence of claim of right, there was also a total lack of evidence as to whether the door to the house was locked or was only ajar when the appellant entered the house and took the things.

Held: (1) “The appellant’s defence of claim of right was not rebutted. Having so found the matter squarely falls under Section 9 of the P.C. which says inter alia “A person is not criminally responsible in respect of an offence relating to property, if the act done….. by him with respect to the property was done in the exercise for an honest claim of right without intention to defraud”. In this case there is no evidence to show that the appellant had no right to the property which he honestly believed to be his father’s property. Nor is there evidence of intention to defraud (2) “As to the alternative charge of entering a dwelling house with intent to commit a felony c/s 295 of the Penal Code …. I fail to see any evidence to support this lesser charge ….. Before the appellant is convicted of this alternative offence it must be proved that at the time of entering the hose he had already formed the intention to commit a felony therein. There is no such guilty intention. On the contrary as I have already stated he believed at the time for entering the house that he had a bona fide claim of right to take the property he took”. (3) The conviction quashed and the sentence set aside.

(1970) H.C.D.

- 276 –

284. Mayanga v. R. Crim. App. 252-M-70; 10/7/70; Mnzavas, Ag. J.

The appellant, lawfully married to one Amina, was convicted of assault causing actual bodily harm c/s 241 Penal Code and sentenced to 9 months imprisonment. On 1.3.70

the appellant came home at 9. a. m. and found Amina missing. He started looking for her in the vicinity carrying with him a stick. As he was approached a bush near his house he saw Amina with one Mereka, the complainant, in flagrante delicto in the bush. The complainant tried to run away but accused caught him and struck him with the stick he was carrying and thereby causing him to suffer a wound 3" X ¼ X ¾ on his left paratal region and contusion on the left shoulder and left knee. The appellant also assaulted Amina with the stick and as a result she sustained abrasions on hr left buttock thigh and right foot.

Held: (1) "As it was held in Fidel Nyembe v. R. [1966] H.C.D. 34 provocation cannot justify an assault, although the provocation act can be taken as a mitigating factor in so far as sentence is concerned". (2) "In the present case the appellant found the complainant in the act of adultery with his wife; this was an affront of so grievous a nature as to entitle the court to excise leniency in sentencing the accused. In my view, and as agreed by the State Attorney, the sentence of 9 months imprisonment, in a case of this nature, is manifestly excessive. The sentence is accordingly reduced to such term of imprisonment as would result in the immediate release of the appellant". (3) Appeal against sentence allowed.

285. R. v. Anyambilile Crim. Sass. 21-Tukuyu-70; 20/3/70; Saidi, J.

The accused was convicted of murder. The deceased was a notorious thief and on the material night had employed tricks to create opportunity so that he could steal from the accused's shop. He first set fire to a kitchen of one Loti, accused's neighbour. Whereupon the accused was hurried out to help his neighbour. Meanwhile the deceased stole number of things from the accused's shop. Later the deceased was caught by the accused and was tied by the hands and legs with a piece of wire. The accused and others then gave a good amount of beating to the deceased. The accused then placed the deceased's right arm on the ground and tried to cut it with the how. As the accused did not succeed in cutting off the deceased's arm he brought the stone, placed the arm of the deceased on the stone, and cut it off with the Hoe. After this the accused went into the shop and brought out bread and soda water and ate and drank. Thereafter he said he would go to report to the police, and went on his bicycle. The

decease was left lying down bleeding, and he bleed to death that same night. The accused returned at about sunrise with police, to find that the deceased had died. The Counsel for the accuse submitted (a) that the accused had acted under provocation that he did not intend to kill the deceased but merely wanted to punish him, and that he had by mistake cut the deceased's right arm with the hoe

While he was aiming a blow at him with a stick after he was incensed by finding his radio damaged….. that the acts of the deceased in firing the kitchen, luring the deceased from his shop, stealing his radio and other articles, running away with these articles, and damaging the aerial of the new radio the accused had bought that same day, were all provocative acts and (b) that the facts establish the offence of manslaughter and not murder. Although four assessors were of the view that the accused could not be found guilty of murder as it appeared to them that he had been seriously provoked by the deceased in the way the deceased came to his shop, lured him out after setting fire to a nearby kitchen, stole his radio and other articles, ran away with them and had to be chased and caught, and dropped the radio and damaged it.

Held: (1) "In Tanzania as in many other African countries there is a deep-rooted prejudice and contempt in the minds of the people against thieves, so that serious beating or even killing of thieves is not taken as an offence. It is with this outlook the assessors have approached the case. They blame the deceased who was a thief, and can see nothing wrong with what the accused did in cutting off the arm of a thief who had been overpowered, arrested, tied by both hands and legs and thrown on the ground like an animal for slaughter. It is true that thieves are a nuisance to society and do so often cause trouble and inconvenience to their victims. But we must not forget that they are human beings and cannot be treated like animals. Cruelty to animals also is forbidden and punishable at law." (2) "If the accused had only wanted to punish the deceased he would have tied the arm to stop the bleeding as soon as he saw the bleeding, if it s true that he had aimed a stick blow at him but found that he had seriously injured him with the hoe …. It is obvious that the accused had cut off the

deceased's arm deliberately and was quite happy with having done so. He clearly knew what would happen to the deceased, i.e. he would bleed to death from the cut wound … "I regret I am unable to agree with (the assessors on the issue of provocation)". The provocation is alleged to have been given by the damage to the aerial of the accused's new radio. In Yusuf v. R. (1952) 19 E.A.C.A. 249 it was held that the question of provocation does not raise in the case of wrongful acts done to property. The main ground of provocation alleged by the accused is the damage to the aerial of his new radio. Quite frankly, the damage to the aerial of the radio could not give the accused such provocation as would constitute legal provocation under section 202 of the Penal Code. Here legal provocation would be a wrongful act or insult done to a person and not to property ….." (4) Accused convicted as charged.

286. Manasse v. R. Crim. App. 219-M-70; 1/7/70; Onyiuke, J.
The appellant was convicted on 2 counts (a) for failing to stop for police signal c/s 56 (h) and 70 of the Traffic Ordinance, Cap. 168 and (b) for corrupt transaction with agent c/s 3(2) of the Prevention of Corruption Ordinance, Cap. 400. The appellant's main ground of complaint was that a signal was given to him to stop within the meaning

of section 56(h) of the Traffic Ordinance. The evidence on which the conviction was founded was tendered by Police Corporal Kitande and is as follows: - "I am a police corporal, Geita. My duties include arresting charging offences. On 4/3/70 I was at Busigi with Senior Inspector Mchole. We were in a police land rover. We saw a bus MZE 3 Ford. I was in uniform. I suspected accused that he was carrying excess passengers. I signaled accused to stop. He never stopped. I chased accused and I met him at the ferry. I told him I was charging him'. The evidence tendered in support of the 2nd count was that on 28/3/70 the appellant went to Kitanda's house, but he was not in. appellant was treated to tea by Kitande's wife. He then gave her a parcel which contained 4 tea cups and saucers. According to Kitande appellant later told that he had brought the parcel as a present and asked Kitande to do him a favour in his case.

Held: "It is my view that it is not enough for a police officer to state that he signaled an accused driver to stop. He must adduce evidence from which the court can infer a proper signal was given and the accused saw it or ought to have seen it. In other words, there must be evidence to who that the signal amounted to an order to stop and that it was properly communicated to the accused …." (2) "I am of the view that it cannot be said that the intention has been proved beyond reasonable doubt in the sense that the inference to be drawn from the appellant's statements leads irresistibly to the conclusion that the appellant gave the present so that he should not be charged with a traffic offence. I am aware of the decision of Mustafa, J. (as he then was in Amir Nathoo v. R. [1970] H.C.D. No. 51. in that case the accused gave 800/- to the Regional Education Officer as an inducement 'so that the said Education Officer would give him the examination papers for Standard VII for 1969 at which his sister was a candidate'. The accused in that case stated, in his plea, as follows: "It is true I gave 800/- to Mr. Percival Maridadi so that he would release the 1969 Standard VII examination papers to me for use by my sister Naaz Nathoo'. This was entered as a plea of guilty. On appeal it was contended that the plea was equivocal in that he did not admit that the 800/- had been given corruptly. The learned Judge held that 'it is inconceivable appellant could have though the Regional Education officer could give him the said examination papers other than dishonestly or in a corrupt transaction'. In this case the statements made by the appellant were too ambiguous and equivocal to justify the inference that the present could not have been given other than dishonestly or for a corrupt transaction ……" (3) Appeal allowed, appellant acquitted and discharged.

287. Dhirani v. R. Crim. App. 426-M-70; 6/7/70; Mnzavas, Ag. J.

The appellant was convicted of causing death by dangerous driving and sentenced to $2^1/_2$ years imprisonment. The counsel for the appellant applied for bail on the ground that the prospects of the appeal against conviction being successful were overwhelming. The contended that the Magistrate misdirected himself by not taking into account

the discrepancies in the evidence given by the prosecution witnesses – in that he thoroughly relied on the evidence adduced by eye witness but failed to take into account the discrepancies in their evidence. This misdirection, e argued was fatal to the prosecution case and that the accused should have been acquitted of the charge. Touching on the question of alleged discrepancy the state attorney was of the view that the magistrate gave thorough and adequate analysis as to why he did not think that the discrepancies were fatal to the prosecution case.

Held: (1) "I refer to the case of HASSAN WALJI VS. R (1968) H.C.D. Case No. 174 in which Georges C.J. said and I quote ….' 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 the appeal has an overwhelming chance of successes and the test is not met 'where an argument in the facts needs detailed references to the text of the evidence or the judgment to support it'. It is clear that it has been established by a very long unbroken line of authority that bail pending appeal u/s 321(1) (a) of the Cr. Procedure Code should only be granted where there are overwhelmingly good prospects of success on appeal against conviction because of exceptional and unusual reasons…." (2) "In this case, the arguments need detailed references to the text of the evidence as well the judgment … and it cannot be said with any amount of certainty that the appeal has overwhelming chance of success." (3) Application denied.

288. Kibodya v. R. Crim. Rev. 35-D-70; 15/7/70; Makame, J.

The accused was the Acting Director of the Institute of Education at the University College. He was convicted of stealing by person in public service c/ss 265 and 270 of the Penal Code and was sentenced to a substantive term of imprisonment for two years and the statutory minimum of twenty four strokes of corporal punishment. After serving for five and a half months and receiving the first instalment of 12 strokes, he wrote to say that it had been brought to his attention that this case did not fall under the

Minimum Sentences act, 1963. the matter, therefore, came up to the High Court by way of revision.

Held: (1) "…..I am satisfied that the accused was properly convicted and that his case comes under the Minimum Sentences act, 1963. The charges were under sections 265 and 270 of the Penal Code. The Written Laws sections 265 and 270 of the Penal Code. the Written Laws (Miscellaneous Amendments act of 1968, 1st Schedule, adds to the definition of a person employed in the Public service 'Any person employed by or in the service of the Community or any corporation within the community or any institute of the community'. The University College of Dar es Salaam Act, 1963 assented to on behalf of the east African Common Services Organisation, leaves me in no doubt that the University College of which the institute is a part was an institute of the Common Services Organisation and at the material time, of the Community. And further, higher education and research which are among the

Things the University College was created to provide are among the aims of the community. (2) "Moreover, even if one could argue, and in my view one cannot, that the University College and so the institute of which it is part, is not a Public Service as defined above, the accused will still not escape the provision of the Minimum Sentences Act because he will clearly come under the schedule to the Minimum Sentences act part 1 item 2 for the reason that he would be a servant employed by a 'charity'. means 'Any fund or organisation for the relief of poverty, the advancement of education, the alleviation or prevention of sickness or mitigation of the consequences of disaster'. There can be no argument but that the institute of education comes under 'charity'" (3) "The Minimum Sentences act does not make exceptions for people with brilliant academic careers. In the circumstances, I am compelled to confirm the sentence imposed by the trial magistrate because although the accused is a first offender the sum he stole is well over Shs. 100/-."

289. Tatu Taijiri v. R. Crim 335-D-70; 24/6/70; El-Kindy, Ag. J.

The police were looking for stolen cattle. When they arrived at Mpembe Village they saw the appellant driving a heard of cattle. They stopped the appellant for the purpose of inspecting the herd; since it was dark the appellant was ordered to drive the herd to the police station for examination. The appellant, it was adduced, gave one Inspector Timothy Shs. 100/- as an inducement or reward for Timothy's not arresting or taking him to police station on suspicion of cattle theft. The appellant was convicted of corrupt transaction c/s. 3(1) of the Prevention of Corruption Ordinance Cap. 400. On appeal it was argued that the magistrates wholly elide upon projection witnesses and did not take into consideration the defence evidence.

Held: (1) From (the) evidence it is clear….. that the appellant was not arrested, as the charge sheet suggested, now was he suspected of any offence although the police officers wanted to check his herd …. The appellant offered him one currency not of 100/- to induce him to release him, but specifically… So that he is not taken to police station. I would agree that tit appears that there was no reason for the offer of money since he was neither arrested nor suspected of specified offence ….." (2) "The main ground of appeal is not lack of evidence on which such conviction could have been based, but on the proposition that the learned magistrate had misdirected himself on this approach and reasoning in this case. The particular which is alleged to contain the misdirection is this:- 'Accused admits that it was his first time to meet Inspector Timothy. That being so it would be difficult for (him) to fabricate a case against accused without any reasons. I do fine that inspector Timoth. That being so it would be difficult for (him) to fabricate a case against accused without any reasons. I do find that Inspector Timothy could not fabricate a case against accused and he has told the truth. I find no substance in accused denied. I convict the accused as charge." Taking the approach of the learned magistrate as it stands, it seems to me that the approach is not correct as the reasoning is not necessary one. To say that because there were circumstances which made it difficult for a witness to tell lies against an accused, then that witness is telling the truth and the defence has no substance, is clearly an incurably wrong approach. The reasoning clearly shows that the consequences are not necessary. At it has been held by this court in the case of Lokhart – Smith v. R. (1965) E.A. p. 211 at 217

And the case of Moshi d/o Rajabu 1967 – 68 H.C.D. No. 384, this approach is incurably wrong and cannot be corrected at this stage as that would amount to resumption of the magistrate's job. Furthermore… The learned magistrate did not consider the evidence of the defence witness. His evidence contradicted the evidence of the prosecution witnesses in a material way, as he said he did not see any money being given to the police officers. This court cannot imagine what would have been the effect of the evidence of this witness had the learned trial magistrate considered it. I would agree that there was more than enough material on which the conviction could have been upheld had the learned trial magistrate approached the case correctly. Having arrived at this conclusion, I find there is no need to consider the alternate arguments on the question of the sentence." (3) Appeal allowed.

290. Rashid v. R. Crim. App. 83-M-70; July, 1970; Onyiuke, J.

The appellant was convicted on two counts. The first count charged him with resisting lawful arrest and the particulars of offence were that the appellant "on the 22nd day of November, 1969 at Popatia Bus-stand, Kigoma, did unlawfully obstruct Police Constable Paulo in due execution of his duty by assaulting him on his chest with fist while he was arresting him with offence of being a rogue and vagabond", contrary to section 243(a) and (b) of the Penal Code. The second count charged him with being a rogue and vagabond contrary to section 177, subsections (3) and (4) of the Penal Code. The prosecution story was that a complaint of stealing was lodged with the police by one school boy, whereupon the police began the investigation. The accused gave some contradictory excused for his being there and then started to run away. When cought he assaulted on constable but was immediately overpowered by another policeman. The appellant in his defence stated: "He told me to stand up and we should go to police

station. I asked why. He just insisted. I stood up and refused to go to police station until he told me why …. "On appeal to the High Court.

Held: (1) "I deal with count (2) first. This count as the statement of offence shows combined subsections (3) and (4) in one count and the particulars incorporated some ingredients of subsection (3) and some ingredients of subsection (4). I do not think it is open for the prosecution to create such a hybrid offence. It only leads to vagueness and uncertainty as to the offence charge …. Subsection (3) provides that "every suspected person or reputed thief who has no visible means of subsistence and who cannot give a good account of himself shall be deemed to be a rogue and vagabond and shall be guilty of a misdemeanor." It is not enough that a person cannot give a good account of himself or has no visible means of subsistence to be guilty of an offence under this subsection. The prosecution must, in addition, prove he is a suspected person. It cannot prove that a person is a suspected person. It cannot prove that a person is a suspected person within the meaning of the subsection by merely showing that he cannot give a good account of himself. The subsection does not say that every person who has no visible means o subsistence or who cannot give a good account of himself shall be deemed to be a rogue and vagabond. A person who cannot give a good account of himself or who has no visible means of subsistence must be somebody who has become suspect by some antecedent conduct. The suspicion which makes a person a suspected person must be suspicion arising from acts antecedent to the act occasioning the arrest. In R. v. MOHAMEDI s/o MZEE [1968] H.C.D. 148 it was held that in a charge under subsection (4) of section 177 of the Panel Code the prosecution must give particulars as would lead to the conclusion that the accused was there for an illegal or disorderly purpose. It was held that particulars of offence which merely stated that the accused were "found wandering upon the highway at such time and under such circumstances as to lead to the conclusion such persons were there for an illegal or disorderly purpose" are not sufficient

particulars under that subsection. This decision has not been heeded in the present case and the same vague and imprecise particulars were stated in the particulars of offence. It is hoped that those responsible for drafting charges would bear the above decision in mind while drafting particulars of offence under section 177(4) of the Penal Code. There is, besides, not sufficient material on record to sustain the conviction under section 177(4) of the Penal Code ….” (2) “It is clear the appellant was never told why he was being arrested”. A person who is arrested without warrant is entitled to be told why he was being arrested. A person is entitled to know on what charge or suspicion of what crime he is arrested. This is the general rule. The rule does not however apply where the circumstances are such that he person arrested knows or must know the general nature of the alleged offence for which he is arrested or detained; nor does it apply where the person arrested himself creates a situation which makes it practically impossible to inform him e.g. by immediate counter-attack or by running away. (See Biron J. in MZIGE JUMA. V. REPUBLIC [1964] E.A. Law reports p. 107) in the present case, the point was not considered by the learned magistrate. I have then to review the evidence on this point to determine the issue. It appears from the record especially the particulars of offence that the appellant was arrested not for stealing or for being suspected of stealing (the) suit case …… but for being a rogue and vagabond. It seems to me that (police constable) at the time of arrest did not quite make up his mind why he was arresting the appellant and therefore could not tell him the reason for the arrest …. A person is entitled to be told the reason for his arrest unless the rule is excluded from applying in a particular case by circumstances which I outlined above and which they do not exist in this case. The appellant was therefore, in the circumstances, in the absence of a reason being given him for his arrest, entitled to defend himself”. (3) Appeal allowed.

