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Case should be cited as follows: [1972] H.C.D. n. 27

The final number indicates the case number, not the page number.

TANZANIA

HIGH COURT DIGEST

Faculty of Law,
University of Dar es salaam,
P. O. Box 35093,
DAR ES SALLAM

Selection of Cases

All decisions of the High Court containing significant rulings of law are reported. In addition we report all decisions of the court of Appeal for East Africa in cases originating from Tanzania which are of interest in their own right or which dispose of cases previously reported in the Digest.

Index

The index has two divisions: a) Civil, which includes all non-criminal and non-penal topics; b) 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 Reporting

We reproduce, whenever possible, complete or lightly edited versions of the cases selected. In other instances, a summary of the facts is reproduced in the head note.

Identification of Cases in the High Court

The system of identifying cases decided by the High Court is shown in the following example:

"Ali s/o Hamisi v. R., (pc) Crim. App. 828-DSM-66; 19/1/67; Saidi J."

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

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

(2) Court of Origin – This indicates the type of court in which the case was originally heard. “(PC)” stands for “Primary Court”, 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.

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

(5) City – this indicates the city in which the case was heard, or to whose registry the case was assigned, by the High Court. “DSM” is Dar es Salaam; “DDM” Dodoma “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 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 19th January, 1967, by Mr. Justice Saidi.

Identification of Cases in the Court of Appeal for East Africa

The system of identifying cases decided by the Court of appeal for East Africa is as follows:

Ezekia s/o Simbamkali v. R., E.A.C.A. Crim. App. 30-DSM-72, 19/7/72.

The name of the judge delivering the judgment is indicated in the holdings.

INSPECTION NOTES

Inspection Notes contain information and counsel useful to magistrates and advocates alike, and are therefore included in this Digest. The cases involved are assigned no High Court number. The citation 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 Notes by the High Court.

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- See: MINIMUM SENTENCES ACT; SENTENCE.

COMPULSION

- Murder – Threat to kill accused ceased when murder weapon handed to him by party threatening. 1972/60.
- "Two or more offenders' – Not necessary that other participants be charged with accused. 1972/60.

CUNCURRENT SENTENCES

See: SENTENCE.

CONDITIONAL DISCHARGE

See: SENTENCE.

CONFESSIONS

See: EVIDENCE.

CONSERVATION

See: FAUNA CONSERVATION ORDINANCE.

CONTEMPT OF COURT

- Failure to attend – Mens rea required – Conviction improper where accused was in toilet. 1972/36.
- Non-attendance of witness c/s 150(1), C.P.C. – Presence at burial of mother is lawful excuse. 1972/153,

CONVERSION

See: THEFT.

CONVERSION NOT AMOUNTING TO THEFT

Moving objects alone covered – Car battery not included. 1972/178.

CO-OPERATIVES

See: MINIMUM SENTENCES ACT.

CORROBORATION

See: EVIDENCE.

CORRUPTION

See: PREVENTION OF CORRUPTION ACT.

CREATING A DISTURBANCE

See: ABUSIVE LANGUAGE.

CREDIBILITY

See: EVIDENCE.

CRIMINAL TRESPASE

Entering on land of another and preparing vegetable beds against the expressed wishes of owner may support charge of criminal trespass but not forcible entry. 1972/31.

DEFENCE OF PERSON

- Assault – Plea of guilty – Vitiated by possibility of self-defence. 1972/54.
- Homicide – Pregnant woman justified in using lethal force to defend herself from deceased attempting to abort her. 1972/117.

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DEFLILEMENT OF GIRLS UNDER TWELVE

- Evidence – Complainant's testimony requires corroboration. 1972/90

- Sentence – Imprisonment, even suspended, is inappropriate where accused is youthful first offender pursuing course of instruction. 1972/226.

DISQUALIFICATION FROM DRIVING

See: ROAD TRAFFIC.

DRIVING

See: ROAD TRAFFIC.

EMPLOYMENT ORDINANCE, CAP. 366

- Charge – Method of charging for many similar breaches of enactment .1972/162.

ESCAPE FROM LAWFUL CUSTODY

Sentence

- Imprisonment – Ten months excessive in circumstances. 1972/209.
- Irrelevant considerations – Gravity of charges pending at time of escape. 1972/209

EVIDENCE (See also EVIDENCE in Civil Index)

Accomplices

- Corroboration – Required as matter of practice except in exceptional circumstances. 1972/41; 1972/95; 1972/213.
- Corroboration – Several accomplices cannot corroborate one another. 1972/213.
- Victims distinguished. 1972/86.

Admissibility

- Confessions. 1972/44; 1972/160.
- Notes used by witness to refresh memory. 1972/240.
- Trial within trial – Proper procedure. 1972/192.
- Alibis – See: EVIDENCE – Burden of proof.

Burden of proof

- Alibis – Need not be proved by accused. 1972/87.
- Confessions – Prosecution must prove voluntarily made.
- Defence – Finding that accused ’s explanation is untruthful proper basis for conviction. 1972/178.

EVIDENCE (CONTD.)

Burden of Proof (Contd.)

- Defence – Need not be proved by accused. 1972/178.
- Possession of government trophy – Burden of proving lawful possession on accused. 1972/185.
- Prosecution – Cannot rely on defence case to resolve contradictions in own evidence. 1972/178.
- Prosecution – Not sufficient to disprove defence case – Must prove own case beyond reasonable doubt. 1972/178.
- Stealing by finding – Accused not required to prove lack of fraudulent intent. 1972/33.
- Children of tender years. – Corroboration – Required by law for evidence not given on oath. 1972/90.
- Circumstantial evidence – Must be incompatible with any explanation other than guilt of accused. 1972/87; 1972/105; 1972/184.

Confessions

- Admissibility – Admissible where made to TANU youth leader. 1972/160.
- Admissibility – Inadmissible where made to Ward Executive officer. 1972/44.
- Co-accuseds – Confession of one implicating other – Only operates to buttress already strong case. 1972/240.
- Definition – Admission of incriminating fact coupled with exculpatory explanation is not confession. 1972/239.
- Retracted – Corroboration required. 1972/44; 1972/95; 1972/108; 1972/179.
- Voluntariness – Burden of proof lies on prosecution. 1972/240.
- Voluntariness – Trial within trial – Proper procedure. 1972/240.

Corroboration

- Accomplices. 1972/41; 1972/95; 1972/213.

- Children of tender years. 1972/90.
- Confessions – Retracted. 1972/44; 1972/95; 1972/108; 1972/179.
- Dying declarations. 1972/160.
- Opinion evidence. 1972/58.
- People with interests of own to serve. 1972/156; 1972/157.
  Sexual offences. 1972/90.

EVIDENCE (CONTD.)

- Credibility – Question of fact not law. 1972/24.
- Dying declaration – Corroboration required as matter of practice, 1972/160.
- Evaluation of evidence – Accused's own testimony may be taken into account in finding him guilty beyond reasonable doubt. 1972/217.

Experts

- Evidence deserves respect but is not binding. 1972/212.
- Medical evidence is merely aid to court. 1972/35.

Identification

- Accused – Bare assertions of recognition not adequate – Must be accompanied by details. 1972/206.
- Accused – Identifying parties in confused state of mind – Confirmation of evidence required. 1972/101.
- Accused – Single witness – Further proof required in circumstances. 1972/180.
- Stolen goods – Catalogue numbers of spare parts inadequate. Serial numbers required. 1972/178.
- Stolen goods – Production of cattle in court not essential. 1972/157.
- Identification parades – Proper procedure. 1972/165.
- Judicial notice – Registration of cooperative published in the Gazette. 1972/103.

- Notes made by witness – May be used to refresh memory but not admissible as evidence. 1972/192; 1972/240.
- Opinions – Corroboration required of opinion as to speed of vehicle. 1972/58.

Presumptions

- Failure of prosecution to call relevant witness – Inferences in favour of accused may be drawn. 1972/42.
- Recent possession of stolen goods – Clothing – Ten days after theft – Conviction for housebreaking and theft. 1972/214.
- Recent possession of stolen goods – Corrugated iron sheets – Short period – Conviction for receiving. 1972/42.
- Recent possession of stolen goods – Money and clothing – Two days after theft – Conviction for housebreaking and theft. 1972/21.
- Recent possession of stolen goods – Radio – Two and half hours after theft – Conviction for housebreaking and theft proper.

EVIDENCE (CONTD.)

Presumptions (Contd.)

- Recent possession of stolen goods – Radio – Two and half months after theft – Conviction for receiving. 1972/166.
- Proof – Arson – Threat to burn down house insufficient in itself to establish guilt. 1972/184
- Sexual offences – Corroboration required as matter of practice. 1972/90

Suspects

- Evidence requires corroboration. 1972/156; 1972/157.
- Victims distinguished. 1972/86.
- Unsworn statement by accused – Cross – examination by court or prosecution improper – Questions put by court for clarification permissible. 1972/197.

Witnesses

- Hostile – Evidence of negligible value. 1972/212.
- Notes – May be used to refresh memory but not admissible as evidence. 1972/192; 1972/240
- Prosecution – Public prosecutor also prosecution witness and investigating officer – Whether fair trial. 1972/9.
- Single witness – Additional evidence required in circumstances. 1972/180.

EXCHANGE CONTROL ORDINANCE, CAP. 294

Sentence

- Imprisonment – Whether appropriate for first offender. 1972/88.
- Imprisonment – Whether severe sentences appropriate in view of increase in offences. 1972/27.

FALSE PRETENCES

See: OBTAINING BY FALSE PRETENCES.

FAUNA CONSERVATION ORDINANCE, CAP. 302.

- Game trophy – Possession of – Burden of proving lawful possession on accused. 1972/185.
- "Possession" – Meaning. 1972/82.

Sentence

- Fine of Shs. 1,000/= for failing to record game killed not excessive in circumstances. 1972/82.
- Forfeiture of gun – Not authorized for offence of ailing to report game killed. 1972/82.

FAUNA CONSERVATION ORDINANCE, CAP. 302 (CONTD)

Sentence (Contd.)

- Forfeiture of gun – Third party owner – Lack of knowledge of offences no defence. 1972/170.
- Forfeiture of gun – When authorized. 1972/82.
- "Set gun" – Meaning. 1972/82.

FINE

See: SENTENCE.

FIRE ARMS

See: ARMS AND AMMUNITION ORDINANCE.

FORCIBLE ENTRY

Entering on land of another and preparing vegetable beds against the expressed wishes of owner may support charge of criminal trespass but not forcible entry. 1972/31.

FORFELTURE

See: SENTENCE.

GAME

See: FAUNA CONSERVATION ORDINANCE.

GOVERNMENT STORES

See: POSSESSION OF GOVERNMENT STORES.

GOVERNMENT TROPHIES

See: FAUNA CONSERVATION ORDINANCE.

GRIEVOUS HARM C/S 225, PENAL CODE

Grievous harm

- Includes only those permanent bodily hurts which seriously interfere with health or comfort. 1972/225.
- Loss of part of ear constitutes. 1972/35.
- Loss of tooth does not constitute. 1972/175; 1972/225.
- Mends rea – Harm done to person other than one intended – Whether transferred malice suffices. 1972/45.
- Provocation – Not defence. 1972/113.

GRIEVOUS HARM WITH INTENT

See: ACTS INTENDED TO CAUSE GRIEVOUS HARM OR PREVENT ARREST.

GULLTY PLEA

See: PROCEDURE – Plea of guilty.

GUNS

See: ARMS AND AMMUNITION ORDINANCE.

HIGHWAYS ORDINANCE, CAP. 167

See: ROAD TRAFFIC.

HOMICIDE

- Causation – Fact that deceased might have lived had he received proper medical attention does not relieve party who inflicted injury of responsibility. 1972/199.
- Common intention. See: COMMON INTENTION..
- Compulsion – See: COMPULSION.
- Manslaughter – Sentence – Imprisonment for three years where no weapon used and death unforeseeable. 1972/233.

Murder

- Malice aforethought – Intoxication – Intent to kill doubtful where accused was drunk and acted without apparent motive. 1972/199.
- Malice aforethought – Manifested by blow struck on head with sharp instrument. 1972/50.
- Malice aforethought – Not found where death resulted from only one blow. 1972/89.

Provocation

- Alleged provocative act should be considered in light of antecedent aggravating circumstances. 1972/207.
- Evidence of accused‘s first reaction to the provoking act is especially significant. 1972/212.
- Formula requiring finding as to whether the mode of resentment bore a reasonable proportion to the provocation – Not appropriate in Tanzania. 1972/212.
- Insults accompanied by prodding with stick – Killing shortly thereafter – Killing not provoked in circumstances. 1972/212.

- Killing in heat of passion in revenge for an insult distinguished from killing in heat of passion as result of an insult.
- Ordinary person of the community to which the accused belongs – May refer to tribal community – Local customs and traditions relevant. 1972/212
- Prior suspicion of adultery does not exclude defence of provocation where accused finds his wife in circumstances suggesting adultery even where accused set out on search for wife carrying borrowed lethal weapons. 1972/179.
- Proper direction to be given to assessors. 1972/212.
- Refusal by wife to cook for husband – Sufficient provocation where preceded by other aggravating circumstances. 1972/207

JURISDICTION

See: PROCEDURE.

LABOUR

See: EMPLOYMENT ORDINANCE.

LARCENY

See: THEFT.

LIQUOR

- Intoxicating Liquors Act
- Forfeiture of trade license – When order appropriate. 1972/115.
- Selling after authorized hours – Sentence – Imprisonment inappropriate for first offender. 1972/115.

MANSLAUGHTER

See: HOMICIDE

MENS REA

- Contempt of court. – Failure to attend – Mens rea required. 1972/36.

- Corrupt transaction c/s 3 (2), Prevention of Corruption Act, 1971 – Corrupt intention required. 1972/186; 1972/224.
- Doing grievous harm with intent – Whether transferred malice suffices. 1972/45.
- Fauna Conservation Ordinance – Forfeiture of gun used in commission of offences – Third party owner – Lack of knowledge of offences no defence. 1972/170.
- Grievous harm – Whether transferred malice suffices. 1972/45.
- Minimum Sentences Act – Stealing government property – Knowledge that property belonged to government necessary. 1972/40.
- Transferred malice – Assault aimed at on party harms another – Whether mens rea of doing grievous harm with intent is present.

MINIMUM SENTENCES ACT, 1972

- Age of accused – Act does not apply to juveniles. 1972/163.
- Minimum Sentences – Robbery – Minimum of 7 years mandatory irrespective of whether accused is first offender. 1972/154.
- Mitigating circumstances – Not found where accused is married with dependent relatives. 1972/173.
- Transitional provisions
- General effect. 1972/91.
- Probation order not “sentence” passed prior to commencement of new Act. 1972/173.

MINIMUM SENTENCES ACT, 1972 (CONTD.)

- Value of property – Minimum sentence must be imposed where value exceeds Shs. 100/= 1972/173.

MINIMUM SENTENCES ACT, CAP. 526

- Bail – Offence under Act bailable. 1972/92.
- “Charity” – Fund collected by Village Development Committee to build dam not covered. 1972/104.

Compensation

- Order may be made in kind or in money – Previous cases not followed. 1972/97.
- Several accused – Should only be ordered to extent of each accused's responsibility. 1972/103.

Cooperatives

- Judicial notice may be taken of registration published in Gazette. 1972/103 Production of certificate of registration – Proper procedure. 1972/103.
- Public service – Tanzania Electric Supply Company not covered. 1972/84.

Schedule offences

- Breaking with intent to commit felony not scheduled. 1972/34
- Receiving stolen property is scheduled even where accused did not know goods were stolen in the course of a scheduled offence. 1972/166; 1972/173.
- Reference in schedule to repealed Prevention of Corruption enactment – Interpreted as reference to corresponding sections of new Prevention of Corruption enactment. 1972/52
- Stealing government property – Knowledge that property belonged to government necessary. 1972/40.
- "Special circumstances" – Whether small value of property involved can constitute. 1972/116.
- Suspended sentence – Unlawful for scheduled offences. 1972/25.
- Value of property – Leniency not permissible where value exceeds shs. 100/=. 1972/91.

<u>MOTOR VEHICLES</u>

- See: ROAD TRAFFIC.

<u>MURDER</u>

- See: HOMICIDE.

NATIONAL AGRICULTURAL PRODUCTS BOARD ACT CAP. 567

- Applicability – Act not applicable where produce bought for self – consumption. 1972/96.
- Forfeiture – Principles governing. 1972/48.

NECESSITY

- Contempt of court – Failure of witness to attend – Presence at burial of mother is lawful excuse. 1972/153.

OBSECENE LANGUAGE

- See: ABUSIVE LANGUAGE.

OBTAINING GOODS BY FALSE PRETENCES

- Intent to defraud – Defined as intent by deceit to induce a course of action – Unnecessary to show intent not to pay for goods obtained. 1972/223.
- Obtaining – Comprises only transfers of ownership – No obtaining where transferor had no power to transfer ownership. 1972/94.

OBTAINING REGISTATION ETC. BY FALSE PRETENCES

- False pretence – Must be made by accused not by third party. 1972/159.

PLEA

See: PROCEDURE

POSSESSION OF GOVERNMENT STORES

- Government stores – Property of National Service not covered. 1972/215.
- Unlawfulness of possession – Triable issue where accused alleges he received goods from his brother. 1972/215.

PREVENTION OF CORRUPTION ACT, 1971

- Bail – Offences involving corrupt transactions bail able. 1972/92.
- Corrupt transaction c/s 3(2)
- Accused acting as go-between for party giving bribe. 1972/217.
- Act done “corruptly” when done to sway agent from impartial discharge of duties or from loyalty to employer. 1972/186, 1972/224
- Act must be done “corruptly”. 1972/186; 1972/224.
- Applies to any agent whether public or private. 1972/186.

- Quality plea unacceptable where statement of facts does not reveal ingredients of offence. 1972/176.

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PREVENTION OF CORRUPTION ACT, 1971(CONTD.)

- Corrupt transaction c/s 3(2) (Contd.)
- In absence of motive proven to be neither evil nor dishonest, paying money to agent to do his duty is to act "corruptly".
- Where intention of giver is corrupt, it is irrelevant that bribe was given to party so that he should perform his duty. 1972/186.
- Public servant obtaining advantage without consideration c/s 6- Corrupt motive need not be proved. 1972/186.

PROCEDURE (See also PROCEDURE in Civil Index)

Adjournment

- Change of pleas by accused – Ten days' adjournment unjustified. 1972/200.
- Psychiatric examination – May be ordered any time after plea is taken. 1972/232.

Alternative verdicts

- Conspiracy to commit misdemeanor cannot be substituted for attempting to procure a certificate by false pretences. 1972/159
- Criminal trespass may be substituted for forcible entry. 1972/31.
- Grievous harm may be substituted for doing grievous harm with intent. 1972/45
- Person charged with principal offence cannot be convicted of being accessory to that offence. 1972/42.
- Possession of stock suspected of being stolen may not be substituted for cattle theft. 1972/22.
- Receiving stolen property may be substituted for theft. 1972/42.
- Simple theft may be substituted for theft by servant. 1972/29.
- Simple theft may be substituted for theft from person. 1972/39

- Appeal – See: APPEAL.

Assessors

- Replaced in course of trial – New assessors do not hear all evidence – Trial a nullity. 1972/152.
- Views on sentence may not be taken in High Court trials. 1972/233.

Bail

- Material factors – Allegation that accused will interfere with witnesses – Evidence showing reasonable cause for belief required. 1972/92; 1972/161.

PROCEDURE (CONTD.)

Bail (Contd.)

- Material factors – Co-accused granted bail – Discrimination unjustified in circumstances. 1972/161.
- Material factors – Fear of prosecution that accused, if released, might impede investigations of flee not sufficient ground for denying bail where investigations delayed and no evidence presented to justify fear. 1972/198.
- Material factors – Improper to deny bail because accused is non-citizen charged with corrupt transaction. 1972/92.
- Material factors – Vague allegations that accused may impede investigations and may be charged with more serious offence inadequate. 1972/119.
- Material factors – Whether accused will appear will appear for trial is main consideration. 1972/92; 1972/161.
- Bail – Murder charge – Granted only in exceptional cases – Fact that accused in remand one year not sufficient. 1972/26.
- Bail pending appeal – See: APPEAL.

Charge

- Defective – Being in possession of property suspected of having been stolen. 1972/57.
- Defective – Driving overloaded vehicle on bridge. 1972/43.
- Defective – Housebreaking – Felony intended not cited. 1972/106.
- Defective – Laid under repealed section – Defect curable where new section virtually identical. 1972/183.
- Defective – Membership in unlawful society – Wrong society named – Convictions upheld. 1972/151.
- Duplex – Theft – Articles stolen at different periods. 1972/51.
- Duplex – Three offences in one count. 1072/162.
- Meaning of "charge read and explained". 1972/83.
- Withdrawal under s. 86(9) of Cr. P.C. – Meaning of expression "…. Before the accused person in called upon to make his defence." 1972/118.
- Conduct of trial – Public prosecutor also investigating officer and prosecution witness – Whether fair trial. 1972/9.
- Quality plea – See: PROCEDURE – Plea of guilty.

Insanity

- Adjournment for psychiatric examination – May be ordered at any time after plea is taken. 1972/232.

PROCEDURE(CONTD.)

Insanity (Contd.)

- Medical observation under s. 164(3) C.P.C. – Accused must be detained in hospital not remand prison. 1972/158.
- Procedure where evidence of mental instability. 1972/113.
- Joinder – Breaking and stealing joined with practicing medicine without licence – Misjoinder. 1972/111.
- Judgment – Failure to deal with defence case – Improper. 1972/177.

- Judgment – Not necessary to mention every witness provided substance of evidence considered. 1972/225.
- Judgment – Too brief – Not necessarily fatal. 1972/164.

Plea

- Change of magistrates – No obligation for second magistrate to take plea when he continues case and does not re-commence it. 1972/38.
- Change of magistrates – Rule that new magistrate must call on accused to plead again is of doubtful practical value. 1972/201.
- Failure to take plea afresh on reopening of hearing before same magistrate – Irregularity not occasioning failure of justice. 1972/201
- Failure to take plea at all renders trial a nullity, 1972/201.

Plea of guilty

- Equivocalness – Assault – Equivocal where possibility of self-defence raised. 1972/54.
- Equivocalness – Causing death by dangerous driving – Equivocal plea. 1972/172.
- Equivocalness – Corrupt transaction Facts outlined do not support charge – Plea should not be accepted. 1972/176.
- Equivocalness - Grievous harm – Not equivocal where accused said “I was provoked and cut her with an axe”. 1972/113.
- Equivocalness - Whether equivocal when accused says “it is true” After charge read and explained. 1972/83.
- Procedure – Accused should e required to plead to each constituent element of offence charged following explanation of same. 1972/186.
- Withdrawal – Court may allow accused to withdrawn guilty plea after conviction but prior to imposition of sentence, where facts raised in mitigation constitute denial of offence. 1972/49; 1972/200.
- Reconciliation – Inappropriate in case of unlawful wounding.

PROCEDURE (CONTD.)

- Records of trial court destroyed – New trial appropriate except where sentence has been served or largely so, in which case appeal allowed. 1972/190.
- Reopening of case – Defence permitted to call supplementary witnesses after defence case closed but prior to judgment being delivered. 1972/201.

Restitution

- Property allegedly stolen by accused – Should be returned to accused on acquittal where there is no proof of complainant's title thereto. 1972/211.
- Stolen goods sold to third party – Whether owner entitled to recover. 1972/231.

Retrial

- Inappropriate where evidence doe not support conviction. 1972/152.
- Inappropriate where large part of sentence has been served. 1972/152; 1972/190.
- Inappropriate where value of goods stolen is small. 1972/152.
- Trial – High Court judge may not continue trial begun by another. 1972/232.
- Trial within trial – Voluntariness of confessions – Proper procedure. 1972/192; 1972/240.
- Unsoundness of mind – See; PROCEDURE – Insanity.
- Unsworn statement by accused – Cross – examination by court or prosecution improper – Questions put by court for clarification permissible. 1972/197

Witnesses

- Non-attendance – Burial of mother lawful excuse. 1972/153.
- Non-attendance – Call of nature lawful excuse. 1972/36.
- Recall – Accused must be informed of right to recall when change of magistrates. 1972/38.
- Recall – Circumstances in which court will allow. 1972/218.

- Recall – Leave of court always required. 1972/218.
- Waiver of right to call witnesses by defence advocate not binding on accused – Accused himself must respond to court's address information him of his right to call witness. 1972/155.

PROVOCATION

See: HOMICIDE.

PUBLIC ORDER ORDINANCE, CAP. 304

- Conduct conducive to breach of peace – Uttering of foolish and unpatriotic words on death of national leader does not constitute offence where listeners are merely displeased. 1972/222.

PUNISHMENT

See: SENTENCE.

RAPE

- Carnal knowledge – Penetration necessary – Clear evidence required. 1972/98.
- Lack of consent must be proved beyond reasonable doubt – Doubt exists where parties appear to have been previously acquainted, and complainant apparently did not scream or take immediate steps to have accused apprehended. 1972/205.

RECEIVING STOLEN PROPERTY

- Facts establish theft – Conviction of receiving stolen property sustained. 1972/99.
- Recent possession of stolen property – See: EVIDENCE – Presumptions.

RECENT POSSESSION

See: EVIDENCE – Presumptions.

RECONCILIATION

See: PROCEDURE.

RENT RESTRICTION ACT, CAP. 479

Subjecting a tenant to annoyance – Fine of Shs. 300/= not excessive. 1972/182.

REPATRIATION

See: SENTENCE.

RESTITUTION

See: PROCEDURE.

REVISION

See: APPEAL.

ROAD TRAFFIC

- Carrying passengers for hire without licence – Order to forfeit fares unlawful. 1972/174.

Causing death by dangerous driving.

- Death caused by burst tyre for which accused in no way to blame – Not offence. 1972/58.
- Equivocal guilty plea. 1972/172.
- Objective test applicable – Overtaking convoy of trucks at night – Vision suddenly obscured by fog – Duty to slow down or stop. 1972/202.
- Sentence – Disqualification alone inadequate and improper – Not substantive sentence but corollary to sentence. 1972/85.
- Sentence of 18 months' imprisonment excessive. 1972/216.

Disqualification from holding driving licence

- Not substantive sentence but corollary to sentence. 1972/85.
- Special reasons – Court should play active role in eliciting. 1972/47.
- Special reasons – Do not exist where accused allegedly has 30 dependents and driving is sole means of support. 1972/167.
- Special reasons – Exist where accused acted under orders from employer. 1972/196.
- Special reasons - Exist where accused employed to drive vehicle which unknown to him was uninsured. 1972/47.

- Special reasons – Exist where accused was driving sick child to hospital in uninsured vehicle. 1972/120.
- Special reasons – Must be mitigating factors relating to circumstances or facts of offence – Reasons personal to offender not necessarily excluded – Criterion laid down in Whittall v. Kirby modified. 1972/120.
- Driving overloaded vehicle over a bridge – Requirements in charging. 1972/43.

ROAD TRAFFIC (CONTD.)

- Driving while efficiency impaired- Sentence – Fine of Shs. 400/= excessive where accused earns Shs. 160/= per month. 1972/196.
- Driving without insurance – Absolute Discharged appropriate where accused is blameless driver employed to drive vehicle of another. 1972/47.
- Driving without licence – Damage to motor vehicle – Compensation order improper where loss not occasioned by commission of offence as such. 1972/37.

ROBBERY

Common intention – See: COMMON INTENTION.

SELF – DEFENCE

See: DEFENCE OF PERSON.

SENTENCE

Appeal (See also SENTENCE – Revision)

- Circumstances in which appeal court will interfere with sentence imposed by trial court. 1972/53; 1972/88; 1972/114.
- Court of Appeal for East Africa may consider lawfulness, although not severity, of sentence on second appeal. 1972/88; 1972/216
- High court may impose greater punishment than imposable by trial court. 1972/88.

Approved school – Requirements. 1972/28.

Compensation (See also: MINIMUM SENTENCES ACT – Compensation).

- Appropriate in case of assault causing actual bodily harm. 1972/175.
- Buyer in bad faith of stolen goods not entitled to compensation 1972/231.
- Convicted person must be given opportunity of being heard. 1972/231.
- Improper where loss not caused by offence as such. 1972/37
- May be made to special owner rather than actual owner of goods stolen. 1972/231.
- Necessary requisites. 1972/53.
- Order should take effect as from date of conviction and not date of release of accused. 1972/121.
- Order under s. 284A(7), Penal Code, is mandatory. 1972/53.
- Sale of property taken from accused to provide fund for compensation – Court may authorize – Recourses of third parties affected. 1972/121.

SENTENCE (CONTD.)

Compensation (Contd.)

- Several accused – Joint and several order appropriate to extent of accuseds' responsibilities. 1972/34; 1972/103.

Concurrent sentences

- Appropriate for offences committed in same transaction. 1972/34; 1972/107.
- Appropriate for similar offences committed as part of a single plan. 1972/102.

Conditional discharge

- Length not limited by maximum prison term assigned to offence. 1972/32;
- Whether a sentence. 1972/32.
- Consecutive sentences – See: SENTENCE – Concurrent sentences.
- Disqualification from driving – See: ROAD TRAFFIC.

Fine

- Driving while efficiency impaired – Shs. 400/= excessive where accused earns Shs. 160/= per month. 1972/196.
- Financial means of accused – Failure to determine not necessarily fatal. 1972/182.
- Financial means of accused – Should be determined. 1972/115.
- Subjecting tenant to annoyance – Shs. 300/= not excessive. 1972/182.

Forfeiture

- Court should state why order is made – Omission not always fatal. 1972/48.
- Discretionary – Proceeding must show that magistrate applied mind judicially. 1972/48.
- Fauna Conservation Ordinance – See: FAUNA CONSERVATION ORDINANCE – Sentence.
- Principles – Party affected must be given opportunity to oppose. 1972/115.
- Theft – Order of forfeiture unauthorized. 1972/211.
- Traffic Ordinance – Illegally obtained fares – Forfeiture order unauthorized. 1972/174.

Imprisonment

- Assault causing actual bodily harm – Nine months excessive in circumstances. 1972/175.
- Defilement of girls under twelve – Inappropriate where accused is youthful first offender pursuing course of instruction 1972/226.

SENTENCE (CONTD.)

Imprisonment (Contd.)

- First offenders – Normally undesirable. 1972/88; 1972/114.
- Selling beer after authorized hours – Imprisonment in appropriate for first offender. 1972/115.
- Irrelevant considerations

- Failure to show remorse by pleading guilty. 1972/223.
- Gravity of charges pending at time of escape from lawful custody. 1972/209.
- Rumored bad conduct of “court clerks” should not be considered in sentencing particular court clerk. 1972/223.

Material factors

- Accused well educated and capable of appreciating economic effects of offence against Exchange Control Ordinance. 1972/27.
- Co-accused governed by provisions of Minimum Sentences Act. 1972/163.
- Damage caused to national economy. 1972/88.
- Educational career of accused. 1972/226.
- Good record. 1972/189.
- Increase in offences. 1972/27.
- Length of time in custody. 1972/28; 1972/53.
- Nature of assault in case of manslaughter. 1972/233.
- Physical pain caused. 1972/235.
- Unforeseeability of death in case of manslaughter. 1972/233.
- Value of property stolen – Food crops – Irrelevant that crops stolen were of insignificant monetary value. 1972/203.
- Youth of accused. 1972/226
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Ananiah v. Richard Mwaitebele (PC) Civ. App. 81-D-71; 11/12/71 Mwakasendo Ag. J.

The appellant sued the respondent for enticing his ward Sabina whom the primary court found to be below the age of 21 years. The established facts were that the girl left the appellant's home at the instigation of the respondent in order to live in concubinage with him. The primary court awarded the appellant compensation. The district court reversed the decision holding that the girl was fully grown-up woman over the age of 21 years there fore no action for enticement could be brought.

Held: (1) “The medical certificate issued after the girl had been examined by a Doctor on my directions, shows that the girl is aged about 20 years and certainly not above 21 years. It follows therefore that the Judgment of the District Court which rested solely on the finding of age to be over 21, cannot, on that ground, be sustained.” (2) “There still remains the question whether the decision of the Primary Court is sustainable in law or not. It is, I think, generally accepted by both parties that the operative the area within which the parties reside. Both parties are Africans of the Nyakyusa tribe. They are both residents within the limits of the jurisdiction of the Dar es Salaam City Council. But I am reliably advised that as of the time of this judgment there is no restatement of customary law applicable to all Africans within the jurisdiction of the Dar es Salaam City Council. I am further advised that the Local Customary Law (Declaration) Order, 1963 has not been made applicable to the area of jurisdiction of the Dar es Salaam City Council. In my opinion therefore the customary law governing the parties district, which is Rungwe District.” (3) “By the Local Customary Law (Declaration) (No. 3) Order, 1964 (GN. 250 of 8/5/64) the Local Customary Law (Declaration) Order, 1963 was made applicable with only slight modifications, to the African within the jurisdiction of the Rungwe District Council to whom the Local Customary Law foretasted relates. In the instant case, having regard to the tribal affinity of the parties, I am satisfied that the Customary Law operative in the matter in dispute is that declared by the Local Customary Law (Declaration) Order, 1963 and accordingly I will deal with this appeal with particular reference to the rules contained in the Local Customary Law (Declaration) Order, 1963.” (4) “The customary rule which in my judgment, has an relevancy to the matter in issue is Rule 89 of the Local Customary (Declaration) Order, 1963, which provides: “89. Kama mwanamume anamshawishi msichana aliye chini ya miaka 21 (aliye chini ya ulinzi wa baba yake) ahame kwao na kukaa naye kinyumba, and hatia na anastahili kulipa faini, isiyopungua shilingi 50/= na kumlipa fidia baba wa yule binti isiyopungua shilling 100/=. Fidia ni lazima alipwe kabla ya faini.” From reading the judgment of the Primary Court, it is abundantly clear that it had this rule in mind when reaching the conclusion

That the appellant was entitled to compensation for the enticement of his ward by the respondent. I have no doubt in my mind that that conclusion was right. This conclusion was in fact inevitable in view of the clear findings of fact. “(5) “However, having found that the Primary Court was right in finding in favour of the appellant, I am unable to uphold the award of Shs. 600/= as damages in the cause. There is to my mind no discernible principle on which these damages were assessed and awarded. I fail entirely to see that the facts in this case would justify the award of such a large sum of money as damages. While I concede that the question of what to award is one in the absolute discretion of the trial Court, nevertheless, the Court must state reasons for awarding a substantial sum as damages. If this is not done it is unlikely that such an award would be affirmed by this Court. Be that as it may, on a careful consideration of the facts in this case, I am not in the least persuaded that an award of Shs. 600/= is justified. In all the circumstances I am satisfied that the sum awarded is exorbitant and should be reduced. The award will therefore be reduced to a sum of Shs. 200/= which sum is to be paid to the appellant.” (6)”It may perhaps be argued that the appellant is not entitled to receive this money, as he is only a guardian and not the father of the girl. But I think such an argument would be completely misconceived. The words “aliye chini ya ulinzi wa baba yake” in rule 89, must be given a broad and sensible construction if the whole object of the rule is not to be defeated.”