291. Jaki and others v. R. Crim. App. 230, 231 and 232-M-70; 29/7/70; Onyiuke, J.
The three appellants were jointly charged with and convicted of the offence of obtaining money by false pretences c/s 302 of the Penal Code. the appellants approached the complainant and told him they had secondhand clothes for sale and showed him samples. The complainant was a dealer in second-hand clothing. The appellants further

stated that the second-hand clothes were at Gungu Village and gave their price as Shs. 1000/.Thereupon the complainant produced Shs. 100/-. And handed it over to the ten-cell leader who then handed it over to the 3rd appellant. The complainant and 1st appellant then left for Gungu village. At Gungu the 1st appellant could not produce the clothes and attempted, in fact, to run away. The complainant held him and they returned to ten-cell leader's house without any clothes. While the complainant and 1st appellant were away, the 2nd and 3rd appellant left the ten-cell leader on the pretext of going to answer the call of nature, and disappeared. The appellants were later arrested and charged of obtaining Shs. 100/- by false pretences. They denied receiving any money or offering to sell any clothes

to the complainant. They were convicted of the offence. On appeal to the High Court the only question was whether the existence of a contract of sale between the appellant and the complainant could save the appellants from being criminally liable for the false pretences, on the basis of which, the money (Shs. 1000/-) was parted with.

Held: (1) "I am of the view that the existence of a contract of sale did not negative their criminal liability for false representations which induced the complainant to part with his money. In REGINA v. KENRICK [1843] 5 Q.B.D. 49 it was held that a false pretence, knowingly made, to obtain money was indictable, though the money was obtained by means of a contract which the prosecutor (complainant) was induced by the falsehood to make. In that case the accused persons had conspired to make a representation, knowing it to be false, that certain horses were the property of a private person and not of a horse-dealer, thereby inducing the prosecutor to by the horses. It was held that proof of those facts was sufficient to sustain on indictment for obtaining money by false pretences". (2) Appeal dismissed.

292. Harji Govind & Others v. R. Crim. App. 91-A-70; 14/8/70; Bramble, J.

The four appellants, partners in a firm, were jointly charged and convicted of two counts (a) failing to pay the Fund within the prescribed period statutory contributions contrary to

section 15(2) and 38(1) (d) of the National Provident Fund Act, and (b) failing to have employers registered with the Fund as a result contra regulation 6 of the National Provident Fund (General) regulations and section 38 (1) (f) of the National Provident Fund Act. They were fined Shs. 50/- on each count section 8 of the National Provident Fund Act inter alia empowers the Minister by order in the Gazette to declare any employees or category of employees to be registrable as members of the Fund: and any employer or category of employers to be contributing employers. The appellants admitted that there were two persons in their employ for more than seven years and that a third person, an Asian was permanently employed. There was evidence that a boy had come to learn tailoring as an apprentice. The apprentice stated that he wanted to learn the job and was not being paid. On appeal to the High Court.

Held: (1) "The main question was whether the appellants had four employees which would make a firm a contributing employer in accordance with the provisions of Government Notice No. 39 of 1968. The relevant definition of employee is: _ any person who is employed in Tangayika under any contract of service or apprenticeship with an employer whether by way of manual labour clerical work or otherwise and howsoever paid, such employment not being one of employment as a member of the crew of any ship: 'Paid' means paid in money or money worth. From the above it cannot be said that the apprentice was a temporary employee for the purposes of the act since he was not paid. While temporary and exempted employee are to be taken into consideration in fixing the number of employees the firm could only

be said to have had three employees and as such would not be a contributory employer. The learned magistrate misdirected himself on this point". (2) "Since the two charges were based on the fact that the appellants' firm was a contributory employer the misdirection would lead to injustice and I allow the appeals and order that the fines be refunded, if they have already been paid".

293. Deushanker v. R. Crim. Case 7-D-70; 25/5/70; El-Kindy, Ag. J.

The accuse was convicted on his own plea of guilty for theft of Shs. 16,690/10 c/s 265 Penal Code. This money was collected by the accused in his capacity as Court Broker for Singida Region in respect of various civil cases. He was committed to High Court for sentencing as the District Magistrate was of the view that he did not have sufficient power to impose adequate sentence. In High Court it was argued that the offence be treated as a simple theft and the Court should not apply the Minimum Sentences Act.

Held: (1) "Admittedly the section of the law referred to in the lower court is theft under section 265 of the Penal Code, but the particulars, in my view, clearly show that the intended charge was theft by public servant c/ss 270 and 265 of the Penal Code …. I consider that in fact the accused was charged for theft by public servant, but the section of the law omitted to state that it was also contrary to section 270 of the Penal Code. Therefore, I exercise my powers of revision, and amend the reference to section of the law so as to include section 270 of the Penal Code….. I would …. Respectfully disagree with the defence counsel and hold that as this was in fact a charge of theft by public servant, the offence fell under the Minimum Sentence Act". (2) (On the issues of the deterrent and exemplary sentence) "Accused is a business man, and I am told that he used part of this money to pay for instalments of his land rover, and part of it to pay for the wedding expenses of his daughter. I do not have any sympathy for anybody who makes use of trust money in this manner. As a liabilities business man, he should have raised money in other ways to meet his liabilities towards payments for his land rover and wedding expenses for his daughter … in my view, if he had valued his position in society, he would have been careful and would certainly have done everything to avoid the breach of trust which he had committed…. It cannot be denied that if Court Brokers take liberty. With monies collected in the course of their employment, public confidence in respect of safety of their property in custody of Court Brokers would be undermined. Taking all these factors into consideration, I agree that a deterrent sentence is called for even though the accused in this case is more first offenders. In the circumstances, I sentence the accused to a term of three years in prison. As he is 56 years, he is exempted from the application of corporal punishment."

294. K. A. S. Mwaitebele v. R. Court of Appeal Crim. App. 62-D-70; 11/7/70; Lutta J. A.

The appellant was convicted on seven counts of wrongful confinement in that he did unlawfully arrest and confine

people for allegedly refusing to pay local rates at Karagwe. His appeal to the High Court was dismissed but the sentences of twelve months were varied to six months on each count. On appeal to the East African Court of Appeal, the appellant argued: (a) that section 95(4) of the Local Government Ordinance empowered him in his capacity as local rate collector to arrest without warrant any one who he suspected to be a tax defaulter three months after the due date and therefore the learned judge erred in holding that he had no such authority; (b) that the learned judge should have held that the trial magistrate was wrong in sentencing the appellant to a term of twelve months without giving him the option of paying a fine as provided by section 253 of the Penal Code.

Held: (1) “On a charge of wrongful confinement, all the prosecution has to prove is the confinement; it is then for the accused to show that there was no arrest and confinement or that he was justified in his action and that the confinement was lawful. From the evidence the trial magistrate found as a fact that the arrests and confinement were for non-payment of the 1969 local rates although the same were not yet due …. We are not prepared to disturb that finding fact. [His Lord ship set out s. 95(1) and (4) of the Ordinance and continued] …. To justify the appellant’s action, h must show, firstly, that he was a rate collector appointed under the provisions of section 100 of the said Ordinance; secondly, that the complainants had neglected or failed to pay the 1969 local rates within three months after the same had become due. Section 42(1) of the said Ordinance can only be of assistance to the appellant if the complainants had failed to pay the 1969 local rates within three months of the due date, and after the provisions of section 91 of the said Ordinance have been complied with. In our view the appellant

has failed to show on a balance of probabilities that this action was justified and accordingly this ground of appeal fails". (2)"Where as we agree that the trial magistrate should not have imposed a maximum sentence of imprisonment, we are satisfied that the learned judge set the matter right, and cannot agree that section 253 of the Penal Code confers powers on a convicted person to opt to pay a fine rather than serve a prison sentence. Whether to impose a fine or a sentence of imprisonment, or both, is entirely a matter for the court's discretion." (3) There is no reason why a circular letter from his Regional Commissioner which appellant sought to produce should have been held inadmissible….. "However the letter would not materially have helped the appellant's case". (4) Section 45(1) of Cap 537 giving to justices of the peace powers of arrest would have been inapplicable to this case. The power of arrest given to justices relates only to cognizable offences which must be interpreted in accordance with section 2 of the Criminal Procedure Code. (5) Appeal dismissed.

CRIMINAL CASES

295. Mathuradass Kara v. Republic Court of Appeal Crim. App. 124-D-70; 13/7/70; Spry, V.P., Law and Lutta, J.J.A.

The appellant was convicted of receiving a tape recorder, knowing the same to have been stolen contrary to section 311(1) of the Penal Code. Two young men who were convicted of stealing the tape recorder stated to a police officer first that they had hidden it somewhere and then that they had sold it and then they led the police to the appellant's shop where it was found wrapped in a parcel. At their trial, the two young men each denied having led the police to the shop or giving or selling the tape recorder to the appellant. When asked the appellant denied having received a tape recorder and he denied knowledge of what was in the parcel but stated that someone had left he parcel there for collection later. He was convicted and on appeal to the High Court the Chief Justice held that there was evidence on which the magistrate could find that the tape recorder was left at his shop with the knowledge of the appellant because after a preliminary denial, he admitted to the police that someone had left it there.

Held: (1) “With great respect, this is a misdirection. The appellants “preliminary denial” related to the question whether a tape recorded had been left in his shop, and his subsequent admission, after being shown the tape recorded wrapped in paper, was no more than an admission that someone had left the parcel there. At no time did the appellant admit knowing that the parcel contained a tape recorder.” (2) “We feel that it must be a possibility that the two young men hid the tape recorded in the appellant’s shop, in his absence, so that it would not be found in their possession by the police who were then conducting an intensive search for it. Their subsequent statement that they had sold it to the appellant may well have been a lie. Certainly there is no evidence that any money was found on them. Although there is strong suspicion against the appellant, we are not satisfied that his guilt has been proved beyond reasonable doubt.” (3) (obiter) In considering the nature of the appellant’s possession of the tape-recorded the learned Chief Justice relied, at least to some extent, on the definition of “possession” In section 5 of the Penal Code. “This was a misdirection. There is direct authority on the point in the judgment of this Court in Shantilal Manibhai Patel v. Reg. (1955) 22 E.A.C.A. 425, a case originating in Kenya, which was not cited to the learned Chief Justice or to us. That case is authority for saying that either exclusive or joint control of the stolen property may be sufficient possession to constitute the offence and in the course of the judgment, read by Briggs, J. A., It was stated that counsel had correctly pointed out that the wide definition of “possession” in the Penal Code does not apply in relation to a charge of receiving stolen property ….. The position in our view is the same in Tanzania.” (4) Appeal allowed.

296. Mwizalubi Matisho v. R. Crim. App. 554-M-70; 11/8/70; Mnzavas, Ag. J.
The accused was convicted of stealing bicycle c/s 265 of the Penal Code. He admitted to five previous convictions all of which were for dishonesty. In sentencing the accused the magistrate

'There is little doubt that this accused does not benefit from the sentence he was previously served in prison ….I think that the concern at the moment is to protect the public …. A reasonably long prison sentence might be the solution'. He then sentenced him to 3 years imprisonment, and ordered that he be under police supervision for 12 months. On appeal to the High Court.

Held: (1) "I fully agree with the learned resident magistrate that the appellant is unlikely to be reformed by prison sentence however stiff. However, reformation is not the sole object of punishment. The courts have a duty to protect the public from wicked people like the accused and with respect I echo the learned magistrate's direction that the accused needs to be removed from circulation for a long time. In the circumstances, the sentence interfering with it." Appeal dismissed.

297. Osman v. R. Crim. App. 346-D-70; 30/7/70; El-kindy, Ag. J.

The appellant was charged with and convicted of conveying property suspected to have been stolen or unlawfully obtained c/s 312 of the Penal Code. The appellant had traveled by a lorry carrying some drums of paraffin. Inspector Mohamed on failing to get satisfactory explanation from the appellant as regards the drums suspected that the appellant might have obtained the oil unlawfully and therefore arrested him. The appellant had made conflicting statements to the police in the courts. The magistrate convicting the accused said". "The accused is now claiming that property belonged to his brother. But right from the time of his arrest, he has given so many conflicting stories about these drums. He said they belonged to him and he could show the receipt and the person who sold them to him. Then he changed his story the same night and said he had no receipt and would not point but (7) to the seller. On the following morning, he also made conflicting statements after he was cautioned. One wonders which one could true at all. He is a young man just over 20 years and I see no reason for fearing the police. If he did not know whose kerosene that was, then he should have said so to the police. There is no evidence of any threats on him by the police." On appeal to the High Court.

Held: (1) “I may state that the burden of proof is on an accused person to give a reasonable explanation as to how he came by the property suspected to have been stolen or unlawfully obtained, and that this burden of proof is not heavy one and that the statement to be considered by the trial court is that which he makes in court ….. and not any statement which he might have made to any one else (including a police officer) as the duty to give an explanation does not arise until the accused is before the court ……. (2) “The learned magistrate had considered all the various statements the appellant had made at various times and places as if at all these places the appellant was under duty to give explanation. Gain the learned magistrate appears to have been unable to make up his mind as to which explanation he was going to consider as the appellant’s explanation as it can be seen from the words one wonders which one could be true. Again this passage contains a misdirection in that it suggests that the learned magistrate was looking for an account which ‘could be true’ when the appellant’s duty is only to be given an account which

night be reasonably true and which is consistent with innocent possession. The learned magistrate, therefore, erred when he considered all these statements together. This is not to say that the learned magistrate should not have considered the various statements made by the appellant to the police. These would have been considered when testing the appellants account. As the learned magistrate misdirected himself in this manner, this court cannot say that the learned magistrate would have come to the conclusion he did. He considered the statement in the light of the decisions of this court, especially the decision of Kiondo Hamisi v. R. 1963 E.A. 211 p. and ALI RAMADHANI v. R. 1967/68 H.C.D. 430. (3) [The court then discussed the credibility of the witnesses]. “However, this court would not be justified in substituting its own views for that of the trial court since it did not have the benefit of listening to the witnesses speak although the appellant is entitled to have the appellant’s court’s own consideration and views of the evidence as a whole and its decision thereon (see DINDERRAI RAMKRISHAN PANDYA v. R. 1957 E.A. p. 336)”. (4) Appeal allowed conviction quashed.

298. Lucas v. R. Crim. App.; 304-M-70; 12/8/70; Mnzavas, Ag. J.

The appellant was charged and convicted of assault causing grievous harm c/s 225 of the Penal Code and sentenced to 3 years imprisonment. One night in December last year, the complainant was sitting outside the house of one Mwalimo conversing with one Mota and other people. According to the complainant, when they were there the appellant came to the house in a drunken manner and entered the house saying, as he was getting into Mota's house "I am going to sleep with Mota's wife to night by force." Mota hearing what the appellant was saying followed him and pulled him out of the house. The appellant left the place but after an hour or so came back carrying a big stick. He then suddenly and without warning struck the complainant on the head. The complainant fell down and remained unconscious for a whole day. The appellant in a sworn statement told the lower court that he was so drunk that he did not know what he did. He said that his assaulting the complainant was mere bad luck.

Held: (1) "It may very well be true that the appellant was under the influence of alcohol when he delivered the brutal blow; but drunkenness per se is not a defence in a criminal charge. To be a defence it must be shown that by reason of the effect of alcohol upon an accused's mind he did not know what he was doing (i.e. lack of mens rea) at the time he committed the offence, or that he became insane because of the drink. There is no evidence to this effect. On the contrary the evidence shows that the appellant was in full control of his senses. It is possible that alcohol may have inflamed his passions or increased his audacity or even reduced his self-control but this cannot be said to be a defence in law. In my view, a person who has voluntarily indulged in excessive liquor drinking should be held fully liable for any consequences which may follow. To hold otherwise would mean to put the public in enormous danger". (2) "Insofar as the sentenced is concerned I do not close my eyes to the fact that the blow by the appellant was inflicted on a most vulnerable part of the body rendering the complainant unconscious for a whole day. The appellant is lucky that the complainant survived blow. I am not very sure whether drunkenness can serve as a mitigating factor insofar as punishment is concerned – Kenny (Outlines of Cr. Law 18th Edn.) page 58 is of the view that this is the province of ethics of law. However, taking into account the facts of this

Case and the further fact that Geita is a notorious district for violence, I tend to agree with the learned district magistrate that deterrent sentences for offences of this nature are indicated." (3) Appeal dismissed.

299. Gabriel v. R. Crim. App. 329-M-70; 29/7/70; Onyinke, J.

The appellant was convicted for stealing Shs. 500/- c/s 265 of the Penal Code and sentenced to 8 months imprisonment. At his appeal it was submitted that at the trial after two prosecution witnesses had given evidence the prosecution was allowed to withdraw a charge by substituting a fresh charge. Instead of the case being started de novo, a third witness was called and prosecution case was close therefore, the only admissible evidence against the appellant was that of the third witness and as this was insufficient to sustain the conviction, the appellant was entitled to be acquitted.

Held: (1) "The submission sounds plausible but the flaw in it was that it did not distinguish between withdrawing from the prosecution of an accused under s. 86 and withdrawing a charge by substituting a fresh charge under 209 of the Criminal Procedure Code. Under s. 86 the prosecution can apply to withdraw from the prosecution of an accused. If the application is granted then the proceedings come to an end and the accused is either discharged or acquitted. What the prosecution did in the present case was not to withdraw from the prosecution but to withdraw the charge by substituting a fresh charge in a prosecution from which they had not withdrawn. This application could validly be made under s. 209(1) of the Criminal Procedure Code. The proceedings in this case, in which first two witnesses gave evidence, were the same proceedings in which third witness gave evidence on 2/12/69. I therefore reject (this) contention.' (2) There were no merits in the appeal and sentence was not excessive. Appeal dismissed.

300. Jumbe v. R. Crim. App. 158-A-70; 14/8/70; Bramble, J.

The appellant was convicted in the District Court of Arusha of causing death by reckless driving contrary to section s 44A(1) and 70 of the Traffic Ordinance and sentenced to 18 months imprisonment. The first ground of appeal was that the District Court has no jurisdiction to try cases under Section 44 (A) (1) of the Traffic Ordinance because under section 44 A (2): “An offence against this section may be tried in the court of a Resident Magistrate……. Only these proceedings originated in and were conducted by the District Court of Arusha. The presiding magistrate was a Resident Magistrate and it was submitted on behalf of the Republic that the fact that a Resident Magistrate presided made the court a court of a Resident Magistrate.

Held: (1) “This point was decided by Biron. J. in a Dar es Salaam Appeal Taidin Allarakhia v. His Highness the Aga Khan App. No. 28 of 1968. This was appeal in a matter arising out of the Rent Restriction Act which conferred jurisdiction in the court of the Rent Restriction Act which conferred jurisdiction in the court of the Resident Magistrate. The matter was determined by the Senior Resident Magistrate sitting in the District Court and it was held that:- “The fact that a court is presided over by a magistrate of a particular grade does not, ipso facto, transform that court into the class of the magistrate’s grade. It is expressly provided for in the Act that a class of court shall have its own register and its own prescribed soul.’ These instant procedures were heard and tried by the District Court of Dar es Salaam and the order and decree was issued from that court

bearing the seal of such court. Therefore, in my judgment, despite the fact that the court was presided over by a senior resident magistrate, the trial was, in fact, held on and the order and decree made by the District Court of Dar es Salaam, which court has, as indicated no jurisdiction to try such suit. This was a civil case but the questions of jurisdiction apply equally to criminal matters. With respect, I fully agree with the above arguments and I am fortified in this by the provisions of section 36 of the Magistrates’ Court Act which reads:- ‘A court of a resident magistrate shall have and exercise jurisdiction in all proceedings in respect of which jurisdiction is conferred by any law for

the time being in force – (a) on a court of a resident magistrate; or (b) on a district court, or on a district court held by a resident magistrate or a civil magistrate, in the exercise of its original jurisdiction'. In addition the interpretation section of the act specified that a district magistrate includes a resident magistrate. A resident magistrate sitting in a district court can exercise only the jurisdiction of the district court and cannot for example; impose a penalty grater than is allowed to the district court. (2) Appeal allowed.

301. Abdalla v. R. Court of Appeal Crim. App. 102 – D- 70; 12/8/70; Spry, V.P., Law and lutta, JJ. A. Judgment of the Court.

The appellant was at all material times the senior Prison Officer in the Tabora Region, and as such ex-officio Chairman of the Prison Officers Staff Club. The profits from this Club were paid into a fund operated by the Club's treasurer and the monies were kept in the prison safe by the appellant for safe custody. The fund was used principally for the purpose of making loans to prison officers. The appellant was convicted on various counts. He had admitted initialing the entry in the cash book relating to money allegedly stolen and was convicted of stealing. He was also convicted on two counts of obtaining money by false pretences for issuing post-dated cheques and 'falsly pretending that he had sufficient funds in his personal account'. The High Court upheld the convictions while quashing others. On appeal to the Court of Appeal:

Held: (1) "The learned Resident Magistrate convicted the appellant (of stealing) without any clear finding as to whether or not he disbelieved the appellant, but chiefly because the appellant in his cautioned statement had admitted responsibility for the entries in the cash book for which he had signed". (2) (Conviction cannot be supported because) Firstly, an admission of responsibility for sums signed for is not an admission of having stolen those sums if a shortage is subsequently discovered. Secondly, if the admission of responsibility did amount to an admission of theft, then the appellant's statement to this effect to a police officer was a confession and therefore inadmissible". (3) "In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it. This is

a representation as to a future event and cannot support a charge of obtaining money by false pretences, if the drawer o the cheque in fact has an account at the bank. It is a different matter of course if he has no account, because in drawing a cheque he is making the representation that he has an account, which is a false representation of an existing fact (R-V-Dent 42 C.A.R. 165), but her the appellant did have an account at the bank on which the

Cheque was drawn". (4) "There only remains count 6, which related to an occasion when the appellant borrowed Shs. 100/= and gave a cheque of the same date in exchange, at a time when he knew he has insufficient funds in his account to meet the cheque. This could provide the basis of a charge of false pretences, but it is not clear from the evidence whether it was the pretences, but it is not clear from the evidence whether it was the pretence which induced the treasurer to part with the Shs. 100/= As the learned editor of Kenny's "Outlines of Criminal Law" 18th Ed. at page 249 says, the handing over of the property must have been actually caused the pretence, and prosecuting counsel should not omit to put an express question as to his. The actuation must be proved by direct evidence, not by inference. No such question was put in this case, and we are left in doubt whether the treasurer handed over the money because he was ordered to do so by his superior officer or because he was given a cheque by the appellant." Appeal allowed.

302. William Hanning v. R. Court of Appeal Crim. App 66-D-70; 15/7/70; Spry, V-P., Law and Lutta, JJ. A. (Judgment of Court).

The appellant was convicted of corrupt transactions under the Prevention of Corruption Ordinance, Cap. 400. In particular the High Court held that the appellant while he was Regional Engineer of Mwanza, and public servant, had corruptly accepted for him a Mercedes Benz Saloon car from one Ahmed, the director of a company which held contract with the government, as a reward for showing favours to the company in the affairs of the government: and had similarly accepted an interest free loan from one

Soutis. The appellant was sentenced to 3 years imprisonment. On appeal to the Court of Appeal. [For the rulings in the High Court see [1970] H.C.D. 171]

Held: (1) "The appellant accepted the car without consideration, and were can see no merit in the appeal against conviction on this count which is hereby dismissed. Even had the transaction been found to be a loan, it would not have affected the conviction, since the definition of "consideration" includes a loan and we are satisfied, for reasons which appear later in this judgment, that the alleged consideration would have had to be regard as inadequate…. It seems to us, reading 6 as a whole, that when it refers to accepting any valuable thing for a lawful consideration which the recipient knows to be inadequate, "inadequate" must mean less than the value of the thing accepted, and value will ordinarily mean the price which a willing purchase would pay to a willing vendor. In the case of a loan, the "adequate" consideration will be not merely the promise to repay, but also the promise to pay interest at least the lowest rate at which the borrower could have borrowed elsewhere, taking into account, of course, and security he could offer, his general credit-worthiness, current rates of interest and any other relevant factors." (2) "(The counsel for the appellant) relies on a passage in the judgment of the Board in Public Prosecutor v. Yuvaraj [1970] WLR 226 which may be taken as meaning that the only burden placed on the accused in a charge involving corruption is to show on a balance of probabilities that he was not acting corruptly. But in the same judgment, at 233, appears the following with reference to the corresponding section to 8 in the Tanganyika Ordinance – "The section is designed to compel every public servant so to order his affairs that he does not accept a gift in cash or kind from a member of the public except in circumstances in which he will be able to show clearly

that he had legitimate reasons for doing so." This statement, with which we agree, supports the view taken by the Chief Justice. "The elements of a charge contrary to 3 (1) of the Ordinance are that the accused person – (a) corruptly (b) accepts a consideration (c) as an inducement or reward for doing or not doing something in relation to his principal's affairs. When that accused person is a public officer, as in this

case then 8 provides that when it is proved that the consideration has been accepted (in this case the car) by such public officer, and that the person from whom the consideration is accepted is a contractor holding or seeking a contract from the Government, then the consideration shall be deemed to have been accepted “corruptly as such inducement or reward as is mentioned in 3 unless the contrary is proved”. The section does not say that where it is proved that any consideration has been accepted by an agent of the Government as an inducement or reward, the consideration shall be deemed to have been accepted corruptly unless the contrary is proved. The deeming applies both to the consideration having been accepted corruptly, and as an inducement or rewards, and the burden of proving the contrary in both these respects, on a balance of probabilities, lies on the accused person. We are accordingly satisfied that the Chief Justice correctly directed himself on this point, and that it was for the appellant to satisfy the court on a balance of probabilities that he did not accept the car from Zahir Ahmed corruptly as an inducement or reward.” (3) On a preliminary objection that reasonable notice had not been given of intention to call four witnesses whose statements had not been produced at the preliminary inquiry the Court of Appeal remarked: “The court may, and indeed must consider the nature of the evidence and in particular its importance, its complexity, the likelihood of surprise and the possibility that evidence in rebuttal which might have been available earlier may no longer be available. Notice which would be quite reasonable for some simple, perhaps formal, evidence may be wholly inadequate for some simple, perhaps formal, evidence may be wholly inadequate for evidence of a complex and highly incriminatory nature. This is not a matter where a remedy is lightly to be found in adjournment and we think, with respect, that the Chief Justice was wrong in expecting the application for adjournment to come from the defence. If the notice was unreasonable, it is the prosecution that requires such an adjournment that when the witness is called, the notice that was given is not unreasonable. The applications for adjournment ill follow the decision that the notice was unreasonable; it is not a factor to be considered in deciding on the reasonableness of the notice. The ground for granting an adjournment are set out in s. 268 of the Code and we do not think a court will, save in exceptional circumstances, be satisfied that reasonable cause exists, when the failure to give proper notice was due to negligence or worse.” (4) On the interpretation of item

7 of the Schedule to the Minimum sentences Act which reads: “Taking part in a corrupt transaction with an agent contrary to s. 3 of the Prevention of Corruption Ordinance (Cap. 400) or obtaining an advantage without consideration contrary to s. 6 of that Ordinance’. The counsel for the appellant argued that: ‘The words “corrupt transaction with an agent” apply only to a person who enters into a transaction with an agent and not to the agent himself and that the specific reference to receiving an advantage “without lawful consideration” is exclusive and therefore that Act does not apply to the receiving of an advantage for an inadequate consideration. The court of Appeal: ….. “We are not persuaded by the first of these arguments. We think that the words “entering into a corrupt transaction with an agent “are ambiguous and therefore it is proper –

to look to the intention of the legislature. Offences under s. 3 of the Ordinance are more serious than those under s. 6. Certain offences under s. 6 committed by agents are unquestionably included in item 7 we regard it an unthinkable that the legislature should have included those offences and yet excluded all offences by agent under s.3 therefore we think the ambiguity in item 7 must be resolved by holding that the words “corrupt transaction with an agent” are to be read as one and that any party to such a transaction is caught by the item.” (5) “As regards s. 6, we think there is ambiguity …. The Act is a penal statute of great severity and should therefore be interpreted strictly …… it cannot therefore safely be assumed that there was any intention to include any offences other than those specifically mentioned. Moreover, while the question was probably not thought of, it is at least possible that the legislature though that as questions of inadequacy are entirely matters of degree, offences that depend on those questions are not appropriate for minimum sentences. We would therefore hold that the Minimum Sentences Act does not apply to those offences under s. 6 which consist of the receipt of advantages for an inadequate consideration but only to those where there is no lawful consideration. It follows from the above that in our opinion the conviction on count 7, which alleged obtaining a loan for a consideration which the appellant knew to

be inadequate was not one coming within the scope of that Act." (6)However, the Court of Appeal held that no miscarriage of justice has occurred, and the sentences were not excessive and therefore dismissed the appeal.

303. Magige and Another v. Republic Crim. App. 236-M-70; 29/7/70; Onyike J.

The two appellants, members of the Police Force were convicted of breaking into a building at the New Alimasi Prospect Plant, Mwadui, with intent to commit a felony. The guarding of the plant and offices was the sole responsibility of the Tanzanian Police. Evidence was given by a night watchman guarding the administration offices. Heard four banging's at the plant, whom he identified as the appellants who were supposed to be on guard. He stated that he did not go to find out because; it was not part of his area to guard. The trial magistrate found that the plant had been broken into by the appellants or with their knowledge. On appeal the credibility of the night watchman was challenged on the ground that he neither raised an alarm nor reported what he saw; that he either heard nothing or was a party to the crime.

Held: (1) "This appeal calls for a clear appreciation of the principles which should govern an appellate court in an appeal on a question which should govern an appellate court in an appeal on a question of fact and the credibility of a witness is essentially a question of fact". (2) An appellate court should not disturb the finding of fact by the trial court, based on verbal testimony, unless it is manifestly unreasonable. (WATT v. THOMAS [1947] 176 L.T.R. 498, Rex v. Karia Mawji [1949] 16 EACA 117 Daudi Mwabusilo v. John Mwakiwila [1967] H.C.D. 59)." "Where, however, the matter turns on proper inferences to be drawn from established facts or relates to issues which are susceptible of being dealt with wholly by argument the appellate court is in as good a position as the trial court and can more readily set aside the judgment of the trial court (See Platt J. in JUMA ALIBAX SAID v. R. [1967] H.C.D.

383 and Lord Robson in KHOO SIT HOH v. SIM THEAN TOUGH [1912] A.C.

(3) “Turning to the instant case, I hold that I am bound by the learned magistrate’s view of the credibility of P.W. 5, based, as it was, on the witness’s verbal testimony. Was there anything inherently improbable in that story? It is said that the witness should have raised an alarm or rushed to the scene or reported the matter if he really heard and saw what he testified to. The simple answer to this was furnished by the witness himself. The section where the incident happened was barred to him and was in the assured security of police guards. It would be unreasonable to expect the witness to suspect the Police and to go to investigate. He held his peace and left it to the police to do their job. Unfortunately the Police guards turned bandits.” (4) That the appellants were police officers on duty was an aggravating factor and the sentence of 15 months imprisonment was appropriate. (5) Appeal dismissed.

304. Mtunduchile and Other v. Republic Crim. Apps. 257, 258 and 259-D-70; 19/8/70; Biron J.

The three appellants were convicted of burglary, stealing and rape and sentenced to a total of three years and twenty four strokes each. According to evidence given by a woman and her daughter, the appellants broke into their house, stole some articles and demanded to have sexual intercourse with the daughter who was in an advanced state of pregnancy. The mother, fearing for the life of her daughter, offered herself instead, whereupon each of the appellants had sexual intercourse with her in turn. All the appellants set up defences of alibi.

Held: (1) “The appellants were well known to the women who had ample opportunity of recognizing them. There was no reason to doubt the credibility of the women and therefore the learned magistrate was justified in finding that the appellants broke into the house, stole therefrom and had sexual intercourse with the older woman. (2) “On the issue whether in the circumstances consent to sexual intercourse was given, “I know of no specific case to the point. “The judge then set out s. 130 of the Penal Code where under the accused were charged and convicted and hen continued (3) “The two women were alone in the house, which is apparently isolated. They were

threatened with death by three men armed with knives if they tried to raise the alarm. Although the mother consented, in fact volunteered herself as a substitute for her daughter, such consent is, to my mind, vitiated by her fears for her daughter's health, and it is not irrelevant to not that the section above set out expressly states that if the consent is obtained 'by fea of bodily harm', the act would still constitute rape. The mother, apart from her maternal affection was under a duty to protect her daughter, therefore I fully agree, with respect, with the learned magistrate that the acts of the three accused constituted rape on the part of each. The conviction for rape is therefore duly upheld." (4) "The rape in this instant case was, considerably aggravated by the fact that the three accused were prepared to have sexual intercourse with the daughter, which, in her condition, as is commonly believed, would have been extremely dangerous to her health; then, when the mother offered herself in order to save her daughter, they each in turn had inter course with this elderly lady, whose age is given as about fifty. The sentence imposed on the conviction for rape is accordingly set aside, and there is

substituted therefore a sentence of imprisonment for two years, to run consecutively with the other sentences, making an aggregate of imprisonment to be served of four years. (5) Appeal dismissed.

305. Milinga v. Republic Crim. App. 400-D-70; 19/8/70; Biron, J.

The appellant was convicted of stealing 4 bags of cement and sentenced to two years imprisonment. The appellant was employed as a foreman on some construction work at one Mission. Then bags of cement were found missing from the work store. Two witnesses; both of them apparently apprentices working under the appellant, testified that one evening the appellant called them and asked them to assist him in taking 4 bags of cement from the store, which they did. One of these witnesses said he was paid Shs. 10/- by the appellant, whilst the other said that he, the appellant, promise him Shs. 20/=, which he had not paid to-date. The appellant giving evidence on oath denied

stealing any cement. The magistrate, however, accepted the evidence of the two apprentices and convicted the appellant.

Held: (1) "The whole of the prosecution's case rests on the evidence of the two apprentices, who are clearly accomplices, and the magistrate failed to direct himself that they were accomplices and that it would be dangerous to convict on their evidence without corroboration. It is possible, in fact, probable that had the magistrate directed himself on the danger of convicting on uncorroborated accomplice evidence, and he would not have convicted the appellant as he did. Although it is not a rule of law, but only one of practice that he evidence of an accomplice requires corroboration, it is a very salutary rule and it is only in rare cases that a court will convict on such uncorroborated evidence." (2) "Although the evidence of each of the two apprentices supported that of the other, it is well established that where the evidence of a witness requires corroboration, the evidence of another witness which itself requires corroboration cannot constitute corroboration." (3) "Appeal allowed."

306. Rashid v. Republic Crim. App. 342-M-70; 29/7/70; Onyinhe J.

The appellant pleaded guilty to two counts of driving a motor vehicle on the public road without due care and attention c/ss 47(1) (a) and 70 of the Traffic Ordinance (Cap. 168) and "using a motor vehicle without a third party risk insurance policy' c/s 4 (1) & (2) of the Motor Vehicle Insurance Ordinance (Cap. 169). He was sentenced to a total fine of Shs. 250/- or two months imprisonment in default and disqualified from holding a driving licence for twelve months. On appeal against conviction and sentence, additional evidence was admitted to show that (a) at the material time policy o insurance existed and (b) there were special reasons why the appellant should not be disqualified from holding a driving licence. The evidence showed that the accident in question occurred on the 4th of April 1970. the vehicle (MZD 474) which appellant was driving belonged to a large building and engineering company which engaged special agents in Dar es Salaam to handle its insurance matters. On the 24th March a letter had been written by the agents to the National Insurance Corporation requesting renewal of insurance in respect of the vehicle. On the 1st April a further letter was written and it ended by saying,

"In the meantime, the risk understood to be held covered". On the 15th May a letter issued from the General Manager N.I.C. stating that a policy in respect of the

MZD 474 which had expired on the 31st March was renewed from thereafter to expire on the 31st March 1971.