2. Adam Ambali v. Yusufu (PC) Civ. App. 97-D-71; 11/12/71; Mwakasendo Ag. J. The appellant successfully sued the respondent in the Primary Court for damages for injury he claimed he suffered “due to the respondent’s actions of having an affair” with his daughter. Appellant’s daughter was a 16 year old primary school girl who on occasions absented herself from school and returned home late at nights. She gave evidence to the effect that she was having an affair with the respondent who had intimate relations with her on occasion. The

District magistrate reversed the decision of the primary court on the ground that the appellant had failed to establish his claims.

Held: (1) “With respect I entirely agree with the conclusion reached by the District Court. It would be highly dangerous for the Court to condemn a party in damages on the word of a young girl of doubtful moral fibred, without there being any independent evidence to corroborate her story. In any case it is highly doubtful whether appellant has shown injury to himself or his reputation to ground a claim for damages.” (2) “Furthermore I very much doubt whether this cause of action is maintainable at all under the customary law which appellant’s advocate has asserted is or should be applicable in this case. The only rule of customary law which could in a proper case be relevant is Rule 89 of the Local Customary Law (Declaration)

Order 1963 ….. Unfortunately as I am presently advised, the Local Customary Law (Declaration) Order, 1963 has not been made applicable to the areas of jurisdiction of the Dar es Salaam City and Mzizima District Councils. The Customary Law Declaration Order, 1963 is therefore not binding upon the parties in this case.” (3) “But even if I were persuaded that the unmodified customary laws and practice of the African people residing within the aforementioned administrative jurisdictions were similar to the customary rules declared by the 1963 Order and I have no reason to think that they would be different, I would still hold that such rules could be inapplicable to the facts of the present case. By no stretch of the imagination could it be said that the respondent in this case, was guilty of any enticement of appellant’s daughter. Even assuming, as one might be entitled to in the circumstances, that it were true that the respondent had an affair with appellant’s daughter on one or two occasions, that of itself could not in my opinion amount to an enticement. There is no law as far as I know which prevents young people, of opposite sexes associating as they wish, even to the extent of having intimate relations between them.”

3. Zilaje v. Fembera (PC) Civ. App. 108-M-71; 11/12/71; Kisanga Ag. J.

The appellant's father owned shamba and at his death, some 32 years before the action was brought, it was inherited by the appellant. At that time she was a minor and the sub-chief allocated it to his nephew who has been in occupation over since. She was successful in her claim for possession of the shamba in the primary court but the decision was reversed in the district court.

Held: (1) "When [the appellant] argued the appeal personally in this Court, she appeared to be an elderly woman of about 40 years. If she was dispossessed of the land some 32 years ago, i.e. when her father died, this means that she was 8 years old when she was thus dispossessed. She needed another 13 years before she reached the age of majority which would enable her to sue for the land. Giving allowance for the 13 years during which she was still a minor, it follows that she had some (32-13) = 19 years during which she was of full capacity and she could have brought the action, but she did not Court will not readily interfere in order to give remedy where the party seeking such remedy sat on his rights and did not act with reasonable promptitude. For instance, in the case of Shabani Nassoro vs. Rajabu Simba (1967)H.C.D. 233, in which the facts were similar, Saidi, J. as he then was held that the court is reluctant to disturb persons who have been in occupation of the land for a long period, and having said that, he refused to give remedy where the party seeking such remedy delayed to bring the action for 18 years. In the present case the appellant is in no better position because she delayed to bring the action for the last 19 years. Again, in the case of Said Mfaume v. Rajabu Fuko (1970)H.C.D. 106, Georges, C. J.

Held that where a party returns after some 20 years and claims land against a person who has been occupying and improving the land then he must bring very convincing evidence if he is to succeed." (3)"I am, therefore, of the view that the

appellant sat on her rights for too long, and that she has not given any sufficient ground which would warrant interference by this Court and accordingly the appeal is dismissed."

4. Mukyemalila and Thadeo v. Luilanga Civ. App. 19-M-71; 11/12/71; Kisanga Ag. J.

The respondent inherited the land in dispute from his deceased father. From 1954 he allowed the first appellant to use it to grow seasonal crops on it. The latter eventually sold the land to the second appellant. The respondent sued for the recovery of his land. The primary court found against the respondent on the ground that the land was no longer his because he had disposed of it in favour of the taking additional evidence, found that the disposition in 1954 was not an outright gift to the appellant but a limited one in the sense that the appellant was only allowed to use the land for growing seasonal crops thereon. He, therefore, reversed the decision and order that the respondent be re-possessed of the land. In the high court the appellants argued that the respondent's claim to the land was time barred under the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, 1964 and that the magistrate erred in recording additional evidence on the appeal.

Held: (1) "Paragraph 2 of the said Rules provides that; - No proceedings for the enforcement of a claim under customary law of a nature shown in the second column of the Schedule here to shall 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 first accrued or on the day, when these Rules come into operation, which ever is the later. And item 6 of the relevant Schedule provides. 'Proceedings to recover possession of land ….. 12 years'. It seems clear from the evidence of the respondent that he commenced the proceedings only because the appellant Mukyemalila sold the suit land to the second appellant Thadeo. In other words, so long as the appellant Mukyemalila was occupying the land with the permission of the respondent, the dispute did not arise. The limitation period therefore

cannot be said to have started running from 1954 when respondent allowed the appellant Mukyemalila to occupy the land. It stated to run when Mukyemalila sold the land to the second appellant Thadeo." (2) "It is apparent from the evidence of the respondent that he brought the proceedings of the land in favour of Thadeo. In those circumstances because the period between the institution of the proceedings and the time the action accrued or the time the Limitation

Rules were made is less than 12 years." (3)"The District Court magistrate stated in his judgment that he recorded additional evidence from [the] witness in the exercise of his powers under section 17(a) of the Magistrates' Courts Act. That section provides: - "17. In the exercise of its appellate jurisdiction, a district court shall have power – to direct the primary court to take additional evidence and to certify the same to the district court or, for reasons to be recorded in writing, itself hear additional evidence". Just before receiving this additional evidence the learned district court magistrate stated: - "I feel to record the additional evidence of ex headman Miti". It is clear that there was not sufficient compliance with the provisions of the section quoted above because the district court magistrate recorded no reasons for taking this course. However, looking at the record it seems that there was good ground for taking such additional evidence because it gives some idea of the back ground history to the suit land while the evidence of the parties and their witnesses related mainly to contemporary matters. Had the learned District Magistrate followed the correct procedure there fore, I am satisfied that he would have recorded a sufficient reason for taking additional evidence from this witness." (4) Appeal dismissed.

5.Ngonyani v. Mbuguni (PC) Civ. App.57-D-71; Nov. 1971; Mwakasendo Ag. J.

The appellant's daughter was betrothed to 'A'. 'A' paid Shs. 700/= as bride price, Shs. 80/= sitting fee, Shs. 70/= Hodi money and Shs. 148/= as a gift to his fiancée. Before the marriage the respondent seduced the girl and impregnated

her. ‘A’ demanded and was refunded all the money paid to the appellant and to his daughter. Appellant sued the respondent for damages for the loss incurred by him in having to refund ‘A’ the money. The primary court applying Wamakonde law found for the appellant. The District court on appeal affirmed the decision but reduced the sum payable by Shs. 148/= paid as gift to the appellant’s daughter, applying rule 13 of the Customary law (Declaration) Order 1963.

Held (1) “I have found the decision of the lower Court unsatisfactory on two major grounds. The first is that though the Courts purport to adjudicate the matter in dispute in accordance with the Customary Laws and practice of the Wamakonde, I have totally failed to find the record or statement of the appropriate Wamakonde customary rule pertaining to the subject matter in dispute. The two lower courts are no doubt familiar and conversant with the customary laws and practice of the Wamakonde but this Court is not. And no imagination is required to see how impossible it is for this Court to deal with this appeal without a proper statement of the Customary rule in question being made available to the Court … I shall order that the record be referred back to the District Court with instructions to record a statement of the Wamakonde Customary rule or rules relating to the questions in issue with sufficient particularity.” (2) “The second ground on which I found the lower Court’s decision unsatisfactory is on the matter concerning the refund of Shs. 148/= given by “A” as gifts to appellant’ daughter. The District Court applying rule 13 of the Customary Law (Declaration) Order 1963 held that this gift was not refundable. This decision would have been perfectly in order were it not for the provision of the Law of Marriage Act 1971. The Second Schedule to the Act amends the Judicature and Application of Laws Ordinance, Cap. 453 by adding an new section 3A, which provides: ‘(3A) Notwithstanding the provisions of this Act the rules of Customary Law and the rules of Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971. The Law of Marriage

Act, 1971 makes a specific provision for the return of gifts and therefore in accordance with Section 3A of the Judicature and Application of Laws Ordinance; set out above, rule 13 of the Customary Law. (Declaration) Order, 1963, is inapplicable to the matter in issue. Section 71 of the Law of Marriage Act provides as follows: '71.A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the Court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise." This is also a matter on which the District Court should take additional evidence directed towards finding out whether or not the alleged gift of Shs. 148/= was made with the intention on the part of the giver that it should be conditional on the marriage being contracted between "A" and appellant's

6. Bishenshe v. Gregory and Juma (PC) Civ. App. 102-M-70; 11/12/71; Kisanga Ag. J.

The first respondent sold a clan shamba to the second respondent without informing the appellant who is a member of his family. The appellant sued the two respondents jointly for the redemption of a clan shamba worth Shs. 3,400/=. The primary court at Kalabagaine

Allowed the appellant to redeem the land on repayment of the purchase price and compensation for improvements done to the land and gave her $1^1/_2$ years during which to redeem such land. Shs appealed to the district court at Bukoba where she urged that the land be restored to her clan without any compensation to the buyer. The district court upheld the decision of the primary court.

Held: (1) "Both courts below found that the second respondent had carried out improvements on the land worth Shs. 400/= There is nothing on the record to suggest that this finding was wrong, and the order requiring the appellant to well-founded in law". (2) "The appellant is at liberty to redeem the clan land on

payment of the purchase price, Shs. 1,650/= plus compensation for improvements in the sum of Shs. 400/=." (3) "The trial magistrate had allowed the appellant to redeem the land within 18 months from the date of his judgment but that period has already expired now. The appellant is shown to be an elderly woman of about 65 years of age and in the absence of any evidence as to her means and ability to raise this fairly substantial sum of money, I think that it would be reasonable to give her one year from the date of this judgment during which to redeem the ten the land should become the property of the second respondent, Shabani Juma."

7. Mkiriti v. Mtanyi (PC) Civ. App. 68-M-71; 11/12/71; Kisanga Ag. J.

The appellant's brother, now deceased, was married to the respondent's sister, 'B' and there were two children of the marriage who, however, died. Following the death of her husband "B" in accordance with the customary law became the wife of a brother of her deceased husband. That brother also died and she became the wife of yet another brother. When that brother died in 1961, she became the wife of the appellant sued to recover the bride price paid by his brother, the original husband of "B". The primary court judgment was a majority decision, with the magistrate himself dissenting. The two assessors who sat with him held that according to Zanaki customary law, when the husband dies, his widow must be inherited by his brother, and should she refuse to be so inherited the bride price which was paid in respect of her must be refunded. The primary court magistrate, however, in dissenting relied on paragraph 62 o the Law of Persons, G. N. No. 279 of 1963, which is applicable to Musoma District. The district court reversed the decision of the primary court.

Held: (1) "Paragraph 62 provides: The widow is to be asked if she agrees to be taken over by the brother of the deceased.

If she refused the bride price is not refunded and the widow is free to go and live with her brothers.' With great respect to the primary court magistrate. I think that this paragraph was not applicable here because the widow had already made up her mind to be the wife of the appellant, and she lived with him as his wife from 1961 till 1970 when she decided that she no longer wanted to live with him. In my view, this paragraph should be constituted to mean that the widow should exercise her election as soon as it is practicable after her husband's death, and that once she has decided to accept the deceased's brother as her husband then she cannot subsequently elect to leave him on the strength of that same provision of paragraph 62. This view would appear to be fair because it seeks to ensure the succeeding husband some measure of certainty and stability in relation to the widow so that he can plan his future life accordingly. I am therefore of the view that the appellant's claim could not be defeated by the application of paragraph 62 cited above." (2) "The district magistrate, however, while upholding the opinion of the primary court magistrate, relied on paragraph 52 (b) of the same Law of Persons. That paragraph makes provision for refunding bride price in cases of divorce and it reads: - "Where a marriage comes to an end, without the husband or the wife advancing any specific grounds for it, then If there are any children of the marriage, whether alive or dead, bride price can never be refunded …." That paragraph presupposes that the marriage has come to an end following a divorce. But in the instant case the marriage is still subsisting because the appellant, by virtue of customary law, succeeded his deceased brother and became the husband of the surviving widow." (3) "In the case of Sungwa Fumbuka vs. Manyanda Kasalucha (1968) H.C.D. 84, the husband sued for the recovery of bride price on the ground that his wife deserted him. Cross, J. held that the marriage between the parties was still subsisting and the parties were not divorced, so that no refund of bride price was allowable. The circumstances of the present case are similar, and I think that the same principle should apply so that the appellant's claim for refund of the bride-price could not be entertained unless and until he has brought divorce proceedings against his wife." (4) Appeal dismissed.

8. Mashanshare v. Amina (PC) Civ. App. 75-M-71; 11/12/71; Kisanga Ag. J.

The respondent unsuccessfully sued the appellant in the primary court for the recovery of a piece of land, but on appeal to the district court that decision was reversed. The appellant, therefore, appealed to the High Court. The suit land was clan land originally belonging to M, decreased Sometime previously M had pledged the land but his brother Mpanju, also deceased, redeemed it for Shs. 800/= and gave it back to him. M had no children and in 1958 he bequeathed the land to the respondent who was a member of the same clan. The appellant was also a member of that clan. M died in 1970 and the appellant opposed the bequest on he ground that when M's brother redeemed the land. It became his property and it ceased to be the property of M, so that

Upon the brother's death the land should descend to his heir, M therefore had no right to bequeath it to the respondent as he did.

Held: (1) "[T]here is evidence to show that after Mpanju had redeemed the land he restored it to Mohamed and that in doing so he imposed no restrictions on how Mohamed may deal with the land. P.W. 3 testified that Mpanju redeemed the land in order to keep it within the clan, and P. W. 4 said that Mpanju gave the land to Mohamed without any restrictions. It would seem from this that there was nothing to restrict Mohamed in his dealing with the land as he liked provided that in so doing he did not offend the rules of customary law by taking the land outside the clan to which he himself and Mpanju belonged." (2) Appeal dismissed.

9. Abdallah Shant v. Mussa (PC) Civ. App. 123-D-70; 20/1/72; Onyiuke, J.

The appellant and respondent, African Moslems, were married according to Islamic Law. The marriage ended by divorce by talk 18 years after solemnization. After the divorce the respondent filed a suit in the Primary Court claiming Shs.

3,300/= as representing her contribution to the costs of erecting two houses and a but during the subsistence of the marriage. The respondent's case was that shortly after their marriage the appellant who was then working as a house-boy for a certain expatriate found her a job as a yaya with the same employer. It was agreed between them that the appellant was to take her wages as her contribution to the building of some houses. It was part of the agreement that one of the houses would eventually be given to her. On the basis of the agreement the appellant received her wages for the whole period of her employment and built two houses. When the expatriate left they went to live in Bagamoyo where the respondent's relatives gave them a piece of land on which they cultivated rice. They used the proceeds of the sale of the rice to build yet a third house. When the marriage broke up the appellant refused to give her any of the houses. The appellant disputed the claim. He admitted that the respondent was employed as she alleged but denied receiving her wages and that there was any partnership or arrangement between them. The primary court magistrate concurred with the assessors that there was not sufficient evidence for a finding of partnership and held that the respondent could not simply allege partnership by virtue of being the appellant's wife. On appeal to the district court the magistrate set aside the decision and awarded the respondent the amount claimed. He disagreed with the findings of the assessors and held that the respondent's story was consistent and held that the respondent's story was consistent and was sufficient to support her claim. In making his order he relied on the English case of Balfour v. Balfour [1919] K. B. 521. He stated that that case established the principle that contracts between husband and wife were enforceable if they were intended to have legal consequences. In the High Court counsel for

The appellant conceded that the respondent did contribute but argued that since this was an appeal from a primary court the law to be applied was either Moslem

law or customary law. He submitted that the district magistrate was wrong to apply English law.

Held: (1) “I agree … that the proper law applicable to the case was customary law or Islamic law and that it was wrong for the District Magistrate to import the principle of English law.” (2) “I am of the view however that the District Magistrate’s conclusions were fully justified on the basis of customary law and/or Islamic law. That Islamic laws as well as Customary Law are equally applicable to Africans converted to Islam is fully established by the decisions in Hussein Mbwana v. Amiri Chongwe (Tanzania High court Civil Appeal No. 1 of 1969) and Re. Kusudwa [1965] E. A. 248. In the latter case Sir Ralph Windham C. J. stated as follows:- “The fact that a tribe may have been converted to Islam does not necessarily mean that its customs, particularly those relating to land tenure are thereby changed.” In the former case Spry J. (as he then was) made the following observations: - “It has sometimes been argued that Islamic law is to be regarded as applying to Africans as part of their customary law. In my view this is not a sound proposition. Customary law is the body of customs which b usage has acquired the force of law. As such it is constantly changing with changing ways of life. It cannot therefore, in my view include a complete and fully developed system of Religious law. Some elements of Religious law may, of course, be absorbed into the customary law but they are then to be judged and are subject to change as part of the customary law and they lose the attributes of the Religious law from which they were derived. I hold therefore that there are two systems or law which may apply in an African Muslim Community, Religious law in matters personal, such as marriage, and customary law which may apply in all spheres of life.” (3) “The District Magistrate was therefore not strictly correct when he held, in effect, that Islamic law was exclusively to be applied to the case before him. There can be no doubt that a contract such as the on under consideration is enforceable under Customary law. Even under Islamic law a Muslim wife is not obliged to provide anything for household expenses, a Muslim wife’s wages are her personal property and there is nothing, in principle, to invalidate or to prevent the enforcement of an arrangement such as the present

one under Islamic law." (4) "The District Magistrate was fully justified in his finding on the fact. The reasons given by the Primary Court for dismissing the respondent's claim were unsound." (5) Appeal dismissed.

10. William v. Maria (PC) Civ. App. 22-A-69; 17/12/71; Kwikima Ag. J.
An application was brought under or. 42 r. (1) (b) of the Civil Procedure Code urging the court review own order

for summarily rejecting the applicant's appeal. The learned advocate for the applicant argued that the court had no power to reject an appeal summarily because that was contrary to the provisions of Or. 29 rr. 17, 18 & 19 C. P.C which make it necessary for the court to hear any party who lodges an appeal before deciding upon that appeal. The respondent in reply questioned the validity of the application as being time – barred.

Held: (1) "This whole question devolves upon the interpretation of various provisions of the Magistrates Courts' Act Cap. 537. It is intended to examine the relevant provisions relating to the appellate jurisdiction of the High Court in matters originating from Primary Courts. In every file which comes up for appeal purposes, the High Court registry inserts a form which in part reads as follows: - (Primary Court Appeals can be summarily rejected under Section 24 (4) Magistrates' Court Act …..) Section 24 (4) itself cannot be fully appreciated without being read in conjunction with section 24(1). Taken together these section read thus: - 24(1) Subject to the provisions of subsection (2) and (3) of this section a judge of the High Court may, if satisfied that an appeal in any other proceeding is without substance, summarily reject the appeal. 24(4) a judge may, if satisfied that an appeal in any other proceeding is without substance, summarily reject the appeal. It is an elementary rule or interpretation of statutes that words should normally be construed in their ordinary sense and meaning. The two sections read together would mean to any ordinary person, lawyer or

layman that High Court judges have the power to reject summarily any matter, criminal civil or otherwise, coming up from the Primary Courts. It must be pointed out, with due respect to the learned counsel for the applicant, that the power to act as the court did in this case is expressly provided for under section 24 which cannot be said to be vague or ambiguous." (2) "The learned counsels for the applicant went on to argue that the provisions of the Civil Procedure Code applied to appeals from the Primary Courts and that failure to adhere to any provision of the C. P. C. would be fatal to the decision of the High Court. When submitting this argument, the learned counsel did overlook the provisions of S. 32 (3) (c) which reads as follows: - "In the exercise of their respective jurisdictions under this part, the High Court and District Court …..Shall not be required to comply or conform with the provisions of any rule of practice or procedure otherwise generally applicable in proceedings in the appellate or revisional court, but may apply any such rule where it considers the application would be advantageous to the exercise of such jurisdiction" In other words, a judge is not fettered by the provisions of the Civil Procedure Code in determining appeals from the Primary courts. Indeed he should not apply them to the detriment of justice. The spirit of this provision is that "substantial justice (should) be done without undue regard to technicalities." Where justice so demands,

Such provisions may be applied, however. But their application is not mandatory and is determined by the need to do substantial justice. The are only applicable in furtherance of the cause of justice, not in order to put the cause of justice in danger. And when it appears that a slavish adherence to them would jeopardize the cause of justice, the law has expressly provided against their application." (3) Application rejected.

11. Kalengo v. Bula Mangi (PC) Civ. App. 65-Dodoma-71; 7/2/72; Kwikima Ag. J.

The District Magistrate sent the records of five appeal cases which were brought under Part vi of the Law of Marriage Act. To High Court. He contended that by virtue of ss. 80(1) and 165(2) of the said Act that he was incompetent to determine them.

Held: (1) “When taking this course of action I doubt whether the learned magistrate consulted his colleague the Resident Magistrate at Singida. Had he done so, the latter would not have failed to point out to him that the new Marriage Act was never intended to alter or affect in any way the way in which appeals are to be conducted. The Marriage Act does not expressly or implicitly purport to repeal, replace, amend or in any way effect a single provision of the Magistrate Courts Act which lays down the order of Courts through which appeals are to be taken. Section 80(1) and section 165(2) of the Marriage Act do not provide for appeals from primary courts to go directly to the High Court. Section 80(1) reads: “Any person aggrieved by any decision or order of Magistrate Court in a matrimonial proceeding may appeal there from to the High Court.” These words certainly do not mean that a Primary Court case will go straight to the High Court without the appeal being taken, first to the District Court as laid down in the Magistrates Courts Act ss. 16(1) and 21(1) which sections the Marriage Act has not misapplied in relation to itself. These two sections provide respectively that appeals from Primary Courts shall lie first to the District Court and then to the High court.” (2) “The learned magistrates interpretation o the sections he has quoted becomes more puzzling when s. 73 of the same Act (i.e. the Marriage Act) is read in conjunction with the section he has quoted. The section reads: ‘(1) A Primary Court shall have jurisdiction to entertain a suit under this part where the parties were married in accordance with the customary law or in Islamic form or, in the case of a suit under section 69 or section 71 if the court is satisfied that had the parties proceeded to marry they would have married in accordance with the customary law in Islamic form. (2) The Jurisdiction of the primary court under this section shall be concurrent with the jurisdiction of a district court a court of, a resident magistrate or the High Court as the case may be. This section repeats

the same hierarchy of courts as is laid down in the Magistrates Courts Act. It does not set out to out the appellate jurisdiction of the District Court in any way."

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12. Abdallah v. Singu (PC) Civ. App. 15-Dodoma-71; 29/1/72; Kwikima Ag. J.

The applicant, a Mngoni by tribe successfully sued the respondent, a Mnyaturu in the Puma Primary Court for defamation of character. The action arose out of an allegation by the respondent's daughter that the appellant was responsible for her pregnancy. The applicant did not establish any customary law of defamation, and therefore the District Court reversed the judgment of the primary court. An appeal was brought to the High Court, but out of time, and gave the illness of his in-laws as the cause of delay.

Held: (1) "If there was a custom which the suit was maintainable, the applicant would still not satisfied that the illness of an in-law is sufficient cause for an educated schoolteacher like the appellant to delay filing his appeal. (3) "The appeal itself is bad because it is highly doubtful whether the Primary Court had jurisdiction to hear and determine this suit. No tribal custom was proved under which this suit could have been brought. The parties being of two different and not neighboring tribes, no custom commonly applicable to them could be found. The Puma Primary Court certainly had no jurisdiction to determine this suit, once the applicant had failed to prove that there was a tribal custom under which he could proceed. For this reason alone the appeal would not hold." (4) "The reason for delay is insufficient. There being no apparent failure of justice this application is dismissed with costs. Should the applicant wish to pursue his cause, he should file a suit in the court of the Resident Magistrate where his cause will be heard under the law of Tort which has no customary basis."

13. Mtenga v. University of Dar es Salaam Civ. App. 53-d-71; E.A.C.A. 8/2/72; Law, Mustafa, JJ. A and Duffus, P.

The appellant was employed as an Administrative Assistant by the University of Dar es Salaam, by a letter dated 4th June, 1968, which stated that the appointment was probationary and subject to the relevant Regulations of the College Council. The principal terms ad conditions were summarized on the reverse side. Paragraph (iv) provided: "(iv) You will be on probation for a period of one year in the first instance at the end of which period, subject to your work and conduct being satisfactory and to your passing any requisite examinations, you will be eligible for confirmation in your appointment." In January, 1969, the appellant was granted an increment, not withstanding the provisions of regulation 15(c) (1)

Of the relevant Regulations, which lays down that an employee will not be entitled to an increment until the date of his confirmation? On the 3rd June, 1969, the appellant's probationary period as defined in his letter of appointment expired without the appellant having received notice of any extension of his period of probation, as required by regulation 15 (a) of the relevant Regulations. On the 15th August, 1969, the appellant received from the Principal of the University a letter expressing dissatisfaction with his work and purporting to extend his probationary period until 31st December, 1969. In January, 1970, the appellant received a further increment. On 2nd May, 1970, the Principal purported to terminate the appellant's probationary appointment summarily, with payment of one month's salary in lieu of notice, in accordance with regulation 16 (a) of the relevant Regulations, which empowers the Principal to terminate a probationary appointment on one month's notice. The appellant, dissatisfied with his dismissal, complained to the Commissioner of Labour Tribunal (here in after referred to as the Tribunal) as being "an apprehended Trade Dispute" within the meaning of the Permanent Labour tribunal Act, 1967. The Tribunal's main recommendations were that the appellant should be considered as having been confirmed in his appointment, and given three months salary in lieu of notice, as is appropriate in

the case of the dismissals of a confirmed officer. The Tribunal did not recommend the appellant's re-instatement. The respondent University accepted the Tribunal's recommendations, and paid the appellant a further two months salary, which he accepted. Notwithstanding this, the appellant then sued the respondent University, claiming a declaration that the purported termination of his appointment was invalid, re-instatement into his former position, and alternatively unspecified damages for wrongful dismissal. The University by its defense pleaded, firstly, that the court had no jurisdiction to entertain the suit as the matters in dispute had been lawfully disposed of by the Tribunal; secondly it denied that the appellant had been confirmed in his appointment; and thirdly, it claimed that the appellant was lawfully dismissed as a probationary employee. The trial judge held that his jurisdiction to entertain the suit was not excluded by the proceedings before the Tribunal, and this holding has not been challenged on appeal. He dismissed the suit on the ground that the appellant had filed to discharge the onus of proving that he had ever been confirmed in his appointment.

Held: (1) After careful consideration, and without in any way wishing to condone the dilator and unbusiness-like methods adopted by the respondent University in this case, and its disregard of its own Regulations, I am of the opinion, with respect, that the learned judge came to a correct decision in this case, and that his judgment should be affirmed As to the increments, the Regulations merely say that an

Employee on probation shall not be entitled to increments. This does not prevent increments from being paid to a probationer, whether b mistake or intentionally, and such payment cannot in my view be construed as equivalent to confirmation." (2) "As to the continued employment of the appellant after the expiry of his probationary period, it is clear from paragraph (iv) of the terms and conditions endorsed on the appellant's letter of appointment, to which I have

already made reference, that such expiry only renders the employee eligible for confirmation, and does not involve automatic confirmation. The appellant in this case has established that he was eligible for confirmation, but has failed o establish that he was in fact confirmed in his appointment." (3) Appeal dismissed.

14. Magoma v. Mahemba (PC) Civ. App. 31-M-71; 2/2/72; El-Kindy J.

The respondent successfully sued the appellant for 6 months unpaid rent. It was established that the appellant was a tenant in the house of the respondent, and that it was let to him for Shs. 25/= per month. The appellant occupied the said house for six months, but he did not pay any rent. He contended that the trial court – Primary Court of Bunda – lacked jurisdiction to hear a rent restriction case, and therefore the trial was a nullity.

Held: (1)"Section 14 of the Magistrate Court's Act, 1963 Cap. 537 confers jurisdiction over certain matters on Primary Court, but rent matter is not one of them. From Section (1) of the Rent Restrictions Act, 1963, cap. 472, jurisdiction to try cases o this nature, in certain claims, is conferred on "a Court of a Resident Magistrate of competent jurisdiction." I would agree, therefore, the Primary Court lacked jurisdiction in this case. See also the case of Jayant D. Desai v. Hashi Warsama (1967) H.C.D. No. 171. The trial was null and void.

15. Kitmbi v. Makambi (PC) Civ. App. 17-Dodoma-71: 23/2/72; Kwikima, Ag. J.

The respondent unsuccessfully sought to stop the appellant planting crops on what he claimed to be the land he had been allocated in accordance with the customs of the tribe of the parties i.e. Wapangwa. On appeal the District court gave judgment n his favour. The appellant in the High Court pleaded the National Policy and claimed that he is entitled to cultivate the disputed land because the respondent has not been developing it. Instead, he as just let it stand idle. In his opinion, therefore, the appellant fees justified in occupying idle land even without consulting the owner or the land-allocating authority.

Held: (1) "The ruling that the appellant should take the land was based not on law but on the policy that no

One can legitimately claim land unless he develops it or otherwise effectively occupies it." The assessors who sat with the appeal magistrate sided with the respondent whom the trial court had found to have had prior title to the disputed land. The tables were then turned on the appellant." (2) "Like the learned trial magistrate, I appreciate that land should not be left to lie idle and fallow simply because there is someone claiming possession. Incidentally the National Policy on land is that the present generation holds it in trust for their descendants. There is therefore no land ownership here. Instead, individuals or groups are allowed to take possession and occupy on condition that their occupation should be effective and that they should develop the land they possess. This however does not mean that people can indiscriminately occupy any piece of land they find lying idle as the appellant did in this case. The Government has designated some authorities to allocate land. Only by the permission and/or directions of these authorities can anyone claim to have lawfully acquired a plot. The Government does not certainly intend that people shall go about grabbing idle land. Otherwise conflicts such as the present one would be legion. Our peace and harmony would be in jeopardy if acts such as the appellant's were suffered." (3) "Whereas the respondent has shown that he was lawfully allocated the disputed plot, and that the allocation was made to him many years before the appellant chose to intrude, the appellant entered unlawfully without seeking the respondent's permission or the permission of the land allocation authority. In appealing to this court he is inviting it to legalize his unlawful and high-handed act. Political considerations apart, the appellant seems to have a nagging feeling against the respondent who was formerly a sub chief. Unfortunately courts of law do not base their decisions on political trends which may be in vogue at any particular time. There are definite laws and rules which the party has set down for courts to follow in resolving disputes. Courts would do well to confine themselves to their will defined terms of reference i.e. the laws of the Nation. The trial court

accepted the respondent's contention that he had prior title to the land which he cleared and broke. The appellant did not seek or obtain leave to enter the land. His entry was therefore unlawful and even politics would not condone his act. (4)Appeal dismissed.

16. Aziza v. Iddi (PC) Civ. App. 4-Dodoma-72; 5/2/72; Kwikima Ag. J.
The appellant's father died when she was still an infant. The respondent, the brother of the deceased, inherited his estate and acted as Walii to the appellant when she grew up and married. Before her marriage, however, she was living with her maternal uncle who assumed full responsibility of bringing her up. Her husband with whom she was living

paid two cows and 13 goats as her bride price. There was conflicting evidence as to how much of he bride price the respondent received. The issue was whether the appellant can sue to recover her own bride price from her uncle who inherited her father's estate in accordance with the laws of the Warangi. The Primary Court ruled that the appellant should receive back from her own paternal uncle the bride price paid to him by her husband. This decision was reversed on appeal to the District Court.

Held: (1) "The appellant's claim must have been brought under customary law, for it was under customary law that the respondent was declared the heir to her father's property. The only other law under which this suit could have been brought was Moslem law but I doubt if the parties and especially the appellant intended that the suit should be decided according to Moslem law. Under Moslem law, the dowry would have been negotiable between her and her suitor. It would then able paid to her and she would choose who to entrust or give it to. But according to the evidence given originally, the bride price was negotiated by the respondent and her mother. This practice is in accordance with the customs of African tribes such as the Warangi. The law governing bride price was from

the beginning that of the Warangi. According to that law, i.e. Warangi customary law, this suit was found by the assessors to be not tenable. It was for the appellant to prove that according to the customs of the Warangi a wife could claim her bride price from those entitled to it such as her guardian or her uncle. This the appellant id not even attempt to show. All she did was to prove that the respondent received her bride price – a fact the respondent has at no time denied. Those assessors who ere presented with the issue emphatically denied the existence of such custom as would support the appellants claim." (2) Appeal dismissed.

17. Magunda v. Komea (PC) Civ. App. 14-Dodoma-71; 21/2/72; Kwikima Ag. J.
The respondent successfully sued the appellant for the custody of a child born about five months after their marriage had broken up. The appeal to the District Court was dismissed. It was established that the appellant left the respondent's home when she was four months pregnant. Not wishing to lose his expected child the respondent paid to the appellant's father one cow as is customary among the Wagogo. This payment was made in order that the respondent should obtain custody of his child after it was born and weaned. Upon the latter eventuality the respondent claimed custody only to be told that he was not the natural father because during his marriage with the appellant she had been adulterously – sleeping with one Mkavi whom the appellant and her brother recognized as the father of the child. The appeal was brought out of time.