Held: (1) "There being no policy of Insurance in respect of MZD 474 on the 4th April 1970, appellant's plea of guilty is taken as unequivocal and his appeal against conviction is therefore incompetent. A distinction should be drawn between the existence of a policy of insurance, on a particular date and the issue of a policy of insurance with retrospective effect to cover that particular date. The former complies with s. 4 (1) while the latter does not. The question, posed above, cannot, therefore, be concluded by the fact that an Insurance Company considers itself 'on risk with regard to a particular date. The assumption of risk by Insurance Company may be relevant and conclusive in civil proceedings but that is another matter." (2) "I find as a fact that what the Insurance Company did was to issue a policy of insurance in respect of the vehicle (MZD 474) with retrospective effect from 1st April 1970. This was perfectly legitimate but unfortunately it could not save the appellant from conviction under s.4 (1) of the Motor Vehicle Insurance Ordinance. There was no policy of insurance in respect of the use of the vehicle (MZD 474) on the 4th April, 1970". (3) "The letter from the agents that in the meantime, the risk is understood to be held covered." Compliance with. 4(1) of the Motor Vehicle Insurance Ordinance cannot be regarded as cover note for "s. 4 (1) of the Ordinance contemplates a document embodying a valid contract of insurance or at least a cover note. Section 5 provides that in order to comply with the requirements of s. 4 the Policy of Insurance 'must be a policy which is issued by a person who is approved by the Governor in the Gazette, as an insurer for the purpose of this Ordinance'. The whole policy of the Ordinance would be defeated if oral undertakings were to be held to be a compliance with s. 4 (1) of the Ordinance." (4) "Special reasons' has been described as "a mitigating or extenuating circumstance, not amounting in law to a defence, yet directly connected with its commission, which the court ought o consider when imposing

punishment." WHITTALL v. KIRBY [1946]2 All England Reports 552). A circumstance peculiar to the offender as distinguished from the offence cannot be regarded a special reason. Thus the fact that an accused is a first offender or that he has committed no motoring offence for many years is not a special reason but is rather a general reason not directly connected with the commission of the offence under s. 4 (1) and is the sort of mitigating fact advance by any accused in an 'allocutus' after being convicted of any offence." (5) "What is 'special reason' must depend on the circumstances of each case. It is unwise to generalize." The appellant was an unsophisticated driver working under a big company manned by responsible officials I so not think it would be reasonable to expect the appellant to confront his employers and ask them to satisfy him that his particular vehicle was effectively insured. I find that special reasons exist in this case which make the court would refrain from making an order of disqualification on the appellant. The order of disqualification imposed on the appellant should be set aside." (R. v. Mtumwa [1951] 1 T.L.R. 99, 100 and R. v. John Gedeon [1957] E.A. 664). (6) "In cases like this, the more appropriate person to be charged is the owner or employer who has ordered or let the driver use a Vehicle which has not been insured though this is not to negative the criminal liability of an employed driver. (R. v. Gedeon [1957] E.A. 664 and John s/o Mhanze [1969] H.C.D. 62). Fine on the second count is therefore reduced to Shs. 50/-"(7) "Appeal partly allowed."

307. Republic v. Mohamed Crim. Case 92-M- 70; 17/8/70; Onyinke, J.

The accused was charged with murder. The deceased and another person returned drunk to the deceased's residence where the accused was also staying. Deceased's wife served them food and retired to sleep. The deceased's friend also went to sleep. They were awaken a little while later by noise outside to find the deceased lying in a pool of blood and bleeding from the chest. The state sought to tender in evidence the post mortem report of a doctor who had left the country and whose where about were unknown. The defence objected to the admissibility of the report relying on R. v. Masalu [1967] E.A. 365.

Held: (1) “I allowed the report to be tendered as it was technical admissible under s. 34 (b) of the Evidence Act, 1967. in indicated at time the document was tendered that the weight to be attached to it was to be considered in my judgment.” (2) “The court in a criminal case a discretion to refuse to admit evidence which may be prejudicial to the accused though technically admissible (R. v. Masalu [1967] E.A. 365). The question whether the Court would exercise its discretion to reject a document which is technically admissible would depend on the facts of each case and the degree of prejudice to the accused. In Masalu’s case there apparently no evidence, beside the medical report, as to the cause of death. In the instant case there was substantial oral evidence as to the cause of death. The medical report expressed in technical and medical language what eye-witnesses were expressing in ordinary language. I, therefore, decided to admit the post-mortem examination report in the circumstances. The position may be different in such cases like causing death by poisoning where the medical report may be the only evidence of cause of death. In such cases it may well be that, since the accused had no opportunity to cross-examine the doctor who prepared the report, it would be too prejudicial to admit the document against him in a capital charge.” (3) “The prosecution led no evidence to show how the deceased met his death. But is was clear that the accused inflicted the fatal wound that caused the death since the deceased was healthy and it was not suggested that he fought with any other person besides the accused. (4) [Disagreeing with the assessors] “The circumstances were too uncertain to permit of any firm finding that the accused is guilty of murder – the deceased and accused, were known to be very drunk that night. This is a borderline case and the accused is entitled to the benefit of the doubt.” (5) “Accused was found guilty of manslaughter and not murder as charged.

308. The Republic v. Musa Yusufu, Crim. Rev. 34-M-70: 14/8/70; Mnzavas, Ag. J.
The accused, an employee of Kalemera Primary Court, was charged with and convicted of two counts of stealing by public servant and two counts of fraudulent false accounting c/ss 265 and 270 and 317 of the Penal Code. He was sentenced to 12 months and six months imprisonment on counts of stealing and on counts of fraudulent false accounting respectively. On the question of Minimum Sentences Act – In sentencing the accused,

the learned Resident Magistrate said, “the accused is a young man of 16 years and coupled with the fact that he is a first offender, I find that there are special circumstances in his favour. The accused alleged that he is suffering from pneumonia, and there is no evidence to contradict him. I have to accept his word. Consequently there are enough

special circumstances which dictate the taking of this case out of the Minimum Sentences Act which I do”.

Held: (1) “I do not agree with the magistrate that there were special circumstances within the definition of section 5(2) of the Minimum Sentences Act, to entitle him to impose a lesser sentence than the minimum. In my view, and without in any way trying to challenge previous decisions on this point, section 5(2) of the Minimum Sentences Act only comes into operation if three things are satisfied (1) The person so convicted must be a first offender; (ii) The property obtained or attempted to be obtained in committing the offence does not exceed Shs. 100/= o r(iii) in cases falling under section 3(2) of the Prevention of Corruption Ordinance the value of consideration given does not exceed Shs. 100/-. These conditions having been fulfilled – in this case only condition No. (i) and No. (ii) Apply; the court must, over and above look for special reasons, if any, before taking an offence out of the Minimum Sentences Act. In the present case the accused is certainly a first offender. His youthfulness, I agree, can be taken as a special circumstance. But the money stolen certainly exceeds Shs. 100/- He stole in all Shs. 566/-. The allegation that the accused is a victim of pneumonia is a matter more conveniently dealt with by the prison medical officer than a court of law. In my view, it should not have been included as a special circumstance to mitigate the sentence.” (2) Sentences in all counts increased to the statutory 2 years and 24 strokes corporal punishment.

309 Sanda v. R., Crim. App. 361-D-70; 14/9/7P Saidi, J.

The appellant was convicted of driving a motor vehicle on the public road whilst his efficiency was imparadised by drink c/ss 49(1) and 70 of the Traffic Ordinance, Cap. 168 of the Revised Laws. He was fined Shs. 500/- or 4 months' imprisonment and disqualified from holding or obtaining a driving licence for 3 years. Appellant argued that the fine was heavy since he was first offender; that his income was small and that the disqualification order was not necessary as the Landover received slight damages.

Held: (1) "The fact that the damage to the landrover was slight is not a special reason. Nor drunkness is a special reason. The law is that in conviction for this offence disqualification is automatic unless special reasons are given by the accused. "Special reasons" for not disqualifying a driver from holding or obtaining a driving licence must be special to the case and not the accused: Ali Hussein Gulamali-V-P, I.T.L.R. 379; Rex-v Mtumwa Ahmed, I.T.L.R. 99; Pyarali Abdul Padamsi –v- R., 11 T.L.R. 100; R. v. John Gedeion and another, (1957) E.A. 664 and Muindi Kilinzo v. R., (1962) E.A. 667." (2) "Had he been driving for an emergency say taking a woman in labour or a person seriously injured to the hospital it would be a special occasion. The same would apply if he was riving to help the victim of fire or snake bite to hospital. It would also be a special occasion if he was driving to save the landrover from destruction by fire or floods. No such necessity arose here." (3) As the appellant was first offender and his pay was small the fine was reduced to Shs. 200/- or 4 months' imprisonment in default of payment. His appeal against the order for disqualification was dismissed.

(1970) H.C.D.

- 300 –

310. Mdeha v. R; Crim. App. 520-D-70; 28/8/70; Biron, J.

The appellant was convicted on two counts of criminal trespass and using abusive language c/ss 299 sub. Sect. (1) b and 89(1) (a) of the Penal Code respectively, and was sentenced to a fine of Shs. 150/- or 3 months imprisonment in default on the first count and a fine of Shs. 150/- or 6 months imprisonment on the second count. The undisputed facts of the case were as follows: The appellant had a civil suit in a Primary Court and obtained judgment for Shs. 184/60. The complainant is a Primary Court Magistrate but not the one who gave judgment in favour of the appellant. The appellant

filed execution proceedings and the salary of the judgment-debtor was attached and a first installment of Shs. 64/- was received by the complainant. When the appellant went to collect the money, the complainant informed him that he had deducted Shs. 22/- from the Shs. 64/- received by him and had given it to one Ramadhani who apparently had been awarded judgment against the appellant in some civil suit. The appellant it seems lost his temper and demanded his full money but the complainant told him that he had every right to make the deduction and that he was acting within his magisterial powers and ordered the appellant to leave his chambers. Appellant had been given Shs. 42/- but also demanded the Shs. 22/- and it was apparent from the evidence that he called the complainant a thief. The complainant had the appellant arrested and kept in custody.

Held: (1) "The magistrate's chambers wherein the offence was purportedly committed are not within the ambit of the section. It is sufficient to quote from the head-note to the case of Kombo v. R. Criminal Appeal No. 337 of 1967, reported in the 1967 High Court Digest [1967] H.C.D. 225 wherein the leaned Chief Justice stated; "The criminal trespass convictions cannot stand since the statute clearly applies to private property and not to public offices." (2) "Even if the section could beheld to apply to the magistrate's chambers, there is till a question of indent, that is in order to constitute the offence, there must be an intent and I quote "to intimidate and insult or annoy … or with intent to commit any offence. The appellant's intention was to recover the money lawfully due to him and I may add unlawfully withheld from him by the complainant, who had absolutely no right at all to deduct the Shs. 22/- from the money received by the court for the appellant." (3) On the second count "It is an indispensable ingredient of the offence, that the abusive language uttered by an accused, in this case the appellant, was likely to cause a breach of the peace. [Citing r. v. Jihn, Crim. Rev. No. 29/1969 reported in 1967 High Court Digest, [1967] H.C.D. 61 "Held: The statute is aimed at preventing incitements to physical violence. Mere annoyance or displeasure among the list is not sufficient."] Although the magistrate appears to have somewhat inflated views of his position and powers it is hardly likely or even conceivable, that he would have resorted to physical violence and created a breach of the peace, in his own chambers." (4) On the second count "The term of imprisonment for six months imposed in default of

the payment of the fine, is ultra vires, as the maximum term of imprisonment which can be imposed in default of the payment of a fine not exceeding Shs. 400/- is four months – vide section 29 of the Penal Code." (5) Appeal allowed.

CIVIL CASES

311. Kinyozi v. Bandawe (PC) Civ. App. 39-D-69; 29/6/70; Makame, Ag. J.

The parties were engaged to be married, but they did not marry. The child was born at the respondent's village, and according to her this was after her two-year relationship with the appellant was over and after she had met the father of the child, one Jaffer. According to the appellant, she merely went home for the confinement, and they continued to associate after the child was born. There was ample evidence of some association, not necessarily sexual, after the child was born, and according to Mr. Mapezi, then Area Secretary, Lindi, the respondent did at one time say in his presence that the child was the appellant's. But, as Mr. Mapezi pointed out, that was mentioned by the way; because it did not concern the problem he was called upon to resolve.

Held: (1) "To me the problem is straightforward. It is not disputed that there was no Christian or Moslem marriage between the parties. The parties merely cohabited, but here was not even a customary marriage within the meaning of section 86 of Law of Persons, G. N. 279 of 1963." (2) "Assuming the appellant fathered the child, he took no steps in accordance with the law to legitimize the child under section 181. With respect, therefore the district magistrate was right in holding that the child is that of the respondent and her relatives, in accordance with section 178." (3) Appeal dismissed.

312. Mkumba v. Mussa (PC) Civ. App. 12-D-69; 22/8/70; El-Kindy, Ag. J.

The District Court of Ilala directed the Court Broker to attach the house of the appellant. This order was made as a result of the decision of the primary court Temeke, and confirmed by the District Court. The respondent claimed that she was entitled to a share of wealth which was accumulated by the appellant during their 22 years of married life.

The facts leading to break up of their marriage were not in dispute. At the time of divorce, the appellant promised before the elders that he would build her a house, although she had no right to such a house. The Primary Court unanimously decided that the respondent had not right to any share of the property accumulated by the appellant during their married life just because she was the appellant's wife. Apparently the appellant did not honour the undertaking, and the respondent sought to enforce the undertaking and the result of her action is the present order. For the appellant it was argued that this was a promise, which is not part of the judgment, and therefore it cannot be enforced as against the appellant. And that it was only a bargain, and therefore she could not attach the house as she did. For the respondent, it was argued that the offer to build the house was a compromise upon divorce, and that court can take recognition of an enforce such agreement.

Held: (1) "Looking at the record in both lower courts, there is no doubt that the appellant agreed to build a house for the respondent, but this agreement was subject to the term that the respondent would show the appellant the plot where he could build the house. It was, therefore, no unconditional compromise, and it appears to me that the appellant could not be expected to build the house if the respondent did not show him the plot. Therefore, if the appellant did not build the house, the error

was that of the respondent, who did not play her part. As it was, the order could not have been complied with nor could it have been enforced against the appellant." (2) "I agree that it was a marriage compromise and therefore this court could take recognizance of it." (3) Appeal allowed.

313. Mwinyile v. Chilomate (PC) Civ. App. 39-D-70; 25/8/70; Biron J.

The plaintiff sued the respondent in the Primary Court of Mwitikira, claiming two head of cattle as recompense for grazing and looking after the respondent's 60 head of cattle. The assessors, who sat with the Primary Court Magistrate, held that the appellant was entitled to one cow for looking after the respondent cattle. The Primary Court

Magistrate, however, contrary to law, disagreed with these assessors and awarded the appellant two cows. The District court Magistrate on appeal, very rightly remarked on the Primary Court's failure to comply with the proper procedure before Primary Court which is that in the event of a difference opinion between a magistrate and assessors or any of them, the matter be decided before a Primary Court by the votes of a majority of the magistrate and the assessors or any of them the matter be decided before a Primary Court by the votes of a majority of the magistrate and the assessors present. The District court which sat with assessors went even further and directed itself on the Wagogo customary law, that where one is entrusted with grazing and looking after another's cattle, as recompense for such care of the owner's cattle, he is entitled only to the milk and manure derived from such cattle. It, therefore, held that the appellant was not entitled to anything, since he had enjoyed the milk and the manure from the cattle he was looking after. The appellant, in respect of Gogo customary law, submitted that when one entrusts his cattle to another to look after and graze them for him, they usually come to some agreement as to how many of the offspring the person looking after the cattle should receive as are ward in addition to the milk and manure enjoyed from such cattle. As makes sense, the appellant said that this additional reward would depend on the number of cattle and the length of time during which they are herded by the recipient of the cattle. The appellant stated that the respondent had agreed that they would come to some agreement as to how many head of cattle he should receive, in addition to the milk and manure enjoyed, when he was ready to collect his cattle. But later the respondent refused to discuss any such arrangement, and re-took possession of all his cattle, which had by them increased to 59. The appellant further explained in answer to this Court that the 50 head of cattle entrusted to him, consisted of 20 bulls, 20 calves, and of the remaining 10, only to give milk, and two others were pregnant when re-taken by the respondent. He further stated that he looked after the respondent's cattle for whole year.

Held: (1) "I see no reason for not accepting the appellant's statement of fact, as it is not inconsistent with the evidence adduced before the lower court, nor do I see any reason for disagreeing with the appellant's submissions on gogo customary law." (2) "In all the circumstances, bearing in mind that the offspring were limited to three only, I

consider that the decision of the assessors who sat with the Primary Court Magistrate, was the proper one and it is not irrelevant to note, that the appellant in answer to this Court, declared that he was satisfied with the opinions and decision of the assessors of the Primary Court." (3) Appeal allowed. Appellant to receive one cow.