Held: (1) "In her affidavit, the appellant alleges that she was late to indicate her intention to appeal because her counsel – the only advocate in Dodoma – was away attending

High Court Sessions at Singida. I will concede the applicant that this country has a crying need for advocates after a mass exodus by former non-indigenous lawyers. At the rate of our progress, it may take 20 years before even the status

quo ante 1971 is restored. In saying this, I should not be taken to accept the applicant's excuse however. On the contrary I am not in the least persuaded that it was necessary for he applicant to see an advocate in order to appeal ….. She could still have signified her intention before consulting an advocate …" (2) "The applicant's persistence in this cause is tainted with vengeance and bad faith. That is why she even dares to plead her own immorality in order to deny her former husband of his lawful (if not natural) child. The applicant cannot be said to be acting in good faith when she asks this court to exercise its discretion in her favour so as to afford her opportunity to retain a child she adulterously and immorally conceived during her marriage to the respondent. She cannot expect equity must have clean hands … I would reject the application because the applicant's persistence contra bono mores." (3) Appeal dismissed.

18. Madundo v. Mweshemi & The A. G. Misc. Civ. Cause 10-M-70; 25/1/72; El-Kindy, J.

The petitioner, a parliamentary candidate in the general election held on the 30th of October, 1970, Sought to avoid the results of the said election in respect of the parliamentary seat of Busega Constituency. The petitioner alleged that due to non-compliance of the election provisions enacted in the Elections Act, 1970 No. 25 of 1970 the results were affected and therefore they should be avoided. The petition was opposed by the first respondent Mrs. Dorothea Milembe Ng'wishemi, who was the successful candidate, and the second respondent, the attorney General. At the general elections the first respondent polled 18, 550 votes, the petitioner, 14,400. There was, therefore, a majority of 4,160 votes in favour of the first respondent who was declared the successful candidate. Some 484 votes were spoilt. In his petition, the petitioner claimed, inter alia, that some ballot boxes were left for two nights in a bar unguarded and this irregularity left room for any person to tamper with the votes. He asked the court to declare the election void and order a scrutiny or recount. A preliminary point of burden of proof was raised.

Held: (1) “Section 123(1) of the elections act, 1970, simply states that the grounds for avoiding an election have to be “proved to the satisfaction of the court.” It does not state what form of known standard of proof should be applied. To this extent, the act left the Act, what standard of proof should be required. With such provision, there are at least three possible standards of proof. One, that the Act meant no more than an ordinary standard of proof required in a civil suit. That is to say proof on balance of probability. I

Am no certain whether proof of that standard necessarily means that the court is “satisfied”, bearing in mind that often an ordinary civil court finds that more probably than not a particular issue is proved. The second possibility is that the proof required is proof beyond reasonable doubt which is a normal standard of proof required in a criminal trial. And thirdly, it is possible that it means that it is a standard of proof which is between balance of probability or preponderance of probability and proof beyond reasonable doubt. This is an in-between standard of proof. In normal circumstances, courts do not like to interpret provisions of law out of nothing and without any assistance from other sources. Courts have to take into account the spirit of the Act or provision of law, and compare that with any other legislation or Act or judgment (precedents) so that a reasonable interpretation can be made. It is for this reason that the learned Chief Justice Georges and Bramble J., as they were then, went out of their way, in the case Mbowa v. Eliufoo (1967) E. A. p. 240, to consider the case of Bater v.Bater (1950) 2 All E. R. 458 which was a matrimonial case which had a similar phrase embodied in the English matrimonial Legislation. And they came to the conclusion that where a reasonable doubt is established by the evidence led they could not say that they were satisfied and hence they required that there should be proof which left the court in “no reasonable doubt” that one or more grounds for avoiding election was or were proved. Now in normal civil suits one does not talk about proof which leaves “no reasonable doubt.” It is simply a normal

language of a criminal court where proof has to be beyond reasonable doubt. It is for this reason that I did not mince my words when I held, in the case Yongolo v. Erasto & AG (1971) H.C.D. 259, that the required proof was proof beyond reasonable doubt. And I still think that it was a reasonable interpretation to put to this phrase. And in the case of Philip Tibaijuka v. Samuel Kassano & AG my learned brother judge (Kisanga Ag. J.) said, when commenting on my decision in the above quoted case; "With great respect I think this interpretation is sound and correctly represents the law" thereby he accepted the standard of proof set out by me. In supporting his contention, the petitioner's counsel argued that, at least the learned judge Onyuiuke J. in the case of Ng'weshemi v. Kisehna and AG. (1971) H.C.D. No. 251, did not accept the proposition in the case of Mbowe v. Eliufoo. With due respect, having re-read Ng'weshemi case several times, I do not accept the interpretation in the case of Mbowe v. Eliufoo. The said judgment is silent about the required standard of proof. This silence cannot be taken to mean dissent on the part of the learned judge. Silence on an issue such as the one in hand can mean anyone of several things. I could mean dissent, or acceptance and approval, or no opinion on the matter, or doubtful on the proposition, or any other reason. It cannot, therefore be said that one or the other meaning was the one intended by the learned judge. It would not, therefore, be correct to read too much in the silence of the learned judge. It seems to me, therefore, that this

Court has come down firmly with the requirement that such proof has to be beyond reasonable doubt by sheer examination of the language used in the Act and persuasion of other authorities. I am unable to hold that this requirement was not good law. No doubt the requirement places a heavy burden on a petition and, with respect, with some good justification. As my learned brother Kisanga Ag. J. said in Tibaijuda's case quoted above, that an election petition is more serious matter and had wider implications than an ordinary civil suit. What is involved is

not merely the right of the petitioner to a fair election, but the right of voters to non interference with their already cast votes i.e. their decision without satisfactory reasons. In my view, to require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations. This is why it is not enough merely to prove the allegations but also necessary to prove that the allegation affected the results of the election. No doubt a person who seeks to avoid election results has the duty of leading evidence in support of this allegation. Without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on petitioner's evidence." (2)"Having regard to the evidence before this Court, I find that the allegation in issue has not been proved to the satisfaction of this Court." (3) Petition dismissed.

19. Kambuga v. Lugaijamu (PC) Civ. App. 165-M-70; 3/2/72; El-Kindy J.

Paulo Lugaijamu, the respondent, sued the appellant, Rubimbe Kambuga for adultery with his wife Clescentia and the trial court ordered the appellant to pay Shs. 100/- to the respondent as compensation. The facts of the case were: - The respondent was married to his wife in 1950 according to Christian rites, and thereafter they lived peacefully for 12 years. There were 4 children of the marriage. Thereafter, misunderstandings occurred and his wife sued for divorce in 1963, but she was unsuccessful. She did not go back to live with the respondent although the trial court had directed that she should return to the respondent but lived with her parents for some time before she became "married" to on Alphonce. The respondent found her living with Alphonce but he took no steps against him. Later she met the appellant and cohabited with him. The latter did not know that she was married to the respondent as she told him that she had divorced Alphonce some three years back. The trial court held, in a majority decision, that she was still the wife of the respondent and that the suit was maintainable.

Held: (1) “Admittedly she was still legally the wife of the respondent, but she had deserted him since 1963. During all this time, the respondent took no steps to take back his wife or to exercise some kind of matrimonial authority over her. There is no indication that he wants her back at all . It looks as if he is torturing her and would exploit other people who have any form of relationship with her. Their marriage, in spite

Of the absence of divorce, is dead.” (2)”It is not understood or at least I cannot figure it out why after all these years the respondent chose to start legal proceedings against one of his wife’s paramours if it was not intended to torture the woman and to create difficulties with the appellant. These facts weigh in favour of the appellant.” (3) Appeal dismissed but compensation reduced to Shs. 1/=

20. Shyam Thanki & Others v. New Palace Hotel Ltd. Civ. App. 26-D-71; E.A.C.A. 17/3/72; Duffus P. Mustafa and Lutta JJ. A

The issue started as a claim by the respondents as landlords or premises known as the New Palace Hotel to recover possession and mesne profits from the two appellants. On the 24th March, 1971, the appellants applied for an adjournment of the hearing pending the hearing of an appeal. The application was heard by Biron J. who ordered that pending the appeal the appellants should pay off towards the arrears of rent accrued, Shs. 25,00/= by the end of that month, 31st March, 1971 and Shs. 25,000/= by the end of April, 1971, and thereafter to pay the current rent accruing until the determination of the suit. Also if any installment is in arrear by more than 10 days, the defendant to hand over immediate possession.” The next step was on the 14th May, 1971 were not carried out and asked for an order for possession of the premises and for the attachment of the appellants’ goods and chattels. This affidavit came before Biron, J. on the 15th May, 1971, who treated the affidavit as an application and ordered that an order

for possession and also a warrant to attach the moveable property issue. On the 18th May, 1971 the appellants filed a chamber application asking the court to rescind the order for possession and seizure of the goods and also to stay the court broker from acting on these orders. This application was made under section 38 and/or section 78 and/or section 95 of the Civil Procedure Code. The chief Justice who heard it granted a stay of execution. The matter again came before the Chief Justice on the 21st May, 1971, and after hearing arguments from both sides he rejected the application holding that from the order of Biron, J., on the consent of the parties, it seems that the application for stay of the execution is without merit and unjustified. Meantime, on the 20th May, 1971, the appellants filed yet another application, very similar to the first application. This application, however, asked that the order for possession only be – (a) discharged or rescinded, or (b) be reviewed or set aside and was, in this case, made not only under sections 38, 78 and 95 of the Civil Procedure Code but also under section 19(5) of the Rent Restriction Act. It was not brought to the attention o the Chief Justice. On the 11th June. 1972, it was brought before Biron, J. By that time, however, the respondents had already re-entered

Into possession of the premises and were running the business. Biron, J. refused to make the order holding that he could not interfere with the order of the Chief Justice. The present appeal is against the order of Biron, J. rejecting the application.

Held: (1) “In fact, section 19(5) of the Rent Restriction Act would appear to have no application to the facts in this case so that in effect this application was also made under the three sections of the Civil Procedure Code.” (2) “The first issue on this appeal is whether the order of the Chief Justice dated 21st May, 1971, was made without jurisdiction and therefore a nullity. If that order was a nullity then clearly this appeal must be allowed and the application referred back to Biron, J. for further hearing. If, however, the order made by the Chief Justice

was within his jurisdiction and therefore not a nullity, then the question is whether Biron, J. was correct in refusing to adjudicate on a matter already dealt with by the Chief Justice. Here the principles of res judicata as set out in section 9 of the Civil Procedure Code, would apply … This application was made by the appellants under three separate sections of the Civil Procedure Code but in effect it was a simple application to set aside Biron, J's order of the 15th May, 1971. The application could have been made under any of the three sections; that is sections 38, 78, and 95 of the Civil Procedure Code but the appellants chose to make the application under all three sections. There appears to be no dispute as to the Chief Justice's jurisdiction to act under section 38 or section 95 of the Civil Procedure Code but it is submitted that the Chief Justice had no jurisdiction to act under section 78, the review section of the Civil Procedure Code, as Biron, J., the judge who made the order for the writs to issue was available and should, under mandatory provisions of rule 5 of Order 42 have heard the application. I will consider these three sections. The question arises whether if, in fact, the Chief Justice had no jurisdiction to act under section 78 he would still have had jurisdiction to act and hear the application under either or both o the other two sections. The relevant portion of section 38 of the Civil Procedure Code states – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by charge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. 'Court' here means the High Court and there appears to be no question but that the Chief Justice had jurisdiction, as a judge of the High Court, to act under this section. This section does not require that the application be heard or dealt with by the individual judge who passed the decree or ordered the execution." (3) "the appellants' main ground for the decision of the order of possession was that the application for execution was not in writing in accordance with rule 10(2) of the Civil Procedure Code and accordingly they argued that the order for possession was a nullity. The order of Biron, J. of the 24th March, 1971 would in my view have been a "decree" within the meaning of

section 3 of the Civil Procedure Code, but if not a decree then it was an “order” within the meaning of that section and by virtue of

Section 31. The provisions of the Code relating to the execution of decree are, as far as applicable, deemed to apply to the execution of orders. This would therefore appear to be a proper application for determination under section 38 of the Civil Procedure Code and in my view the court, presided over by the Chief Justice, had jurisdiction to hear the application.” (4) “Section 95 preserves the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Here again I think that it is unquestionable but that the Chief Justice would have had jurisdiction to hear this application acting under his inherent powers as preserved by section 95 but, of course, it is another matter as to whether he would have granted any relief in the exercise of his inherent jurisdiction.” (5) “There is the reviewing section, section 78. Here again it is not in dispute that the application for review should have been heard by Biron, J. by virtue of the express and mandatory provisions of Order XL11, rule 5(1) as he had made the order complained of and was still attaché to the court and available to hear the application for review, [counsel], for the respondents however pointed out that it was the appellants themselves who brought this application before the Chief Justice and caused him to adjudicate and determine that matter and further that his hearing of the application was completed without objection b either side. He submitted that the hearing by the Chief Justice was only an irregularity in procedure and was not a case of a complete lack of jurisdiction. He submitted that the High Court did have jurisdiction and that the Chief Justice could properly have heard the application if Biron, J. was not still attached to the court when the application was presented. This Court must presume that the appellants or at an rate their legal advisers, knew of the provisions of rule 5 and it does seem to be most unfair and

inequitable that the appellants should seek the ruling to the Chief Justice and then, when this ruling is unfavorable, turn around and Endeavour to have it set aside and obtain another hearing on grounds which have been of their own making.

All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess. Mr. Lakha, however, argues that in this case the High court did have jurisdiction to hear the application under all three sections of the Civil Procedure Code relied on by the appellants and that the directions under o. XL111 R. 5(1) as to the hearing of the application to review would be only a procedural matter, a breach of which would be an irregularity curable by consent or acquiescence of the parties and did not deprive the High Court of jurisdiction. There is some authority in support of this proposition; thus, I would refer to the majority judgment of the Court of Appeal in England in the case of Shrager v. Basil Dighton Ltd. (1924) 1K.B. 274, where it was held that an irregularity in the appointment of an Official Receiver to hear a High Court case did not render the trial a nullity but could be waived by the parties ……..

There are other cases on this subject but I do not find it necessary to make a definite ruling on this aspect of the appeal as in my view the Chief Justice clearly had jurisdiction to hear this application under the provisions of the two other sections relied on by the appellants: (6) “The main question on this appeal was, therefore, whether Biron, J. was correct in refusing to make an order on the application before him. [Counsel] for the appellants, referred to the application before Biron, J. as being the same application which came before the Chief Justice. With respect, this is not altogether clear as the application before the Chief Justice would appear to have been that made on the 18th May, 1971, whilst that before Biron, J. appeared to be that made on the 20th May, 1971. In fact,

both applications dealt with the same issue, the setting aside of the order for possession of the premises, and although there were some differences between the two applications and he affidavits in support, the issues in each application appeared to have been identical and in each case the appellants relied on the same three sections – sections 38, 78 and 95 of the Civil Procedure Code. The issue was finally determined by the Chief Justice in his decision of the 21st May, 1971, and in my view the principles of res judicata apply." (7) Appeal dismissed.

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21. Mughanga & Anor. Crim. App. 75, 76-D-71; 28/12/71; Mnzavas, J.

The two appellants were jointly charged with and convicted of house-breaking c/s 296(1) of the Penal Code and were convicted and sentenced under the Minimum Sentences Act.

It was established that on 19/9/70 the complainant's shop was broken into and property valued at Shs. 1,237/- was stolen including Shs. 1,510/- hard cash. On the following day the first appellant was arrested and was found with Shs. 500/= in Shs. 100/= currency notes but could not explain satisfactorily as to how he got the money. As for the second appellant, when his house was searched, certain clothes which the complainant identified as belonging to him were found.

Held: (1) "Taking into account the fact that the two appellants were found in possession of money as well as clothes hardly two days after the breaking of complainant's shop, the only reasonable inference in the absence of a reasonable explanation by the accused as to how they came to be in possession of the same it that they were not only the thieves but also the people who broke into complainant's shop." (2) Appeal dismissed.

22. Nyamsindika v. R. (PC) Crim. App. 111-M-71; 11/1/72; Kisanga, Ag. J.

The appellant was charged with cattle theft c/ss. 268 and 265 of the Penal Code. Since the owner of the alleged stolen sheep could not be traced, the trial magistrate held that the charge of stealing could not be proved. He, however,

convicted the appellant of being in possession of stock suspected of having been stolen c/s 3(1) of the Stock Theft Ordinance and the question on appeal was whether the trial magistrate was entitled to enter the alternative verdict as he did.

Held: (1) “There is no provision either in the Criminal Procedure Code or in the Stock Theft Ordinance which makes it possible for a person charged with cattle theft under the Penal Code to be convicted of being in possession of stock suspected of having been stolen under the Stock Theft Ordinance. Indeed section 8 of the Stock Theft Ordinance provides that where a person is charged with stealing any stock listed under section 268 of the Penal Code he may be convicted of alternative offences under sections 4, 5, 6 and 7 of the Stock Theft Ordinance relating respectively to trespass with intent to steal stock, being found near stock in suspicious circumstances, fences around stock enclosure or cattle boma and offences relating to brands. There is no provision in the Ordinance however that such a person may be convicted under section 3 of the Ordinance of being in possession of stock suspected of having been stolen, and to my mind such an omission was a clear

Indication that it was not the intention of the Legislature to provide for an alternative conviction under section 3 of the Ordinance when a person is charged with stealing stock. I am therefore of the view that it was not open to the trial magistrate to convict the appellant under section 3 of the Stock Theft Ordinance when the charge was laid under sections 268 and 265 of the Penal Code.” (2) Appeal allowed.

23. Salehe Selemani and Anor. v. R. Crim. App. 19 and 21-Dodoma-71; 16/12/71; Mzavas, J.

The complainant, a school boy aged about 14 years, was sent by his father to a nearly shop to buy sugar. He was given one 100/- Shilling not. On arrival at the shop he handed the money to the owner of the shop Z and asked for sugar worth

Shs. 4/- As he was handing the money to Z the two accuseds arrived at the shop and asked to buy cigarettes. Soon after Z found that he did not have enough change or the shillings 100/-note and returned the money to the complainant who left the shop followed by the accused. It was established that the second accused grabbed the complainant, put his hand in his trousers pocket and took the Shs. 100/- note and both accuseds took to their heels. The complaint reported to the police and investigations led to the arrest of the accuseds and to their heels. The complainant reported to the police and investigations led to the arrest of the accuseds and to their being charged with the offence of robbery with violence c/ss 285 and 286 of the Penal Code. The first accused pleaded that he saw no point of putting up a defence because the complainant did not mention him as one of the robbers. The second accused gave his defence on oath and denied committing the offence.

Held: (1) “The learned state attorney though admitting that there was little direct evidence implicating the first accused with the offence he argued that the first accused under the doctrine of common intention was equally guilty of the offence of robbery with violence. He, in support of his argument referred the court to the decision by Bramble J. in Juma Kurasi vs. R. (1969) H.C.D. Case No. 72. I agree with the learned counsel that the facts in Juma’s case clearly disclosed common intention but, with due respect to the learned state attorney, it cannot be so said in the present case. In this case there was, I agree with the Republic, evidence that both appellants were seen at the shop when the complainant was there with his Shs. 100/= note. Equally it is clear that both appellants were seen later by the complainant as he was going home. From the evidence of the complainant himself he did not mention the first appellant as having taken part in the robbery. He from the evidence remained completely passive in so far as the robbery is concerned although he also ran away after the second appellant had grabbed and robbed the complainant …. It is settled law that where two or more persons are charged with an offence, the prosecution has to prove the actual guilt of each accused or alternatively the prosecution must prove that the accused persons were acting in pursuance of a common purpose when one of

them committed the alleged offence…. As it was held in Wanjiro d/o Malerio and Another vs. R. (1955) 22E.A.C.A. 521, for the doctrine of common intention to apply. 'It must be shown that an

Accused person shared with the actual perpetrators of the crime a specific unlawfully purpose which led to the commission of the offence charged.' There is no evidence what-so-ever in this case showing that the first accused shared with the second accused who was the actual perpetrator of the crime, a specific unlawful purpose which led to the commission of the offence of robbery with violence. For the above reasons it would, in my view, be unsafe to support the conviction in so far as the first accused is concerned." (2) "As for the second accused I am fully satisfied and I agree with the Republic that there was ample evidence in support of the conviction."

24. Nangela v. R. Crim. App. 233-M-71; 14/1/72; El-Kindy, J.

The applicant applied for a certificate to be issued in terms of Rule 49A (1) of the East African Court of Appeal Rules, 1954 which provides that a superior court could issue a certificate upon being satisfied that the intended appeal raises questions of law proper for the determination by the court of Appeal and that the intending appellant be certified a pauper. The applicant contended that the prosecution evidence should not have been accepted and secondly that he was no longer capable of meeting the costs of the appeal since he had exhausted his savings.

Held: (1) "In his affidavit, the applicant continued to maintain that the trial court and therefore the appellate court erred in accepting the evidence of the bursar as she was not a person to believe. And in his petition of appeal, he explained why she ought not to have been believed. As I see it, the issue was one of credibility and having looked at the evidence, I cannot say that any legal issue arises out of it. It was a question of whether the trial court would accept the

evidence of the bursar or not, and this is a mere question of fact. The trial court was satisfied, after considering the various aspects of the case, that she was a reliable witness and the appellate court saw no reason to differ within this finding of fact. In the result, I find that the first requirement of rule 49A was not satisfied. I am prepared, and I in fact accept, that the applicant is no longer capable of meeting the costs of appeal as he has exhausted his savings, but this by itself is not adequate reason for certifying that he should be granted leave to appeal to the court of Appeal as a pauper." (2) Application dismissed.

25. R. v. Taimu s/o Nzunda Crim. Rev. 181-D-71; 24/12/71; Mwakasendo Ag. J.
The accused was convicted of attempted rape c/s 132 of the Penal Code and sentenced to 12 months imprisonment. The sentence was suspended for 8 months under Section 294A of the Criminal Procedure Code.

Held: (1) "While no one would quarrel with the reasons given by the Magistrate for not sending the accused to jail [he was 17 years old and had a clean record] it is quite clear

That the Magistrate has misunderstood the whole object of the provision of Section 294A of the C.P.C." (2) "The court has no power to order the suspension of a sentence imposed on a person convicted of an offence specified in the sixth Schedule to the Criminal Procedure Code or in the Schedule to the Minimum Sentences Act 1963. Rape and attempted rape are some of the offences prescribed under the sixth Schedule to the C. P.C. It was therefore illegal for the magistrate to suspend the sentence inflicted for attempted rape." (3) "It may also be noted that the provisions of Section 294A of the Code were primarily intended as an alternative to imprisonment. In O'Keefe [1969] 1 All E. R. 426 the English Criminal Court of Appeal said that suspended sentences should only be imposed when by having eliminated all other alternatives the court decides that the case is

one for imprisonment. At page 428 of its judgment the English Court said …." And the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?" (4) "The Magistrate having already ruled out the propriety of a prison sentence had the option of one or more of the following sentences: absolute discharge, conditional discharges probation order, a fine or corporal punishment." (5) The sentence of 12 months suspended was quashed and a sentence of 10 strokes of corporal punishment was substituted.

26. R. v. Martin s/o Stanslaus & 3 Ors. Crim. Sessions 131-M-71; 31/12/71; Makame J.

The 1st accused was one of 4 persons charged with murder. He applied for bail pending trial on the ground that (a) he had been in custody over a year (b) he is a former Senior Police Officer with a fixed residence and reliable sureties (c) he had had a knee operation and it would be beneficial to his health if he were allowed bail.

Held: (1) "The High Court has power to grant bail even in a case of murder [by virtue of] Subsection (3) of section 123 of the Criminal Procedure Code." (2) "In a case of murder bail will be allowed only in exceptional and most unusual circumstances." (3) "One year in remand prison is a distressingly long time but because this unfortunate feature is rather common and because so may factors are contributive to such delays, this court will be opening the flood-gates if it allowed the application on that ground." (4) "Having a fixed residence and substantial sureties is a persuasive factor but against this are posed two things: first, is the possible punishment the offence attracts, which may tempt even the most honest and solid citizen to flee, and secondly, the implication that accused persons of straw would be at a clear disadvantage because of their lack of effluence …." (5)"I would recommend to the prison authorities that the accused's liberty be not curtailed more than is necessary and that he should be given every reasonable opportunity to exercise his knee ….." (6)The application was refused.

27. R. v. Taher Ali Gaikwad Crim. Case 6-1-71; 31/12/71; Mwakasendo Ag. J.

The accused was convicted by the District Court of Dar es Salaam on his own plea of guilty to two offences c/ss 22(1) (d) (iii) and paragraph (i) of part 11 of the Fifth Schedule

To he Exchange Control Ordinance. The accused was committed to the High Court for sentence.

Held: (1) "As this Court has stated more than once in recent weeks, offences relating to the Exchange Control are ever on the increase and this trend is bound to continue unless and until the Courts become conscious of their detrimental effects on the county's well-being and reflect this consciousness in the type of sentences they impose on all those found guilty of their contravention … I have carefully considered the circumstances in this case including the fact that the accused is a highly educated man who knew exactly the effects of his actions upon the well-being of this country and I have reached the conclusion that this is a proper case where a deterrent sentence is called for." (2) The accused was sentenced to six months and four months imprisonment on the two counts, the sentences to run concurrently.

28. R. v. Simon Daudi & Yusufu Ramadhani – Crim. Rev. 2-D-72; 14/1/72; Biron J.

The accuseds were convicted of housebreaking and stealing and committed to Malindi Approved School for three years. The proceedings were forwarded to the High Court for examination before the order was carried into effect. The High Court found (a) that the accuseds, both juveniles, had not been medically examined as to their ages, nor a finding made thereon as required by the Children and Young Persons Ordinance s. 16, (b) before committing them to the

Approved School the magistrate had not enquired from the Manager whether there were vacancies at the School as required by s.24 of the Ordinance and (c) the order for a fixed period was irregular. The proceedings were accordingly returned to the district court with directions.

Held: (1) "The medical reports … disclose that one of the accused is aged about 12 years whilst the other is aged about 14 years. According to the Probation Officer's report the two juveniles got into trouble on account of lack of proper parental control..... Although it would appear from the report that the accused would benefit from probation, in view of the long lapse of time and the fact that they would appear to have been in custody, although on remand, for nearly a year, I am very far from persuaded that the justice of the case requires any punishment to be meted out, or even any supervisory order to be made, at this so belated stage." The order committing the accused to the Approved School was set aside and an absolute discharge substituted.

29. Victor s/o Bundala v. R. Crim. App. 485-D-71; 31/12/71; Mwakasendo Ag. J.
The appellant was convicted on 3 charges of fraudulent false accounting and 4 charges of stealing by public servant c/ss 317(b) and 271 and 265 of the Penal Code respectively. The appellant was employed by the Government of Tanzania and was seconded to the Kilombero Ujamaa Co-operative Ltd. His

Salary being paid by Government. At the hearing of his appeal his Counsel drew attention to the fact that the Police Officer who had acted as investigating officer also gave evidence at the trial as well as acted as the public prosecutor.

Held: (1) "The point raised by Counsel is of the greatest importance…… I have come across only two decided cases: Jumanne @ Alli s/o Hamisi v. R. (1967) H.C.D. 278 and Gamalieri Mubito v. R. (1961) E.A.C.A. 244. In Hamisi's case the accused was convicted of theft. Indispensable to the prosecution case was the testimony of the Prosecuting Officer who also did much of the

investigation before the case came to trial. On appeal the High Court (Per Cross J.) citing Gamalieri Mubito v. R. held "a failure of justice may well have been occasioned." The convictions were quashed because according to the appellate Court "there was lacking that appearance of fairness and impartiality which should characterize the administration of the Criminal law. In view of the importance of the evidence of the prosecuting officer the Court could not be sure that there was no failure of justice." In the instant case it cannot be seriously argued that the evidence of A.S.P. Mbawalla was of any great importance to the success of the prosecution case and therefore the position is definitely different from that which obtained in the Hamisi case. I would accordingly hold that the fact that the prosecution witness acted both as prosecutor and investigating officer did not prejudice the fair trial of the accused." (2) "Since all the fraudulent false accounting charges were framed and grounded on the mistaken assumption that the appellant was a servant [of the Co-operative society], I do not think that the convictions on these charges can be properly maintained." (3) "I am more than satisfied that there is more than ample evidence to support the appellant's conviction on these [theft] charges …… I am further satisfied that in view of what is already stated above the accused is only guilty of simple theft and not theft by servant."

30. R. v. Hamood Nassoro Misc. Crim. Cause 9-M-71; 28/1/72; Makame J.

The accused was charge before the District Magistrate Shinyanga with wrongful confinement. At the close of the case for the prosecution the Magistrate held that a prima facie case had not been made out and did not call on the defence. The Republic applied for leave to appeal out of time against the decision of the Magistrate on the ground that although the ruling was delivered on 14 July 1971 a copy of same was not supplied until 29 September 1971 and up to the hearing of this application a copy of the proceedings had not yet been received.

Held: (1) "In dismissing the charge the learned Magistrate observed 'there was no evidence to show that complainant was shut in the accused's automobile to the extent of depriving liberty ' and that wrongful confinement by itself in law

must be something illegal and not only wrongfully confining someone'….. The legal issue raised

Is an important one." (2) "It is meet and proper that the matter should be considered by the High Court ……In Kiomboi Criminal Case No. 42/66, R. v. Yusuf Daudi & 3 Others, my learned brother Biron expressed the view that it is arguable whether the tying of a person's hands is wrongful confinement. (3) "The delay by the Republic is under-stand able." Leave to appeal out of time was granted.

31. Shindika v. R. Crim. App. 163-M-71; 7/1/72; Makame, J.

The Area Commissioner allocated a piece of land to Umoja wa Utamaduni. It was established that the land belonged to the Town Council and that it had been lying idle. It was contiguous to the appellant's garden of vegetables. After the group had started clearing the piece of land allocated to them the appellant trespassed on it and started making beds for planting potatoes. He was advised by the Area Commissioner to stop but he paid no heed so he was charged with and convicted for forcible entry c/s 85 of the Penal Code.

Held: (1) "I respectfully agree with the learned State Attorney …. That the facts support a charge of criminal trespass contrary to section 299, rather than forcible entry." (2) "Accordingly I substitute for the original conviction of forcible entry one of criminal trespass contrary to section 299(a) and in the place of seven months jail term I impose one of three months, the maximum for this type of trespass."

32. R. v. Mwukwa Crim. Rev. 76-M-71; 7/1/72; Kisanga Ag. J.

The accused was convicted on his own plea of failing to comply with a removal order c/s 3(b) of the Townships (Removal of Undesirable Persons) Ordinance, and was given twelve months conditional discharge with a further order that he

should comply with the removal order immediately. The matter was admitted on revision to consider (a) whether the order for conditional discharge was a sentence in law and (b if so whether it was lawful considering that under section 6(2) of the Townships (Removal of Undesirable Persons) Ordinance, the maximum prison sentence for this offence is only three months. The accused a first offender was a young person aged about 14 years and it would appear that the learned trial magistrate dealt with him as a juvenile under Section 18(1) of the Children and Young Persons Ordinance.

Held: (1) ….. "The order was within the provisions of section 18(1) of the Children and Young Persons Ordinance cited above. The said section 18(1) is under Par 111 of the Children and Young Persons Ordinance which is headed "Punishment of Juvenile Offenders." It appears therefore that an order of conditional discharge under this section is a punishment and thus a sentence." (2) "I also think that the trial magistrate was entitled to order a period of conditional discharge which is longer than the maximum prison term for the offence of failing to comply with the removal order for, in my opinion, the maximum

Prison term for failing to comply with a removal order has relevance only where the accused is called upon to be sentenced for failing to observe the condition of his release, it is only then that the court ought to ensure that it does not impose a term in excess of the maximum prison term which is provided for the offence for which the accused is being sentenced." (3) "One point, however, was not raised when the case was being admitted in revision or at the hearing of the revision, and that is whether the learned trial magistrate was entitled to order the accused to comply with the removal order previously made by the Area Commissioner. The removal order made by the Area Commissioner was a purely administrative decision and it is not apparent under what provision of the law the trial magistrate sought to enforce it. It is true that under section 23(b) of the Children and Young

Persons Ordinance the magistrate has power in a case like this to make an order repatriating the young person to his home district. That section however does not seem to empower the magistrate to enforce a removal order made by the Area Commissioner, and if a contrary view were to be taken this might lead to a conflict in the functions of the court. Under section 5 of the Townships (Removal of undesirable Persons) Ordinance, a person aggrieved by a removal order made by the Area Commissioner may appeal to the district court which has power, among other things, to cancel that removal order. Thus, in the present case, if the accused were to appeal to the district court against the removal order, the trial magistrate might find himself having to cancel the removal order which he himself has had occasion to enforce, and to my mind, such a situation would be both embarrassing and undesirable. I therefore think that the role of the district court in such a matter should be restricted only to deciding whether or not the accused failed to comply with the removal order. If after conviction the Area Commissioner still felt that the accused must be repatriated, there is a provision which enables him to achieve that end. For, under section 6(3) of the Townships (Removal of Undesirable Persons) Ordinance it is provided that a second or subsequent removal order may be made in relation to any person who is convicted of any offence against the Ordinance. (4) “It therefore appears that the learned magistrate was not entitled to make the order requiring the accused to comply with the removal order, and accordingly that order of the trial court is set aside.”

33. Mgora v. R. Crim. App. 369-M-71; 7/12/71; Jonathan, Ag. J.

The appellant was convicted of stealing c/s 265 of the Penal Code. The evidence adduced by the prosecution was to the effect that the complainant had dropped her wrist watch and a couple of months or so later, another woman was seen wearing what resembled the lost watch. Investigations revealed that the watch had previously been in the hands of the appellant who gave it to his girl-friend-cum-wife. The appellant claimed that he had bought the wrist-watch. On these facts the appellant court found that there was considerable doubt if the watch

belonged to the complainant. The question remained as to whether the appellant could be convicted of stealing by finding.

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Held: (1) “It is a cardinal principle that in criminal proceedings, unless otherwise specifically provided the onus is always on the prosecution to establish every ingredient of the offence charged. Here it was not for the appellant to establish that he did not know the owner nor that he did not believe he could find him. To my mind, the subsection does not create a presumption that a person steals who finds and converts lost property thereby requiring him to exonerate himself by showing that he had no fraudulent intent. The prosecution had to prove that the appellant knew the owner or that he had reasonable grounds for thinking that the owner could be traced. Evidence to this effect was completely lacking and so a prima facie case was not made out.”(2) Appeal allowed.

34. Muniko v. R. Crim. App. 869-M-70; 7/12/71; Jonathan, Ag. J.

The appellant and his younger brother were jointly charged with and convicted of shop-breaking and stealing c/ss 297 and 265 of the Penal Code. He was sentenced to consecutive terms of imprisonment of three years and one year respectively and ordered to receive 32 strokes of corporal punishment. In addition the trial magistrate ordered that they should contribute towards compensation of Shs. 3,335/- to the complainant despite the fact that the value of the property stolen was Shs. 2,414/= and that one of the items stolen a radio worth Shs. 700/= had been recovered. Three issues called for determination; First, whether the changes were properly brought under section 297 of the penal Code; Secondly, whether the order that sentences should run consecutively was proper and lastly, whether the compensation order was proper.

Held: (1) “It is patently clear …… that the charges were wrongly brought under the afore-mentioned sections of the Penal Code. The facts were squarely within the scope of section 296 of the Penal Code, which provides for the

charging of one offence only in respect of facts as those found by the court. Section 297 applies to a situation where there has been a breaking into one of the specified structures with intent to commit a felony but the intended felony has not, in fact, been committed. That being so, there would be no question of charging under a second count. Where, on the other hand, the intended felony has been committed, as was the case here, then section 296 would apply. This section comprises both the breaking – in with intent and the actual commission of the felony intended. In the particular facts of this case, therefore, the appellant should more properly have been charged under the section. I would not, however, consider that the convictions under the two counts should for this reason be set aside, and they are to stand." (2)"Te learned district magistrate purported to sentence them under the Minimum Sentences Act. Clearly that was wrong as neither section 297 nor 265 as such, comes under the purview of the Act. In the case of the appellant, the magistrate ordered he should be given 32 strokes. He ordered so in these words: - 'The sentences to run consecutively and the accused shall receive 32 strokes of corporal punishment (Sec 12 C.P.C. as amended by Act 10/69). It is incomprehensible that the

Section cited should be construed as empowering a court to make an order in excess of 24 strokes for a conviction under the Minimum Sentences Act. I am inclined to think that the learned magistrate was referring to the consecutiveness of the sentences passed on the appellant." (3) "I think that the sentences should run consecutively was also improper in the circumstances of the case, notwithstanding the provisions of section 12 of the Criminal Procedure Code. Save in exceptional cases, where two or more offences are committed in the same transaction, as in this case, it is improper to order that the sentences should be served one after another." (4) "A compensation order was made in these terms: - "Order - Both accused men will contribute towards compensation of Shs. 3,335/- to complainant – recoverable as though it were a civil suit." This

order is imprecise while the amount is excessive. No doubt it was made under the Minimum Sentences Act which, as already indicated, was not applicable having regard to the failure to charge the appellant under section 296. The value of the things stolen was shown in the charge as Shs. 2,414/= and the court was incompetent to order for compensation in excess of that sum, itself excessive, as, included in the sum was a sum of Shs. 700/= being the value of one of the items stolen, namely the radio, which the court ordered should be handed back to the complainant. A proper order to make in the circumstances would have been under section 176 of the Criminal Procedure Code, thereby requiring both accused, jointly and severally, to compensate the complainant with a sum of Shs. 1,714/= and I so compensate the complainant with a sum of Shs. 1,714/= and I so order in substitution of the trial court's order in this respect." (5)Appeal against sentence dismissed compensation order varied and order for corporal punishment set aside.

35. R. v. Ramson Mbogo Crim. Rev. 26-M-71; 8/12/71; El-Kindy J.

The accused was charged with and convicted of grievous harm c/s 225 of the Penal Code. The evidence accepted by the Magistrate was that the accused had bitten off a piece of the complainant's right ear. The medical report showed that the complainant sustained a cut in a one inch long on the right upper ear lobe and described the wound as amounting to "harm".

Held: (1) "The learned magistrate who had the advantage of looking at the relevant ear when the complainant gave evidence saw that in fact a part of the ear was cut off …. He was entitled to come to that conclusion as the duty of resolving facts in dispute is his, and the medical evidence is just there to aid him. There although the medical evidence was unclear, the trial magistrate was entitled to hold as he did and I see no reason to interfere within his reasonable finding of fact." (2) "Section 5 of the Penal Code defines grievous harm. It reads as follow: - Grievous harm means any harm which amounts to a main or dangerous harm, or seriously or permanently injures health or which is likely to injure health, or which amounts to permanent disfigurement or to an permanent

or serious injury to any external or internal organ, member or sense. After citing Regina v. Ali s/o Fakili 2 T.L.R. p. 44; R. v. Msungwe (1968) E.A. p. 203; Russel on Crime, 1958 Ed. 11th Edition at

pp. 693 and 695 and R. v. Mipaa @ Masanja s/o Mananjimia (1968) H.C.D. No. 265). (3)"In this case the complainant lost a bit of his ear …. Unlike the phrase, 'dangerous harm' the phrase 'permanent disfigurement' is not defined in the Penal Code and it is left to the common sense of the courts to interpret it. In ordinary language the phrase means affectation of the body to the detriment of the person involved. A figure of a person includes his ear, and if such an organ is affected to the detriment of such a person it is, in my view, a permanent disfigurement, although it was not of a serious nature. In my view, the facts of this case do not fit into any other description except that of permanent disfigurement. I accordingly find no reason to differ with the finding of the learned trial magistrate on the matter."

36. Gordon v. R. Crim. App. 641-M-71; 2/11/71; Kisanga, Ag. J.

The trial magistrate summarily sentenced the appellant under Section 114(1)(b) of the Penal Code because the appellant had failed to turn up in court in answer to a summons to give evidence. No charge was framed but the record indicated that the court asked him to give reasons why he should not be punished under Section 114(2) of the Penal Code. The appellant claimed that he was in the toilet at the material time.

Held: (1) "In the case of Antony Mhikwa vs. R., (1968)H.C.D. n. 460, Seaton, J. held that it is to be presumed that an offence under section 114(1)(a) of the Penal Code requires mens rea. The offence created under section 114(1) (a)is that of showing disrespect to judicial proceedings or to a person before whom such proceedings are being conducted. In the present case the offence created under section 114(1) (b) is that of failing to appear to give evidence in

answer to a court summons. Both offences are cognate to contempt of court and are much of the same character. Thus I think that the rule in Antony Mhikwa's case should equally apply to require proof of mens rea or intentional disrespect where a person is charged with failing to appear to give evidence in answer to a court summons. And if that rule is applied to the present case, then the accused's explanation, which was unrebutted, that he was in the toilet when he was called upon, would clearly negative any such mens rea or intentional disrespect."

37. R. v. Mwombeki Crim. Rev. 213-D-71; 1/12/71; Biron, J.

The accused, a District Development Officer, was convicted of driving a motor vehicle belonging to the District Council, without being in possession of a valid driving licence. In the course of driving, the accused drove into a wall and damages the vehicle. The cost of repairing it was Shs. 1,072/30. The trial magistrate made an order that the accused was to pay Shs. 1,072/30 as compensation to the Government for damaging the vehicle, apparently under Section176 (1) of the Criminal Procedure Code. The issue that had to be resolved was whether the compensation order was valid or not.

Held: (1)"The section …. Empowers a court to order compensation to any one who and I quote: has suffered materials loss or personal injury in consequence of the offence committed ….' The offence committed by the accused was driving without being in possession of a valid driving licence, but the loss occasioned by the damage to the vehicle was not a consequence of the offence. Had the accused been convicted of dangerous or careless driving, the compensation order would have been in order. But under the conviction as it stands, the compensation order was ultra vires." (2) "If the authorities feel that the accused should be held liable for the damage he caused to the vehicle, there is special provision to recover from him compensation for the damage, laid down

in the Specified Officers (Recovery of Debts) Act 1970 which could be invoked." (3) Order of compensation set aside.

38. Josis Zakayo v. R. Crim. App. 70-M-71; 2/11/71; Kisanga, Ag. J.

The appellant was convicted on a number of counts of stealing and forgery. The case was beard by two magistrates, the first of whom was transferred after hearing the evidence of all but one of the prosecution witnesses. The second magistrate exercising his discretion under the provisions of section 196(1) of the Criminal Procedure Code decided not to re-commence the trial. He did not take the plea of the appellant nor did he inform of his right to recall the witnesses who had given evidence before the first magistrate.

Held (1)(After citing R. v. Rajabu Ramadhani 2 T.L.R. 49) "In the present case, however, the succeeding magistrate did not re-commence the trial, he merely continued it from where his predecessor had stopped, and I think that in such a situation he was under no obligation to take a plea of the accused." (2) "The proviso to section 196(1) provides that "(a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard and shall be informed of such right by the second magistrate when he commences his proceeding. The learned trial magistrate failed to inform the appellant of his right to have the witnesses resummoned and reheard. The case against him depended to a great extent on the credibility of witnesses so that the assessment of the evidence would best be done by the magistrate who had the opportunity of seeing and hearing both the appellant and the prosecution witnesses." (Rembenisele Elisawo v. R. 1967 H.C.D. 75 followed). (3) The trial was declared a nullity and a fresh trial was ordered.

39. Selemani v. R. Crim. App. 188-M-71; 10/11/71; El-Kindy, J.

The appellant was convicted by the trial court of theft from the person of another c/ss 296 (c) and 265 of the Penal Code. The evidence established that the appellant arrested the complainant and on their way to the police station in a

police vehicle, the complainant alleged that the appellant started searching him while the vehicle was in motion and took

From his pocket Shs. 3,000/-. On arrival at the police station, the appellant remitted Shs. 2,000/- only to a police officer on duty. The complainant protested that some money had not been remitted. As a result of these protests, the appellant was taken to a room to be questioned about the money. While in that room the appellant was seen handing Shs. 900/= to the driver of the vehicle who was in the room. The appellate court accepted the finding that the Shs. 900/= was part of the money of the complainant and the issue was to establish the stage at which the appellant formed the intent to steal.

Held: (1) “While it is possible that one could argue that when the appellant was taking the money out of the pocket of the complainant he was performing his duty of searching the complainant, the same cannot be said when he was handing over the money to police constable Theonesti. He had Shs. 3,000/- in his possession and therefore when he withheld the Shs. 1,000/= at the time of hanging over Shs. 2,000/= to police constable Theonesti, he manifested an intent to necessary intent to steal, and not when he took out the money from the pocket of the complainant. In the circumstances, I theft from the person of another as charged. It was beyond reasonable doubt that he was guilty of simple theft. For this reason, therefore, the conviction for theft from person of another contrary to sections 269(c) and 265 of the Penal Code Cap. 16 are quashed. And in accordance with section 181 of the Criminal Procedure Code, Cap. 20, I substitute therefore a conviction for theft contrary to section 265 of the Penal Code, Cap. 16.”

40. R. v. Muhona Crim. Rev. 78-M-71; 5/11/71; El-Kindy, J.

The accused was convicted on his own plea of guilty of entering a dwelling house with intent to commit a felony and of stealing. On the latter count, it was

established that the accused stole a radio from a Head-teacher of a Primary School. The radio was the property of Kasulu District Council and had been lent to the school by the Council. On these facts the trial magistrate imposed the Minimum Sentences or not the accused knew that the radio belonged to the Council.

Held: (1) "The facts, as recorded, did not show that at the time of stealing the radio, the accused knew that the radio belonged to the District Council of Kasulu. This Court has already held in the case of Samson v. R (1967) H.C.D. No. 317 that such knowledge was necessary before the provisions of the Minimum Sentences Act, Cap. 526, can be brought into effect. Therefore on the facts, the learned magistrate erred in imposing a sentence of two years imprisonment." (2) Term of imprisonment of 9 months substituted on the second count.

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41. Saudi Mkuyu v. R. Crim. App. 649-M-70; 16/11/71; El-Kindy, J

The appellant was convicted of theft c/s 265 of the Penal Code. He was tried together with 3 other accused persons on charges of housebreaking and theft in respect of a radio. The evidence on which the appellant was convicted was largely that of his co-accused. The appellant was acquitted on the house-breaking charge on the ground that "nobody saw the appellant break into the house of the complainant."

Held: (1) "Evidence on accomplices is admissible in law, and a conviction is necessarily bad it proceeds from the uncorroborated evidence of an accomplice (See section 142 of Evidence Act, 1967), but in practice corroboration is looked for because an accomplice is likely to swear falsely to shift the blame from himself …… Each accused shifted the blame on to the other accused and the majority of them tended to shift if on the appellant. This evidence should have put the learned trial magistrate on his guard, and had he properly directed himself he would not have failed to realize that it was not the

sort of case where after believing accomplices, he could act on such evidence without corroboration. In the circumstances, it cannot be said that there was any material corroboration of the allegation of the accomplices, circumstantial or otherwise." (2) (obiter) "If the evidence had been corroborated the learned magistrate would be entitled to hold that the appellant was in possession of the stolen radio $2^{1}/_{2}$ hours after the breaking … the learned magistrate refused to convict the appellant on the count of house-breaking because nobody saw the appellant break into the house of the complainant. With respect, this was a serious misdirection as it tended to show that he was unaware of the doctrine of recent possession. Where an accused is found in possession of stolen property shortly after the commission of the offence of house-breaking, it can be presumed that in the absence of a probable explanation, he came into possession of it through house-breaking, it can be presumed that in the absence of a probable explanation, he came into possession of it through house-breaking and stealing or receiving it knowing it to have been stolen or unlawfully obtained." The conviction was quashed and the sentence set aside.

42. Mrisho v. R. Crim. App. 318-D-71; 29/12/71; Biron J.

The appellant, a shopkeeper, was charged with and convicted of stealing (c/ss 269(c) and 265 of the P.C.) 187 corrugated iron sheets, the property of Messrs. Rajpar Shipping Corporation Ltd. He was sentenced to imprisonment for 9 months. He appealed from the conviction and sentence. His co-accused was acquitted of stealing but was convicted of being an accessory after the fact and put on probation for 12 months. He did not appeal. The established facts were that a total of 187 sheets were stolen from outside the go down of the Corporation, where they were laying awaiting shipment to Mtwara. The top sheet of each bundle was marked with the description of the addressee. Sometime after the incident a police party went to the appellant's house

Together with the appellant and found the appellant's co-accused in the process of loading on to a vehicle some corrugated iron sheets. After a search of the appellant's house, and including the sheets already loaded, there were found a total of fifty-five corrugated iron sheets. Two of these sheets bore the descriptions of the addressees. The sheets were all subsequently identified by several witnesses including employees of the Corporation. The appellant claimed that he bought the sheets from a man who he knew only by sight. On the basis of his conflicting statements to the police, after being cautioned, and in court, the trial magistrate observed that the first were made "immediately after the arrest of the accused persons and when the memories of the incidents were still fresh". But he concluded that "there could only be one inference to be drawn and that is that the accused persons are incapable of telling the truth". It was disclosed to the appellate court that the appellant was, previously to this trial, charged with the offence of receiving the sheets but the charge was withdrawn by the prosecution and that the evidence of the driver of the vehicle which was material, was not taken by the trial magistrate. The judge adjourned the appellate proceedings and directed that the trial court should call the driver, Hassan Halfani, and record his evidence to the appeal court. The trial court later informed the appeal court that the driver could not be traced.

Held: (1)"There is [a] file which discloses that the appellant was originally charged in connection with these corrugated iron sheets, the subject matter of this instant case, with receiving fifty-five corrugated iron sheets knowing or having reason to believe the same to have been feloniously obtained. After one witness had given evidence the prosecution applied to withdraw the charge, and it is not irrelevant to note that defence counsel submitted that the charge should be withdrawn under section 200 of the Criminal Procedure Code. Had the court acceded to that request the appellant would have been acquitted and these instant proceedings could not have been brought. However the court, apparently on the application of the prosecution discharged the appellant under section 86

of the Criminal Procedure Code which permits the appellant being charged with the same offence, as indeed he was." (2) "At the resumed hearing of this appeal learned counsel for the appellant submitted that the Court should draw an adverse inference from the failure of the prosecution to call the driver Hassan Halfani. Section 122 of the Evidence Act 1967 reads: "The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. This section corresponds except that the word 'infer' is substituted for the word 'presume' with section 114 of the Indian Evidence Act which it has repealed and re-enacted. Woodroffe on the Indian Evidence Act setting out the illustrations to section 114 gives at illustration (g) the following: that evidence which could be, and is

Not, produced would, if produced, be unfavorable to the person who withholds it' As conceded by learned State Attorney, the court could and I think should, presume in the appellant's favour that if the driver Hassan Halfani had been called, he would have given evidence that he brought corrugated iron sheets to the appellant's shop….And I propose to consider the case against the appellant on such footing." (3) "[The trial magistrate] stated that the statements made by the appellant and his co-accused to the police were made, and I make no apology for repeating what he said: 'when the memories of the incidents were still fresh', and …. It seems odd that the magistrate, who would appear to be accepting these statements as statements of the true facts, should nevertheless have convicted the appellant of stealing one hundred and eighty seven corrugated iron sheets, as charged. Like the learned magistrate I consider that the appellant's cautioned statement more nearly reflects the truth than does his testimony in court. Apart from the fact that these statements contradict each other, if the cautioned statement is accepted, it establishes that the appellant bought from comparative strangers fifty-five iron sheets at Shs. 3/- a sheet, less

than a third of the price he gave in court, which probably is their real value, and he obtained no receipt." (4) "It has been established beyond any peradventure that these corrugated iron sheets within a short period of their being stolen were found in the appellant's possession. On the application of the doctrine of recent possession the court may presume, in the absence of a reasonable explanation of innocent possession that these corrugated iron sheets were unlawfully obtained by the appellant. The appellant has given two explanations, one in his evidence in court and the other in his cautioned statement. As already remarked, apart from being contradictory, the first, that is in his cautioned statement which is much more likely to be true, does not raise any doubt as to the appellant having obtained the corrugated iron sheets unlawfully. The magistrate found that he had stolen them, but, as I think sufficiently demonstrated, the evidence would point, as agreed to by learned State Attorney, to the appellant having received the corrugated iron sheets found in his possession knowing them or having reason to believe that they were unlawfully obtained." (5)"Accordingly I quash the conviction for stealing one hundred and eighty seven corrugated iron sheets and substitute therefore a conviction for receiving fifty-five corrugated iron sheets knowing or having reason to believe that they had been feloniously obtained, contrary to section 311(1) of the Penal Code, which as noted, was the charge originally brought against the appellant." (6) "It is now necessary to deal with the case of the appellant's co-accused although he has not appealed, and I therefore propose to deal with his conviction in the Court's jurisdiction in revision. As noted, he was acquitted on the substantive charge of stealing one hundred and eighty seven corrugated iron sheets but convicted of being an accessory after the fact and he was placed on probation. It is well established law that a person charged with the principal offence cannot be convicted on such charge of being an accessory after the fact to the

principal offence. Such conviction will lie only if he has been specifically charged being an accessory after the fact contrary to section 387 of the Penal Code. It is sufficient to cite one authority to the point and that is the case of Murui s/o Wamai and 5 others v. R. reported at XX11 E.A.C.A. 417. The conviction is quashed, and the order placing the appellant's co-accused on probation is formally set aside."

43. R. v. Nanji Trading Col. Ltd. and 2 Ors. Crim. Rev. 160, 161, 162-D-71; 5/1/72; Biron, J

The version combined 14 cases for convenience. The issues were the same. The accused, three companies, were charged with overloading c/ss 44 and 51 as read in conjunction with General Notice No. 242 of 1971, of the Highways Ordinance, Cap. 167. Please of guilty were entered in the Magistrate's Court and the companies were all convicted and fined. Notice to show cause why the sentences should not be enhanced wee served on them apparently because of the prevalence of the offence. It was then argued that (1) the particulars of offence as worded were more appropriate to 'Overloading a vehicle' than 'driving a vehicle with excessive weight over the bridge': (2) that the prosecution filed to set out in the charge the essentials as are required by s. 44 of the Highways Ordinance e.g. an averment that the vehicle concerned was of excessive weight or driven at excessive speed without the written consent of the road authority; (3) the charge did not allege that the vehicle in each case exceeded the specified weight in crossing the bridge without the written consent of the road authority and that although all the companies pleaded guilty in writing to the charge, it does not necessarily follow that the companies concerned had not in fact obtained the written consent of the road authority. The pleas, therefore, did not constitute unequivocal pleas of guilty to the offence as set out in the section of the Ordinance.

Held: (1) “The first ground of objection ….. However, would not, I think, be fatal to the conviction as the particulars of the offence read together with the statement of offence which specifically refers to the General Notice which lays down the maxima weights and widths of vehicles, which are permitted to cross the bridge, sufficiently disclose and describe the offence. The defeat in the charge if any is curable under section 346 of the Criminal Procedure Code.” (2) “Although it may well be argued that [point three} is a somewhat technical point ….. it is of such substance that the Court finds itself constrained, however reluctantly, to uphold the submissions made on behalf of the companies concerned that the defects in the charge sheet are fatal to the convictions.” (3) Convictions quashed and the sentences set aside.

44. Lundamoto & Mkonda v. R. Crim. App. 164, 165-D-1971; 5/1/19782; Biron. J. The two appellants were together convicted of burglary and stealing. They had been charged with a third man who was acquitted at the trial, the present appellants being the first and third accused.

The accuseds had forcibly entered the complainant’s premises at night and after grappling with him and his wife, ransacked the premises and stole some cloth and a sum of money. It was alleged that the accuseds had confessed to a ten-cell leader, a police officer and to a ward executive officer. The appeal judge excluded the confession to the police officer as inadmissible under s. 27 of the Evidence Act 1967. He excluded the confession to the ten-cell leader as inadmissible under S. 28 since it was made in the presence of a police officer. He then considered the confessions to the ward executive officer.

Held: (1) “[As for] the confessions made to the ward executive officer, the two sections of Evidence Act, 1967, section 27 and 28, correspond to and are re-enactments of sections 25 and 26 of the old Indian Evidence Act, which was repealed and replaced by our evidence Act. Although the two sections deal with

confessions made to or whilst in the custody of a police officer, there is a long line of cases to the effect that these two sections are not to be narrowly construed as limiting their operation to police officers, but are extended to cover a wide range of officials who have been granted powers of arrest, as, for example, in the old days a tribal policeman, a village headman, and administrative officer in charge of the police in his district and whilst acting in such capacity, and also other officers who have vested in them powers of arrest. Most of the officials enumerated above are no longer in existence, and in some cases their offices have been abolished, and they have been replaced by new types of officials." (2) "The principal legislation concerned with these officials and their powers is contained in the Local Government Ordinance (Cap. 333 – Supp. 62), wherefrom it is sufficient to quote Sections 42, 42A, 42B and 420 of the Ordinance Cap. 333 – Supp. 62 and continued]: "It is thus clear from the foregoing provisions that the clerk to a district council, which includes the chief executive officer of such council, and a messenger employed by such council, as well as the clerk to a divisional committee, which will also include the chief executive officer of such committee, have vested in them powers of arrest and are therefore, in so far as confessions are concerned, in the same position as police officers." (3) "Although other officials like a ten-house-cell leader, so I have held in many cases in connection with ten-house-cell leaders, whose powers are expressly laid down in the Interim Constitution, that confessions made to them are admissible, and it is not irrelevant to add that a number of such cases wherein the accused was convicted of murder, have found their way to the court of Appeal for East Africa and my ruling had not to date been queried. In my view, although an official may exercise powers of arrest and may even be popularly believed to have vested in him such power that in itself is not sufficient to equate him to a police officer so as to render confessions made to him inadmissible. There must be, to my mind, some express authority conferring on such official

Powers of arrest in order to equate him to a police officer in respect of confessions made to him or in his presence. I am fortified in this view by the observation of my brother Onyiuke in R. v. Bakari Mussa and another (Criminal Sessions Case No. 2245 of 1969) in dealing with a confession made to a village executive officer which he held admissible, stating in his judgment: - '…I am of the view that there must be some legal basis for the performance of police functions. A mere exercise of police powers is not enough and cannot give a person greater powers is not enough and cannot give a person greater powers than an ordinary member of the public." (4) "The powers and duties of a ward executive officer are nowhere defined but after a great deal of research which accounts for the delay in the preparation of this judgment. I have discovered that ward executive officers are replacing if they have not already done so, divisional executive officers and that the post of divisional executive officer either has been or is being abolished. This would bring into play section 23(3) of the Interpretation and General Clauses Ordinance (Cap. 1- Supp. 66-70) which reads:- 23.(3) – Where an Ordinance confers a power or imposes a duty on the holder of an office – (a) if the designation of that office is subsequently changed, the power or duty shall be deemed to have been conferred on the holder of the office as now designated; if the office is abolished, and the duties previously attaching to that office, or any of them, are vested in the holder of another office, the Principal Secretary, President's Office may by notice in the Gazette confer the power or duty on the holder of such other office, and the notice may be given retrospective effect from the date on the which the first –named office was abolished.' Therefore on the application of this section, a ward executive officer would have the same powers as a divisional executive officer who, as noted, has or rather had, as the post appears to have been abolished, powers of arrest and can therefore be equated to a police officer for the purpose of sections. 27 and 28 of the Evidence Act, 1967 above set out." (5) "As sufficiently demonstrated the case against the first accused does not rest on his confessions alone but there is

extraneous evidence as well. In the case of the third accused however, there is no other admissible evidence a part form his alleged confession to the ward executive officer. Apart from the fact that such confession for the reasons given, would appear to be inadmissible, there is ample authority to the effect that a repudiated or retracted confession even if admissible, requires corroboration, and in this case there is no corroboration at all." (6) "In the circumstances I find myself constrained to quash the conviction in the case of the third accused, and set aside the sentence imposed on him."

45. R. v. Kiston Crim. Sass. 146-D-71; 4/10/71; Onyiuke J.

The accused was charged with doing grievous harm with intent c/s 222(1) of the P.C. The particulars read that on or about the 4th November 1970, he, with intent to main or disfigure, unlawfully did grievous harm to one Athumani by knocking him down with a motor vehicle. The case arose out of a quarrel between the accused and P.W. 1 over a

Girl P.W. 3. P.W. 3 was at all material times employed by P.W. 1 as a barmaid. She was on duty on the night of the incident and after leaving work proceeded to the bus stop to take a bus home. A taxi driven by the accused came along and she stopped it and asked for and was given a lift. The accused made improper suggestions to her and attempted to take her to his house by force. P.W. 1 who had joined the taxi came to her help a thwarted the accused's plant. When the witnesses descended from the car the accused drove it furiously at P.W. 1. The latter was hit by the car and fell down. Athumani, P.W. 4, who had come out of his house to witness the commotion, was hit by the car. At this stage he was standing on the step leading to an open verandah in front of P. W. 1's house. He fell and became unconscious. He came to in the hospital. Did not know the accused before and had no quarrel with him. The medical witness described the injuries he sustained as multiple abrasions on the left leg. It was argued by the

accused that the charge had not been proved as laid, as he did not know P.W.4, had no quarrel with him, and did not intend to cause him any harm. He contended it was a case of accident or negligent driving for which he cannot be liable under section 222(1) of the Penal Code. On behalf of the Republic it was argued that this was a case of transferred malice and that since the accused intended to do grievous harm to P.W. 3 and in carrying out that intention he wounded P.W. 4 his general malice was sufficient to support a conviction under section 222(1) of the Penal Code: R. v. Latimer (1886) 17 K.B. 359.

Held: (1) "I directed the assessors in my summing up to pay particular attention to the incident that took place between the accused and P.W. 1. I asked them to consider whether the accused hit P.W. 1 with his car by accident or through negligent driving, or whether he deliberately hit him with it. If it was the latter, then in the circumstances of the case he was liable for doing grievous harm to P.W. 4 although he was unaware of his presence at the time. The assessors were unanimous in their opinion that the accused hit P.W. 1 with intention to kill him." (2) "I am satisfied on the evidence that he [the accused] intended to do P.W. 1 grievous harm with his car. I find that in the execution of this intention the accused also knocked down P. W. 4 who was standing close by. The accused should have foreseen this risk as a consequence of his deliberate man oeuvre, but I find that he was unaware of his presence and in that sense did not intend to do him harm." (3) "The prosecution has chosen to bring the charge against the accused for doing grievous bodily harm to P.W 4 instead of to P.W. 1. Apparently the prosecution thought that the injury done to P.W. 1 was not as serious as the injury to P.W.4. I doubt whether this is a valid reason in law for not charging the accused with doing grievous harm to P.W. 1

with intent." (4) "The question posed by this case is whether it is essential to secure a conviction under section 222(1) of the Penal Code to prove a specific intent in regard to the person who was in fact wounded, or whether a general

intent to do grievous hard was enough. Section 222 of the Penal Code in so far as it is relevant provides as follows: - ‘any person who, with intent to main disfigure or disable any person, or to do some grievous harm to any person…. (1) unlawfully wounds or does any grievous harm to any person by any means whatever … is guilty of a felony, and is liable to imprisonment for life.’ In R. v. Latimer, Law Reports 17 Q.B. 362, the prisoner, in striking at a man, struck and wounded a woman beside him. The prisoner was charges with unlawfully and maliciously wounding the woman. The jury found that the blow was unlawful and malicious and that it did in fact wound the woman, but she being struck was purely accidental and not such a consequence of the blow as the prisoner might have expected. The prisoner was convicted. On appeal the question was whether on those findings the prisoner was rightly convicted. The Queen’s Bench Division, consisting of five judges, held that he was rightly convicted … I note, however, that the charge in that case was brought under section 20 of the English Act (24 and 25 Victoria, Chapter 100), which provides that; - ‘Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person shall be guilty of a misdemeanor.’ Section 20 of the English Act leaves out the intent and appears to correspond with section 225 of the Penal Code, which provides that: - ‘Any person who unlawful does grievous harm to another s guilty of a felony, and is liable to imprisonment for seven years.’ It is section 18 of the English Act that corresponds to section 222 of the Penal Code. Section 18 of the English Act provides that: - ‘Whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person’, with intent shall be guilty of a felony. The reasoning in R. v. Latimer appears to me to cover the case under section 18 of the English Act, but in R. v. Hewlett, 1 F & F. 91 it was held that where a prisoner struck A but B interposing, received the blow and was wounded, he could not be convicted of wounding with intent to do B grievous harm. The correctness of this decision was doubted in R. v. Stofford (187)) 11 Cox’s Criminal Cases, page 643. In that case the prisoner was indicted under section 18 of the English Act with doing grievous harm with intent. The facts were that the prisoner wounded A, whom he mistook to be B. It was held that he was

rightly convicted although he mistook his victim to be somebody else; the prisoner struck the person before him though he was somebody else. This case is not quite on all fours with the present case, as in that case the prisoner intended to strike the person before him although he thought he was somebody else. In the present case the accused was not even aware that P.W.4 was on the scene."(5) "Turning to the wording of section 222 of the Penal Code, it will be noted that the section did not say that 'any person who, with intent to do grievous bodily harm

to any person, unlawfully wounds <u>such person</u>, or that person', or words to that effect. It simply says 'lawfully wounds any person'. By way of analogy I refer to section 1956 of the. Penal Code. That section provides that: - 'Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.' Section 200 of the Penal Code defines malice aforethought to include 'an intention to cause the death of or to do grievous harm to any person <u>whether such person is the person</u> <u>actually killed</u> or not'. (The underscoring is mine). The question is whether the absence of similar words in section 222 of the Penal Code makes any difference. There is no reason in principle why it should, but I prefer to leave the matter open. What difference does it make to a person's guilt whether he intended grievous harm to A and in the execution of that intention seriously wounds an innocent third party? He has that blameworthy state of mind which section 222(1) of the Penal Code. I shall however leave the matter open." (6) "I am, however, satisfied that on the evidence the accused is guilty of the offence constituted by section 225 of the Penal Code …… The accused drove his car furiously, close to P.W. 1's house with the intention to knock him down and in the process he knocked down P.W. 4 also. The unlawful act done by the accused was in creating a dangerous situation with his car with intent to cause grievous bodily harm to P.W. 1. It was this unlawful act that caused serious injury to P.W. 4. The accused was not merely

negligent or reckless: he was more than that. I am satisfied that he is guilty of an offence under section 225 of the Penal Code, to wit, unlawfully doing grievous harm to P.W. 4., Omari Athumani, and, acting under section 181 (1) of the Criminal Procedure Code, I convict him of that offence."

46. R. v. Hemed Crim. Rev. 47-A-71; 17/12/71; Kwikima J.

The accused was convicted of stealing c/s 265 P.C.) Two books containing State Lottery tickets, the property of the Government of the United Republic. He was sentenced to two years imprisonment and 24 strokes. The was sentenced to two years imprisonment and 24 strokes. The issues raised on appeal were (1) Whether theft from the State Lottery was theft from the government; and (2) whether the appellant could have benefited under s. 5(2) Cap. 526 (the Minimum Sentences Act) because of his age and other factors.

Held: (1) [s]uch theft is indeed theft from the Government of the United Republic of Tanzania, following the ruling in R. v. Rajabu Juma 1969 H.C.D. 304." (2)[T}he trial court accept the age of the appellant [a first offender], to be 19. The monetary value of the stolen property was Shs. 42/- only. These factors were sufficient to cause an inquiry to be made as to whether there were any special circumstances. The learned trial magistrate did not find any. The learned State Attorney supported this view. With the greatest respect, it should be pointed out that the courts are anxious that youthful offender should not be kept in jail too long lest they should be contaminated by older and hardened criminals. There is always a chance to

Reform a young offender …… In Yusufu Mauruti v. R. (1967) H.C.D. No. 419, to name one among many authorities, youth was held to be a special circumstance." (3)"There was another circumstance which was special in this case: the accused did not gain anything from his crime. No material loss was occasioned to the complainant. In R v. Magusha Masunga, High Court Bulletin

No. 250, it was held to be a special circumstance that a watch worth 50/- was recovered from the accused who had burgled into a house to steal it. The facts of that case are not entirely dissimilar to those in the present case." (4) Accused sentence reduced in facilitate his immediate release.