314. Re: Manyara Estate Ltd. and Others v. The National Development Credit Agency [1970] H.C.D. Nos. 267 and 268.

Editor's note:

The issue in this case was whether the Agency was entitled to have its mortgage debt (for which it had recovered judgment) satisfied in full with priority over the other judgment creditors. It was held that the Agency had no priority since the right of occupancy which was a security for the mortgage had been revoked. This issue has now been satisfactorily resolved by s. 14B of the Land Ordinance, Cap. 113. the section was added by the Land Laws (Miscellaneous Amendments) Act No. 28 of 1970 in July 1970 s. 14B reads: S 14B – (1) Where any amount is paid to the President on behalf of a previous occupier in accordance with the provisions of paragraph (b) of section 14 and the President is satisfied that – (a) "Such previous occupier had created a mortgage on the right of occupancy of the land previously held by him; and (b) that the amount payable to the mortgagee in respect of such mortgage remains wholly or partly unpaid," the President shall, out of the amount so received by him, make payment to the mortgagee of the amount remaining due to him under the mortgage, and where such payment is made to a mortgagee the remainder only, if any, shall be paid to the previous occupier: Provided that the President may refuse to make a payment under this subsection to a mortgagee is such mortgagee fails to lodge his claim for such payment in writing with the Minister within three months of the date when the right of occupancy of the previous occupier was revoked. Where there are two or more

mortgagees, the priority applicable for payment of them under subsection (1) shall be on the same basis as obtained with mortgages under the law for the time being regulating mortgages.

315. Lehmann's (E.A.) Ltd. v. Lehmann & Co. Ltd. Civ. Case 92-D-64; 29/8/70; Ruling by Dy. Registrar Mwakibete.

In this Bill of costs item No. 3 was the subject of objection. The said item consisted of instructions to defendant suit and instructions to set up a counter claim. In the former case Shs. 38,500/- was being claimed. In respect of setting up a counter claim.

Held: (1) "I have no remitation in holding that the fee claimed in the counter claim is grossly excessive. Evidence is there indicating that the debt was acknowledged in writing from time to time. The law whether or not a claim is time barred is clear especially where one acknowledges that debt from time to time. I am not convinced the mere research on the law of limitation in the circumstances of this case would merit a claim of Shs. 11,500/-. I accordingly tax off Shs. 9,000/-. (2) "I now go to deal with the first leg of the claim. The whole case was one involving accounts – between two Companies. The said Accounts extended over a period of some 14 years – commencing from 1950-1964 when the suit was filed in Court. (It was argued that it was the complexity of the matter and not he amount claimed that mattered. The court was asked to be guided by the principles as laid in K v. Z – (1957) E.A. 255 in assessing the instructions fee and to hold the amount claimed as grossly excessive). (According to the Counsel for other inside to set up a good defence to such a suit their research involved immense amount of time and that it further involved going through all the amount of time and that it further involved going through all the correspondence and accounts over that period.) On the above submissions

I am quite satisfied the case involved a lot of preparatory work. Admittedly it was not at all a simple case. The one who won must be adequately remunerated. But he should not be allowed to claim beyond what could be said to be reasonable in the

circumstances. With all the submissions of Mr. Riegel in mind I consider Shs. 25,000/- would be a reasonable fee in the circumstances." (3) "I accordingly allow Shs. 25,000/- as fee to defend the suit. "

319. Dourado v. Dourado Matr. Cause 8-D-70; 12/9/70; Georges, C. J.

This was an application by the respondent in matrimonial proceedings for the stay of an ex-parte injunction made on 24th August 1970 by which he was ordered t leave the flat which was the matrimonial home and not to enter it nor to molest the petitioner his wife, in the use and occupation of it. The basic objection the grant of this application was that it had been made ex-parte that there were no circumstances of irreparable loss or irreversible prejudice which necessitated an ex-parte application. For the petitioner it was contended that there was no jurisdiction in this Court to stay an order for injunction once granted.

Held: (1) "There is undoubtedly power to vary, discharge or rescind any such order. In my view the power to discharge must include the power to suspend. Rescission need not be perpetual, it could be for a period and I am satisfied this Court could suspend the order for an injunction until the inter parties hearing of the application. The exercise of this power would be discretionary." (2) "I have looked at the authority quoted on the hearing of the ex-parte application – Silverstone v. Silverstone [1953] 1 All E.R. 556. it would appear that the curt does have jurisdiction make an ex-parte injunction in a situation where there was a dispute as to who should be the occupant of the matrimonial home pending the determination of the petition. That case was somewhat different from this, in that at the time of the filing of the application both husband and wife were in actual occupation of the house and the question was who was to be kept out pending the hearing of he petition. Mr. Balsara has pointed out, and I agree with that the English matrimonial rules govern us here in these matters. I would myself have preferred, had this application been made to me, to have adjourned it for a short period in order to enable the respondent be present and be heard before issuing the injunction. But I am not satisfied that there is any good reason in this case to discharge the order which has been made by the learned judge." (3) "Accordingly the order for stay will not be granted."

317. Msigiti v. Tunguli (PC) Civ. App. 19-D-70; 28/8/70; Biron, J.

The appellant had instituted a suit in the primary court claiming that a shamba possessed by the respondent's sister and which respondent wanted to sell was clan land. The land originally belonged to the grandfather of the parties. The respondent contended that the land had been given to his mother by his father and that is father and that it had been cultivated by his sister for 36 years since the death of their father and therefore it was not clan land. Both the primary and district courts fund for the respondent.

Held: (1) "The Primary Court directed itself that where a man has two wives and sons by these wives, the son who inherits a shamba belonging to his mother, has full title to it. It is only when the shamba is inherited from the father that it remains

clan land. This is according to Kisambaa Custom." (2) "The Primary Court further directed itself that according to Kisambaa Customary Law, a person who has cultivated and been in undisturbed possession for three years of land, cannot be deprived of it." (3) "The Primary Court further held that the shamba belonged to Matuli and dismissed the appellant's claim." (4) "In all the circumstances, as, I think, sufficiently demonstrated, the two courts considered the evidence adduced and directed themselves on the law applicable. And I am very far from persuaded that any court would be justified in interfering with their decision and orders." (5) Appeal dismissed.

318. Mbowe v. Attilio Civ. Ref. 1-D-70; 15/8/70; Georges, C.J.

This was reference from the taxation from the bill of costs. The Deputy Registrar who was the taxing master allowed all the items claimed except three. His ruling stated that "A study of the bill of costs" had given him "a clear picture that certain items of the claim were excessive." The objection to the ruling was on the basis that the taxing master had not indicated what circumstances he had taken into account in taxing of the amounts which he did. Only a study of the proceedings and not the bill of costs could guide him

to a decision. He did not give reasons for his decision and therefore cannot be said to have acted judicially.

Held: (1) “I would not wish to go so far as to say that a taxing master should state in detail the reasons which led him to come to the conclusion to which he did come. After all, the factors to be taken into account in arriving at an instruction fee (and my remarks must be taken as being applicable to such items alone) must, in the very nature of the exercise, be difficult to reduce to rigid propositions, unless these propositions are themselves so general as to have very little meaning.” “I would prefer, therefore, to state that while it is desirable that taxing master should set out their reasons, the mere fact that they have not done so incases where instructions fees are being considered should not be considered a fatal error in principle necessitating that the matter be remitted to be taxed afresh – more so when there has been full argument on the contested item. The court should generally interfere only when it is clear from a close consideration of the sum allowed that there must have been an error in principle in the assessment.” (2) “No decision can be based on the study of the bill of costs. It could be argued that the error is one of language rather that that of fact and that what the taxing master meant to say was that the study of the proceedings had given him a clear picture of he matter. In the circumstances of this case, however, I can see no reason why this presumption should be made. The taxing master may very well have meant what he said and if he did he was in error.” (3) Taxation remitted to another taxing master for reconsideration.

319. Jelemela v. Shita (PC) Civ. App. 39-M-70; 17/8/70; Mnzavas, Ag. J.

The respondent sought dissolution of her marriage on the ground of desertion by the appellant husband. Evidence before the courts below showed that when the appellant married a second wife, his interest in the respondent diminished and he ceased to have sexual intercourse with her. This continued even after an attempted reconciliation of the parties by local elders. The appellant argued that it was the respondent who had deserted him by deciding to go to her parents.

Held: (1) “It is true that the respondent decided to go to her parents – she is in fact now living with her parents with her one child aged four years. But his does not make her the defaulting party. She decided to leave the matrimonial home after the respondent had deliberately refused to have marital intercourse with her for over a period of two years. Elders tried to reconcile them but without success. In my view by his conduct, the respondent deserted the appellant than the reverse. (2) “To my mind although there was no physical desertion as mentioned under section 160 of the Law of Persons, G.N. 279/63, the mere fact that the respondent deliberately and without reasonable excuse refused to cohabit with his wife entitles the wife to a divorce under section 160 of the Law of Persons – G. N. 279/65. May I also add that the parties being Wanyamwezi; section 229 – Sheria na kawaida za Wanyamwezi by HANS CORY apply. This section says – “kama mume kwa makusudi hampi ngono mke wake kwa muda mrefu, tendo la namna hii linafikiriwa ni sababu ya kuachana”. Cory does not define what can be said to be “muda mrefu” but in my view two years of non-cohabitation cannot be said to be a short period. Find that the desertion has been proved and I accordingly, like the district court, order that the marriage between the appellant and the respondent be dissolved. As a child was born to the parties the provisions of section 52B of G.N. No. 297 of 1963 apply no bridewealth is refundable.

320. The State Trading Corporation v. Tanganyika Fire Appliance Co. Civ. Case 117-D-70; 16/9/70 Georges, C. J.

Wigglesworth and Co. Ltd. whose assets and liabilities have now been taken over by the plaintiff, the State Trading Corporation, had entered into an agreement with the defendant that in consideration of the defendant ceasing to sell locally manufactured fire fighting appliances and other equipment, Wiggles worth would pay him a commission on all fire fighting equipment which they sold. There was evidence to show that the plaintiff corporation acknowledges this agreement by paying some commission. In this suit on 3 promissory notes, the defendant applied under Order 35 R. 3 for leave to defend claiming a set off. Defendant alleged that it had been intended that he would not

have to meet the promissory notes which would be dealt with as part of the account between the plaintiff corporation and himself. In support of this, he pointed out that all the 3 notes bore the remark, “A/C with S.T.C.” The issue was whether unconditional leave to defend should be granted.

Held: (1) “I am not persuaded that there is any merit in this argument. The promissory notes appear to me to be what they re, that is unconditional promise to pay, and the mere fact that a notation is placed indicating that they may be referable to some particular account does not make them less unconditional>” (2) The promissory notes were unconditional, they were signed by the defendant, and therefore the plaintiff ought to have his judgment. For the sum claimed on the notes. No order for unconditional leave to defend ought to be made. (Terrazo Paviors v. STD. Joinery and Building Co. [1967] E.A. 307 cited is not helpful). (3) “Following the procedure which I adopted in A.P. Hirji & Company v. A.N. Panjwani, (H.C. Civil Case No. 94 of 1970), I shall order that there be judgment for the plaintiff against the defendant for the sum claimed with cost to be taxed. Execution of this judgment will be stayed until 15th October, 1970. If the defendant files a suit on or before 15th October, 1970 to enforce his set-of, the stay will continue until the final determination of this suit, with

liberty to the plaintiff to apply. (4) This is not an appropriate case to ask defendant to put up security for judgment because on his affidavit, he has raised a substantial claim which if proved will be for a sum much larger than plaintiff’s claim. (5) “Accordingly no security will be ordered, but as I have indicated the plaintiff can apply to have the stay of execution rescinded if the defendant behaves in such a way as to indicate that he plans to leave the country without satisfying the judgment or in the alternative if he does not press this suit with sufficient dispatch.”

321. Tasma Finance Corporation – In the matter of v. Lucy Estates Co. Ltd. Misc. Cause 49-A-68; 15/9/70; Bramble, J.

A winding up order was obtained against the respondent company. A Court Broker was appointed by the Official Receiver as Provisional Liquidator to take possession of the respondent company's assets until a Manager was appointed and the property handed over to him. The Court Broker's Bill of Costs assessed at Shs. 22,000/- was not submitted under Rule 180 of the Companies Winding up Rules 1929 and was not paid. The property of the company having been sold by the Creditors in exercise of a Power of Sale as mortgagees and with the consent of the liquidator, this application was brought by the Official Receiver under S. 191(5) of the Companies Ord. (Cap. 212) for an order that the Court Brokers bill be paid by the liquidator.

Held: (1) S. 191(5) "gives redress with respect to an act or decision of the Liquidator. The act complained of is the failure to pay the broker's charge. As he was employed by the official Receiver there was a responsibility in the Official Receiver to ensure payment of the fees and he will have a right to challenge the liquidators default. While it is clear that the Liquidator and the Official Receiver were aware of the taxed Bill of costs of the Broker there is no proof that a claim was made on the Liquidator either by the official Receiver or the Broker and the failure to pay cannot be said to be an act or decision which entitles the official Receiver to complain under Section 191(5) of the Relevant Ordinance. Even assuming that the summons was rightly taken out, it has not been questioned that the liquidator has no assets and if he has no assets he cannot pay. The sale of the Company's properties was not made in the course of the winding-up when the sale price would have been paid to the Liquidator and such charges would have priority over even the interests of secured creditors. The Court cannot direct a person to do something which is impossible." (2) "By exercising their power of sale the creditors removed from the liquidator the possibility of settling debts which had priority over secured debts though this was not a result that was foreseen. (3) Though it is just that the Creditors who moved the court should bear the Court Broker's bill because this was loss through the consequent depreciation of the assets by the costs in the winding-up proceedings, they are not properly parties to the application since it relates to an act of the liquidator. (4) Application dismissed.

322. Likarambito v. Namanacho (PC) Civ. 62-D-70; 12/9/70; Saudi, J.

The respondent claimed her marriage to be declared "faskh" on the grounds of neglect and lack of maintenance. She alleged that the appellant, her husband, with whom she had lived for some years and had four children failed to build a house for her and to provide clothes and food for her and her children. The primary court

declared the marriage "faskh". The District Court affirmed and the husband appealed on the basis that there was no ground for dissolving the marriage since he had left his wife to come to Dar es Salaam to look for a job in order to raise money for the maintenance of the family. He was then involved in a motor accident disabling him for a long time so that he could not work.

Held: (1) "The facts clearly show that the husband had neglected his wife for a long time before he left the village for Dar es Salaam. Complaints were lodged with the cell-leader, jumbe and TANU Chairman and he was found "guilty" and fined. It does appear that he had in fact deserted his wife and made her live in very difficult conditions with the children." The Primary Court gave him over a year's time to make up his mind and make provision for the maintenance of his wife but he did not care. I cannot understand how he is going to keep a family in such a manner. If he wants a wife and children he had the obligation of providing for their maintenance and must also provide a house for them. (2) "In paragraph 143 of NIKAHI by Sheikh Ali Hemedi El-Buhry it is stated …… "If the husband's where about are not known or his credit at home is insufficient or if to send to the place where he is and receive a reply will take a very long time, and the Kadhi thinks it better to make the marriage faskh, in view of the condition of the woman and her state of want because of lack of maintenance, and if there is no property of the husband, he shall make the marriage faskh". (3) In paragraph 145 of the same book it is stated ….. "If the Kadhi finds that the husband is quite unable, he shall give him three days, required by Sharia, even that is, if the husband does not ask for this period. The reason for this period is to make quite certain that the husband is

unable. On the fourth day the marriage will be made faskh in the morning that is at daylight on the fourth day the wife is authorized and empowered to make the marriage faskh, if the husband has not provided food on the fourth day. If he does provide food on that day, the marriage will not be made faskh, and the husband will owe for the three days. If when the three days are given two days pass but on the third the husband provides food for that day, and fails on the fourth day, the marriage is made faskh on the fifth." (4) "It does therefore appear that a wife may apply the court for the marriage to be declared "faskh" I she is not provided with food for 3 days and if this continues her prayer will be granted on the fourth day. In the present case the wife was totally neglected for over a year and he marriage with the appellant was eventually declared faskh."(5) "The appellant was away in dare s salaam for over a year. He could not have met the respondent so that he had no claim to the child born after the marriage was declared "faskh". (6) Appeal dismissed.

323. Zachary v. Biharamulo District Council Cv. App. 3-M-70; 24/8/70; Mnzavas Ag. J.
The parties entered into a written contract that the appellant, in consideration of a sum of Shs. 4050/-, was to prepare and supply to the respondent office furniture made of mninga timber. The respondent repudiated the contract because the furniture delivered was made of mvule and not mninga timber. The appellant did not deny that the had made the furniture out of mvule timber, but he claimed that the parties had rescinded their written contract by substituting for it an oral one by which the furniture was to be made of mvule and therefore the respondent had no right to

Held:(1) "I fail to accept that there was such a variation of the original written contract the appellant had experiences difficult in obtaining mninga timber and wanted to utilize mvule timber instead one would have expected him to communicate his difficulty to the Council in writing. Indeed he wrote a letter to the Council on 30/10/68 asking for extension of time of the delivery of the furniture. He, in this letter, asked the time of delivery of the furniture to be extended to 11/11/68. This request was accepted

by the Council in their telegram of 8/11/68. Nowhere in the letter of 30/10/68 does the appellant express his inability to obtain mninga timber apart from saying that he received the timber rather late from Uganda. Nor does he in this letter ask to be allowed to substitute mvule mninga timber. From the evidence, the learned resident magistrate was entitled to come to the conclusion that the written contract between the parties dated 28/9/68 was the contract binding them." (2) "The contract between the appellant and the respondent Council was clearly one for the sale of goods. Section 52(3) of the sale of Goods Ordinance, Cap. 214 says "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description no included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole." In the present case, the appellant supplied furniture of a totally different description from that he was under obligation to deliver. The obligation to deliver mninga furniture to the defendant Council went so directly to the substance of the contract, or in other words was so essential in its very nature that the non-performance may fairly be considered by the Council as a total failure to perform the contract. This being a breach of a condition, the respondent Council is entitled to treat the contract as repudiated." (3) Appeal dismissed.

324. Jafferali and another v. Borrisaw and another Civ. Case 29-A—69; 16/9/70; Bramble, J.

This was an application for an order from the court precluding the respondent from acting as an advocate for the defendants in the certain actions. It was based on a letter written to advocate for the plaintiffs which stated as follows: - "We now consider ourselves free to act for the Vendors only unless and until the matter goes to Court, when of course, the writer will be a material witness." The respondent replied that the words used in the letter referred to were in error and the application was premature in that he had not been summoned as witness.