47. Mahela v. R Crim. App. 156-M-71; 17/12/71; Makame, J.

The appellant pleaded guilty on two counts: (1) Driving without insurance, c/ss 4(1)(2) and 19 of the Motor Vehicle Insurance Ord., Cap. 169; and (2) driving a motor vehicle with defective springs, c/ss 30(1) (k) and 69, Traffic Ord., Cap. 168. He appealed against the order for disqualification which was made consequent on his conviction on the first count. It was established that he was employed as a driver on a vehicle owned by two persons. The insurance policy had in fact expired. When he was asked to advance special reasons, if he had any, against disqualification, the appellant said "I ask for leniency because it is my hoe for earning a living. I have nothing else except that I have children at home."

Held: (1)"Quite properly, the magistrate held that these were not special reasons but, in my view, as the charge-sheet disclosed that the appellant was an employed driver and because the appellant was unrepresented, the magistrate could reasonably have 'participated' and asked the appellant if he knew whether the vehicle was not insured. The chances are that the appellant would have said, as he asserts now on appeal, and convincingly in my view, that he did not know then that the policy had expired. This would have been a "special reason" as was held in Rex vs. Mtumwa Ahmed 1 T.L.R.99. Singleton, J. said in Blows vs. Chapman [1947] 2 All E.R., p. 576, quoted with approval by Saidi C.J. in R. vs. Richard Mbilinyi, Dar es Salaam Criminal Revision No. 68/71: "It is not, I think, the duty of a workman to ask his employer each day 'Is this vehicle insured"' I respectfully agree. Accordingly I set aside the order for disqualification and order that the appellant's driving licence should be restored to him." (2)"On the same count the present appellant was sentenced to pay a fine of Shs. 100/-. Although the appellant did not appeal against the fine, it is just and opportune to consider the matter. In Ahmed's case, Mahon, J. reduced the fine from Shs. 100/- to one

of Shs. 20/-. The substantial reduction must be indicative of the learned Judge's view that the accused in that case was not to blame, and indeed he remarked. 'The charge contained in the second count could very properly have been disposed of, I think, under the provisions of section 38 of the Penal Code.' For

Myself, accepting the view of Singleton, J., as I do, I do not see why the appellant in this case should pay a fine at all, as he is not to blame. Accordingly, I order that the fine on this count, which has been paid, should be refunded to the appellant and I substitute for it, an absolute discharge."

48. R. v. Abdallah & Others Crim. App. 112-D-71; E.A.C.A. 13/12/71; Duffus P. Lutta and Mustafa JJ. A

The Director of Public Prosecutions appealed against a decision of a judge acting in his appellant capacity. The judge had set aside the forfeiture order made by the district magistrate in five criminal prosecutions under the National Agricultural Products Board Act, 1964, Cap. 567, for a breach of the National Agricultural Products Board (Transport Control) Order of 1969, G.N. 247/69. Paragraph 3 of the Order prohibits the transportation of any agricultural product, to which the Act of 1964 applies, which exceeds 30 kilos in weight, without a permit from the Board and then in accordance with the terms and conditions specified in the permit. Paragraph 8 of the Order makes it a criminal offence to contravene any provision of the Order and provides that on conviction the court 'may, in addition to such fine or term of imprisonment, order that the agricultural product in respect of which the offence is committed shall be forfeited to the United Republic.' The appellants had pleaded guilty to contravening the legislation and the magistrate either before or after fining them, called upon each to show cause why an order for forfeiture of the produce, the subject of the charges, should not be made. In the absence of them offering any reason the order was made. In setting aside the order of forfeiture the appellate judge seemed to have been influenced by the

fact that the cumulative effect of the fines and the forfeiture were, 'grossly excessive for a statutory offence involving no moral turpitude.'

Held: (1)"The judge, acting on the authority of the decision in the case of Ngulila Mwakanyemba v. R. (Case No. 314 in the 1968 High Court Digest – Tanzania) said that the forfeiture order should also have shown the authority under which it was made and should also have contained sufficient reasons to show that the magistrate had contained sufficient reasons to show that the magistrate had applied his mind judicially as to whether or not to make the order. [It was submitted for the D.P.P.] That the district magistrate had followed the correct procedure in law and had ordered the forfeiture in the exercise of his judicial discretion and he asked this Court to restore the district magistrate's order ….. [T]he respondents, supported the judgment of the High Court and he submitted that the district magistrate had not exercised his discretion judicially as he appeared to have cast the onus on the defendants to show cause why he should not order the forfeiture." (2) "The order of forfeiture was clearly a judicial discretion given to the trial court. The principles governing the exercise of judicial discretion have been widely dealt with in numerous cases. In the case of Yakobo Mbugeramula v. R. 18 E. A. C.A. 207 at 210 this Court, in considering the order of forfeiture under the Arms and Ammunition Ordinance of Uganda, said-

'In short the exercise of discretion remains a matter dependent upon the facts of each particular case which must be exercised judicially in the light of such facts.'" (3) "It would be wrong to lay down any definite rules as to the exercise of discretion but the following quotation from Stroud's Judicial Dictionary (3rd Ed. Vol. I "Discretion") based on the cases therein set out, in our view aptly sets out some of the general rules that do apply. 'Where something is left to be done according to the discretion of the authority on which the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute. 'According to his

discretion', means, it is said, according to the rules of reason and justice, not private opinion." "(4) "We would here consider the case of Ngulila s/o Mwakanyemba quoted by the learned judge. We have read this judgment, which is a short judgment of Duff, J. in his Revisional Jurisdiction in Criminal Revision No. 48 of 1968. In that case there was no provision for forfeiture in the offence charged and the learned judge said – 'Every forfeiture order should specify the authority under which it is made and should contain sufficient reasons to show that the magistrate applied his mind judicially to the question whether or not the order should be made." The facts in this case are quite different in that here the right to order forfeiture in each of the five cases is contained in the paragraph under which the defendants were charged and here clearly there was no necessity to the magistrate to again repeat that he made the order for forfeiture under that paragraph when, in fact, he was clearly sentencing the defendants under the same paragraph. We agree that the proceedings should show that the magistrate has applied his mind judicially in dealing with the question of forfeiture but in this case, as we have pointed out, the magistrate in fact showed in his record that he called upon each of the defendants to show cause against the forfeiture before he proceeded to make the order of forfeiture. We think it would be preferable for the court not only to show that it is considering whether to make the order of forfeiture but also to state why it made the order but this is not a fatal defect. Each case must be considered in its own particular circumstances and in this case, with respect to the views of the learned judge, the facts show an apparent flagrant disregard of the law by each of the defendants." (3) "The National Agricultural Products Board Act, Cap. 567, together with the National Products Board (Control and Marketing) Act, 1962, are both Acts to control and regulate the production and marketing of agricultural products and the particular order in this case – the National Agricultural Products Board (Transport Control) Order, 1969, exists to carry out the provisions of these laws. All these laws and the order were fully considered and brought into force by the Government for the national prosperity and the general good of all the people. In these five cases the facts show that these appellants have, in fact, completely disregarded the law

and have made no attempt to explain their acts and really put forward no plea in mitigation. The greater the amount of forward no plea in mitigation. The greater the amount of

The produce involved the greater was the attempt to evade the law. In each of these cases a considerable amount of produce was involved and in four of the cases the offence took place at night, when the transport of produce is forbidden. In these circumstances we are of the view that the district magistrate did not inflict an excessive fine. The fine was only Shs. 250/- on each defendant and the maximum was a fine of Shs. 2,000/- or a sentence of six months imprisonment or both the fine and imprisonment. We are also satisfied that the district magistrate's order of forfeiture was made only after he had considered all the facts before him and was done in the exercise of his judicial discretion and should not therefore have been set aside by the High Court." (6) Appeal allowed. Order for forfeiture restored.

49. Philemoni s/o Byabochwezi v. R. Crim. App. 372-M-1971; 8/12/71; El Kindly J.

Appellant was convicted on three counts in respect of offences against the Fauna Conservation Ordinance, Cap. 302. The second count was that he had hunted and killed a warthog, without licence c/ss 12 and 53 of the Ordinance. The accused had been issued with a licence but had already killed the number of animals permitted and therefore when he killed the warthog it was not authorized. He pleaded guilty to the court, but in mitigation said that he only killed the animal because it was damaging his crops. As proof that he acted in good faith, he pointed out that it was he who had indicates on the licence that he had killed the

additional animal and otherwise the police would not have been aware of the offence.

Held: “In my view, the entering of this warthog in the licence would tend to suggest that the appellant believed honestly and reasonably, though mistakenly, that he could kill the alleged warthog by the licence he had, and if that was so, then the appellant was putting a defence of mistake of fact (see section 11 of the Penal code, Cap. 16). On the face of it, the appellant appeared to have pleaded guilty to the charge, but what he said in mitigation, which was not taken into account even in passing sentence, raised a defence which the trial court should not have left unattended. It is well established that a plea of guilty can be withdrawn even after conviction (See Hassan s/o Mohamed v. R. 1968 H.C.D. No. 429). The appellant should have been given the opportunity, after the conviction had been entered, to explain whether, even in the light of his statement in mitigation, he still pleaded guilty to the charge. It was the duty of the court to explain the problem involved because if the appellant was merely saying that he was ignorant of the law, that would not be a defence (see section 8 of the Penal Code, Cap. 16), but if he meant that it was an honest mistake of fact ……. Or that he was putting defence of property as his defence (see section 18 of the Penal Code, Cap. 16) the trial court would not be satisfied that the appellant was unequivocally pleading

guilty to the charge in spite of the appearance. For this reason, I cannot say that the plea of the appellant, on this count, was unequivocal so as to enable this court to uphold the conviction of the appellant on the second count as well.”

50. R. v. Simoni Crim. Sass. 27-A-71; 11/12/71; Kwikima Ag. J.

The accused was charged with the murder of his father. He pleaded “not guilty”. The prosecution could not bring forward evidence of any eye witness to the act of killing. They, however, called no less that five witnesses, four of whom were

related to the accused and his late father, who attested that the accused had admitted the killing of his father to them. The doctor who examined the body of the deceased said that there was a head wound caused by a sharp instrument which occasioned bleeding in the brain-intracerebral haemorrhage. The postmortem examination performed on 10/12/70 revealed that death had occurred within 24 hours of the examination. This was corroborated by the five witnesses to whom the accused admitted to have killed his father in that they all said that they saw the freshly stained body on the evening of 9/12/70. The evidence of the five witnesses established that the accused had led a crowd of the assembled villages to the body after confessing to the act. At the time he was carrying a blood-stained axe which was seized from him after he had shown his unwillingness to surrender it when he was called upon to do so. The accused had also made an extra-judicial statement admitting the act. In his defence he retracted this statement.

Held: (1) “There is no evidence that the accused was induced to admit or that pressure was brought to bear on him. The admission is therefore admissible, following the case of Shsrifaali and Anor v. R. (1955) 22 E.A.C.A. 379”. (2)”The only question to consider is whether malice aforethought has been proved or not. The court must take into account the fact that he accused used an axe, that it was used in a very deliberate manner and that the blow was aimed at the head. Such have been held to be the salient considerations in R. v. Tubere Ochen (1945) 12 E.A.C.A. 63. I am certain in my mind, and both the gentlemen assessors agree with me that the accused killed his father and the use of the axe to inflict the fatal blow on the forehead could be evidence that he intended to kill his father. There is evidence that accused was angry at his father for having removed the cattle from his (accused’s) house. So angry was the accused that he did not feel content to kill the deceased only. He went further to kill and destroys the cattle. It is little wonder that the accused has offered no defence in his unsworn evidence. He does not explain why all the witnesses should tell lies against him. It has been held that to strike a person on the head with a sharp instrument like a spear, an axe or an arrow is a manifestation of malice

aforethought (R. v. Gwogere Sinyangwira (1953) 2E.A.C.A. 133). Judging from the circumstances of this case, and the evidence as a whole, I am left in some doubt the accused killed his father with malice aforethought. There is evidence given by Daniel that the deceased was looking for his son just before he

Died. The deceased is reported to have been very angry when doing so. When the deceased at last saw accused, he could have started a fight during which he the accused could have struck the fatal blow. With this possibility in mind, I am left in some doubt whether the accused killed his father with malice aforethought, the deceased must have been angry for the loss of his goat and the possibility of his acting violently on seeing his son cannot be ruled out completely. It is a cardinal rule of criminal law that any doubt which the court may have should benefit the accused. (3) "The evidence before me being what it is, I am left in some doubt whether the prosecution have proved malice afore-thought on the part of the accused. I would therefore find accused not guilty of murder. In view of the overwhelming evidence that he killed his father, I would find him guilty and convict him of manslaughter."

51. Mwandihi v. R. Crim. App. 103-D-71; E.A.C.A. 27/10/70; Duffus P. Lutta & Mustafa JJ. A

The appellant was convicted of the offence of stealing c/s 265 of the Penal Code and was sentenced to two years imprisonment. His appeal to the High Court was summarily dismissed and there was included the sentence of twenty four strokes. The facts as found by the magistrate were that the appellant was carrying out repairs to a refrigerator in the stores of the Tanga Consumers' Co-operative Society on 21st August, 1970, and at about 4.00 p.m. when he left to go home, the store-keeper, who had put two large tins of 'Blue Band 'Margarine on the counter of the store with the intention of trapping the appellant, followed and arrested him at a distance of 3 yards from the store, and found the two tins in his

possession. The appellant said that he had bought the tins. Whilst the police was being called he escaped. The storekeeper reported the matter to the manager of the said Society. Shortly the appellant appeared and showed them a receipt and alleged that he had bought the two tins from a shop. The matter was reported to the police who went to check at the alleged shop. The owner of the shop stated that the appellant bought two big tins of 'Blue Band' Margarine and two tins of beef from his shop at about 5.00 p.m. The police constable the manager, storekeeper, and the appellant went to the latter's house where a search was made. They found and seized three large size 'Colgate' tubes and 4 tins of margarine behind the appellant's photographs, 33 packets of 'Nacet' razor blades, 23 table knives under the carpet, 2 packets of steel wool under the cupboard, and 2 dozen match boxes. The appellant's defence, which the magistrate rejected, was that all these articles were bought by him. In the Court of Appeal it was argued on his behalf that there was no identification of the allegedly stolen articles and therefore conviction could not be supported. The following authorities were cited in support of this argument: Bawari s/o Abedi v. R.

1967 H.C.D. Case No. 11, Henry Geruasi v. R. 1971 H.C.D. Case No. 129, and R. v. Edwadi s/o Sylvester 1970 H.C.D. Case No. 130. It was further submitted that the prosecution failed to prove beyond reasonable doubt that the appellant stole the articles in question.

Held: (Lutta J. A.) (1) "The evidence is that these goods were found missing from the complainant's store. These facts and circumstances lead irresistibly to the conclusion that the appellant stole the articles in question. We are therefore satisfied that the appellant was rightly convicted." (2) "The learned judge stated in his order that the appellant was sentenced to two years imprisonment and twenty-four strokes under the Minimum Sentences Act. The magistrate found that the appellant was 48 years old and did not therefore

impose the statutory twenty-four strokes. We accordingly set aside the sentence of twenty-four strokes." (3)"We would add one comment. All the articles were included in one charge although the evidence in this case shows that the articles in question were taken from the store at different periods and thus more than one offence was committed. We think that the charge is duplex and that the proper course should have been to make each taking the subject of a separate charge. (See. R. v. Bally Singh 37 Cr. App. R. 28). We are satisfied, however, that in this case no failure of justice was occasioned by the duplicity and we would apply the provisions of section 346 of the Criminal Procedure Code. For these reasons we accordingly dismiss the appeal."

52. Nathoo v. R. Crim. App 129-D-71; E.A.C.A. 14/12/71; Duffus, P.; Lutta, Mustafa, JJ. A.

The appellant was charged with the offence of corrupt transaction c/s 3(2) of the Prevention of Corruption Act 1971. He pleaded guilty but before sentence was passed there was argument as to whether the Minimum Sentences Act, Cap. 526 applied. The trial magistrate held that the Minimum Sentences Act was inapplicable. The Republic contended that the offence charged under Section 3(2) of the Prevention of Corruption Act 1971 was a scheduled offence under Cap. 526 and so the Minimum Sentences Act was applicable. The learned Chief Justice acting under Section 327 of the Criminal Procedure Code directed that a notice of enhancement should be issued to the appellant and exercising the powers of the High Court under section 329 of the Criminal Procedure Code held that the offence of corrupt transaction c/s 3(2) of the Prevention of Corruption Act 1971 fell under Cap. 526 and imposed the minimum sentence prescribed. See [1971] H.C.D. 371. The main issues for the E.A.C.A were first, whether or not the provisions of Cap. 526 apply to the Prevention of Corruption Act, 1971; and secondly, whether or not natural justice was done to the appellant since the judge who served notice of enhancement of sentence had already resolved the issue and therefore should not have heard the case himself.

Held: (Majority judgment not signed by Lutta, J. A.); (1)"By section 327 of the Criminal Procedure

Code, power is conferred on the High Court to call for and examine the record of any criminal proceedings before any subordinate court in order to satisfy itself as to the legality, correctness or propriety of any sentence imposed on a person convicted of any offence. If after examining the record the High Court considers that the case is a proper on for revision under section 329 of the Criminal Procedure Code, it will cause a notice of enhancement of sentence to issue for that purpose. In exercising its powers on revision the High Court exercises powers conferred on it by section 329, 321 and 322 of the Criminal Procedure Code. The notice of enhancement of sentence was served on the appellant, who appeared and was represented by an advocate at the hearing. Although the notice of enhancement of sentence might have been differently worded we are satisfied that there was not breach of natural justice and that there was no failure of justice." (2) "The provisions of section 10(1) of the Interpretation Act clearly apply to the Act. There would be no doubt about this but to make this very clear section 20(3) of the Act specifically states: 'The provisions of' sub-section (2) shall being addition to and not in substitution of the provisions of section 10 of the Interpretation and General clauses Ordinance.' The Act must therefore be read as if there was a specific provision that the reference in paragraph 7 of Part 1 of the Schedule to Cap. 526 to the offence of taking part in a corrupt transaction contrary to section 3 of cap. 400, shall, unless the contrary intention appears, be a reference to the offence of taking part in a corrupt transaction contrary to section 3 of the Act. To decide this we have to consider the provisions of Cap. 526 and its purpose and intention. This Act was obviously brought in to ensure that the courts passed adequate sentences in the offence specified. This Statute was intended to remedy a social condition existing at the time in the community and was an Endeavour to at any rate lessen the prevalence of the offences set out in Cap. 526. Cap. 526 do not amend the scale of punishment but it does fix

the minimum sentence. The new act re-enacts with modifications the scale of punishment, it fixes a higher scale but does not fix a minimum. We can find no conflict between the provisions of the Act and those of Cap. 526. The Act sets out the punishment for the offences but it does not fix the minimum and is in no way repugnant to the provisions of Cap. 526." (3) Appeal dismissed.

53. William Frank Haining and 2 Ors. v. Rep. Crim. App. 82-D-71; 14/12/71; Duffus, P. Lutta and Mustafa, JJ. A.

This was an appeal against sentence. The first and second appellants pleaded guilty to count 2 of the information which, as amended, charged them with obtaining money by false pretence contrary to section 302 of the Penal Code, for that in the month of May, 1969, with intent to defraud, they obtained from the Government of Tanzania Shs. 513, 343/10 by false pretences. Both these appellants were sentenced to $2^1/_2$

Year's imprisonment and the sentence on the first appellant were ordered to be served concurrently with the sentence passed at an earlier trial for the offence of corruptly receiving a motor car. This offence was connected with the present ones. (See (1970) H.C.D.171). In addition to this sentence the court, acting under the provisions of section 176, subsection (1) of the Criminal Procedure Code made an order for compensation against the first and second appellants, jointly and severally, to pay to the Attorney-General of Tanzania the sum of Shs. 513,343/10 in respect of the loss suffered by the Government. The third appellant pleaded guilty on count 4 of the information for occasioning a loss to his employer – the Government – contrary to section 284A of the Penal Code, for that between the 5th February, 1969, and the 15th May, 1969, he caused the Government to suffer a loss of Shs. 513,343/10. The third appellant (who was the fourth accused on the information) was sentenced to 18 months imprisonment and, along with a third accused person who has not appealed, was ordered, by

virtue of the provisions of section 284A (7) of the Penal Code to repay to the Republic of Tanzania compensation in respect of the sum of Shs. 513,343/10 loss by the Government. The third accused (Green) was, on account of ill-health, given a suspended sentence under the provisions of section 394A of the Criminal Procedure Code.

Held: (1) "Imposition of a sentence except where the sentence is fixed by law, is a matter which lies in the discretion of the trial judge and an appellate court will not interfere except where it appears that in assessing the sentence the trial judge has acted on some wrong principle, or has imposed a sentence which is manifestly excessive or inadequate." (2)"This offence [Obtaining by false pretences] carries a maximum of 3 years imprisonment but the learned Chief Justice, after full consideration of all the facts, imposed a sentence of $2^{1}/_{2}$ years imprisonment and directed that this sentence should run concurrently with the sentence passed at an earlier trial in Criminal Sessions, Case No 295 of 1969. The main submission on this appeal is that this sentence constitutes double punishment for what was, in effect, the same offence. The short answer to this complaint is that in fact this was not the same offence but two different offences, and further, that this question does not now arise as the trial court has already ruled against the submission of autrefois convict and the appellant has accepted this ruling by specifically pleading guilty to this charge. It was also argued that the judge in the former case did take the facts constituting this present offence into account when he sentenced the appellant at that trial … On the other hand, it was agreed at this appeal that the judge did not, in passing sentence in that former trial, act under the provisions of section 290A of the Criminal Procedure Code which deals with the taking of other offences into account. These facts were all considered by the learned Chief Justice in this case and the legality of his sentence has not been questioned. The learned Chief Justice did apparently take into account that the two offences were

To a large extent based on the same facts when he gave the concurrent sentence but the length of the sentence in this charge was a matter within his discretion and we cannot see that he acted in any way improperly. We see no reason to interfere with the sentence and we dismiss the first appellant's appeal against his term of imprisonment." (3) "The second appellant was also sentenced to $2^1/_2$ years imprisonment but there appears to have been a genuine misunderstanding as to whether this appellant was in custody awaiting trial in this case or whether he was in custody on a detention order. The Chief Justice appears to have been under the impression that he was kept in detention on some other charge and was not in custody awaiting trial in this case. However, both the learned advocates for the appellant and for the Republic agreed from the Bar that, in fact, the appellant was in custody awaiting trial in this case as from the 22nd April, 1970. He was sentenced on the 30th March, 1971. It does appear, therefore, that the learned Chief Justice was not aware of the true facts of his arrest and remand in custody awaiting trial or he would have taken this period of his being in custody into account when passing sentence. We would therefore accordingly reduce the sentence of $2^1/_2$ years imprisonment and in lieu thereof substitute a sentence of 19(nineteen) months imprisonment."(4)"We can see no reason to interfere with the sentence of 18 months imprisonment imposed on the third appellant and his appeal in this respect is dismissed." (5) "The order for compensation under section 284A(7)of the Penal Code is a mandatory order … The question of the court's acting under subsection (7) was fully considered and argued before the Chief Justice when he was considering sentence and the appellant's advocates had the opportunity and did, in fact, put forward various extenuating circumstances in the appellant's favour. The learned Chief Justice fully and correctly considered the provisions of subsection (7) of section 284A in making the order for compensation against the third appellant and we can see no reason to interfere with order and the third appellant's appeal against the order for compensation under section 284A is therefore dismissed."(6) "We now consider the question as to the order for compensation under section 176 of the Criminal Procedure Code … The necessary requisites for an order for

compensation are … (1) that it appears to the court from the evidence that the prosecutor or a witness in the case has suffered material loss or personal injury as a consequence of the offence; (2) that substantial compensation would be recoverable by that person in a civil suit; and (3) the court then, in its discretion, may order the convicted person to pay such compensation as the court deems fair and reasonable. Before, therefore, the trial court orders compensation it must be satisfied and decide that these requirements exist. This means that the court must consider and judicially determine first the factors (1) and (2) set out above and then exercise its discretion and make such order as it deems fair and reasonable. Compensation is not a punishment as such but is an order made in addition to any other punishment and is

An Endeavour to settle, in a summary manner, any civil loss that the prosecutor or witness in the case may have suffered as a result of the offence. A convicted person would not ordinarily expect that an order for compensation would necessarily follow his conviction; thus, for an offence of obtaining money by false pretences under section 302 of the Penal Code the punishment set out in that section is imprisonment for three years. An order under this section is imprisonment for three years. An order under this section would usually be made on the application of the prosecutor but if not a court may clearly act on its own accord but in doing so it is performing a judicial act which would materially affect both the party receiving the compensation and the convicted person who has to pay the compensation. It is essential here that these persons and more especially the convicted person should be called upon to show cause why and order should not be make. To do otherwise would be a breach of natural justice and would amount to a person being condemned without having a hearing. The necessity for this to be done would appear from the facts in the case. Thus, in considering the first essential, that is as to whether material loss has been suffered by the prosecutor or the witness, the question arises here as to whether

this loss was suffered in consequence of the act either of the first and/or of the second appellant. In this case the court did not hear all the evidence and a plea of guilty were entered and there was no evidence as to the details of the loss suffered. There might have been other factors affecting the actual amount of the loss. As to the second essential, as to whether the first and second appellants would be liable to pay compensation in a civil action, the question arises as to what would be the liability of the first appellant. His liability, if any, would appear to lie in tort but the question would be, what would be the cause of action and, as for the second appellant, [counsel] pointed out that one question is whether the action would lie against his firm, to whom apparently the excessive amount was paid under the contract, or would the second appellant be personally liable? The, on the question of the assessment of the compensation, this is a matter in the discretion of the judge but in exercising this discretion and in deciding what amount would be deemed fair and reasonable the court could properly take into consideration the fact that the first appellant has lost, to the advantage of the Government, his pension and compensation rights, and the fact that apparently the second appellant has had his house, cars and other property confiscated. All these would be matters that would need investigation and consideration and it would be absolutely essential in the due discharge of justice that the convicted person be heard before an order is made. We would therefore allow the appeal of the first and second appellants against the order for compensation made under section 176 of the Criminal Procedure Code."

54. Hamisi Mayala v. R. Crim. Rev. 69-M-71; 7/1/72; Kisanga, J.

The accused was charged with assault causing actual bodily harm contrary to section 241 of the Penal Code. In reply to the charge he said: "I did beat him (the complainant) and he beat me too. We fought." The trial magistrate entered this as a plea of not guilty. After a number of adjournments the case eventually came up for hearing before another magistrate. P.W. 2 said that the complainant aimed

blows with his first at the accused but these blows missed the accused who dodged them successfully. Accused then beat the complainant on the lips and inflicted an injury which caused bleeding form the mouth. When this witness concluded his evidence the accused said: “I beat this man (the complainant) for fear that he was going to assault me. I agree that I beat him unlawfully.” The trial magistrate then proceeded to convict the accused on his own plea and sentenced him accordingly.

Held: (1) “It is clear from the evidence …. That the accused was assaulted by the complainant. In his plea the accused said that he beat the complainant for fear that the complainant was going the assault him. To my mind the facts clearly raise the issue of self-defence. The accused agreed that he beat the complainant unlawful, but it was for the court to decide whether in law the conduct of the accused was unlawful. The law is clear that where a person is being assaulted it is a good defence if he strikes his assailant in self-defence subject, however, to the requirement that he must retreat, if possible, and that the force used was only such as was necessary to the defence. In the circumstances of this case, therefore, I am of the view that it cannot be said that the plea of the accused was unequivocal because the accused may have inflicted the injury on the complainant in circumstances which in law amounted to self-defense. The proper course to take was to proceed with the trial and after all the evidence was received then the trial magistrate should decide whether the allegation of self-defence was maintainable.” (2) Conviction quashed and sentence set aside.

55. R. v. Timoteo Crim. Rev. 72-M-72; 7/1/72; Kisanga, Ag. J.

The accused was convicted of failing to comply with a removal order c/s 3(b) of the Townships (Removal of Undesirable Persons) Ordinance. The punishment for such an offence is a fine not exceeding Shs. 200/= or imprisonment not exceeding three months or both such fine and imprisonment. In the instant case, the accused was sentenced to six months conditional discharge under section 38(1) of the Penal Code and ordered to proceed to his home district by the earliest means available and pending such departure, the accused was to remain

in police custody. The question then was whether or not the sentence of conditional discharge and the repatriation order were lawful.

Held: (1)"In the present case since the accused was being sentenced under section 38(1) of the Penal Code it would appear that the maximum prison term of three months specified under section 6(2) of the Ordinance [cap. 104] cannot have any relevance at the time of passing this sentence because the two sentences are quite independent of each other. It seems that the sentence would be improper only if it exceeded the maximum of twelve months as laid down under section 38 (1) of the Penal Code. I think that the maximum sentence of three months' imprisonment under section 6(2) of the Ordinance[Cap. 104] would be relevant only where the accused is called upon for sentencing after he is shown to have committed any offence during the period of conditional discharge, so that at the time of sentencing the accused after he commits an offence during such period of conditional discharge, the court is in fact sentencing him for the offence under the Ordinance and not under section 38(1) of the Penal Code; and it is only then that it would be valid to contend that the sentence so passed must not exceed the maximum of three months imprisonment as provided under section 6(2) of the Ordinance. I therefore think that the learned trial magistrate was entitled to order six months conditional discharge under section 38(1) of the Penal Code even though this period was longer than the maximum prison term provided under section 6(2) of the Ordinance [Cap. 104]. (2) "I now turn to consider the order of repatriation. In the case of R. v. Paulo Hamisi, (1970) H.C.D. 41, it was held by this Court that the court has no authority to make such an order of repatriation. The power to make such an order is vested only in the Area Commissioner under section 3 of the Ordinance, while the district court is empowered under section 5 of the same Ordinance only to hear appeals against such orders and to try persons accused for violating orders. On that authority, therefore, the order for repatriation in the instant case was ultra vires and is

accordingly set aside. It also follows that the related order requiring the accused to be in police custody pending repatriation to Bukoba was ultra vires and is also set aside."

56. Michael v. R. Crim. App. 462-A-71; 31/12/71; Bramble, J.

The appellant made an application for bail pending appeal claiming that he was a first offender and of good character; that there was no likelihood of his running away and that there was an overwhelming probability that the appeals would succeed. The question was whether or not he principles mentioned above which apply to the granting of bail before conviction are equally applicable to the granting of bail pending appeal.

Held: (1) "In The Masrani [1960] E.A. 320 Sheridan, J. pointed out that these principles apply to the granting of bail before conviction and that there are different considerations after conviction when in accordance with the United Kingdom practice bail is granted only in exceptional circumstances. This had been previously emphasized in a Tanganyika case, Highir Singh Lamba v. R. 1958 E.A.L.R. 337, by Spry then Acting Judge ….. As to the point of

There being an overwhelming chance of success I cannot so hold as the twenty-five grounds of appeal deal only with facts and suggest that the matter is very arguable."

57. R. v. Julias Crim. Case 133-Sumbawanga-1970; Inspection note; Onyiuke, J. (undated).

The accused in this case was charged with an offence c/s 312, P.C. The statement of offence was to wit, "Being in possession of property suspected to have been stolen or feloniously obtained c/s 312 of the Penal Code." The particulars of offence were that he was found in possession

Phillips radio which was reasonably suspected of having been stolen or unlawfully obtained, to wit, the accused cannot give a satisfactory account to such possession. The charge sheet was signed by the Public Prosecutor as required by S. 88(5) of the Criminal Procedure Code. The magistrate who heard the case made the following order: “Section 312 clearly states that an accused person stopped under section 24 of the Criminal Procedure Code. This has not been stated in the particulars of offence; therefore the charge is defective and is dismissed.”

Held: (1) “It was held in Kiondo Hamisi vs. Republic (1963) E.A. 209 that a charge under S 312 of the Penal Code should allege that the accused was detained in exercise of the powers conferred by S.24 of the Criminal Procedure Code and that at the time whom he was detained he was conveying or was in possession of a specified thing which might reasonably be suspected of having been stolen or unlawfully obtained. S. 89 of the Criminal Procedure Code gives the power to magistrate to reject a formal charge which does not disclose any offence but requires him to record his reasons for such order. Apparently the learned magistrate held the view that no offence under S. 312 of the Penal code was disclosed in the charge because of the failure to state an essential ingredient o the offence. He was, in my view, quite right to reject the charge. This would not however preclude the prosecutor from again presenting a proper charge under S. 312 of the Penal Code.” (2)”I may point out however, that S 312 of the Penal Code had been repealed and replaced by a new section by S.5 of the Administration of Justice (Miscellaneous Amendments) Act 1971 which came into operation on the 29th October 1971”. (3) Order; File returned to the District Court.

58. Emmanuel s/o David v. R. Crim. App; 25-Dodoma-71; 7/12/71 Mnzavas, J.
Appellant was convicted of causing death by dangerous driving c/s 44A of the Traffic Ordinance. The appellant was a police driver and was going to investigate a reported crime. The deceased, a police constable, was sitting beside the appellant in the cabin of the land rover which the appellant was driving. As the

appellant was driving along the road, a tyre burst and the vehicle left the road and hit a tree. The deceased was thrown out of the vehicle and sustained injuries from which he later died.

Held:- (1) “The learned magistrate found that the accused must have been traveling at a speed between 35 m.p.h. and 45 m.p.h. at the time of the accident.” (2) “From the judgment it is amply clear that the trial magistrate found the appellant guilty because he came to the conclusion that the appellant was driving the vehicle at a speed which made him unable to stop the car instantly when the tyre burst while he knew that he was driving a boarded car. Earlier in his judgment the court came to the conclusion that the accused must have been driving the vehicle between 35 m.p.h. and 45 m.p.h. The court came to this conclusion after hearing the evidence of Juma (P.W.5), on of the passengers who sat behind the land rover. He disbelieved the testimony of P.C. Augustine (P.W.) a vehicle inspector, who told the court that the vehicle must have been traveling at 60 to 70 m.p.h. when the accident occurred. The learned magistrate was entitled to disbelieve P.C. Augustine and believe Juma instead. But the magistrate should have accepted Juma’s evidence with caution in that his evidence was, at best, opinion evidence. In W. Milburn vs. Regina 2 T.L.R. (R) page 27 in which the question of speeding was in issue Abernethy J. as he then was, said at page 29; “The evidence of a Police officer that an accused is traveling at a speed in excess of the speed limit is mere opinion evidence and a count will not convict on such evidence unless it is supported by some other evidence whereby the officer’s evidence becomes evidence of fact and not merely of opinion”. That case is not quite on all fours with the present case but the above remark by the learned judge clearly illustrates what evidence should be adduced in support of a charge where the question of speeding is in issue.”(3) “Even if it is, for arguments’ sake, accepted that the accused was traveling at 35 to 45 m.p.h. at the time at the accident, it cannot be said with certainty that the

speed was the cause of the burst of the tyre. Nor can it be said that driving a motor vehicle at 45 m.p.h. on a tormac road at 2 a.m. is dangerous driving within the definition of dangerous driving given under section 44A (1)(a) of the Traffic Ordinance. The accused was driving at a moderate speed on a first class road and at a time when the amount of traffic on the road was at its lowest when the unfortunate accident happened. As rightly argued by the learned state attorney in considering the circumstances in a charge of causing death by dangerous driving the test to be applied is purely an objective test. There is no legal definition of driving to the danger of the public and there cannot be any legal definition." (4) Appeal allowed.

59. Donald William Ibrahim v. R. Crim. App. 32-Dodoma-71; 4/12/71; Mnzavas, J.

The accused was charged with and convicted of fraudulent false accounting and stealing by a person employed in the public service c/s 317 (c), 265 and 270 of the Penal Code. The charge in count one was that the accused did during the period of August and September, 1969 with intent to defraud, omit the entry of a receipt for Shs. 100/= in the remand prisoner's register. The second count was that the accused stole Shs. 100/= the property of a remand

Prisoner, which came into his possession by virtue of his employment. He was sentenced to 9 months imprisonment on count one and 18 months on count two. At the time the alleged offences were committed the accused was employed as a prison officer in Isanga Prison and was in charge of the admission section of the prison.

Held: (1) "The omission to enter the sum of shillings 100/= in the prisoners cash register was, on the evidence, clearly fraudulent and, as the accused failed to account for the shillings 100/= the only reasonable inference is that he stole the money." (2)"Stealing by servant is by virtue of part 1 of the schedule to the

Minimum Sentences act, Cap. 526 of the laws, a scheduled offence. If it is proved that an accused was employed in the public service at the time he committed the offence and that the thing stolen was the property of the Republic, or came into his possession by virtue of his employment then the accused will have to be sentenced under the Minimum Sentences Act. The learned state attorney in support of this argument referred the court to the decision by Biron J. in Yesaya Gweseko (1970) H.C.D Case No. 160. In this case the learned judge refused to follow the narrow interpretation of the phrase by virtue of his employment" by Spry J. (as he then was) in Rajabu Mbaruku vs. R. (1962) E.A. 669. As rightly mentioned by Biron J, the decision in Rajabu's case is what it is because the learned Judge felt bound by English decision regarding the interpretation of the phrase by virtue of his employment" and was fortified in his decision by the language of section 4 of our Penal Code at that time. Now things have considerably changed. Our Penal Code is no longer interpreted "in accordance with the principles of legal interpretation obtaining in England." Section 3 of Act No. 26/1971 is to the effect that the court in construing the provisions of the Penal Code will be guided by the principles of natural justice. In the present case there is no dispute whatsoever that the appellant was a person employed in the public service when he stole the shillings 100/= Equally there is no doubt at all that he received the said money by virtue of his employment as a prison officer, that is, a servant of the Government. This being the position the learned resident magistrate should have imposed a sentence under the Minimum Sentences Act. (3)Appeal dismissed.

60. Joshua s/o Sonko v. Rep. Crim. App 88-D-71; E.A.C.A. 24/10/71; Duffus, P. Lutta and Mustafa JJ.A

The appellant was convicted of murder, but as he was found to be under 18 years of age, he was sentenced to be detained at the President's pleasure. He alleged that he and the deceased had gone fishing in a canoe. f At the river bank they met one W. while in the middle of the river they came across a hippo, and both the accused and the deceased became frightened and fell into the river.

The accused managed to swim ashore. The accused went and told W of the incident. He alleged that W thereupon decided that the deceased should be killed and his property taken. The accused led W to where the deceased was, and W was alleged to have told the accused that if he, the accused,

Did not kill the deceased, W would kill the accused. W then handed a panga to the accused who then cut the deceased several times with the panga after which W and the accused went to the deceased's house and shared his property. In the course of his defence, the accused's counsel invoked the provisions of section 17 of the Penal Code. This provides inter alia – a person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done only because during the whole of the time it is being done part of the offender instantly to kill him or to do him grievous bodily harm if he refuses. The trial judge found that the alleged threat by W to kill the accused was not present all the time, and that once the panga was handed to the accused b W, the threat had ceased to exist, as the accused was then in a position to withstand W's attempt to put his alleged threat into effect. The accused had therefore killed the deceased after the threat had ceased to exist, and therefore could not invoke the provisions of section 17 of the Penal Code in his defence. The trial judge also said that the section is only available to an offender who is jointly charged with another or others.

Held: (1) "The two or more offenders referred to in section 17 need not be jointly charged with an accused person, they could be abettors of the offence and indeed could be persons who had absconded and could not be traced or had died. The word "offenders" is not synonymous with "co-accused". However, this misdirection had not in any way prejudiced the appellant or occasioned any injustice as the trial judge had rightly found that the alleged threat by Yeromino to kill the appellant had ceased to exist before the appellant cut and killed the deceased." (2) Appeal dismissed.

61. Karimjee and Ors. v. Commissioner Gen. of Income Tax Civ. Case 180-D-1970; 29/2/72. Saidi, C. J.

A suit was filed on behalf of the Yusufali Charitable trust against the Commissioner General of Income Tax claiming the refund of the sum of Shs. 865,055/38, levied on the dividends accrued to Karimjee Jivanjee Estates Ltd. in which the Charitable trust are shareholders. The sum comprised three years levy. In the past the practice was for the company to deduct and remit to the defendant the required tax from the dividends due to the trust and the defendant to refund it to the trust because it was exempted from paying tax. In 1970 so as to prevent the application of the Limitation Act the plaintiff wrote to the tax department demanding refund of the tax for 1963-65 and threatened legal action if no payment was made within a month. Defendant stated in his reply that the claim had been referred to the Head Office and asked for more time for a decision. The suit was then filed in order to save the tax paid in 1963 from limitation. Subsequently, the defendant wrote acknowledging an obligation to refund the tax enclosed a cheque for the amount claimed. The only issue was one of cost.

Held: "The facts in the record clearly show that the Defendant had not contested or denied the claim for the refund of tax. They merely wanted time to consult their Head Office. It is also abundantly clear that the Plaintiff-Trust filed the suit in order to save the tax for 1963 from limitation and this is what their advocate had made out in his letter of 21st October, 1970. Although the tax for 1963 was outstanding for almost 7 years it appears no serious efforts had been made prior to July, 1970 to claim refund as the letter of 21st October, 1970 refers to another letter of 8th July, 1970 which had not been acknowledged by the Defendant. For these reasons I do not think that the defendant should be made to bear all the costs of the suit when they had not contested the claim or refused

to pay but I feel that the Court fees paid by the Plaintiff-Trust should be refunded to them by the Defendant and I so order."

62. Rutua v. Zambia Tanzania Road Services Ltd. & Anor. Civ. Cas. 7-D-1971; 28/2/72, Saidi, C. J.

The deceased was employed by the 1st defendant as a driver and he died while on duty from injuries sustained from a motor accident. The 1st defendant duly reported the accidental death to the Labour Office for the assessment or compensation. That office assessed the compensation for 8 dependants, i.e. the widow, 4 infant children, mother, father and brother of the deceased. Eight agreements were drawn up under section 15 of the Workmen's Compensation Ordinance and were signed in Kenya by the dependants. An action was subsequently brought by the dependants under the Law Reform (Fatal Accidents & Miscellaneous Provisions) Ord., Cap. 360; the agreements were pleaded in defence.

It was argued on behalf of the plaintiffs that the agreement envisaged in section 15 of the former Ordinance must be one between the employer and a living workman and was not applicable where the workman died. A ruling was sought on this interpretation of section 15.

Held: (1) "This argument does not carry much weight as the meaning of "workman" is extended to his legal personal representative in case he is dead as it is evidence by the provisions in section 2(3) of the Workmen's Compensation Ordinance." (2)"The real dispute that must be resolved is whether or not the agreements signed on behalf of the 4 infant children are valid and binding on these children. In Herman Kaar vs. Chamnion Motor Spares Ltd. and another 1971 E.A. 28 it was held by the Court of Appeal that (i) a binding agreement

(under the Workmen's Compensation Ordinance) can only be made when all the dependants of the deceased are sui juris and (iii) where there are minors compensation must be paid into court. Quite clearly the children could not be barred in this claim. It is a different case with the widow, mother, father and brother of the deceased. In Herman's case the claim of the dependants' children as well as that of the widow was allowed to go to trial although compensation had been paid under an agreement come to. I think in respect of all dependants with liberty to the defendants to set off what has already been paid as provided in section 24 (1)(d) of the Workmen's Compensation Ordinance."

63.Oplustil v. Gaganakis Civ. Cas. 139-D-1970; 28/2/72, Saidi, C. J.

The plaintiff claimed the refund of Shs. 22,000/= being part payment made to the defendant for the purchase of a hotel the latter advertised for sale. Under the agreement the plaintiff undertook to deposit the balance of the purchase price within 14 days of the signing of the contract and the defendant undertook to refund the deposit if the sale was called off through no fault of the plaintiff. The agreement fell through because the Commissioner for lands refused to approve the disposition. Counsel for the defendant contended that the part payment was not refundable as it was paid out as an option to purchase. He also argued that the refusal of the Commissioner to consent to the transfer is not necessarily final for if a second application is made it might be obtained.

Held: "With respect I do not agree ……. In fact in his own letter addressed to the defendant after the consent of the Commissioner for Lands was refused he had advised that this part payment should be refunded to the plaintiff. There is no reason whatever why the plaintiff should lose his money when he is not responsible in any way for the failure of the sale to go through. Without the consent of the Commissioner for Lands the transfer cannot be affected. This is clearly so provided in Section 19 of the Freehold Titles (Conversion) and Government Leases Act, the material

Part of which reads: - '19 – (1) A disposition of a Government lease shall not be operative without the consent of the Commissioner. (2) In this section, 'a disposition' means – (a) an assignment, sub-lease, mortgage or settlement of the term whether in the whole leased land or a part thereof …..' I would accordingly enter judgment for the plaintiff for Shs. 22,000/= with costs and interest."

64. Parekh v. Commissioner of Income Tax Civ. App. 17-D-71; 28/1/72. Onyiuke J.

The appellant, an advocate, appealed against the assessments of Income Tax made upon him for the years 1963 to 1969. The Commissioner of Income Tax moved to have the appeal dismissed as null and void and not properly before the Court because the appellant had failed to satisfy the conditions precedent to the lodging of the appeal and was in breach of all the relevant sections relating to appeals under the Income Tax (Management) Act 1958. It was established that after receiving the assessment the appellant's advocate wrote two letters to the Senior Investigation Officer of the Tax Department. The first was made within 30 days of the notice of assessment but was an intention to lodge a notice of objection; the second purported to be a notice of objection but was given more than 30 days after the notice of assessment. The judge framed the issues as follows: the question for determination is whether the letters amounted to a valid notice of objection for purposes of ss. 99(1) and 101(1) of the enactment (Rev. Edn. 1970).

Held: (1)"Section 99(1) provides as follows: 'Any person who disputes an assessment made upon him under this Act, may by notice in writing to the Commissioner-General, object to the assessment; and no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner-General within 30 days after the date of service of

the notice of assessment. Provided that if the Commissioner-General is satisfied that owing to absence from the Partner States, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving such notice within such period and there has been no unreasonable delay on his part, the Commissioner-General may, upon application by the person objecting, and after deposit by him with the Commissioner-General of so much of tax as is due under the assessment under section 103, or such part thereof as the Commissioner-General may require, and the payment of any penalty due under section 110, admit any such notice after the expiry of such period and such admitted notice shall be a valid notice. The notice of assessment in this case was dated 3rd March, 1971; Section 99 requires that a notice of objection to be valid should state precisely the grounds of objection to the assessment. The latter of the 7th April was not a notice of objection. It was no more than an intention to lodge a notice of objection

which is not the same thing as a notice of objection. The letter of the 3rd May purports to be a notice of objection but was not, in my view, a valid notice within Section 99. Firstly, it was given out of time. Secondly, it did not set out the practice grounds of objection as required by Section 99. I hold therefore that the appellant has not given a valid notice of objection and could act in the absence of such notice validly lodge an appeal."(2)"The appeal is also incompetent under Section 104 which provides that where no valid notice of objection to an assessment has been given the assessment as made "shall be final and conclusive for the purposes of this Act." The matter may however be re-opened under the proviso to Section 99. Until this was done an appeal is incompetent." (3)"I note also that the appellant had not even given a valid notice of appeal as required by Section 101. The failure to give such notice strikes at the very existence of an appeal. Northern Province Labour Utilization Board v. The Commissioner of Income Tax (1960) E.A.1015. Section 101 requires intending

appellant to give a notice of appeal in writing to the Commissioner-General. No such notice has been given."

65. Maharamu v. Salum. Misc. Civ. App. 29-D-71; 4/47/2; Saidi, C. J.

The respondent successfully sued the appellant for wages which he claimed was due to him for 34 months, when he was employed however, asserted that the former was only assisting him in return for the facilities accorded to him to carry on tailoring on the verandah of his shop rent free. It was established that the appellant went away and spent over a year during which time the respondent ran the shop. It was established that appellant went away and spent over a year during which time the respondent ran the shop. The magistrate felt that it would be unreasonable to accept the appellant's claim that the respondent was doing all of this in return for the facilities accorded him of doing his tailoring on the verandah and he gave judgment for the respondent.

Held: (1) "Under Section 35 Sub-section 5 of the Employment Ordinance it is provided that where a dispute arises as to the terms and conditions of an oral contract other than a contract for the employment of casual employees and an employer fails to produce a record of such contract, the statement of the employee as to the nature of the terms and conditions of service shall be receivable as evidence of such terms and conditions unless the employer satisfies the Court to the contrary. This provision applies to the case of the respondent. In the absence of any written agreement to support the allegations of the appellant the provisions of the said section covers the case of the respondent." (2) Appeal dismissed.

66. Sianga v. Elias Misc. Civ. App. 3-A-71; 17/3/72; Bramble J.

This is a objection to taxation under rule 5 of the Advocates Remuneration and Taxation of Costs Rules, 1921. The Bill of costs was taxed in favour of the respondent who was successful in an appeal from a decision of the Moshi Rent

Tribunal. The advocate who conducted the appeal on his behalf did not draw up the memorandum of appeal and was only engaged to argue it. The respondent was allowed 700/- under the item “for instructions.” This was opposed to on the ground that the respondent’s advocate can only be granted a fee for what he did i.e. conducting and arguing the appeal, but could not get an instruction fee.

Held: (1)”The point in issue is how the term is “instructions” to be interpreted. In a reference in The Matter of the Stamp Ordinance, 1931 and in The matter of The Companies Ordinance, 1931 and the Bohemba Mines Limited Misc. App. 1 of 1940 quoted in the Tanganyika Law Reports Vol. 1 page 397, Webb C. J. said: - “In my opinion the word “instructions” in our rules should not be construed as if it were a term of art, but should be construed in relation to the conditions and circumstance of the country in which those rules are to be operate. Here an advocate is both solicitor and barrister, and the meaning that has been given and in my judgment rightly given, to the words “Fees for instructions” was that they are intended to cover, not merely the attendance of a solicitor when he takes his clients instructions, but all his work, other than that which is elsewhere specially provided for, in looking up the law and preparing he case for trial; in other words they correspond rightly to the fee marked on counsel’s brief.” I accept this view. The kinds of instructions mentioned in the First Schedule to Part 111 of the Rules are not exhaustive and indeed the fee of Shs. 60/= on the lower scale and Shs. 100/= on the higher scale for petition of appeal or opposing appeal would appear to be for the advocates attendance to receive instructions only. This does not cover remuneration for drafting a petition of appeal after studying the facts on the case and the law or studying these before proceeding to argue the appeal in courts. The present rules in England leave the taxation of instruction for appeal from an interlocutory or final order or judgment in the discretion of the Taxing Master and there are nine items under this heading; they include, for example, taking instructions to appeal, considering facts and law, perusing pleadings, affidavits, and other relevant documents, general care and conduct of the proceeding. This is in keeping with the interpretation of instructions in these courts. No case has been cited to support

the proposition that instruction fees are limited to the attendance to receive instructions. All the decisions give the wider interpretation." (2) Objection disallowed.

67.Mzirai v. Mvungi Misc. Civ. App. 1-A-1972; 30/3/72; Bramble, J.

The Rent Tribunal assessed the standard rent of premises on the basis of the government valuer's Report. The landlord complained that the Tribunal should have fixed the standard rent exclusive of water and electricity.

Held: (1) "The appellant had an opportunity but led no evidence to challenge the valuer's estimate and recommendation …… The written evidence is very short and I cannot find where the appellant made the statement attributed to him. He does not dispute it and his complaint is that subsequently tenants took advantage of the facilities and the charges for water and electricity have increased excessively within a short period. It is not that the amount fixed at the time was unjust. His remedy lies in Section 4(6) of the Rent Restriction Ordinance which reads: - "This Tribunal shall have power on the application of a landlord or tenant or of its own motion to give further consideration on fresh evidence to the amount of standard rent of any premises, and made a further determination on assessment in accordance with subsection (1) or (2)." "Section 11 of the Rent Restriction Act provides that a decision or determination by the Tribunal shall be final and conclusive provided that an appeal may be made to the High Court on any point of law or of mixed fact and law in the grounds of appeal and must dismiss it as being incompetent." (3) Appeal dismissed.

68. Gadiel v. Dainess Crim. App. 508-A-1971; 3/3/1972; Bramble, J.

A maintenance order was made against the appellant on his admission that he was the father of the respondent's child. The issue raised was one of validity of the maintenance order which had retrospective effect, under s.3 (c) of the Affiliation Ordinance.

Held: (1) “The plaint was filed on the 14th January, 1967 and the learned magistrate made an order for maintenance case was concluded. There are no provisions for making an order retroactive unless the application is made before the birth of the child or within two months of the birth in accordance with the provisions of section 5 of the Ordinance. There was in this respect a serious misdirection in law with respect to the part of the order which provides for payment for the period mentioned above and it must be set aside. The order can only be effective from the date of the determination of the case.” (2) “The rest of the order which provides for the payment of 40/= monthly for the maintenance and education of the child will stand. It states, however, that payment must be made until the puberty of the child but he Ordinance is more specific when it says until the child is sixteen years. I amend the order accordingly.”

69. Ramadhani v. Sungu (PC) Civ. App. 53-Dodoma-1971; 18/4/72; Kwikima, Ag. J.

The respondent successfully sued the appellant to recover a shamba which he alleged was allocated to him in the traditional ways of the Warangi. The court found that each party had been legitimately allocated the shamba, the appellant in 1952 and the respondent in 1961. The later allocation being made in the absence of the appellant.

Held: (1) “This court has held that it is unjust to allocate occupied land without the occupier being present. (Makas Masirori Kateti v. Oloo Sebege 1969 H.C.D 11). The contention that the shamba was communal would militate against the respondent the more in as much as there is no evidence to justify the handing of a communal shamba to an individual. It is safe to assume that the disputed shamba was not communally held and that the appellant occupied it earlier than the respondent. For this reason it would be only fair to overrule both courts below and to dismiss the respondent’s claim unsupported by reason and evidence as it is. Accordingly, the appeal is allowed with costs. The appellant is

hereby declared the lawful occupant of the disputed shamba." (2)"If the respondent has made any permanent improvements on the disputed shamba, he should be compensated." (3) Appeal allowed.

70. Nkulu v. Mkungile (PC) Civ. App. 18-Dodoma-71; 18/4/72; Kwikima Ag. J.
This was an appeal against the dismissal of his claim for damages for libel brought by a primary court magistrate. The surrounding facts were that the respondent had, before him, lost two suits between himself and wife. He then, in one of the petitions of appeal, ascribed his lack of success to the "amorous relationship" between the magistrate and his wife.

Held: (1) "The learned resident magistrate who heard the first appeal was of the view that the magistrate could not sue the respondent because the communication was made in the course of a judicial proceeding and was therefore privileged. To this view I fully subscribe. I would hasten to add, however, that justice would be in jeopardy if litigants were scared to allege misconduct on the part of magistrates just because they were not in a position to prove them should they be called upon to do so. I suppose a magistrate has to accept as a fact of life the prospect of being vilified without being able to do anything about it. On this score alone, I would dismiss the appeal." (2) "There is another score on which I would dismiss the appeal. Libel is actionable under the common law of tort. There is no evidence in this case to show that under the customs of the tribe of the parties such action is maintainable. It is therefore doubtful if the suit was brought in the right court." (3) Appeal dismissed.

71. Mwanhanga v. Kigusi (PC) Civ. App. 46-Dodoma-71; 18/4/72, Kwikima Ag. J.
Plaintiff claimed damages from the defendant who had committed adultery with his wife. It was established that the defendant purported to marry the plaintiff's wife after she had sued and received a divorce from the latter who, however, appealed successfully against the decree. In the court of first instance which

heard the present claim, the defendant was declared to have committed adultery with the plaintiff's wife and was ordered o pay Shs. 280/= as compensation. On appeal to the district court the damages was reduced to Shs. 100/=. The plaintiff then sought to re-instate the first order.

Held: "There was no evidence led at the trial to show how the quantum of Shs. 280/= was arrived at ….. The learned appeal magistrate partly allowed the appeal by reducing the damages to Shs. 100/=. He was of the view that Shs. 280/=was excessive. Again he did not give reason why he felt the amount was excessive. Normally the trial court is more competent to determine the quantum of damages. In this case however, there was neither evidence nor material on which to base the quantum of damages. So the trial court's In view of the fact that the adultery was more technical than immoral and therefore less reprehensible, it is just and equitable to uphold the lower figure of Shs. 100/= fixed by the appeal court. Accordingly the appellant is to pay Shs. 100/= compensation to the respondent whose wife he clearly if mistakenly took in adultery.

72. Sikh Saw Mills Ltd. v. Mtwara /Mikindani Town Council, Civ. App. 3-D-71; 14/4/72; Mwakasendo Ag. J.

A preliminary objection was raised that this appeal was not properly brought because the appellant had in violation of O. 40, r. 2, C.P.C. 1966, failed to file a copy of the ruling of the lower court with his memorandum of appeal. The appellant then asked to be allowed to submit a certified copy of the ruling claiming that at the time of the preparation of the appeal it was not available because of disorganization in the Registry office.

Held: (1)"In [Kunar Arap Rono v. Dhanjal (1966) E.A.184] the appellant had sued the respondent and his plaint was struck out and his claim dismissed by the Magistrate. On appeal as of right to the High Court of Kenya a certified copy of the decree or order was not filed with the memorandum of appeal as required by O. 41, r. 1 of the Civil Procedure (Revised) Rules, 1948, and a preliminary objection was taken by the respondent that the appeal was

incompetent. The Kenya High Court making a ruling on the issue held: “The definition of the word “decree” in S. 2 of the Civil Procedure Act includes the rejection of a

Plaint and the proviso in the section provide that “decree” shall include judgment and that a formal decree in pursuance of such judgment may not have been drawn up, accordingly the appeal was competent”. I must confess that I have not found it easy to understand the reasoning behind the Kenya High Court’s decision in this case. The decision itself would appear to go against all the decided authorities of this Court, and those of the High Courts of Kenya and India. In Munshiram and Co. v. Star Soda Water Factory (1934) 16 K.L.R. 50, an appeal was preferred to the Supreme Court of Kenya from an order made by the Resident Magistrate. The memorandum of appeal had attached to it a certified copy of the judgment or ruling of the Magistrate, but no certified copy of the order appealed from had been included, such order never having been drawn up. The Supreme Court had no hesitation in finding that a copy of the formal order is a part of the papers to be filed when initiating an appeal and rejected the argument of the appellant that no formal order was usual or necessary; the appeal was consequently dismissed. In the face of all these sound decisions of the High Courts of Kenya, India and Tanganyika, I would, with the greatest respect to counsel for the appellant, be disinclined to follow the decision in the Kuna Arap Rono case. In fact the case does not appear to have been fully argued and there is hardly any reference to any of the decided cases bearing on the question at issue. Having regard to the wealth of authority on the other side, I have grave doubts whether Kuna Arap Rono was rightly decided. In any case, I am satisfied that that Kuna Arap Rono was dealing with a situation completely different from that of the present case and therefore the decision in that case cannot be

considered as authority in the instant case." (2)"As already stated, for a proper preference of his appeal to be made, appellant had to comply with the mandatory provisions of 0.39, r. 1 which require every memorandum of appeal to be accompanied by a copy of the decree or order appealed from. The appellant failed to comply with this provision. He had however asked to Court to receive a certified copy of the ruling now and the question is whether this court can properly do so. I do not think this court can properly entertain an application by the appellant to produce in the course of the hearing of the appeal, a certified copy of the ruling which as indicated, ought to have accompanied the memorandum at the time of filing. The rule says emphatically 'the memorandum shall be accompanied by a copy of the decree appealed from and (unless the court dispenses therewith) of the judgment on which it is founded'."

73. Songora v. Khalfan (PC) Misc. Civ. App. 1-Dodoma-72; 4/4/72; Mnzavas, J.
The appellant appealed from a ruling of the district court, Dodoma, which dismissed his application that the respondent should have filed his case against him in the Babati primary court instead of the Dodoma urban primary court. The respondent's suit was for damages for defamation against the

appellant who had accused him of committing adultery with his wife. The appellant contented that the cause of action arose in Babati. On first appeal the district court magistrate found that both the Babati and Dodoma primary courts had concurrent jurisdiction re. s. 17 and 18 Civil Procedure Code, 1966. It was explained in the High Court that the respondent's justification for suing in Dodoma was that the appellant ordinarily resided there as an employee of the East African Railways Corporation in Dodoma. The appellant however established that he was also living in Babati where his wife also lived and it was in Babati where he is supposed to have stated that he found the respondent with his wife.

Held: (1) “As to the question of residence of the appellant there can be no doubt that he is more resident in Babati where his wife lives than he is in Dodoma. With due respect to the learned resident magistrate I would like to point to him that the Civil Procedure Code – 1966 does not apply in cases filed in primary courts, Provisions relating to civil jurisdiction of primary courts are as laid down by the Fourth Schedule to the Magistrate’s Courts Act, Cap. 537. According to section 1(b) of the Schedule which section is relevant to the facts in this case, a primary court has jurisdiction in cases where the cause of action arose within the geographical limits of the court or if the defendant is ordinarily resident within the local jurisdiction of the court. In this case it is not in dispute that the cause of action arose within the local jurisdiction of Babati primary court and not within the local jurisdiction of Dodoma Urban primary court ….. The suit has more connections with Babati than it has with Dodoma. Added to the above I would like to mention … that the cause of action having arose in Babati which is for appeal purposes under the High Court of Arusha, it is administratively more appropriate if the respondent/plaintiff lodge his claim before Babati primary court. If he does so he is to be exempted from paying another court fees.” (2) Appeal allowed.

74. The State Trading Corporation v. Eastern Province Transport Co. Civ. Cas. 40-D-68; 10/9/72. Onyiuke, J.

The decree holder, the S.T.C., had instituted a suit against the defendant firm for Shs. 21,249/20 being the balance of the price of goods sold and delivered to the defendant. Judgment was given in its favour. An application was then made for execution of the judgment against the applicant, Andrew Sypron, he being the sole proprietor of the defendant firm. An order was made admitting the execution and directing that “notice to show cause” under Ord. 21 r. 35 of the C.P.C. be issued. Spyron did not appear at the hearing and the judge issued a warrant of arrest against him under 0.21 r. 35 (2). The decree holder applied for him to be committed to civil prison. In that proceeding it was argued on his behalf that the judgment was against the Eastern Province Transport Co. and not against him

and that he “was in no way interested in the firm at the time that the cause of section arose”. He then applied for an adjournment so that he

might file an application to set aside the execution-proceedings. An order was therefore made releasing him pending the determination of the intended application. He then filed the present. Application to set aside the execution-proceedings. He averred, in his affidavit, that he was not the Eastern Province Transport Co. and that he was never personally served with the summons or any other process.

Held: (1) “Order 29 of the Civil Procedure Code regulates actions by and against firms and persons carrying on business in names other than their own. ‘Firm’ is defined in s. 2 of the Business names (Registration) Ordinance Cap. 213 as “an unincorporated body of two more individuals or one or more individuals and one or more corporations.” The registration of such firms under the Business Names (Registration) Ordinance (Cap. 213 does not convert such firms into distinct legal entities separate from the partners thereof. Order 29 enables actions to be brought by or against such partners in their firm name instead of in their individual names. Rule 10 Order 29 however provides that “any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name and so far as the nature of the case will permit all the rules under this Order shall apply” (Underlining supplied).” (2) “It is my view that where a firm consists of one person a judgment against that firm is tantamount to a judgment against that person since he is the only person carrying on business in that name. The firm name o the sole proprietor is in the nature of an ‘alias Order 21 Rule 49 which deals with execution of decree against a firm presupposes a partnership of two or more persons. I am satisfied that the applicant was the sole proprietor of the Eastern Province Transport Company at the time the cause of action arose and I hold that judgment against the Eastern Province Transport Company was judgment against him personally.” (3) “If I am

wrong in my view of the law I shall then proceed to consider the effect of leave obtained under Order 21 Rule 35. That Rule Provides as follows: “(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment-debtor who is liable be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison. (2) Where appearance is not made in obedience to the notice, the court shall if the decree-holder so require, issue a warrant for the arrest of the judgment-debtor.” (4) “It was held, [interpreting] the Indian Civil Procedure Code, that where a decree has been passed against a firm and an application was made under that Rule to execute the Decree against a particular person as an individual partner of that firm, no separate application for leave to execute the decree against that person need be put in as the application asking for execution against the particular person necessarily implied

Such a prayer for leave to proceed against him as an individual partner. Bombay Company Ltd. Karachi v. Kahan Singh and Another A.I.R. 1931 Lahore 736.’ (5) “I hold that leave obtained under Order 21 Rule 35 dispenses with the necessity to obtain leave to proceed against the named partner under Order 22 Rule 49(2).” (6)Application dismissed and applicant committed to prison as a civil debtor.

75.Mario v. Merali Civ. Cas. 30-D-71; 3/9/1971; Saidi, C. J.

The defendant leased the house on land over which he had a right of occupancy, to the plaintiff for a period of two years commencing on 22nd January, 1970 at the monthly rental of Shs. 800/= payable in advance. Paragraph 4(e) of the lease gave the plaintiff the option to purchase the house at any time during the

pendency of the tenancy at the reserved price of Shs. 200,000/= upon his paying to the defendant the some of Shs. 24,000/= in consideration of the option. It was agreed that if the option to purchase was exercised the sum of Shs. 24,000/= would be set off. Paragraph(f) made provision for extension of the option by 24 months so long as an extra sum of Shs. 24,000/= was paid to the defendant by the plaintiff. In accordance with these terms the plaintiff paid to the defendant the sum of Shs. 24,000/= in consideration of the option. Subsequently he tendered the lease to the Commissioner for Lands for him to consent under the land Regulations to the exercise of the option. The Commissioner refused to give his consent and the plaintiff demanded refund of his money. The defendant argued that the claim of the plaintiff was premature, because he still had ample time to re-apply for the consent of the Commissioner for Lands.

Held: (1) [Quoting s.3 of the Land Regulations] "It seems clear from the wording of Regulation 3 that the option to purchase the house being an agreement to a disposition of a right of occupancy could not be operative unless and until it had received the approval of the Commissioner for Lands. In the present case the Commissioner has refused his consent to the option …… It was contended on behalf of the defendant that the plaintiff still had opportunity of obtaining the consent for the option from the Commissioner and this being so the suit was premature. I would concede that there is still five months time before the lease expires within which another application would succeed. In his letter the Commissioner had clearly stated that "after careful consideration, consent is refused". In the light of this statement it is most unlikely that any further consideration would be given to a second application for consent. Now if consent for the Commissioner to the option to purchase the house cannot be obtained it therefore means that the option to purchase is inoperative for lack of consent." (T.H. Patel v. R. Lawrenson and Anders Matzen, (1957) E.A. 249)." (2) Judgment for plaintiff.

76. Shivji v. Pellegrini, Civ. Cas. 23-D-69; 26/10/71; Onyiuke, J.

The plaintiff's motor vehicle which was being driven by his driver was in collision with the defendant's motor vehicle and as a result the plaintiff's vehicle was damaged beyond repair and his driver received extensive personal injuries. The plaintiff was obliged to pay his driver a total of Shs. 14,132/65 by way of compensation and for medical expenses under the Workmen's Compensation Ordinance. The plaintiff sought to recover this amount from the defendant and asked to amend the plaint to include the claim.

Held: (1) "Order V1 Rule 17 of the Civil Procedure Code provides as follows 'The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties'. The principle on which the court will exercise this discretion were discussed in Eastern Bakery v. Castelino (1958) E.A. 461. As a rule amendment to pleadings should be freely allowed if they can be made without injustice to the other side. The powers of amendments to pleadings should be freely allowed if they can be made without injustice to the other side. The powers of amendment should not be used to substitute one cause of action for another or change an action into another of a substantially different character. Subject to this, the fact that an amendment may introduce a new case is not a ground for refusing it." (2) "The plaintiff had to establish negligence in order to succeed in the pending suit just as he has to establish it in order to establish the right to indemnity under s. 23(3) of the Workmen's Compensation Ordinance was statute barred under Article 22 of the Schedule to the Indian Limitation Act which he submits is applicable to this case since the cause of action accrued before the Law of Limitation Act No. 10 of 1970 came into operation on the 1st March 1971. I agree that where an amendment would prejudice the rights of the opposing party in that it would deprive him of a defence of limitation which has accrued since the filing of the suit it should be refused. The question for consideration is whether the plaintiff's claim under s. 23(3) of the Workmen's Compensation Ordinance is time-barred." (3) "The

accident occurred on the 30th September 1967. The plaint in this case was filed on the 1st March 1969, the compensation was paid to the plaintiff's driver in September 1968 and the plaintiff's right to indemnity accrued as from the date of payment. The present application to amend the plaint was filed on the 6th October 1971, that is to say, 3 years after the right of action accrued. I accept the submission by Mr. Talati, learned counsel for he plaintiff/applicant that the law that applies in this case is the Law of Limitation Act (No. 10 of 1971) and that the claim under s.23(3) of the Workmen's Compensation Ordinance

Is not a claim in negligence for personal injuries but a statutory claim to indemnity based on proof of negligence." [His lordship then referred to S. 48 of the Limitation Act and proceeded]: "This case comes under s. 48(1) of the Act Article 10 of Part I of the First Schedule to the said Act provides 6 years as the period of limitation for a 'suit to recover any sum recoverable by virtue of a written law other than a penalty of forfeiture or sum by ways of penalty or forfeiture'. I hold therefore that the plaintiff's claim under s. 23(3) of the Workmen's Compensation Ordinance is not time-barred." (4) "There is the further consideration that the defendant has, since the date of the accident (30/9/67), been absent from Tanzania. S. 20 of the Law of Limitation Act provides for any suit the time during which the defendant has been absent form the United Republic shall be excluded. The circumstance that under the Civil Procedure Code the defendant could have been served with a summons during his absence from the United Republic is irrelevant to the application of s. 20 of the said Act. (See (1894) 1 Q. B. 533 and (1894) 2Q.B.352)."