Held: (1) "The case relied on is R. v. Secretary of State for India (1941) 2 A.E.R. 546. In which Junior Counsel was called upon to prove certain aspects of Indian Law and continued thereafter to act as counsel in the case. It was held that his was irregular and contrary to practice. There has been no code of practice in Tanzania as far as I am

aware and the practice as laid down by the General Council of the Bar in England has generally been adopted as shown by certain decided cases. In Gandesha v. Killing Coffee shown by certain decided cases. In Gandesha v. Killingi Coffee Estate Ltd. (1969) E.A.L.R. 299. Platt, J. expressed disapproval of counsel being witness and counsel in the same case as also did Seaton J. in Safi Seed Limited v. Ecta (Kenya) Limited & other Revision No. 1 of 1967 (unreported). In the latter case counsel called himself as a witness after he had conducted the case up to that point; he then handed over his brief to another counsel."

(2) "The practice as laid down by the Annual Statement of the General counsel of the Bar, 1911 p. 11 is that a barrister should not act as counsel and witness in the same case; and he should not accept a retainer in a case in which he had reason to believe he will be a witness and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear if he can retire without jeopardizing his client's interests. It appears to me that the adverse comment in Safi's case was not justified since a course had been followed in keeping with settled practice." (3) "Any rules of practice are rules of etiquette and while a court will be diligent in seeing that they are not violated I cannot see that it has any power to make an order to prevent an anticipated violation. Whether or not the respondent will be called as witness is till a matter within his discretion. Until he is so called there can be no violation of any rule of practice. The tenor of the letter under reference shows that the respondent is aware of the particular rule and there is no law under which I can make the order sought. If any positive action is taken which violate the rule the court may than make a ruling. I am of the view that the application is premature and that the court has no power to make the order sought." (4) The application dismissed with costs.

325. Empire Theatres Ltd. v. Tanzania Exhibitors Ltd. Court Of Appeal Civ. App. 1-D-70; 18/8/70; Duffus, P., Georges, C.J. and Lutta, J.A.

In an action with respect to certain premises an order for vacant possession was made by a consent decree in 1962. the order was suspended on condition that (a) the appellants pay by instalments a certain sum by way of arrears of rent, (b) the appellants were remain in possession of the premises until 31 December 1966 provided no default occurred in payment of rent, and (c) all options for renewal were cancelled. On 1 January 1967 the Rent Restriction Act 1962 was amended bringing commercial premises under control. The rent was fixed at Shs. 3,700/- per month with effect from 1st January, 1963. On 1st February, 1967 the respondents, assignees of the interest in 1962 decree, sought leave to execute the order for vacant possession. The appellant opposed the application claiming that the Act having on 1st January 1967 become applicable to the suit premises, they were entitled to remain in occupation as statutory tenants by holding over and urged the high Court to discharge or rescind or suspend the order under the provisions of S. 19(5) of the Act as amended. The trial judge, as a preliminary point of law, accepted that s. 19(5(of the Act as amended did not apply retrospectively and granted leave to proceed with the execution. On appeal to the Court of Appeal.

Held: (1) "The trial judge erred in disposing the matter exclusively on the issue of the retrospectively of s. 19(5) and in not considering appellants' claim of right to remain in occupation as statutory tenants." Per Georges, C.J.: "I agree that the judgment of the learned trial judge does not deal with any other issue but that of the retrospectivity of s. 19(5) of the amending Act. I think it is clear also on a careful analysis of the appellant's application and his affidavit that he was putting forward alternative grounds in support f his right to remain on the suit premises. These have not been discussed no has any ruling been made on them. The question arises as to whether or not his Court should deal with the matter or whether

Matters of fact will have to be determined which will make it more convenient to have the application remitted to the High Court for further hearing and determination….." (2) s. 19(5) is not retrospective in the sense of invalidating orders already made but it does

empower the High Court to discharge or otherwise deal with such order; and s. 29(2) does not limit this jurisdiction. Per Duffs, P. “I am of the view, however, that this Court should also determine whether the learned judge was correct in his inter pretation of s. 19(5) of the Rent Restriction Act (Cap. 479). The interpretation given to this section by the trial judge is quite different to that given by the high Court (Georges, C.J.) in the case of Kotak Ltd. v. Kooverji [1969] E.A. 295 T. [S. 19(5) reads: ‘At the time of the application for the making of any order for the recovery of possession of any premises, or for the ejectment of a tenant therefrom, or, in the case of any such order which has been made, whether before or after the passing of this Act, and not executed, at any subsequent time, the court making or executing the order, as the case may be, may adjourn the application, or stay or suspend execution on any such order, or postpone the date of possession for such period or periods as it thinks fit, and, subject to such conditions (If any) in regard to payment by the tenant of arrears of rent, and otherwise, as the court thinks fit, and, if such conditions are complied with the court may, if it thinks fit, discharge or rescind any such order.’] …. The learned trial judge whilst agreeing that the words of section 19(5) did at first sight give the impression for having a retrospective effect was of the view that the provisions of the transitional s. 29 of the amended Act nullified any retrospective effect of section 19(1). [S. 29 (2) reads: ‘Every order, decision, determination or judgment of a Board, court or the High Court in any claim, application, proceedings or other matter commenced before the commencement of this Act may be enforced, and, where an appeal is lodged against any such order, decisions, determination or judgment, any decision on such appeal may be enforced in the manner provided by the law in force immediately before the commencement of this Act’]. “In my view the meaning of sub-s. (5) Of s. 19 is clear. The sub-section refers to an order for possession which has been made either before or after the passing of the Act and which order has not been executed, and then the subsection gives specific jurisdiction to the court ‘executing’ the order to exercise the very wide powers set out in the sub-section by which the court may delay discharge or otherwise deal with the order of possession. This sub-section does not really have a retrospective effect but rather it gives jurisdiction to the court to further deal with an order of possession already made. In my view the transitional provisions of s. 29 do not in nay way restrict or interfere with

the jurisdiction given by s. 19(5). (Jivraj v. Devraj [1968] E.A. 263 referred). I am therefore of the view that the High Court in considering whether or not to order that the order for the possession of these premises should be executed has jurisdiction to consider the application already made under s. 19(5)." (3) Appeal allowed, the matter remitted to the High Court for further hearing and determination.

326. Mtondo v. Janmohamed Civ. App. 21-D-70; 8/10/70; Biron, J.

This is an appeal from an exparte judgment passed by the Resident Magistrate Lindi upholding the respondent's claim for Shs. 1,657/50 being the price of vehicle sold and delivered to the appellant. The appellant did not appear for the hearing his explanation asset out in the memorandum of appeal being that although the summons was served on him by the process server in Kilwa where he lived at the time, neither he nor the process sever could read English; that

he was told the hearing would be in Kilwa so that he failed to attend court at Lindi where the ex parte judgment was passed against him in his absence. It was submitted by the respondent the proper course was for the appellant to apply to the Resident Magistrate Lindi to set aside the ex parte judgment under Order 9 Rule 13 of the Civil Procedure Code: that the court was not in position to deal with the merits of the appeal at this stage.

Held: (1) "I fully agree with the submission of [the Respondent and therefore I do not propose to deal with the substantive merits of the case." (2) "The position, however, is rendered difficult by the fact that he appellant was, and is, unrepresented by counsel and has not had any legal advice. I think that the appellant should have been advised by the Court of the Resident Magistrate Lindi, before which he appeared on the 30th of July, when he notified his intention of appealing, that his proper course was to apply to set aside the exparte decree. I would go further and say that, as the appellant was unrepresented by counsel, I was the duty of the court to give him such advice. As the court has, in my view, failed in its duty to assist a litigant unaided by counsel, I propose

to make good such failure of the court, and now advise the appellant to file an application in the Court of the Resident Magistrate Lindi, to set aside the ex parte judgment and decree, under Order 9 Rule 13 of the Civil Procedure Code, and I duly extend the time for him to do so." (3) "The position is, however bedeviled by the fact as the appellant now informs me, that he no longer resides in Kilwa, but resides and works here in Dar es Salaam, and he has neither the means to go to Lindi, nor to brief counsel there. The only way out of this impasse, as I see it, in order to do justice, although I must confess I am not entirely convinced of legality of the course I am taking, I grant the appellant leave to apply to have the ex parte judgment and decree set aside by post, supported naturally, by the requisite formal affidavit. Even for the preparation of his application by post, the appellant would require legal assistance, and I have told him to call at his Court to collect a copy of the judgment, and the Court will Endeavour to obtain legal assistance for him from the Legal Aid Society, though I must confess I fail to see how the Legal Aid Society could have him represented by counsel in Lindi, as, so I am informed, there is only one advocate in Lindi, and he represents the respondent." (4) "Leave apply to have the exparte judgment and decree set aside by post granted."

327. Chibolyani v. Milowara (PC) Civ. App. 3-D-70; 7/10/70; Biron, J.

The appellant inherited his brother's widow on the death of his brother, and the parties lived together for over sixteen years. During that time, there were born two children. The respondent then left the appellant, and apparently went to live with a half-brother of hers. The respondent's case was that the appellant was not the father of the children, but one Mazowea, apparently another brother of the deceased. The evidence was adduced to establish the appellant's paternity. A native doctor testified that when he treated the respondent when she was pregnant she brought the appellant's paternity. A native doctor testified that when he related the respondent when she was pregnant she brought the appellant as her husband and the father of the child. The respondent's half-brother also confirmed that the parties had lived together for many years and the two children, the subject of claim had been born to them. The respondent's sole witness was one Mazowea, who said that the children were his. The primary court, as is usual,

sitting with assessors, compared the children with the parties, and found that both children resembled in

appearance the appellant, thus supporting his claim to be their father. The unanimous opinion of the primary court was that, as the children were begotten by both parties who, however, had never formally married, in order to substantiate his claim to the children, in accordance with local Gogo custom the appellant had to pay two cows for each child, which he was prepared to do. The respondent appealed to the District Court of Dodoma. The district court magistrate apparently ignoring Gogo Customary Law, which was applicable to this case, directed himself that, whilst he could find provision for the legitimation of children born to single girls out of wedlock, he could not find any corresponding provision in the case of a widow. He accordingly, reversing the order of the primary court, upheld the respondent's claim to the children. On appeal to the High Court.

Held: (1) "As I think sufficiently demonstrated, the factual evidence established that the appellant was the father of the children. Also, as submitted by the appellant in his memorandum of appeal, the primary court properly directed itself, on the Gogo Customary law, that the children belonged to him on the payment by him of four cows. With regard to the Law of Persons, G.N. 279 of 1963, which the district court magistrate purported to have applied, he had overlooked the provisions of Rule 64, which reads: "If the widow agrees to live as wife with one of her deceased husband's relatives and consent to this has been obtained from the family council, she becomes the legal wife of this relative." Therefore both on the facts, and in law, that is, both under the general Customary Law, and the particular Gogo Customary Law, the appellant is entitled to the children. (2) "The appeal is according allowed. "

328. Isote v. Isota (PC) Civ. App. 119-D-69; 3/11/70; Biron J.

The disputants were brothers. The appellant had succeeded to his father's estate in 1956. The brothers separated in 1962 when the respondent married. The appellant filed a suit in October 1968 claiming from respondent four head of cattle and Shs. 100/- being brideprice he paid for the respondent after the death of their father. The respondent alleged that the brideprice had been paid by his father before his death. The Primary Court found for the appellant but the District Court reversed on the ground that all claims between the brothers ought to have been settled when they formally separated in 1967.

Held: (1) "The Schedule to the Magistrates' Court Act (Limitation of Proceedings Under Customary Law) Rules 1964 lays down the period of limitation for various claims. None of the specific items set out in the schedule would, to my mind, cover this particular claim. Therefore, in my view, this instant claim, if in fact, such a claim does lie under customary law, would come within the ambit of the general provision for limitation se out in Rule 5, which reads:

> "Where any proceeding is brought for the enforcement of a claim under
> Customary law for which no period of limitation is prescribed by these Rules, the court may reject the claim if it is on the opinion that there has been unwarrantable delay in bringing the proceedings and that the just determination of the claim may have been prejudiced by that delay."

(2) "Apart from the fact, as very rightly remarked by the district magistrate, if the appellant had any claim, such claim should have been brought and settled when the parties separated in 1962, I also agree with the learned district magistrate that the claim is now time-barred." (3) Appeal dismissed.

329. Alibhai v. Fidahussein and Co. Ltd and others, Civ. Case 141-D-67: 20/10/70; Georges C.J.

The plaintiff claimed against the defendants a declaration that the partnership existing between himself and them be dissolved, accounts be taken, a receiver be appointed and one party pays to the other any sum found due on the taking of accounts. The first defendant contended that the claim was res judicata as all the remedies prayed for

could have been included in an earlier suit (Civil Case 43 of 1965) in which plaintiff sued the defendants for Shs. 34,500 being salary for 25 months at the agreed of Shs. 1,500/- per month which suit was dismissed because the plaintiff as partner in the firm could not sue for wages until

the partnership had been dissolved. When the plea of res judicata was raised as a preliminary point before another judge (Duff J) he held that the plea would have succeeded had the partnership been dissolved before 17th July 1965 when the plaint was filed. On defendant's preliminary objection:

Held: (1) "Before me, [defendant] has argued that the learned judge clearly would have ruled that the plea of res judicata should succeed if it had been made clear that the partnership had been dis-solved before 17th July, 1965. he then goes on the examine the pleadings to show that from the plaint it is clear that the partnership expired on or about 15th June, 1965, from which it can clearly be inferred that it had expired by 17th July, 1965. He contends therefore, that the suit should now be dismissed on the preliminary objection, his success having been by instalments, so to speak."

"Attractive as the argument may appear to be, I think it is faulty …. "It is true that he agreed fully with the principles [defendant] propounded, establishing that a plaintiff must raise his entire claim in one action and not put them forward in parts in separate actions. He also indicated what he "would be inclined' to do had he applied these principles to the instant case. But he never went on to do that. He then decided the case on what [defendant] now contends, perhaps correctly, was an erroneous view that the date of dissolution was not clear on the pleadings as they stood. In such a situation, the first defendant ought to have appealed against what he now alleges to be an erroneous conclusion based on erroneous grounds. It is difficult under stand the contention that the first defendant was satisfied with the learned judge's ruling when the learned judge had dismissed its preliminary objection for a bad reason." (2) "Duff, J., has ruled that the preliminary objection has failed, and that the action is to continue. If I am to order otherwise now, I would, in effect, be reversing him. I do not think that a preliminary

objection can succeed in instalments (after an earlier rejection), any more than a plaintiff can split his case into instalments launched in separate actions without running foul of the plea of res judicata." (3) Preliminary objection fails.

330. Jabiri v. Bakari (PC) Civ. App. 90-D-70; 26/9/70; Saidi, J.

The appellant's father had purchased 157 coconuts in a shamba for Shs. 1,256 in January, 1960. The conveyance deed which was signed in the presence of the District Commissioner included a statement that the Government does not guarantee of admit that the purchaser had a right in the land thereby sold and that the document conveyed no title to land but merely conveyed the coconut trees and the right of user only. This statement

was added by the District Commissioner. The respondent contended that the appellant's father had purchased the coconut only and not the land so that he had a right to take the land.

Held: (1) "To me it is clear that the parties who were Africans had transferred to one another for consideration a coconut shamba held as a freehold under customary law. It matters little whether or not the government admitted or guaranteed the title of either party in the land as this was a transfer of unregistered land by Africans which is what always happens with Africans in matters of land ownership. The question or registering land is of foreign concept to Africans. Our ancestors had always held land by the right of user without registration and the title of each individual was recognised. (2) "Appellant's father had certainly bought both the coconuts and the land on which they stood. It would be different if he had bought the coconut crop." (3) Appeal allowed.

331. Karmali and Another v. Constantnides. Misc. Civ. App. 1-A-70; 13/10/70; Bramble J.

The appellants were tenants of a flats in house owned by the respondent, on paying Shs. 350/- and the other Shs. 500/- per month as rent. The Rent Tribunal of Arusha

visited the flats and found that the rent paid was high. The Tribunal stated that they considered all factors with the help of the Regional Engineer to come to a finding that the combined rent of Shs. 850/- be reduced to Shs. 500/-. The tribunal apportioned the rent between the appellants to read Shs. 300/- and Shs. 200/- respectively. In 1959 the two flats were rent as one at Shs. 325/- per month. The respondent claimed that she built the house at great cost and rented the flat cheaply at first as she was in need of money.

Held: (1) "IT was not in dispute that the first letting of the premises in question 4(1) of the Rent Restriction Act applies. The standard rent is a rent determined by the Tribunal to be the rent at which the premises were let at presented date, i.e. 1st July, 1959. The Tribunal did not apply the law, as was its duty, and determine what the rent was on the 1st July, 1959. it was not questioned that this was Shs. 325/- per month for the whole flat. The tribunal was of the opinion that a rent of Shs. 325/- was not equitable and it was not bound by it. The only discretion given to the Tribunal is by section 4(2) (a) of the act which is as follows: - [His Lordships set out the provisions of the section and continued]……. "Special circumstances for the purposes of this paragraph have been fully of special circumstances to warrant an increase in the standard rent. The respondent led no evidence on this point. The tribunal purported

to act on information gathered on inspection. The case of Fatehal Ali Peera v. Onoretis Dilla Santa (1968) H.C.D. 414 decided by Georges C.J. is in point. After quoting several authorities he held that:-

> The Tribunal may not base its decision in information gained through its regular work or expertise, unless it is put before the parties rebuttal or modification should they desire (and be able) to do so.

The Tribunal had no power or right to increase the rent as it was on the prescribed date." (2) "For these reasons I must allow the appeal with costs and order that the standard rent of the flat be Shs. 325/- per month, the rents for the two portion being Shs. 195/- and Shs. 130/- per month effective from 1st February, 1970."