77. Nuakyagi v. Mbiso (PC) Civ. App. 138-D-1970; 3/12/1971, Biron J.

The plaintiff sued the defendant in the primary court claiming the refund of Shs. 600/=, given to the latter in 1956. It was not altogether clear what the Shs. 600/= represented, as there were two versions, one being that the plaintiff at first lent

the defendant or his father Shs. 200/= and then handed him an additional Shs. 400/= with which to buy cattle for him, the other that the whole sum of Shs. 600/= was handed him an additional Shs. 400/= with which to buy cattle for the plaintiff. The defendant admitted that he received Shs. 600/= but his case was that he had refunded it to the plaintiff in the form of one cow valued at Shs. 200/= and the balance of Shs. 400/= in cash. The primary court sitting with assessors, found for the plaintiff as it was not satisfied that the defendant had refunded the Shs. 600/= received by him. The District Court allowed the appeal on the ground that plaintiff's claim was time –barred both under Wanyakyusa custom and the Magistrate's Courts (Limitation of Proceedings under Customary Law) Rules 1964.

Held: "I am in no position to confirm or otherwise the magistrate's direction on Wanyakyusa custom, but his direction on the law of limitation as laid down by the Rules referred to, is impeccable. Whether the transaction comes under item 2 of the Schedule to the Rules referred to, that is: "Proceedings for money lent or money due for property sold and delivered" or as is more likely, under Item 5, which reads: "Proceedings for damages for breach of contract or to enforce a contract, other than contracts of or relating to marriage, separation or divorce - (a) if the contract is in writing, (b) if the contract is not in writing, "the limitation period is three years."

78. Mwalwange v. Mwalwajo (PC) Civ. App. 52-D-71; Dec. 1972; Mwakasendo Ag. J.

Appellant had in an earlier case sued the respondent claiming Shs. 600/= as damages for adultery which he alleged respondent had committed with his daughter. The suit was summarily dismissed by the primary court on the ground that the appellant had failed to establish a cause of action there being no law customary or otherwise entitling a parent to claim damages for the adultery or fornication of his daughter. Subsequently, however, the appellant brought a fresh

suit in the same court against the same party and for the same amount of damages as in the earlier case based partly on enticement and partly on the loss of his daughter's virginity; in the alternative he alleged that the respondent had by one artifice or another enticed his daughter to go and live with him as his concubine. The magistrate decided in his favour and awarded him damages assessed at Shs. 550/= the district court reversed the decision.

Held: (1) "It is of course a trite principle of law that there is no entitlement to damage without loss or injury – there can be no monetary compensation without injury or loss being shown. No cause of action would therefore lie where a party claiming damages cannot show that the action or conduct of the defendant has directly or indirectly occasioned injury or loss to him. There is in fact nothing in the present case to show that the plaintiff had suffered any loss or injury as a result of his daughter's loss of virginity. He could not therefore be entitled to any payment of damages."(2)"There is also another reason why I think the plaintiff's claim was utterly incompetent. The claim brought by him is alleged to be governed by customary law but there is, to my knowledge, no rule of customary law which entitled the parent of a girl to sue in damages, the person who happens to fornicate with her, be she a virgin or not. The only rule of customary law which could possibly apply to this case, if it were relevant, is Rule 89 of the Local Customary law (Declaration) Order, 1963 which was declared as the customary law of the Rungwe district in the matters stated therein, by the Local Customary Law (Declaration) (No. 3) Order, 1964. Unfortunately however, the facts of the present case do not fall within the ambit of the rule." (3) "From a proper reading of [Rule 89 of the Declaration] it seems to me that for an action of enticement (which in Kiswahili is "kumshawishi msichana aliye chini ya miaka 21 aliye chini ya ulezi wa baba yake ahame kwao na kukaa na mwanaume anayedaiwa, kinyumba) to succeed the plaintiff has to establish to the satisfaction of the Court the following: (a) That the defendant enticed the girl who is his daughter. (b) That his daughter is or was under the age of 21 years and (c) That the daughter was prior to the enticement living with him and under his custody. Only when the plaintiff has succeeded to establish all these conditions

can he hope to succeed in an action for enticement under customary law. Now, all that the present appellant alleged in his claim was that his daughter had fornicated with the respondent resulting in her loss of virginity. There was no evidence whatsoever of any enticement. There was no evidence that the girl was

Under age nor was there any evidence to show that the girl was under the custody of the plaintiff, although of course, this could be inferred from the circumstances of the case." (4) Appeal dismissed.

79. Hiza v. Shekefu (PC) Civ. App. 117-D-70; 27/11/71; Biron, J.

The plaintiff and defendant possessed and occupied adjoining parcels of land and the dispute is over about an acre lying between their shambas. The plaintiff's case was that his father, assisted by him, had cultivated the disputed portion from virgin bush. His father died in 1966 and during plaintiff's absence in 1968 the defendant encroached over his boundary and started cultivating the disputed shamba. The defendant claimed that as early as 1929 he was allocated a piece of land which included the disputed one. The primary court decided in favour of the plaintiff on the basis of the evidence of his witnesses and the omission of the defendant to appear at the mourning ceremonies and declare his title to the land in dispute when the plaintiff's father died, in accordance with custom. The district magistrate disregarding the views of the two assessors who sat with him reversed the decision of appeal

Held: "Although in primary court cases the decision is determined by the majority, that in effect the assessors if they are unanimous can overrule the magistrate, in a district court, as provided for by The Magistrate's Courts (Amendment) Act 1969, the magistrate is not bound by the opinions of his assessors, as laid down in section 8A(2), which reads: '(2) In determining any proceedings in which a district court or a court of a resident magistrate sits with

assessors, the magistrate shall not be bound to conform with the opinions of the assessors, but in any case in which he does not so conform the magistrate shall record his reasons therefore in writing.' The magistrate has not however recorded his reasons for disagreeing with his own assessors." Appeal allowed with costs.

80. Kimolo v. Wilfrida (PC) Civ. App. 59-Dodoma-1971; 2/5/72. Kwikima Ag. J.
The appellant was one of the respondent's school teachers. The latter contended that he seduced her and made her pregnant; he however, denied the allegation. The prima and district courts gave judgment in the respondent's favour, and the appellant appealed against this decision.

Held:(1) "In his judgment the learned appeal magistrate very rightly referred to ss. 183 and 186 of the Customary Law Declaration, the provisions of which have been amply brought out in Julius v. Denis (1971 H.C.D. 264) …. The learned judge went on to stress that no corroboration of the woman's allegation was required. He relied on Nyangunda v. Kihwile (1967) E. A. 212 for his opinion. I am entirely in agreement with my learned brother. I do not accept the appellant's allegation that the respondent did not prove that he was the father of her child. On the contrary, having been named, it was for the appellant to adduce evidence that he was not and could not have been the author of her pregnancy." (2)Appeal dismissed.

81. Ladack v. Salimin, Misc. Civ. App. 1-Dodoma-71; 3/5/72; Kwikima, Ag. J.
The applicant claimed in the Dodoma Rent Tribunal that the rent he was paying for the shop-cum-dwelling house should be reduced from 325/- to 15/-. The Tribunal granted his request after visiting the site of the premises. The defendant appealed against the decision.

Held: (1) "Although from the wording of its ruling the Tribunal claims to have considered the whole case, it is clear that only the appearance of the suit

premises was the prime factor. Otherwise the Tribunal would not have failed to investigate the appellant's contention that the rent as on 1st January 1965 was Shs. 300/= According to S. 4(1) (a) of the Rent Restriction Act, Shs. 300/= was the standard rent of the suit premises." (2) "The respondent's application for reduction of rent was based on the consideration that the house was built of mud bricks. The Tribunal visited the suit premises and observed first that they were dilapidated and second that there was a co-tenant occupying the other portion of the premises who was paying only Shs. 170/=. The Tribunal has been held by this curt to be a quasi-judicial body which must approach its task judicially. So that when the Tribunal embarked on a visit to the suit premises, it could only do so properly if such visit had been requested by one of or both the parties. Furthermore, the appellant should have been given opportunity o controvert the Tribunal when it was noting its observation. (Sachak v. Kabuye 1969 H.C.D. 292, Govind v. David 1971 H.C.D. 241). To fail to adhere to such practice as the Tribunal did in this case is to fail to act judicially" (3) Appeal allowed, case remitted to tribunal for judicial reconsideration.

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82. Hadju v. R. Crim. App. 704-M-71; 28/1/72; Makame, J.

The appellant was convicted on his own plea of failing to record game killed c/ss 23 (1)(b) and 53 (1) (b) (ii) of the Fauna Conservation Ordinance. He was sentenced to a fine of Shs. 1,000/= or one month's imprisonment in default. The two guns and zebra skin found in his possession were ordered to be forfeited to the United Republic. It was argued on behalf of the appellant that, first the fine imposed was excessive; second, the guns and zebra skin were not found in his possession but in the vehicle he was driving; and lastly, that the order for feature was wrong in law.

Held: (1)"The suggestion that the guns were not in the appellant's possession but rather in his motor vehicle I find ridiculous and cannot take it seriously. The appellant had killed the animals and he said it was correct that the

vehicle was his. It was eminently reasonable to hold that the firearms found in the vehicle were in his 'possession', and it certainly would be wrong and awkward to hold that one is not in possession of a gun unless one is found actually cuddling it." (2) "As to the appellant's ability to pay he fine, a person who can afford to pay several thousands of French Francs on one gun cannot be heard to complain that he sis unable to caught up Shs. 1,000/- as a fine. The offence was a serious one, especially as it was committed by a person with the responsible and high post of Regional Tsetse Fly Officer. I am not disposed to interfere with the fine, especially as the maximum which could be imposed for such an offence is Shs. 10.000/- and the appellant's monthly salary is over Shs. 4,000/-. (3) "Subsection (2B) of section 53 of the Fauna Conservation Ordinance empowers a court to forfeit <u>any weapon</u> used in the commission of an offence, but he same subsection specifically lists all the offences for which forfeiture may be ordered, and failing to record animals killed contrary to section 23(1)(b) <u>is not</u> one of them, so that the learned trial magistrate could not have acted under that. Subsection (2A) under which the trial magistrate purported to act provides:- '(2A)When any person is convicted of an offence against this Ordinance the court may order that any animal, mea or trophy and any poison, poisoned bait, poisoned weapon, stakes, net, gin, trap, set gun, missile containing explosives, share, hide or fence, in respect of which or with which the offence was committed or which was in the possession of the accused at the time of the offence shall be forfeited to the Government'. There is no forfeiture of <u>any weapon</u>

In this subsection as there is in subsection (2B). Therefore to decide whether the present order for forfeiture has any legal basis it is necessary to consider if the guns ordered to be forfeited come under any of the items listed. The nearest that the guns would come to is a 'set gun'. The question to be answered is therefore, what is a set gun? A set gun is not defined anywhere in the Ordinance. No dictionary I have been able to lay my hands on defines a set gun either, except

Webster's Dictionary clearly indicates that a set gun is the same as a spring gun. The shorter Oxford English Dictionary is clear as to the meaning of a spring gun. It defines it as 'a gun capable of being discharged by one coming into contact with it or with a wire or the like attached to the trigger (formerly used as a guard against trespassers or poachers and placed in concealment for this purpose)' I am clear in my mind what such a contraption is and that a gun, per se, does not constitute such a device. It has to be set as part of some form of a trap to become a spring gun. In other words it has to be a set gun to be forfeited under subsection (2A). The following considerations buttress this in my view. Section 53 was amended by Ordinance No. 8 of 1961 which, if I am not wrong, was at least partly, a result of the legal controversy that followed the decision of Law, J., as he then was, in the case of R. vs. Omari Kindamba (1960) E.A.L.R. 407. Before that the law was simple as far as such a present issue was concerned; for it was: 'When any person is convicted of an offence against this Ordinance the court may order that any animal, meat, trophy, trap, weapon, poison, vehicle or instrument in respect of which the offence has been committed shall be forfeited to the Government'. (The only problem raised by the learned judge then being the meaning of 'in respect of which') The splitting and classification of the offences the following year could not have been done without case. Parliament must have intended that not every weapon should be forfeited each time any provision of the Ordinance is offended. The second consideration is that when one looks at the items set out in subsection (2A), one finds that apart from an animal or its parts all the things mentioned have one thing in common, namely the illegal or inhuman capture of animals. The ordinary use of a gun of the type ordered to be forfeited in this case does not involve such capture, no does the failure to record with indelible ink animals killed." (4) Order forfeiting guns set aside (but not in respect of zebra skin).

83. Ahmed. v. R. Crim. App. 443-D-71; 5/1/72; Mwakasendo, Ag. J.
The appellant was convicted on his own plea of corrupt transaction c/s 3(2) of the Prevention of Conception Act, 1971. On appeal it was argued that the appellant's

plea of guilty was equivocal in that the trial court's note on the record "charge read and explained" indicated

that all constituent elements of the offence were not explained to the accused. The words "charge read and explained"; it was contended, meant no more than that the charge has been interpreted into the Kiswahili language to the accused person.

Held: (1) "The record of the case discloses clearly that the charge on being read and explained to the appellant, the appellant said 'it is true.' In the first place, I find Counsel's argument that the words 'charge read and explained' mean 'charge interpreted into Kiswahili to the accused' is a far-fetched and an unreasonable interpretation of a clear and unambiguous statement recorded by the trial Magistrate. What these words mean is simply that the charge as stated in the charge sheet was read to the accused and explained to him and explanation as I comprehend it must mean that each and every constituent element of the charge was explained and made comprehensible to the accused". (2) Appeal dismissed.

84. Bwogi v. R. Crim. App. 846-M-70; 14/1/72; Kisanga Ag. J.

The appellant was convicted of stealing by public servant c/s 270 of the Penal Code and was sentenced under the Minimum Sentences Act to four years' imprisonment and 24 strokes of corporal punishment. It was established that the appellant was employed by Tanzania Electric Supply Company Ltd. as a typist and telephone operator. He demanded and received sums of money which he misappropriated from various customers of the Company purporting to be payments for electricity supplied to them by the Company. Two issues called for decision. First whether or not he offence with which the appellant was convicted fell within the ambit of the Minimum Sentences Act and secondly whether or not

on the facts the charge with which the appellant was convicted was a correct one.

Held: (1) “Although the learned trial magistrate does not give reasons for invoking the Minimum Sentences Act, he would appear to have reasoned that since TANESCO is wholly owned by the Government then the appellant was an employee of the Government then the appellant was an employee of the Government and that any money belonging to TANESCO necessarily belonged to the Government, so that the offence proved fell within the Minimum Sentences Act. With this view, however, I am unable to agree. TANESCO is a registered company and as such it has a separate legal existence of its own. As a legal person it has power to won property, power to sue and be sued and power to enter into contract with its employees, quite independently of the Government. Although P.W. 3 said that TANESCO is wholly owned by the Government and the trial magistrate accepted that evidence, this could not

Warrant the conclusion that the appellant was an employee of the Government so that the monies belonging to the Company were Government money. On the evidence before the court, the true position would be that the Government was merely a shareholder enjoying the rights of a shareholder including the right to participate in dividends and profits while the assets and the incomes accruing from various sources remain vested in the company as its property, and the company retains its power to enter into contracts with its own employees. I am therefore of the opinion that an employee of TANESCO is not a public servant for the purpose of the Minimum Sentences Act.” (2) “It is clear on the facts that the correct charge should have been one of stealing by servant. But the appellant was not charged with that offence. I am therefore unable to enter an alternative conviction for theft by servant and I think that only a conviction for simple theft would be proper.” (3) Sentence reduced to a prison term of $2^{1}/_{2}$ years.

85. R. v. Ally Crim. App. 367-A-1971; 5/5/72 Bramble, J.

The respondent was found guilty of the offence of causing death by dangerous driving c/s 44A (1) (a) and 70 of the Traffic Ordinance and the only penalty imposed was disqualification from holding or obtaining a driving permit for 12 months. The Republic appealed against sentence.

Held: (1)"The Ordinance provides for a maximum sentence of ten years imprisonment for offences of the kind. These courts have for a long time maintained that the general provisions of the Penal code and the Criminal Procedure Code apply to all criminal offences. Under sec. 27 of the Penal Code the court has power to impose a fine instead of imprisonment where the particular law says imprisonment only. There may be circumstances in the commission of an offence which could induce the court not to impose a penalty at all. I cannot see what these could be in cases of dangerous driving more so where death is caused by it. If the facts are such that no penalty should be imposed, it must be that there was no dangerous driving". (2) "In any case disqualification is a corollary to any sentence and is not in itself a substantive sentence. The learned trial magistrate did not, in fact, pass sentence". (3) Appeal allowed and case remitted for trial magistrate to pass sentence according to law.

86. D. P.P. v. Ngonyani Crim. App. 199-D-71; 22/9/72; Onyiuke, J.

The respondent was charged in the District Court of Dar es Salaam with stealing by public servant c/ss 265 and 270 of the Penal Code.

The facts tendered by the prosecution in the court below were that P.W. 1, an Assistant Principal Secretary in the Ministry of Commerce and Industries, obtained on the 11th May 1971 a cheque for Shs. 3,000/= from the Accounts Section of the Ministry. This money was to be used to defray expenses in connection with the projected Japan Expo 1970. The witness cashed the cheque on the same date (11/5/70). He spent Shs. 1,400/= and had a balance of Shs.

1,600/=, all in Shs. 100/= notes. As he did not wish, for security reasons, to take all that money to his house, the witness took the money to the respondent for safe keeping in the safe kept in the office of the Commissioner for Commerce and Industries. The respondent was then working as the personal secretary to the Commissioner and by virtue of that position was entrusted with the key to the safe and with other confidential matters. The transaction between the witness and the respondent took place about 2 p.m. on the 11th May, 1970. Nobody was present when this money was handed over to the respondent and the witness obtained no receipt for it. He said, however, that he trusted the respondent and had in fact entrusted, on at least fifteen previous occasions, similar sums with the respondent's predecessors in office without obtaining any receipts. The next morning (12/5/70) the witness called at the respondent's office to take the money, but the respondent did not turn up for work and was absent from duty for the next three days. The safe remained locked in the respondent's absence. The respondent was found dead drunk by the police on the third day in a house at Kisutu. He had the key to the safe. The safe was opened in the presence of the respondent but no money was found therein. According to P. W. 2, the investigating police inspector, the respondent denied receiving any money from P.W. 1. The trial magistrate "found it difficult to believe that P.W. 1. Handed over the money to the respondent for the reasons: (1) That it is incredible that P.W. 1. entrusted all that money to an officer on such a low salary without obtaining a receipt from him. (2) That the relation between P.W. 1 and the respondent was purely official and could not be a basis for such great trust; and (3) That P.W. 1's evidence had not been corroborated by other persons who could have been called as witnesses." Accordingly he acquitted the respondent. The Republic appealed to the High Court under s. 334(1) of the Criminal Procedure Code against the acquittal. The Republic contended that the reasons given by the trial magistrate in rejecting the evidence of P.W. 1 were untenable and showed that he misdirected himself.

Held: (1)"The case for the prosecution depended to a large extent on the credibility of P.W.1 based as it was on his oral testimony and his demeanor in the

witness box. The trial magistrate was therefore, prima facie, in a better position than an appellate court to decide the issue of credibility based on such oral testimony. It is only where it is clear that the trial court acted on a wrong principle or misdirected itself in arriving at its conclusions that an appellate court can properly interfere. The reasons given by a trial court in arriving at its conclusions may indicate such misdirection. It is in this light that this appeal has to be considered." (2) "The question was not whether P.W. 1 was prudent in entrusting the money to the respondent without obtaining a receipt but whether he in fact did so. In coming to a

Conclusion on this point the learned magistrate failed to direct his mind to the fact that as the respondent was the personal secretary to the Commissioner for Commerce and Industries and by virtue of that office had custody of the key to the Commissioner's safe and other confidential matters, he was clearly occupying a position of trust in the Ministry in which P.W.1 was working. The learned magistrate further ignored the uncontradicted evidence that it was P.W. 1's practice to leave money in the Commissioner's safe and he had done so on at least fifteen previous occasions by simply handing the money over to who ever was the personal secretary to the Commissioner without obtaining a receipt therefore. The reference to the respondent's salary was irrelevant unless the learned magistrate was thinking that P.W. 1 should not have tempted a person on such a low salary by handing such a heavy amount to him without obtaining a receipt. But this could hardly be a ground for holding that P.W. 1 did not in fact hand the money to him." (3) "….. The learned magistrate was under the impression that every fact testified to by P.W. 1 must be corroborated by other witnesses. P.W.1 's evidence did not require corroboration either as a matter of law or as a matter of practice. He was not an accomplice but a victim. His evidence was not inherently improbable as to require confirmation by other witnesses to induce credence. Secondly, some of the facts for which the learned

magistrate required further proof were not disputed. P.W.1 stated that the respondent absented himself from duty and was not in the office for three days after the event. The respondent did not dispute this fact in his cross-examination of this witness and did not give any evidence denying it. There was no need therefore to belabour the issue by calling more witnesses on the point. If, on the other hand, the magistrate felt that the evidence of any witness was essential to the just decision of the case, he had not only the power but the duty to call such witness under section 151 E.A.177." (4) "In view of the foregoing and as nothing turned on the demeanour of P.W. 1 in the witness box I am of the view that the learned trial magistrate misdirected himself in his reasons for rejecting the evidence of P.W. 1. I will allow this appeal and set aside the acquittal and order a retrial before another magistrate of competent jurisdiction."

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87. Geradi v. R. Crim. App. 364-M-71; 21/1/72; El-Kindy J.

The appellant, a Kenyan, was convicted of stealing c/s 265 of the Penal Code.

The evidence, which the trial court accepted, showed that the appellant was a friend of PW. 3, who was a brother in law of the complainant P.W. 2. It was alleged that the appellant and PW.3 regularly took their meals at the house of P.W.2 although the appellant totally denied this. P.W 3 was aware that P.W. 2 was keeping Shs. 3,000/= in tin in her house, but neither P.W. 3 nor the appellant knew the exact spot the money was kept. P.W. 2 said that she buried the money in the ground next to her bed, but it is not clear whether P.W. 3 and the appellant took their meals in the same room. It appears that the complainant wanted to supply money to P.W.3 so that it may be sent to her husband. When she checked her hiding place on the 3rd December, 1970, she found the tin empty and money missing. It happened that the appellant disappeared on this same day. It appears that in the evening of the same day, the appellant decided to go back to Kenya by ship. When he was on board the ship, P.W.3 and police

constables went to him and took him off the boat. As he was getting off the boat, his suit case fell into the lade, but it was retrieved by a Police Inspector P.W. 7. The police officer P.W. 1 and P.W.3 implied that the appellant had deliberately thrown his suitcase into the water, but the appellant said that it had accidentally fallen into the water. From his suit case, a sum of Shs. 543/05 was found and the appellant claimed that the money was his and explained how he came to earn it. Apart from what is stated above there was no other circumstantial evidence to connect the appellant with the theft of the alleged Shs. 3,000/= the learned trial magistrate found that the evidence was adequate for convicting him for theft. The learned magistrate was influenced by the fact that (a) the appellant gave a confused account as to how he came to earn the money he was found with and (d) that the appellant did not produce witnesses to "support his alibi".

Held: "As it can be seen, the case against the appellant was based entirely on circumstantial evidence. Such evidence should show that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that

Of guilt – (see Simon Musoke v. R. (1958) E.A. p. 715 and R. v. Kipkering Arap Koske and Nor. (1949) 16 E.A.C.A. p. 135) and that it is for the prosecution to prove this. Can it be said that the evidence, in this case, satisfied this test? ……. The evidence did not satisfy this test. It simply raised suspicion which is not even strong enough in my view." (2) "Considering the defence, the learned magistrate criticized the appellant for not supporting his alibi. He had no such duty in law and therefore it was a misdirection on the £part of the learned trial magistrate to require the appellant to support his alibi as if he was required to prove his alibi beyond reasonable doubt". (3) Appeal allowed conviction quashed.

88. Ladha v. R. Crim. App. 193 of 1971 E.A.C.A 8/2/72; Duffus, P. Saidi C. J. and Law, J.A. (Judgment of the Court).

This was an appeal from an order of revision made by a judge of the High Court under s. 327 of the Criminal Procedure Code. S. 327 reads: 'The High Court may call for an examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the irregularity of any proceedings of any such subordinate court". The appellant had paid to another person Shs. 4,000/- in Tanzanian currency in exchange for a cheque for £ 200 sterling drawn on a British band. They were both convicted on their own plea of offences c/s 7(1)(b) of the Exchange Control Ordinance, Cap. 294 and were both fines Shs. 2,000/= The High Court acting on a complaint from the Governor of the Bank of Tanzania enhanced the sentence. The accused were represented at the review of the sentence. The appellant was sentenced to six months imprisonment and had his fine increased to Shs. 6,000/- The other accused had his fine increased to Shs. 10,000/= This accused did not appeal. On appeal counsel for the appellant made four submissions. (i) That the High Court was wrong in revising the matter under s. 327 of the Criminal Procedure Code as the resident magistrate's court had not made any error in sentencing the accused, (ii) that the learned judge failed to comply with the principles of natural justice in the exercise of his powers, in that these proceedings were, on the face of the record, instituted on a complaint by the Governor of the Band of Tanzania and the fact of Tanzania would also have influenced the decision of the learned judge, (iii) that the sentence imposed on the appellant was discriminatory in that the sentence imposed on the appellant was discriminatory in that the sentence imposed on the second accused was only that of a fine whilst that imposed on the appellant is one of imprisonment, (iv) that the judge in imposing the increased fine on the appellant had exceeded the jurisdiction of the magistrate. [The court cited Desai v. R. 1971 E.A.C.A. 416 where the

Same court set out the principles on which it would be guided in deciding such matter. In that case the Court held “On consideration, we think that while it is not open to us to consideration, we think that while it is not open to us to consider, on second appeal, whether a sentence is unduly severe or unduly lenient, it must be open to us to consider whether a sentence is lawful, and to interfere if it is not. By necessary extension, we think we have jurisdiction to entertain a submission that a trial court, in considering the sentence to be passed, has misdirected itself in law and, if we uphold such a submission and consider that the sentence passed resulted directly from the misdirection, to interfere with that sentence, so as to substitute for it the sentence which the trial court would imposed had it directed itself correctly”].

Held: (1) “The High Court is justified in interfering with a sentence on the ground that the sentence was completely inadequate having regard to the seriousness of the offence. In sentencing the appellant the senior resident magistrate found that the admitted contravention of the Exchange Control Ordinance did not adversely affect the national economy. In his judgment the learned judge held that this was wrong and that in fact the transaction did affect the national economy. With respect to both the senior resident magistrate and the judge, the transaction was of such a nature that although it would probably gave caused some effect on the national economy, even if only to amonor extent, but the effect had not yet occurred, as the transaction was never completed. On the other hand, admittedly any offence against the Exchange Control Ordinance is potentially an offence of a serious nature as such offences may affect the economy and financial resources of the country. We consider that the High Court had jurisdiction to act under section 327 on the facts of this case and, in the words of the section, “to satisfy itself as to the correctness, legality or propriety of the sentence”. We further consider that the High Court acting as it did in increasing the sentence was acting legally within its jurisdiction and the question as to the quantum or nature of the sentence is a matter coming within the meaning of ‘severity of sentence’ and therefore a matter on which we have no

jurisdiction." (2) "There was absolutely no justification to even suggest that the learned judge who heard and made the revisional order, was in any way affected by the question as to who made the complaint. A judge of the High Court has power, on his own motion, to call for and revise any proceedings came to his knowledge. It would perhaps have been better if the Governor of the Bank had made his complainant through the Director of Public Prosecutions but the fact that the made it direct cannot vitiate these proceedings. We can find no justification for the submission that there had been a breach of the principles of natural justice in his respect."

(3) "We agree that care should be taken never to discriminate between two accused persons when all the circumstances and facts are the same but this was not the case here. First, the offence had been brought about by the request of the appellant to the second accused to assist him in paying school fees in the United Kingdom so to some extent the appellant was perhaps more to blame than the second accused. Then there was the further fact that as a result of this transaction the second accused had lost a responsible and good position which he held in Tanzania and has had to leave the country. There is the further fact that the appellant was a resident of Tanzania whilst the second accused is a foreigner. These were all fact which distinguished between the two accused persons and would in our view have been justification for the differences in sentence. (4) "A further point raised was the fact that the judge in imposing the increased fine on the appellant had exceeded the jurisdiction of the magistrate. The term of imprisonment was, however, within the magistrate's jurisdiction. However, the amendment to section 329 (3) of the Criminal Procedure Code specifically gave the High Court this power of increasing the sentence and in these circumstances we cannot say that the learned judge was wrong in exercising his discretion in the way which he did. We find therefore that the High Court passed the sentence within its jurisdiction and we are unable to find that it

acted on any wrong legal principles. We might say that in the circumstances of this case the sentence of imprisonment itself for a first offender appears to be unduly severe, especially having regard to the purpose for which the money was required, but this is not a matter on which we have any authority to act. It might, however, be considered by the proper authorities." (5) Appeal dismissed.

89. Mwakabuku & Anor. Crim. App. 166-D-71; 8/2/72; Duffus P; Law, Mustafa JJ. A.

The appellants were brother and step brother to the deceased. On 30th July, 1970, the appellants quarreled with the deceased and a fight ensued. The second appellant hit the deceased on his head with a club or a stone ……. But this was sufficient to fracture the skull and the deceased died the next day. On the evidence available, the learned Chief Justice held that the appellants had acted jointly with a common intention in terms of section 23 of the Penal Code. The learned Chief Justice accepted that the first appellant beat the deceased with his hands and the second appellant admitted having thrown a stone in anger towards the deceased. In so far as the first appellant was concerned, the issue was whether or not he acted with the second appellant jointly with a common intention as set out in section 23 of the Penal Code. As for the second appellant the issue was whether or not the prosecution had established malice afore thought

Held: (1) "With respect, we cannot find sufficient evidence to show that the accused acted with a common intention in accordance with section 23 of the Penal Code. What does appear much more likely is that these three brothers quarreled and abused each other; the deceased on one side and the two appellants on the other; but that both appellants acted separately in hitting he deceased so that the second appellant's use of the stone was an individual act for which he alone should be held responsible". (2) "The second appellant

undoubtedly caused the death of the deceased by an unlawful. Act. The question is whether the prosecution have established malice afore-thought. We are satisfied, for the reasons which were have stated, that it must be accepted that this injury was the result of only one blow given by the throwing of a stone. The stone must, according to the medical evidence, have been thrown with considerable force. We have not seen the stone but it must have been of a fairly substantial nature to cause the injury which was inflicted. This question was not really fully considered at the trial. Having regard to all the facts of this case and that only one blow was struck by the second appellant we feel that it has not been established that the second appellant when throwing the stone, intended to kill or cause grievous harm to the deceased and accordingly it would be unsafe to find that the prosecution had established malice aforethought with that degree of certainty required in a criminal case". (3) Appeal of first appellant allowed but found guilty of common assault c/s 240 Penal Code and sentenced to 12 months imprisonment. Verdict of murder set aside and substituted verdict of manslaughter and second appellant sentenced to 7 years imprisonment.

90. Gabriel v. R. Crim. App. 49-A-72; 10/3/72; Bramble J.

The appellant was convicted on a charge of defilement of a girl under 12 years of age contrary to section 135 (1) of the Penal Code and sentenced to twelve (12) months imprisonment. In his judgment the trial magistrate correctly stated the position when he said that: - 'The only evidence there is against the accused is of the complainant. This evidence being of a young child and having being received without oath requires corroboration being independent evidence implicating accused in the crime.' He went on to say, however:- 'I have warned myself of the danger of convicting on uncorroborated evidence but I come to the conclusion that being satisfied that the memory of complainant is good and therefore that she remembers accused and that it is accused who defiled her, I do convict accused as charged.'

Held: (1) "In sexual offences corroboration is required as a matter of practice but, where a court is satisfied of the truthfulness of the complainant and

has warned itself of the danger where there is no corroboration it my convict. This is in a case where the complainant has given testimony on oath. Where the testimony of a young child is not given on oath there cannot be recorded a conviction if there is no corroboration. Section 127(2) of the evidence Act reads:

'Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. Provided that where evidence received by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support therefore implicating the accused.' Since the evidence of the complainant was received in accordance with this section the proviso applies. There was nothing implicating the appellant other than the complainant's evidence and corroboration was required as a matter of law. There was none." (2) Appeal allowed.

91. D. P. P. v. Conerachuma Crim. App. 109-Dodoma-71; 2/3/72; Mnzavas, J

The respondent was convicted on his own plea of guilty of forgery and stealing. He was sentenced to absolute discharge in so far as the charge of forgery was concerned, and to 10 strokes corporal punishment on the count of stealing. The Republic being dissatisfied with the sentence imposed with respect of the charge of stealing brought the appeal under Sec. 334 of the Criminal Procedure Code. The Republic argued that according to the Minimum Sentences Act …… this was not a case where leniency could be exercised, and that therefore the magistrate ought to have imposed a sentence of 2 years imprisonment and 24 strokes corporal punishment instead of 10 strokes.