332. The State Trading Corporation v. Tanganyika Fire Appliance Co. Civ. Case 133-D-70; 19/10/70; Onyiuke J.

Wigglesworth and Co. Ltd. whose assets and liabilities have now been taken over by the plaintiff, The State Trading Corporation, had entered into an agreement with the defendant that in consideration of the defendant ceasing to sell locally manufactured fire fighting appliances and other equipment, Wigglesworth would pay him a Commission on all fire fighting equipment which they sold. The commission earned by the defendant was to be maintained by the parties and from time to time an account was to be made of the dealings between the parties by settling them off against one another. The defendant contended that the promissory notes sued upon were drawn in respect of various purchases of goods made by it from the plaintiff in pursuance of the above agreement. Defendant therefore applied under Order 35 R. 3 for unconditional leave to defend claiming a set off. In a similar suit, ([1970] H.C.D. 320) Georges C. J. refused to grant unconditional leave to defend.

Held: (1) "No new facts have been adduced in the present application. With respect, I agree with that Ruling and feel bound by it. I may only add that Order 35 Rule 3 (a) gives the right to defend where the affidavits disclose such facts as would make it incumbent on the holder to prove consideration where the suit is not a bill of exchange or promissory notes. (See section 30 (2) of the Bills of Exchange Ordinance Cap. 2i5). Rule 3 (b) of the same Order 35 provides that the Court shall give a right to defend if the affidavits disclose such facts as the Court may deem sufficient to support the application. The power conferred on the court by this sub rule (Rule 3 (1) (b) can only be exercised judicially. I am of the view that in so far as Rule 3 (1) (b) applies to bills of exchange or promissory notes the facts disclosed must amount to a defence under the Bills of Exchange Ordinance. It has been held in an English case that in an action between immediate parties to a bill of exchange the matters relied

upon for leave to defend should afford a defence under the Bills of Exchange Acts, in such cases the court treats "the execution of a bill of exchange either as analogous to a payment of cash or as amounting to an independent contract within the wider contract in pursuance of which it was executed and not dependent as regards its enforcement on due performance of the latter". JAMES LAMONT & LTD v. HYLAND LD. (1950) 1 K.B. 585 at Para 591. I do not think that the facts disclosed in the defendant's affidavit impugn the title of the plaintiff to the promissory notes. The defendant delivered the promissory notes to the plaintiff unconditionally for the purpose of goods' made by the defendant from the plaintiff. (See paragraph (6) of he defendant's affidavit). The defendant may well have a good counter claim or set off but the point remains that the plaintiff is entitled to have judgment for the amount claimed in the promissory notes (see NEWBOLD. P. in CAMILLE v. MERALI (1966) E.A. 411 at p.)."

(2) "There will be judgment for the plaintiff against the defendant for Shs. 44,000/- with costs to be taxed. Execution of this judgment will be stayed until 19th November, 1970. if the defendant files a suit on or before that date to enforce his right to commission and credit arising out of the dealings between both parties and/or for damages for any breach of agreement between the parties the stay will continue until the final determination there of with liberty to either party to apply."

CRIMINAL CASES

333. Njau v. R. (PC) Crim. App. 11-A-69; 23/8/6; Platt J.

Appellant was convicted in the Old Moshi Primary Court on two counts of forcible entry c/s. 85 of the Penal Code and malicious damage to property c/s. 326 (1) of the Penal Code. evidence showed that the appellant had been allocated a piece of land though the land had not be on formally conveyed to him because he had not brewed pombe for the headman, but had paid Shs. 20/- in lieu thereof. Without such a formal conveyance,

the Local Authority would have been entitled to reallocate the land but there was no evidence of such reallocation to the complainant, Namikasia.

Held: (1) “The facts f this case point out the questions involved in a charge of forcible entry and it may be as well to consider the purposes of section 85 in general. The section reads as follows [His Lordship set out s. 85 and continued]….. “The section presupposes the situation where a person not in possession of land (We are not concerned here with tenements or buildings) takes possession of the land in a violent manner. Some examples of violence are given in the section by Crime 11th Ed. p. 315) what is required is evidence amounting to something more than a bare trespass. It may be that the accused s either the owner or not, of the land in question. If he is not the owner and has no right to take possession of the land, the case is usually simple to prove. But more often the accused has a reasonable claim to the lad and he considers that the person in possession a trespasser. There are other occasions when the accused is actually the owner of the land and the person in possession of it is indeed a trespasser, nevertheless, if the person with the right of entry, enters the land in a violent manner, he will be liable under the section” (2) “The purpose of the criminal law is that a person should make entry “not with strong hand nor with multitude of people but only in a peaceable and easy manner”, because otherwise there may be unnecessary tumults or breaches of the peace. Thus to some extent the criminal law acts as a check upon the right of self help given by the civil law to a person to re-posses his land. It was no doubt on this basis that many of the cases were brought; and certainly there has been a good deal of self-help exhibited in relation to land.” (3) “Unless there was evidence of re-allocation by the Local Authority, the appellant was entitled to consider that the land was his and on general equitable principles, he must surely have been entitled to call for the formal conveyance at any time. I agree with learned Counsel therefore that appellant had the right to the possession of the land and that Namikasia had no right to it in the absence of her gaining superior title to the appellant or coming to an agreement with him permitting her to cultivate on it.” (4) The appellant did not use any force. He took peaceably the portion

of land to which he thought he was entitled. He was already in possession when he uprooted the yams of the trespassers. There was therefore no forcible entry. (5) Since appellant had occupied the land over which he had a right without making a forcible entry, it follows that he was entitled to remove the property of the trespassers. (6) Appeal allowed and convictions quashed.

334. R. v. Kassam Misc. Crim. Cause 20-D-70; 26/10/70; Georges C.J.

This is an application by the Republic for leave to file an appeal out of time. At the trial the magistrate upheld a submission of no case to answer on the 13th April and released the accused but reserved his reasons which he gave later in an undated ruling. Under s. 335 Criminal Procedure Code, the Director of Public Prosecutions must give indication of his intention to appeal tot eh subordinate courts within 30 days of the acquittal finding or order. The issue was what would be the date of the order in this case and whether good cause had been shown for grant of leave to appeal out of time.

Held: (1) Where a submission of no case to answer is made, “the ruling in effect becomes the judgment in the matter and must conform with section 171 of the Criminal Procedure Code. It should be in writing, contain the points of decision and the reasons for the decision on each point.” (2) “I would think that the appropriate date is the date of the acquittal. There would be nothing to prevent notice of intention to appeal from being given then or within 30 days of that date. No obligation would arise to ledge a petition because the period requisite for obtaining a copy of the ruling would be excluded from the computation of the 45 days.” (3) “The affidavit supporting the application for leave to appeal out of time is some respects unsatisfactory. Like the reasons for the ruling, it is undated – though the month has been typed in as June”. The notation shows that it was not filed until 29th August, 1970.

It does not set out any reasons why the notice of intention to appeal was not give promptly. Had this been done, then when the Director of Public Prosecution received the copy of the ruling on 18th June, he could in complete compliance with the Code, have filed his petition within 45 days.

"Section 335 provides that the High Court may for "good cause" admit an appeal notwithstanding that the periods of limitation prescribed in the section have elapsed. (4) "There fact is that the affidavit filed by he applicant states no cause at all it merely sets out very briefly the history of the matter and states that the Republic intends to challenge the ruling by applying for leave to appeal. In his argument,

Mr. Laxman pointed out that the ruling was received two months late. This could explain the failure to lodge a petition but not to give notice. The result is that now some six months later leave is being sought to reverse an acquittal." (5) No good cause has been shown – Application refused.

335. Simon v. R. Costs of Appeal. Crim. App. 109 –D-70; 27/10/70; Spry, Ag. P., Law, Ag. V.P. and Lutta, J. A.

The appellant was convicted of murder on the strength of two confessions made by him, one to a messenger employed in the service of the Njombe District Council and one to the Area Secretary Njombe. By section 27 of the Evidence act, no confession made to a police officer shall be proved as against a person accused of an offence. Messengers employed by Council are given powers of arrest by section 42A, Local Government Ordinance (Cap. 333) and in exercising these powers, they may exercise all such powers and perform all such duties as are by law conferred on police officers. The issue was whether the confession made to the messenger was inadmissible.

Held: (1) "While we do not feel it necessary to decide this point for the purposes of this appeal, we consider that it may be well founded, particularly having regard to the judgment of this Court in R. v. Jigungu s/o Tungu 10 E.A.C.A. 111 which lays down that a confession made to a person who is not a policeman, but who is performing the functions of a policemen, will be inadmissible by reason of section 27 of the Evidence Act." (2) In relation to another person charged jointly with the appellant, the learned judge referred to section 30 of the Indian Evidence Act. "The Indian Evidence Act ceased to apply to Tanganyika with the enactment of the Evidence Act of Tanzania with effect from 1st July, 1967. Furthermore, section 33 of the Tanzania Act, which

corresponds with section 30 of the Indian Act, prohibits the taking into consideration against an accused person of a confession made by a co-accused, and only allows a confession to be taken into consideration against the maker. It is important that this distinction should be appreciated by all connected with the administration of the law in Tanganyika." (3) Appeal allowed.

336. R. v. Basamaza, Crim. Rev. 39-M-70; 25-9-70, Mnzavas, Ag. J.

The accused, who was employed by Comworks Bukoba s a painter stole a tin of paint worth Shs. 23/-. He was charged with and convicted of stealing by a person employed in the Public service c/s. 270 of the penal Code alone. In convicting the accused, the learned Resident Magistrate waived the conviction against the accused, warned and discharged him.

Held: (1) with due respect to the learned resident magistrate I fail to see which provision of the law

Entitles him to register a conviction and at the same time waive it. Once a conviction always a conviction; unless and until it is reversed, quashed or varied in any other way by a higher tribunal. The waiving of the sentence is illegal ….. The accused was found guilty of stealing c/ss. 265 and 270 of the Penal Code. The learned magistrate should have known that this is an offence under the Minimum Sentences Act, Cap [. 526 of the Laws. This being the position the magistrate's only discretion as far as sentence is concerned is limited by section 5(2) of the Act. "The accused should have been charged with stealing by public servant c/s. 265 and 270 instead of under section 270 of the Penal Code only. I, however, see that this irregularity has no tin any way prejudiced the accused and is therefore curable under section 346 of the Criminal Procedure Code." (3) "In this case the value of the property stolen is worth Shs. 23/- only and the accused is a first offender. There may also have been special circumstances crying for leniency. The magistrate could therefore, (instead of sentencing him to the minimum 2 years imprisonment and 24 strokes corporal punishment) have sentenced him to either 10

strokes corporal punishment or such term of imprisonment as would have appeared to him to meet the requirements of the case. “Warning and discharging” an accused after a conviction is a sentence unknown to laws of this country.” (4) Accused sentence to 3 months imprisonment.

337. Rashidi v. R. Crim. App. 411-M-70; 28/9/70; Mnzavas, Ag. J.

The accused had one, Shaban Hussein, as one of his employees. Shaban died on 22/2/70 of natural causes. Under section 3(5) of Cap. 330, it is a mandatory provision that an employer has to report the death of a worker as soon as practicable, to a labour officer. The section does not say within what period after the death of a worker is an employer required to report the death tot eh labour officer. In this case after the Labour Officer in Kigoma had discovered that one of the accused employees had died, the labour officer wrote him letters requesting him to report the death of his employee by filling in the necessary forms. The accused contacted his advocate and on 12/3/70 the accused made the death report the labour officer. The accused was convicted of failing to notify death of an employee c/ss. 3(5) and 8(1) of the Accidents and Occupational diseases(Notification) Ordinance, Cap 330 of the Laws; and sentenced to a fine of Shs. 100/- or three months imprisonment in default. The trial magistrate in his judgment said that “…… it was after several letters were sent to the accused by the labour officer that the accused contacted his advocate and asked him to comply with the labour officer’s request.” This behavior of the accused was interpreted by the magistrate as Tanta-mount to failure on the part of the accused to furnish the labour officer with the report. On appeal to the High Court.

Held: “I am afraid I do not understand the learned magistrate’s argument. The labour officer may have sent many letters to the accused asking for the report, but this fact does not necessarily prove that the accused failed to send the report. The employee died on 22/2/70, the accused cent the report after his death. This being the position if ail to see why the magistrate says that the accused was late in sending the

report. The section of the law is itself as vague as to the question of time limit an employer is require to report of a death of a worker that I am of the view that taking into account the facts of this case the appellant cannot be said to have delayed in reporting the death of his employee." (2) "May I also add that delay in furnishing the labour officer with a report under section 3(5) of the Ordinance does not constitute an offence: what amounts to an offence under the section is total failure to report a death of a worker. In this case the appellant did report the death of his employee within less than a month after his death." (3) Appeal allowed, conviction quashed and sentence set aside

338. Jamal Manji and Company v. Republic, Crim. App. 316 – M – 70; 29/7/70; Onyiuke J.

The appellant, a first offender, pleaded guilty to permitting a motor vehicle to be driven on the public road without affixing or exhibiting a motor vehicle licence in the prescribed manner ad sentenced to a fine of Shs. 400/- or distress in default. His notice of intention to appeal against sentence was filed 19 days after the 10 days prescribed by s. 3124(a) C.P.C. for filing such notice, this being caused by the fact that it was mistakenly sent to Mwanza instead of Musoma. Another notice was sent to Musoma after the mistake had been discovered. The petition of appeal was however filed in time. When the appellant made this application for leave to file notice of intention to appeal out of time, it was argued by the State that since a judge of the High Court (Mnzavas J) had refused to entertain the appeal because of failure to comply with s. 314(a) C.P.C., the Court had become functus official and could not entertain the appeal:

Held: (1) "The compliance required by section 314 is total. A partial compliance, as by giving the notice of appeal in time but lodging the petition out of time or vice versa is not enough. A partial compliance creates, at most, an imperfect appeal which by section 314 cannot be entertained." (2) "he right of appeal conferred by section 312 of the C.P.C would be lost if the periods of limitation prescribed in section 314 (a) (b) were not complied with. The proviso to section 314, however, provides that the High Court may, for good cause, admit an appeal notwithstanding that the periods of limitation have elapsed, that is to say, restore the right of appeal and treat an imperfect appeal as valid

and proper appeal or allow a notice of appeal to be given and petition of appeal to be lodged out of

time, where no steps have been taken by the prospective appellant. When the curt has exercised this power in favour of an appellant or prospective appellant it would then proceed to entertain tit (consider or deal with it either under section 317 or 319 of the C.P.C. This power to admit an appeal cannot be exercised unless good cause is shown. The good cause has invariably to be shown by the appellant or prospective appellant. He initiates the proceeding by moving or applying to the court to exercise its power under the proviso. But where the Court, ex propio motu, decides to exercise its powers under the proviso, then, I think that it should give the appellant an opportunity to show cause before making an order thereunder." (3) "A close study of the said ORDER showed the Mnzavas, J. merely refused to entertain the appeal because section 314 (a) and (b) had not been complied with. Furthermore, he made no order striking out or dismissing the appeal, apparently leaving it opens to the appellant to show good reasons to the Court to admit the appeal. Had an ORDER been made striking out the appeal as incompetent there might have been some substance in the State attorney's contention. The question before me is whether to admit the appeal for good cause, a matter which was never before Mnzavas, Ag. J." (4) The appellant was anxious to pursue the appeal by engaging counsel promptly. The mistake in relation to the original notice was caused by a clerical error by counsel and appellant ought not to be penalized for this. Good cause has been shown to admit this application. Sentence reduced to a fine of Shs. 150/- (5) Appeal allowed.

339. Anthony and Another v. R. Crim. App. 149-A-70; 11/9/70; El-Kindy, Ag. J.

The appellant were charged and convicted of wrongful confinement c/s 253 of the Penal Code. The particulars of the offence in the charge did not over that the confinement was

wrongful. The issue on appeal was whether the charge disclosed any offence in law, and whether the omission of the word "wrongful" was fatal to the charge or an irregularity that could be cured under s. 346 of Criminal Procedure Code.

Held: (1) "It seems to me that (1) there is no statutory definition of wrongful confinement although there is the opinion of my learned brother Biron J, in the case of R. v. SEFU SAID (1964) EA p. 178 and (2) there is no direct authority on the point from any part African Court. The nearest cases, on similar parts, are TERRAH MUKINDIA v. R. (1966) EA P. 425 AND MUNYAO MUU v. R. (1957) p. 894 where, in the latter cases, the Court of Appeal considered the omission of the word "wrongful" in the particulars of the charge. I find much assistance and guidance from these two decisions. In this case, with due respect to the learned State Attorney, the essence of the offence is the "wrongfulness" of the act which, to my mind means, contrary to law, and it is not just

confinement. I am not satisfied that the omission did not prejudiced the appellants with their defence and that they understood the nature of the charge preferred against them. I find, therefore, the omission is fatal and cannot be cured by Section 346 of the Criminal Procedure Code, however, broad minded one wanted to be." (2) Appeal allowed.

340. Motika v. R. Crim. App. 167-A-70; 28/9/70; El Kindy. Ag. J.

The appellant was convicted of simple theft c/s. 265 of the Penal Code and carrying passengers for hire or reward c/s. 27A of the Traffic Ordinance as amended by Act 31/61 and section 76 of the Transport Licensees Ordinance Cap. 373. According to evidence, appellant who was a driver of the Ngoronga Conservation unit was stopped by four boys who wanted a lift. He took them and drove for some 8 or 9 miles and asked them for a fee. They refused to pay whereupon the appellant made them got off the vehicle without their suit cases which he withheld. It was argued on appeal that since the appellant took the suit cases as a pledge or security, this amounted to theft.

Held: (1) “In my view, the appellant could only fall under the second part of the provision of Section 258(1) of the Penal Code. In my view a person is held to have stolen something capable of being stolen if (1) he takes that thing fraudulently and without use of any person other than the general or special owner. Subsection 2, in my view, explains what acts, if done, would amount for fraudulent intent. One of them is that, if the thing taken is taken with “an intent to use the thing as a pledge or security.” However, it is also useful to consider the meaning of special owner. The same subsection 2 states. “The term ‘special owner’ includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.” In other words, even if a person takes or converts something capable of being stolen with intent to use it as a pledge or security, he would not be held to have taken or converted that thing fraudulently if he was a special owner. In this case, the appellant held the suit case of the complainant on the ground that the complainant had refused to pay him the Shs. 2/50, and it was clearly understood that the complainant would be allowed to take back his suit case upon payment of the money. In my view, the appellant was a special owner. His right to the fare depended upon holding possession of the suit case; otherwise his right would have been lost. I am therefore not satisfied that, in taking the suit case as he did, he committed any criminal offence of larceny c/s 265 of the Penal Code. on his count, therefore, the appeal is allowed. It is ordered that the appellant be released from prison unless held on some other lawful purpose. (2) “I would refer briefly to the manner in which the charge was preferred on the second count. The charge read “2nd Count:

Carrying Passengers for hire or reward c/s 27(A) of the Traffic Ordinance, and Section 26 of Transport Licence, as amended by Act No. 31 of 1961 cap. 373.” In my view, the reference to the transport ordinance was not necessary and quite irrelevant. Section Q 7(A) of the Traffic Ordinance Cap. 168, as amended by Act No. 31/1961, create a complete offence and fully provides for the punishment to be inflicted upon conviction.”

“However this error did not occasion any failure of justice, and the appeal on this point is accordingly dismissed” (3) Appeal allowed in part.

341. R. v. Omari Isumail Crim. Rev. 98-D-70; 7/10/70; Georges C.J.

A charge was framed in the words of the Traffic Ordinance [s. 44A (1) (a)] that accused had driven a vehicle on the road “in a manner which having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic on the road at the time, was dangerous.” Neither the charge nor the statement of facts by the prosecution disclosed any particular act of dangerous driving. The charge merely stated the fact of the accident. The case came up to the High Court for confirmation of sentence.

Held: (1) The statement of facts is inadequate. “It does not even allege that the defendant failed to stop at the major road, or that he was driving too fast, or any of the other particulars of negligence which one would expect to be met out in a matter of this sort. All that is stated is the fact of the accident. By agreeing to this account, the defendant did not agree to any act of dangerous driving. The account given by the police does not even state on what road the other vehicle involved was traveling immediately before the collision.” (2) “The statement of facts should distinctly state the act of dangerous driving on which the prosecution depends. This is important not only from the standpoint of placing on the record a proper admission of guilt, but also for the purpose enabling the Court to assess the appropriateness of the sentence. The degree of negligence of the defendant is a vital a factor in the assessment of punishment as the circumstance of death.” (3) Conviction set aside. Accused to plead again before another magistrate.

342. R. v. Ahmed Misc. Crim. Cause 27-D-70; -/10/70; Saidi, J.

The applicant was applying for bail for the fifth time. He stood charged with conspiracy to defraud the Government of Tanzania of Shs. 886,000/- by claiming extra payment over a contract of Shs. 347, 915/80 and corrupt transaction by an agent in that he had corruptly given a Marcedes Bonz to one Haining a Government Engineer (now

convicted of corruption) to induce him to show favours to his firm. It was agree that applicant had been in

custody too long and that this detention made it difficult to prepare for his defence, and that some European accused with whom the applicant was charged had got bail. Bail was oppressed because the offences were serious and carried heavy sentences.

Held: (1) "In Abdallah Nassor v. R. 1 T.L.R. 289 at pp. 292 Wilson, J. while dealing with a similar application made the following observation:- "English courts have frequently laid down that the proper tests of whether bail should be allowed is the probability that the accused, if granted bail, will appear to take his trial and not seek to evade justice by leaving the jurisdiction (2) In criminal law an accused person is presumed innocent until and unless he is proved guilty and on this consideration most persons charged with the majority offences are allowed bail pending their trials. However, the proper test whether bail should be granted or refused is whether it is probable that the accuse will appear to take his trial. Mr. kapila argued that Mr. Zahir ahmed cannot abscond as he has no traveling papers in his possession at the present moment. My brother Hamlyn J. had stated in Para 2 of his Order: "but there is some consideration of the applicant's failure to appear at the trial. There are places not far distant to which he could presumably go without papers." I am in full agreement with my brother Hamlyn J. on this most important issue. (3) "The offences with which Mr. Zahir Ahmed is charged are serious and in one of these another person alleged to have corruptly received a car from his has been convicted and is serving sentence. These are definitely issues that are likely to induce Mr. Zahir Ahmed to jump the bail if it is granted. This Court is well aware of recent cases of persons who have jumped bails and were not available for trial despite the fact that their passports had been surrendered to police. One of these stole an aeroplane by means of which escaped, although has passport was lying at the police office." (4) The applicant has not been denied bail because he is of Indian origin. (5) Bail refused.

343. R. v. Chamtigiti Crim. Sass. 199-M-70; 31/8/70; Mzavas, Ag. J.

The accused was charged with attempted murder c/s. 211 (1) of the Penal Code. it was alleged that the accused had a quarrel with his brother the husband of the complainant over some cattle which had been used as dowry by the brother in marrying the complainant. The accused asked his brother to divorce the complainant but he refused. Whereupon the accused swore to separate them collected an arrow and shot the complainant in the chest. The complainant was the only witness who saw accused outside the house holding a bow. The accused set up the defence of alibi that he had at the material time been with his girl friend.

Held: (1) "I heard the testimony of Webiro (P.W.1) the complainant. From her testimony and demeanour I was left with an impression that her evidence may well be true.

of what happened on that night. But I must warn myself that there is always a danger to rely upon an identification of a single witness although a conviction so based cannot be, in law, said to be invalid. In Thairu s/o Muhoro and others v. R. 21 E.A.A.C.A. page 187, a conviction was based on the identification of one witness. But that case can be clearly identified from the present one. In that case the identifying witness had to identify the prisoner from other people. The fact that he identified the prisoner and left the others showed that h was definite that it was the prisoner who struck him. In the present case the complainant was faced with the problem of identifying her assailant soon after a quarrel between her husband and the accuse. There was no doubt had-blood between complainant's husband and the accused. But from complainant's answers on cross-examination it is clear that the accused was to lose if the complainant was t die. What the accused wanted was for the complainant to be divorced so that dowry paid for her marriage could b refunded." (2) "Again we have evidence of the let's diary which shows that there could not possibly have been moon-light on the 12/4/69. In CHANDE s/o SAIDI v. R. Dar es Salaam criminal Appeal No. 216/63 Biron, J, had this to say – "Where the prosecution relies on the identification of the accused by one single witness,

the court should consider not only the credibility of the identifying witness but also the possibility of the witness having made a mistake." We have the testimony of Wambura (D.W. 2) who told the Court that one Saturday in April last year the accused spent a night at her place. The 12/4/69 was a Saturday. This testimony is not in any way challenged by the prosecution. From the evidence before me there can be no certainty as to who was the person that shot the complainant with a poisoned arrow. The matter becomes all the more difficult because the alleged arrow could not be produced in court because the person who should have produced it, (the husband of the complainant) has since died." (3) Accused acquitted.

344. R. v. Nyakaho Crim. Sass 95-M-70; 2/6/70; Saidi J.

The accused was charged with the murder of her father-in-law by slashing him to death with a panga. The deceased, an old man of 60 years entered the house of his son, the husband of the accused where the accused was sleeping convalescing from a T.B. attack. The accused was suddenly awakened to find the deceased lying between her legs, his trousers stripped down to his feet, trying to have sexual intercourse with her. Hen she refused to have sexual intercourse with him, he tried to throttle her to stop he from shouting for help, whereupon accused jumped out of bed picked up a panga any cut the deceased several times on the head and arms. The deceased died from those wounds. At the trial a submission of no case to answer was made.

Held (1) "There is no doubt whatsoever that the accused was in the circumstances entitled to defend her –self against the assault on her by the deceased. She was a weak woman who had been suffering from T.B. and was just recovering from the effect of this illness. She was lawfully resting in her own house; while in deep

Sleep she was awakened by the deceased, who had entered the house, locked the door which was then open, stripped his trousers, raised the bed-sheet the accused was covering with an started to lie on her. When challenged he tried to grab the accused's throat to choke her. I agree with the second assessor that it was a very bad behaviour

on the part of the deceased to try to sleep with his daughter-in-law. It is also clear that he misbehaved so grossly when he was a guest in his own son's home where his own ill wife was being nursed. The accused exercised her right of self-defence when she was throttled by the deceased. If she did not do so, she would have been choked to death. Again, under the law, a woman is entitled to defend her chastity against a man who wants to have carnal knowledge of her forcibly. In paragraph 2512 ARCHBOLD, in his PLEADING, EVIDENCE AND PRAACTICE IN CRIMINAL CASES, 36th Edition, deals with "Killing in defence of person or property." There he says "An accused would be entitled to an acquittal where the killing is justifiable as for example …. Where a woman kills a man who attempts to ravish her; 1 Hale 485; 1 Hawk. 7th ed., c. 28, s. 21." (2) "So it would appear that even in cases where a woman feels that a man wants to rape hr she is by law entitled to resist the rape and if while so resisting she inflicts fatal injuries on the man she would be entitled to an acquittal as she would then be defending her chastity. In the present case, the accused has both the rights, that is, the right to defend her chastity and also the right to defend her life when the deceased tried to throttle her in a bid to overcome her and be able to ravish her." (3) Accused acquitted.

345. Mkiramweni v. R. Crim. App. 329-D-70; 30-9-70; Makame, J.

The appellant, formerly the officer in charge of the Special Constabulary in Tanga Region, was convicted of giving false information and of Libel c/ss. 122 and 187 of the Penal Code. Evidence was adduced to the effect that the appellant wrote letters to various people including His Excellency the President of the United Republic and the Chairman of the Permanent Commission of Enquiry alleging that the Regional Police Commander was guilty of nepotism, unfair treatment of Special Constables, irregular use of Government motor vehicles and unnecessary transfers of police officers. Appellant was dismissed by a letter because he did not attend punctually a meeting of Special Constables, and apparently it was this letter which prompted the appellant to write the various letters. There was evidence from both the prosecution and defence witnesses that Special Constables were being dismissed rather abruptly. One prosecution witness said that he had read the letter to His Excellency the President and was satisfied that some of the allegations were true. This witness was not treated as a

hostile witness and therefore there was no way of finding what information was false or true and the Court did not asked what allegations were true and which were false. There was also further evidence of summary dismissal of other Special Constables.

(1970) H.C.D.

- 330 –

Held: (1) “The Regional Police Commander may have power to dismiss Special Constables without giving reasons, but when things reach a court of law in circumstances as the present ones, the reasons for the dismissals may have to be looked at so as to establish whether or not the allegations said to have been made were false. The Regional Police Commander admitted that police officers were being shunted around rather often but his was because there had been some trouble in Lushoto district and police officers from there had to be pulled out and this involved transfers of other policemen.” (2) I agree with the learned Resident Magistrate, that the allegations said to have been made on the second count can be defamatory and I also agree that “the matter is complaint or accusation”, but because of what I have already said in connection with the first count, I am unable to agree with the learned Resident Magistrate that the absence of good faith within the meaning of section 193 of the Penal Code has been shown.” (3) Appeal allowed.

346. Maulidi v. R. Crim. App. 591-D-70; 23/10/70; Biron, J.

The appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees, failure to insure in respect of liability to his employees, failure to insure to pay minimum wages. Evidence established that the appellant who owned a bar paid his barmaids Shs. 60/- per month whereas the minimum wage was Shs. 170/- per month. The appellant pleaded ignorance as to requirement of having employees insured or contracts made out for them. The plea was rejected on the ground that ignorance of law does not excuse.

Held: (1) “Apart from the finding on the facts that the appellant did know the law, I am inclined to the view that these statutory offences are absolute, and no mens rea is required, even so it is pointed that there is no such presumption that everybody is

presumed to know the law. In fact, I very much doubt if such presumption would hold good of even those who administer the law. The principle is that ignorance of the law does not afford a defence which, as the magistrate will appreciate, is no the same as presuming that everyone knows the law." (2) There is no merit in the appeal (3) Appeal dismissed.

347. Lawrent v. R. Crim. App. 200-A-70; 17/10/70; Bramble, J.

The appellant was charged with rape and convicted of Indecent Assault c/s. 135 of the Penal Code. The trial magistrate found that there was no proper corroboration to sustain a conviction of rape and stated that: "However, I would not acquit him just because the facts do not disclose rape. The accused is found guilty of the offence of indecent assault and is convicted on that offence."

Held: (1) "This was not a case of substituting one charge for another in which case the accused should be called upon to made a fresh plea. The intention was

to apply section 181 (2) of the Criminal Procedure Code which provides that: - "When a person is charged with an offence and facts are proved which reduce it to a minor offence although he was not charged with it." (2) It is clear from the judgment that he learned magistrate did matter of practice in cases of indecent assault. Where there is no corroboration the magistrate must warn himself of the danger of conviction but if he finds that the evidence is so convincing that he feels that it would be safe to do so he may justifiably convict. Such a course has not been followed. Nowhere is it stated that he was so convinced with the evidence that he felt it safe to convict and on examining the record I would hesitate t say that the evidence was convincing." (3) Appeal allowed.

348. Shabani Ali and another v. R. Crim. Apps. 181 and 182-A-70; 28/9/70; El-Kindy Ag. J.

The appellants were jointly charged for and convicted with the offence of corrupt transaction with agents' c/ss. 3(1) and 3(3) (a) Prevention of Corruption Ord. Cap. 400. It appeared from evidence which was disputed that the appellants found the complainant a mechanic driving his motor vehicle along a public road. They, being police officers, threatened to prosecute him because he did not have a road licence and insurance policy. Complainant alleged that the appellants managed to exact Shs. 300/- from him in return for a pardon and that he paid this later as he had no money at the moment. None of the prosecution witnesses saw the actual paying of the bribe. The witnesses merely stated that they had seen the Complainant in the company of the appellants. It was argued on appeal that there had not been enough corroboration of the appellants' story.

Held: (1) "In this case, the complainant was an accomplice, and therefore his evidence required material corroboration. For the sake of clarity, the nature of corroboration which is wanted is that which implicates the accused. In the case of LENTO v. MKIRILA v. R. (1963) E.A. 9, the then Chief Justice of Tanzania, Sir Ralph Windham, held that the nature of corroboration required is that which implicates the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates the accused in some material particular not only that the crime has been committed by also that the prisoner committed it. The court of Appeal for East African had laid down similar requirements in their decisions, in the cases of THAKAR SINGH s/o KAHIR SINGH v. REX (1934) EACA Vol. 1 p. 110 at p. 112 and NDAMSIA WA WAMBURU v. REX (1937) IV EACA p. 27 at p. 28. (2) None of the witnesses except Idi Bakari the brother of the complainant (Bakari) knew about the alleged bribe and he was an accomplice since complainant had told him to produce some money for the purposes of the bribe and he had given Shs. 10/- "I have no doubt, in my mind that Bakari knew that his brother was going to bribe his arrestors so that hey do not charge him with

the offence. In the circumstances I agree that the evidence disclosed that Bakari Hamisi was a particep criminis on his evidence therefore needed corroboration and his evidence cannot corroborate the evidence of another accomplice – the complainant." (3) There being no other corroborative evidence it was unsafe to support the convictions. (4) Appeals allowed.

349. Ndelaonjama v. R. (PC) Crim. App. 188-A-70; Kwikima, Ag. J.

The appellant was charged before a Primary Court for criminal trespass c/s. 299 (1) (a) of the Penal Code. He built a dwelling house for himself on what he took in good faith to be his land. Not until the house was completed did the complainant lodge "complaint. Some Tanu officials ordered appellant to pull down the house but he refused whereupon criminal proceedings were instituted against him.

Held: (1) "The respondent cannot be said to have lodged his complaint in good faith. He probably sought to dispossess the appellant of his new house. Such conduct was the subject of adverse comment by my learned brother, Hamlyn J. in the case of Laurent Cohola v. Rembo Odoyo, 1968 H.C.D. 19 when he said: - "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 commenced would point to fact that the claim is not a bona fide one but merely made in order to reap the harvest of another man's labour." The penultimate sentence in that observation is particularly relevant to this case. (2) "There is nothing on the record to sow that the elements of criminal trespass, the entry should have been forcible with intent to annoy. Te appellant entered the land genuinely believing it to be his own, and in broad daylight he started to erect his house until it was complete. Only then did the respondent stir. If the complainant was annoyed, it was not for the forcible entry, for there had been none. The complainant must have woken up to the prospect of acquiring for himself or dispossessing the appellant the house which are appellant had just after putting in effort ad capital." (3) Appeal allowed conviction quashed.

350. Ladislas v. R. Crim. App. 417-M-70; 16/10/70; El-Kindy Ag. J.

The appellant was charged with and convicted of being in possession of uncustomed goods c/s. 147 (d) (iii) and 155 A of the East African Customs Management Act. At the trial, the local customs officer who had been in Tanzania for only $1^1/_2$ years alleged that the goods (vitenges) were manufactured in Congo because he had seen people from Congo wearing such vetenges. On the basis of this evidence the magistrate found that the vitenges were Congo manufactured.

(1970) H.C.D.

- 333 –

Held: (1) “Apart from the serious misdirection which I shall refer to, this evidence is far from being adequate to find such a fact. The vitenges did not have any mark to show that they were made in Congo. The fact that the customs officer said that he had seen women fro the Congo wearing similar vitenges did not necessarily mean that the vitenges found in possession of appellant were not manufactured in this country and therefore they must have been imported from Congo. It was not safe to rely on the knowledge of the local customs officer in a remote station like Kigoma to be knowledgeable about the vitenges which are manufactured in this country and those not manufactured in this country. His evidence should not have given much weight. The customs officer’s opinion in the circumstances did not establish that the vitenges mist have been made in Congo and therefore imported. It is notorious fact that mass manufactured goods could resemble each other closely. There was, therefore, no justification for the learned magistrate’s finding on this issue. (2) “The learned magistrate misdirected himself when he said that “…… all lawful imports go through Kigoma port where there is a customs officer and not Ujiji”. The fact that Kigoma was the authoritative port wshere a customs officer was stationed did not necessarily mean that that the rest of the imports from Ujiji port were unlawful per se. goods could be imported through Ujiji and then the importer could pay all customs duty at the customs office anywhere, including Kigoma.” (3) Appeal allowed.