Held: (1) “Before the provisions of section 5 (2) are invoked in favour of an accused the property obtained or attempted to the obtained in committing the offence must not exceed Shs. 100/= Once it is shown that the property stolen or attempted to be stolen exceeds Shs. 100/= the fact that an accused is a young man and a first offender becomes of very little help to an accused’s youthfulness can be and was properly taken into account as a special circumstance by the trial magistrate. But the learned magistrate failed to direct his mind to the fact that the respondent admitted stealing Shs. 184/65, property’s of the Government. This amount is clearly more than Shs. 100/= and as such removed the magistrate’s discretionary powers to exercise leniency under section 5(2) of the Minimum Sentences Act. I agree with the Republic that the trial magistrate was wrong in sentencing the respondent to 10 strokes corporal punishment instead of sentencing him to 2 years imprisonment and 24 strokes corporal punishment.”

(2) “The argument by the learned state attorneys on 28/2/72 that Act No. 1 of 1972 had removed corporal punishment in scheduled offences was not, strictly speaking, correct. The Act which repeals and replaces the Minimum Sentences Act, Cap. 526, had not come into operation on the day the accused was convicted of the present offence. Nor had it come into operation on 28/2/72 when the appeal by the Republic was heard. The Act, the Minimum Sentences Act 1972, has since however come into operation. It came into operation yesterday (1-3-72) by virtue of section 1(1) thereof. Reading section 1(1) and (2) in conjunction with section 12(1) of the new Minimum Sentences Act it is clear that the sentence of 24 strokes corporal punishment which, but for the new Act would have been mandatory, has now been overtaken by events. Sentences of imprisonment passed under Cap. 526 are saved by the proviso to section 12(1) of the new Act – The Minimum Sentences Act 1972.” (3)”In mitigation the respondent has prayed for leniency saying that he has since refunded the Shs. 184/65 he stole and that he has already received 10 strokes corporal

punishment. I agree with the respondent that this is one of those few cases which need more compassion than condemnation, but, much as I would have liked to be lenient to the respondent I cannot do any better than to comply with the mandatory provisions of Cap. 526, diluted as they are, by section 12(1) of the Minimum Sentences Act 1972. (4) The accused is sentenced to 2 years imprisonment the sentence he should have received had the trial magistrate not misdirected himself.

92. Jaffer v. R. Misc. Crim. Cause 1-Dodoma-72; 25/2/72; Mnzavas, J.

The accused was charged with corrupt transactions c/s 3 (2) and (3) of the Prevention of Corruption Act No. 16 of 1971. His application for bail was rejected by the trial magistrate. The accused being dissatisfied with the ruling, appealed to the High Court contending that the trial magistrate had taken into consideration irrelevant factors such as to whether the applicant was a citizen of Tanzania or member of TANU. The prosecution had alleged (the magistrate did not examine the allegations) that the applicant would if released on bail, tamper with three prosecution witnesses and might even leave the jurisdiction of the court.

Held: (1) “This was by any standards a gross misdirection by the learned district magistrate and, if I may add in passing, the worst I have yet to encounter. For the learned district magistrate to imply in his ruling that he was not prepared to grant bail to the applicant because the alleged offence fell under the Minimum Sentences Act, and because such offences involve civil servants is, to say the least, beyond my comprehension. Offences falling under the Minimum Sentences Act are bailable offences. When dealing with the question of bail where a scheduled offence

Is involved, as was in this case, the usual considerations whether to grant or refuse bail should apply. The fact that an alleged offence is one under the Minimum Sentences Act should not form the basis of a court’s ruling on the

question of whether to grant or refuse bail. The magistrate is saying …… 'and if the accused person is really citizen of Tanzania, he should have not offered the bribe as alleged, because it is said by the TANU PARTY, and I hope, the accused is also a member of TANU, that "I will not give or receive bribe." So this should have been remembered before committing such an alleged offence' (The emphasis is mine).

(2)"The primary object of remanding an accused in custody is to ensure that he will appear to take his trial and not seek to avade justice by leaving the jurisdiction of the court. This is, in my view, the main and most important consideration to be examined before an application for bail pending trial is granted or refused. In paraphrasing this main consideration there come such less important considerations as the nature and seriousness of the alleged offence, the severity of punishment involved and if available at the time of application for bail the strength of evidence in support of the charge. These are the considerations the learned district magistrate should have taken into account before coming to his decision. The learned district magistrate should know, and I hope he knows, that it is not part of our law to keep a man in goal because he is not a citizen of Tanzania or for that matter a member of TANU. To do so would be going counter to the very principles enshrined by TANU as well as the country's constitution." (3) "Time and again this court has said that the true test of a bail application is whether the granting of the application will be detrimental to the interests of justice. It is for the prosecution to satisfy the court that this would be so if bail was granted. Dealing with the question of tampering with witnesses Wilson Ag. C. J. (as he then was) said in Bhagwaji Kakubhai vs. Rex ITLR page 143 ….. 'The tests laid down (in English cases) were that there should be a definite allegation of tampering or attempted tampering with witnesses supported by proved or admitted facts showing reasonable cause for the belief that such interference with the cause of justice was likely to occur if the accused was released'. In the present case there was no more than a mere assertion by the prosecutor that the applicant would interfere with prosecution witnesses if released on bail. There were also fears that he would abscond. There was no

evidence whatsoever to support these hypothetical fears". (4) "The learned district magistrate was clearly wrong in his ruling. I accordingly order that the accused be admitted to bail on his furnishing a bond of Shs. 5,000/= cash and two substantial and independent sureties in like sum as suggested by the learned state attorney. The court further orders the accused to surrender his pass-port to the police. The resident magistrate should see that the above orders are complied with before the accused is allowed on bail."

93. R. v. Musa Crim. Rev. 86-M-71;4/3/72; Makame, J.

The accused was convicted of stealing from the person of another and for escaping from lawful custody. For both offences he was sentenced to 12 months and 6 months imprisonment respectively to run consecutively. The complainant was watching a lion at the Festival Ground, Mwanza Old Airport, during Sabasaba last year and there were several people standing in front of him. The only person behind him was the accused and when the complainant sensed that his wallet containing 120/= had been removed from his pocket he caught hold of the accused. Under the accused's foot was found the money, partially buried in the sand, and this is supported by the evidence of PW.3 the Games Student in attendance at the stall. On the second count the accused was silent when faced with the allegation that on the 9th of July 1971, while he was waiting to be escorted to Court from the Kirumba Police Station, he escapes from the lawful custody of the police. The case was admitted in revision for consideration as to whether there is any standard punishment set down for the offence of stealing from the person of another.

Held: (1) "The trial magistrate might have felt that 12 months for stealing from the person of another was appropriate in the present case but, with respect, there is not standard punishment as such. The particular circumstances of each case must be taken into consideration when assessing sentence. A substantive term of 18 moths for the two offences may be harsh but it is not manifestly

excessive as to warrant interference by this court." (2) "Accordingly the sentences are confirmed." (3) "For some reason not apparent on the record no order was made that the Shs. 120/= should be given back to Mr. Patel the complainant. This is most irregular. The proper procedures is to make the order and then wait until the appeal, if any, is head, or if no appeal is filed, wait until the time allowed for appeal has expired, and then act accordingly. I order that the money should now be given back to Mr. Patel and I direct that this Court should be duly informed when the order is complied with."

94. Ntonya and Another v. R. Crim. App. 44-Dodoma-71; 9/3/72; Mnzavas, J.
The appellant were convicted of cattle theft c/ss 268 and 265 of the Penal Code. The evidence established that the appellants represented themselves to the cell-leader as being the owners of the cow which was later identified by the complainant as his cow which had been missing from his herd. The appeal was merely admitted for argument as to whether the taking of the cow by the appellant from the cell-leader amounted to theft or was only consistent with obtaining by false pretences.

Held: (1)"For a charge under s. 302 of the Penal Code (obtaining by false pretences) to stand, the offender must not only have induced the complainant to transfer possession of the property to him but the complainant must in the process have also transferred ownership of the property to the offender …… In the present case the cell leader cannot be said to have transferred ownership of the cow to the appellants … He did of course transfer his right of possession of the beast but ownership was still with the complainant and could therefore not have transferred a right he did not own." (2) "The taking of the cow from the cell-leader by the appellants, though with the consent of the cell-leader amounted to stealing the cow just as much as if the appellants had stolen it from the

complainant's kraal." (3) "The appeal against conviction is incompetent. The sentence of 3 years imprisonment and 24 strokes corporal punishment imposed on each accused was the statutory minimum on 10/8/71;, the day of the conviction. Corporal punishment though appropriate and mandatory at the time, has now been overtaken by events – Act No. 1/1972. The appellants are each to suffer 3 years imprisonment only."

95. R. v. Mabuku and Another Crim. Sass 112-Dodoma-71; 9/2/72; Mnzavas, J.
The accuseds were charged with murder c/s 196 of the Penal Code. The prosecution called not less than six witnesses who explained to the court the various circumstances of the deceased's death. In their unsworn defence the accuseds told the court that they had been forced to make an extra-judicial statement to the justice of the peace, the first accused going further to say that he had been forced to sign his name on what the Area Secretary had put on a sheet of paper. Since the prosecution's case centered on the extra-judicial statement made by the first accused that he and the second accused had assaulted the deceased and left him helpless in the maize-shamba, the defence contended that the statement had to be corroborated as it had since been retracted. The defence went further to submit that even if the statement could be taken into account against the first accused it was improper to consider it against the second accused, being a confession of the co-accused

Held: (1) "I agree that the prosecution case is wholly based on the extra-judicial statement of Faru to the Justice of the Peace. I also agree that Faru has in the trial within a trial retracted the statement he made to the area secretary. The first question this court has to decide is therefore whether the circumstances in this case are such as to entitle the court to act on the retracted confession of the first accused. My perusal of decisions of the court of appeal on the question of retracted confessions tells me

That it is not a rule of law nor is it a rule of practice that a retracted confession has to be corroborated before a court acts on it. It is however essential that a court has to be satisfied that a retracted confession is true before acting on it." (2) "The accused in the trial within a trial told the court that he admitted killing the deceased because police constable Nkata (P.W. 4) subjected him to violence. He told the court that P.C. Nkata slapped him when he was taking him to Manyoni police station from his village. I totally fail to accept Faru's allegation that he was forced by P.C. Nkata to give a statement to the Justice of the Peace. P.C. Nkata gave evidence and was subjected to a long examination in chief. The learned state attorney anticipating that the accused was going to say that he was subjected to violence when the time came for production of his extra-judicial statement, repeatedly asked P.C. Nkata whether the accused was subjected to violence or forced in any other way to give his statement to the Justice of the Peace. P.C. Nkata told the court that the accused was not in anyway forced or subjected to violence in order to extract a confession from him. In spite of these replies by P.C. Nkata was an afterthought. I see no reason to disagree with him. Had it been a genuine defence the defence counsel would certainly have put questions to P.C. Nkata about the alleged maltreatment of Faru. What is more Faru totally gave a different story in his unsworn defence. There is also the unusual remark by Faru to the deceased's mother. There Faru accused the deceased's mother of having killed a person. Taking all this into account I am satisfied that Faru's retracted confession is fully corroborated by other independent evidence. I am unable to conceive how Faru could be in position to relate to the Justice of the Peace that the deceased was beaten on his head, a story which has been found to be correct, if he was not actually present, and present in an active manner, when the deceased was assaulted. For my part I am fully satisfied that Faru did take part in assaulting the deceased." (3) As for the second accused, Fundi, I agree with the learned state attorney that after the amendment of section 33 of the Evidence Act by section 19 of Act No. 26 of 1971, the law now is that a confession of an accused affecting a co-accused can be taken into consideration against the co-accused. The meaning of the words

"take into account" was discussed in the Indian Case – Emperor vs. Kehri and others – 29 Allhabad 434 and followed by our Court of Appeal in Rex vs. Hangingombe and another 8 E.A.C.A. 33. The court decided that the only way in which such confession can be taken into account against a co-accused is as evidence. The confession of Faru therefore is evidence that Fundi also participated in the beating of the defeated. But such evidence though tending to implicate Fundi with the death of the deceased, the evidence is that of an accomplice.

It is a rule of practice almost amounting to a rule of law that it is unsafe to convict a person on uncorroborated accomplice evidence. Amendment of section 33 of the evidence Act by Act No. 26/1971 does not in any way abrogate this rule of practice. Faru's confession in so far as it affects Fundi suffers from lack of corroboration and as such it would be extremely unsafe to act on it in determining Fundi's guilt. In the event I find Fundi not guilty of any offence and I accordingly acquit him." (4) "Having found that Faru took part in beating the deceased; and taking into account his extra-judicial statement that he inflicted blows on the deceased's head till he became helpless, and the medical report which is to the effect that the deceased died of head injuries, the only inevitable conclusion is that Faru killed the deceased. What I have finally to decide is whether the killing amounts to murder as alleged by the Republic. On the evidence t is difficult to say with that amount of certainly required in a criminal case that Faru inflicted the fatal blows with intention to kill the deceased as to cause him grievous harm. There can be no certainty on this question; and it is sufficient for me to say that I entertain at least a reasonable doubt on the point. The accused is entitled to the benefit of the doubt. I find the accused not guilty of murder but guilty of the lesser offence of manslaughter c/s 195 of the Penal Code." (On accused sentenced to 7 years imprisonment and another accused acquitted).

96. R. v. Hamisi Crim. Rev. 5-Dodoma-72, Mnzavas, J.

The accused was, on his own plea of guilty convicted of buying and transporting four bags of maize from National Agricultural Products without prior permission c/s (2) and 6(3) of the National Agricultural Products Board Act 1964. The accused was sentenced to Shs. 200/= fine and his bags of maize forfeited. The case was admitted for revision. The High Court found that the facts of the case were more consistent with the accused's buying maize for personal use that for commercial purposes.

Held: (1) "I agree that the National Agricultural Products Board Act, Cap. 567, was not intended to stop villagers from selling and buying agricultural produce among themselves if the produce so bought was for the consumption of the buyer and his family. The Ordinance is in my view principally meant to curb the buying of agricultural produce by big merchants from peasants of low prices during the time of harvests and sell the same produce to the peasants and workers later at exorbitant prices. It is not meant for the ordinary peasants and workers who buy produce for no other reason but for their food. (2) "To support a charge of this nature the prosecution should have clearly shown on the facts that the accused bought the

maize in order to re-sell the same at a higher price to the public. As the facts stood it cannot be said that the charges against the accused disclosed any offence. This was in my vies a typical case where the learned magistrate should have exercised his powers under section 89 of the Criminal Procedure Code by rejecting the charge." (3) Conviction quashed and fine ordered to be refunded.

97. Mutito v. R. Crim. App. 378-M-71; 9/3/72; Makame, J.

The appellant was convicted of cattle stealing c/ss 268 and 265 of the Penal Code. Satisfactory evidence was led to establish that less than 12 hours after 8 out of P.W. 1's 16 head of cattle had been feloniously removed from his cattle

pen at Nyamongo, North Mara, and the appellant was found across the boarder in Kenya driving 4 head of cattle convincingly identified as being among the stolen 8. He was fast driving them past P.W. 2's house that was suspicious and tried to stop the appellant. The appellant would not stop so P.W.2 ordered his three his three dogs to persuade the appellant to stop, which the dogs did. The appellant said the cattle were his and that he was merely going to plough his shamba, and he gave a false name. He was subdued with ropes and when he was taken to the local chief, P.W. 4, the latter who knew him identified him as Mutito Waikami. The appellant got the statutory minimum sentence for cattle theft and was ordered to pay 4 head of cattle to compensate for the 4 not recovered. For the Republic although the conviction was supported it was argued that such an order was improper because Section 6(1) of the Minimum Sentences Act, under which the order was made, provides for monetary compensation only, unlike compensation under section 176 of the Criminal Procedure Code which provides that compensation may be "in kind or in money".

Held: (1) "With genuine respect I do not share this restrictive view. Compensation is not confined to monetary compensation. It is a broad term and the purpose of compensation is to ensure that the offender gets no material benefit from his crime. If compensation meant monetary compensation only, section 176 of the Criminal Procedure Code would not have talked of compensation in money or in kind, which implies that compensation may be in money or in kind. If compensation was to be understood to mean monetary compensation only there would have been another term if compensation was payable in kind." (2) "Section 6(2) of the Minimum Sentences Act talks of such compensation being recoverable as a civil debt. A person against whom such a debt is ordered to be recovered is a 'judgment debtor' and the definitions of 'judgment debtor' of a 'decree' in the Civil Procedure Code do not support the implied proposition that a debt can only be a monetary debt. In a society like ours in which barter is still the order of the day there seems to be no justification for being so narrow and unrealistic in our definition. I respectfully agree with what Seaton J., as he

Then was, said in Wanyangura Matuja vs. R. (1968) H.C.D. 507 that a compensation order expressed in terms of cattle is (often – the qualification is mine) bad for vagueness because 'individual cattle may so vary in size and condition that the value of cattle be Shs. 600/= or Shs. 1,200/'. This is quite correct but it is not the same as saying that a compensation order may not be made in kind. It only points out the difficulty that may be encountered whether compensation is in money or in kind it is to be "as assessed by the court", which would have all the available facts at its disposal and use its discretion and common sense. In some cases, perhaps in most cases, it would be more convenience to express the compensation in terms of money but that should be for the court to decide." (3) "Because of the foregoing and in the absence of any special reason to warrant interference, I do not propose to interfere with the compensation order and accordingly I confirm it." Appeal dismissed.

98. Madege v. R. Crim. App. 565-D-71; 18/2/72; Onyiuke, J.

The accused in this case was served with notice to show cause why the sentence passed on him should not be enhanced. He in the interval appealed against his conviction and sentence. He was charged with and convicted of rape c/s 130 and 131 of the Penal Code, and was sentenced to 12 months' imprisonment and 12 strokes of corporal punishment.

Held: (1) "I have, firstly, to consider the correctness of the conviction. I think the conviction cannot stand. The evidence as to rape was not satisfactory. The complainant (P.W.2) stated under cross-examination that she was 'raped' but there was no evidence what she meant by that or of the facts which amounted to the alleged rape. Throughout her examination in chief the complainant did not allege that the accused had any sexual intercourse with her. In a charge of rape there must be evidence of penetration of the penis into the vagina though actual emission of seed is not necessary. The term 'rape' as used

by the complainant ma amount to penetration or not. In view of this ambiguity I will order a retrial of the case and I will remit it back accordingly. The complainant must state clearly what the appellant did to her and it will be for the Court to decide whether this was rape or not." (2) Appeal allowed. Conviction and sentence are hereby set aside. Case remitted to the District Court of Iringa District for trial 'de novo' before another Magistrate of competent jurisdiction.

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99. Sanga v. R. Crim. App. 508-D-71; 14/2/72; Biron, J

The appellant was one of three men who were charged with storebreaking and stealing but were convicted of receiving and were each sentenced to imprisonment for twelve months. It was established that there were stolen from depot of the Tanzania/Zambia Road Services Limited four large tyres. A considerable number of witnesses gave evidence so the effect that some of these stolen tyres were in the possession of one or other accused within days of their having been stolen In addition, a police officer gave evidence to the effect that not far from the depot from which the tyres had been stolen, there were marks of tyres having been rolled along the road and there was found nearby a right-footed sandal which corresponded to a sandal worn by the appellant on his left foot, whilst he wore a different type on his right foot. The appellant's explanation for this was that he had borrowed the sandal he was wearing on his left foot from one of his co-accused, having left his own to be repaired by the same accused, which incidentally, was denied by the said accused. On appeal to the High Court.

Held: (1) "Not only is the conviction fully supported and justified by the evidence, but I would add that the evidence would even support a conviction of the three accused having themselves stolen the tyres as they were originally charged." (2) "As noted, all three accused were charged with storebreaking and stealing, but were convicted of receiving. If the tyres were in fact stolen from a store which had been broken into, the conviction for receiving would also, like the

store breaking and stealing, be a scheduled offence under the Minimum Sentences Act, 1963, and would have attracted at lowest the prescribed minimum sentence of imprisonment for two years and twenty-four strokes corporal punishment. However the so-called store was not really a store at all – (See s. 296(1) of the Penal Code). The so-called store in this case would appear to be nothing more than a wired enclosure, apparently something like a wire-cage, which would not constitute a store within the meaning of the subsection above set out."(3) "I am satisfied and so certify that this appeal has been lodged without any sufficient ground of complaint, except perhaps that the sentence errs on the lenient side, but the appellant is not complaining of that. The appeal is accordingly summarily rejected."

100. Kambi and Another v. R. Crim. App. 73-Dodoma-71; 16/2/72; Mnzavas, J.
The two appellants were convicted of cattle theft c/ss 268 and 265 of the Penal Code and each sentenced to 3 years imprisonment and 24 strokes corporal punishment. The complainant (PW.1) had his ten goats stolen on 5/7/71 as they were being grazed by his children. He approached his cell-leader (PW. 4) and reported to him what had happened and mentioned the two appellants as the people

He suspected as the thieves. The appellants' house (both apparently lived in one homestead) was searched and there a skin of a recently slaughtered goat was found. The complainant identified the skin as having marks on it similar to the marks he had made on his missing goats namely three cuts of the lips of the ears. He had also earlier told the cell leader that one of the he-goats was black and white in colour. The skin found in the appellant's home-stead bore these marks and was black and while in colours. On being interrogated as to how they came to be in possession of the skin which answered the description given by the complainant the two accused admitted having stolen the goat whose skin

was in their house but denied stealing the remaining nine goats. In their joint memorandum of appeal they have, inter alia, argued that the trial magistrate, should not have admitted the alleged confession as it was made "outside a court of law" and before a cell-leader.

Held: (1) "I fail to see the argument regarding the question – 'the confession being made out of court' as most confessions are made out of court. When dealing with the question of confessions courts are not so much concerned with the place where an alleged confession was made, they are more concerned with the person to whom a confession is said to have been made ….. The question of admissibility of a confession made to a cell-leader was amply dealt with by Biron J. in Thabit Ngalile vs. R.(1968) H.C.D. case No. 182 where the learned Judge held ….. They (cell-leaders) have in fact no greater powers of arrest than those of an ordinary citizen … they should not be equated with police officers for the purposes of section 27 of the Evidence Act, and the confession made to the ten house leader was admissible. The confession to the cell-leader was therefore rightly admitted as evidence against the appellants." (3) "The appeals against conviction are incompetent and they be forthwith summarily rejected".

101. Eliya and Others v. R. Crim. App. 90-104-Dodoma-71; 15/1/72, Mnzavas, J. The seven accuseds were charged with and convicted of robbery with violence c/ss 285 and 286 of the Penal Code and each sentenced to five years imprisonment. Save for the first and third appellants the other appellants were also to suffer 24 strokes corporal punishment. The fact as found in the lower court are that on the night 26/10/70 a gang of thieves burst into complainant's house armed with pangas and suddenly started attacking the complainant and his wife (PW.3). Complainant (P.W. 1) related to the court that he was cut with a panga in his forehead and on his arms. According to the evidence of Mariam (PW. 3) she was hit on her forehead with a stick and cut twice on her right hand. Both the complainant and his wife told the court that they saw the first accused

clearly as he was the one who took active part in assaulting them. They also related to the court that they recognized the

Other appellant because it was a moon-lit might and that the complainant had a torch which he flashed at his attackers. All the seven accuseds were neighbours of the complainant. The only evidence which corroborated complainant's testimony and that of his wife was the evidence of Polina (P.W. 2) who told the lower court that he saw the 1st and the 7th appellant as they were departing from the scene of the crime. There was no evidence implicating the other accuseds with the offence apart from the words of the complainant and his wife. The prosecution case wholly depended on the identification of the appellants.

Held: (1) "The entry of the bandits in complainants home-stead and the subsequent assaults on the complainant and his wife must have left them in a confused stated of mind and as such it was extremely unsafe for the trial magistrate to have totally relied on the testimony of the complainant and his wife. Both of them were in panic and had received serious injuries at the time they alleged they saw and recognized all the seven people. The learned magistrate should have looked for corroboration of complainants' testimony in connection with the identification of each of the seven accused before entering a conviction against all of them …. The testimony of these two witnesses needed confirmation evidence before it could be relied upon as basis of conviction. Looking at these appeals in the light of the above the only convictions which seem to be in harmony with the evidence are those in respect of 1st appellant and 7th appellant. It would in my view be unsafe to support the convictions of the other five accuseds." (2) In the event the appeals in so far as the 1st appellant and the 7th appellant are concerned dismissed; but appeals of the other five appellants upheld.

102. Mohamedi v. R. Crim. App. 112-Dodoma-71; 15/1/72; Mnzavas, J.

The appellant was on his own plea of guilty convicted of three counts of stealing by agent and sentenced to 6 months 2 months and 2 months on counts one, two and three respectively. The sentences were ordered to run consecutively making an aggregate of 10 months imprisonment. This was an appeal against the district magistrate's order that the three sentences were to run consecutively. It was argued that the circumstances of the case were similar to those in Chikondumu vs. R. (1967) H.C.D. 403. The ratio decide ding of this decision is that the court found the accused to be a first were relatively small and acting on these mitigating facts Biron, J. held that there was no justification for ordering the sentences to run consecutively.

Held: (1) The accused was first offender as was the case in Chikondamu v. R. but unlike Chikondum's case where the amount involved was described as small "in the present case the accused stole a total of Shs. 2133/30 an amount which cannot reasonably be described as small

The facts on the present case seem to be in all fours with the case of Joseph Kashamakula vs. R. (1970) H.C.D. 201 (where) in revising the consecutive order to a concurrent on Hamlyn J. said that all …. These offences were part and parcel of a single plan of campaign, in such case they should all be concurrent." (2) "It would also appear from the facts that the three offences were merely part of a single plan by the accused to defraud his fellow villagers. The offences have been committed at the same time and in the same single plan to defraud the villagers and as such the sentences should have been ordered to run concurrently and not consecutively." (3) "I therefore set aside all the sentences imposed on the appellant and substitute in their place sentences of 10 months imprisonment on each of the three counts and direct that the sentences be served concurrently. The end result is that this appeal save the above order fails in its entirely."

103. Malaba and Othus v. R. Crim. App. 640 et al-M-1970; Undated – Jonathan, Ag. J.

The appellant were convicted on several counts of, inter alia, stealing by servant c/s 271 and 265 of the Penal Code. After conviction the prosecution produced a certificate of Registration of the Sima Growes Co-operative Society, the appellants' employers, under the Co-operative Society, Ordinance. Further, an order was made in these terms; "All accused persons to compensate the Sima Growers Co-operative Society for the amount of Shs. 28,755/10"

Held: (1) "[The production of the certificate after conviction] was patently irregular. Such evidence should have been led by the prosecution there by giving the appellants an opportunity to cross-examine on it. Without further ado the magistrate proceeded to sentence under the [Minimum Sentences] Act …… In a situation like this it would have been preferable, I think, if the magistrate had gone somewhat out of his way to find the Notice number under which the Society was registered in the Official Gazette. He could then have taken judicial notice of such gazettement and made a specific finding that it was a registered society." (2) "I understand from [the compensation order] it was intended that the accused should pay this sum jointly and severally. It was not a fair order to make in respect of the 3rd and 4th accuseds who were convicted only on some of the stealing counts. In their case a proper order to make would have been that they should pay compensation jointly and severally with the accused only to the extent of their respective responsibilities." (3) Appeals in part allowed.

104. Kapofgo v. R. Crim. App. 895-M-70; 7/2/72; Jonathan, The appellant a member of the Village Development Committee was convicted by the Primary Court of stealing money contributed by the villagers of Legana for the purpose of building a dam and entrusted to him. The appellant was sentenced to 2 years' imprisonment and 24 strokes under the Minimum Sentences Act. His appeal to the District Court was dismissed. On appeal to the High Court it was considered

whether the fund for the building of a dam was a charity or whether the money belonged to the Village Development Committee and therefore to the District Council so as to decide whether the appellant was properly punished under the Minimum Sentences Act.

Held: "The charity is defined under the Minimum Sentences Act as ….. any fund or organization for the relief of poverty the advancement of education, the alleviation or prevention of sickness or the mitigation of the consequence of any disaster. …. The building of the dam ….Would have led to an improvement in the living standards of the villagers. That said, however, it is impossible to add with certainty from the facts of the case that the fund was 'for the relief of poverty' in that locality." (2) "Essentially, the villager's plight was a self-help scheme in which the Council does not appear to have had a hand. The fund, it seems, was to have been used in a manner that suited its contributors and the Council had not control either as to the raising of it or as to its application. In those circumstances, therefore, it could hardly be said that the money belonged to the Council. (3) "In the result, I would hold that the Minimum Sentences Act did not apply". (4) The order of the strokes set aside.

105. Samwel v. R. Crim. App. 440-A-71; 22/2/72; Bramble, J.

The appellant was convicted of Robbery with violence c/ss 285 and 286 of the Penal Code. The trial court found that at 7.30 p.m. on the 13th April, 1971 a gang armed with firearms and a panga went into a shop at Uganda Ltd. wounded one person and stole Shs. 100/=; the appellant was identified as one of the robbers; when an alarm was raised the robbers ran and escaped in a land rover; a Taxi driver chased it and saw the number plate ARD 123; a report was made to the police and they found out that this vehicle belonged to the appellant; at 10.00 p. m. they went to his home and saw the same vehicle parked outside his house; when the appellant was questioned he said that the vehicle that day and had returned from work with it at about 5.30 p. m; he remained in his house with his

family and went to bed about 9.30 p. m leaving his wife in the kitchen. She supported him. A defence witness who carried on a shop in front of the appellant's house saw him come home about 6.00 p. m and did not see him leave up to 9.30 p. m. He stated that the vehicle was parked in front of the shop and he would have seen if it was moved. The appellant was convicted on this circumstantial evidence.

Held: "The appellant had set up an alibi which was not considered at all in the judgment. There was nothing in the prosecution's case to rebut the evidence of the appellant as to his whereabouts at the relevant time and at its lowest this should have raised reasonable doubts as to his guilt." (2) The judge quoted trial magistrate's observations 'the vehicle could not have gone on its own but possibly with the permission of the (appellant). It follows without doubt that if he did not go there alone he gave the switch of his vehicle to a certain man or group of people, but since he has not pointed out the same it can from the circumstances be reasonably inferred that he drove the vehicle himself to Unga Ltd. on the 13/7/71 at around 7.30 p. m.' – and held that "the trial magistrate misdirected himself in that the burden is on the prosecution to prove beyond reasonable doubt that an accused is guilty and not on an accused to prove his innocence. The (trial magistrate's observations) concede that the evidence admits of several possibilities. In the case of Republic vs. Kipbering arp Kroke and another (1949) 16 E.A.C.A. 135 it was held that; 'In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifted to the accused.' (3) "The non-direction and mis-direction are fatal and I

will allow the appeal, quash the conviction and sentence and order that the appellant be immediately released unless otherwise lawfully held."

106. R. v. Ntibilanti, Crim. Rev. 53-M-71; 8/2/72; Jonnathan Ag. J.
The accused who was medically certified as being 12 years old was charged with and convicted of housebreaking c/s 294(1) of the Penal Code and given a conditional discharge. The charge did not specify the felony that the accused intended to commit.

Held: "Time and again this court has stressed that a charge of house breaking should specify the felony that was intended. It is a cardinal principle that a complaint should be couched is words which sufficiently inform the accused of the nature of the offence with which he stands charged. In the present case, having regard to the tender age of the accused, I cannot say that the failure to cite the felony intended did not result in miscarriage of justice." (2) Comments of the court: "At the commencement of the trial the Prosecution produced a medical certificate to the effect that the accused was 12 years old. This is followed by the courts finding in these words: 'Accused's age is 12 years for the purpose of this case'. It is not clear from the record why the certificate was produced and the finding made, but it would appear that it was intended to treat the accused as a juvenile and so to proceed under the Children and Young Persons Ordinance. Whether he was prosecuted under this Ordinance – that remains doubtful, for although it was obligatory to proceed under the Ordinance, the record is silent if its provisions were complied with. It would have been preferable if the magistrate had put on record that the accused was tried as a juvenile and that the provisions of the legislation were complied with." (3) Proceedings declare nullity but retrial not ordered, conviction quashed and the order of conditional discharge set aside.

107. Israel v. R. Crim. App. 79-Dodoma-71; 28/1/72; Kwikima, Ag. J.

The appellant was convicted on two counts of fraudulent false accounting and four of stealing by public servant. He received a cumulative sentence of four years which carried the statutory 24 strokes. His appeal against the conviction was dismissed by the High Court as "there was overwhelming evidence against him." The offences were one single fraud against the same employer, only that the fraud was perpetrated is a series of defalcations which could have been checked had some responsible person cared to act in time. In other words the defalcations were "a series of offences of the same or similar character" such as are referred by s. 136 Cr. P.C. In sentencing the appellant the learned magistrate ordered that sentences on the 2nd and 6th counts should be served consecutively. On appeal against conviction:

Held: (1) "The trial magistrate gave no reason for his order and departed from an approach which the High Court and the court Appeal 'has approved and adopted for a longtime now' namely that offences committed in the same transaction should carry concurrent sentences and before any departure is made from this principle the trial magistrate must be satisfied that there are very exceptional circumstances which warrant that course being taken – See R. v. Kasongo Luhogwa 2 R.L.R. (R) 47. [And R. v. Swedi Mukasa (1946) 13 E.A.C.A 97 and R. v. Fulabhai Patel (1946) 13 E.A.C.A. 186]. "In the instant case, the learned trial magistrate does not seem to have any reason for departing from this principle or else he would have given it. The best approach in a situation such as this one is that put forward by Georges C. J. (as he then was) in Shah v. R. 'The best method of sentencing is to arrive at an appropriate punishment for the entire transaction and award concurrent terms to meet separate court taking into consideration the maximum punishment fixed for each law.'" (2) The sentences revised reduced and ordered to be served concurrently. "The order for corporal punishment shall stand although the learned trial magistrate should in future make a specific finding as to the age of the convicted person. This omission is however, curable under s. 346 Cr. P.C. since the charge sheet gives the appellant's age as 32. This Court does on its own motion find the appellant to be 32 years old."

108. Mbua and Gukwi v. R. Crim. App. 154-E.A.C.A-71; 8/2/72; Judgment of the court of Appeal, Law, J. A.

The appellants were convicted of the murder of a woman called Changa, a suspected witch, by the High Court of Tanzania sitting at Dodoma. In convicting the first appellant, Mbua, the learned trial judge relied mainly on a confession allegedly made by Mbua to his mother, Yundu. Yundu was called as a witness by the prosecution and denied that Mbua had said anything to her about Changa's death. In order to discredit her, she was shown a statement made by her to a police officer in which she had said that "any son told me that yes he did the killing." Yundu denied having said any such thing to the police

Officer. The case against the second appellant, Gukwi, was based on the evidence of Chief Seuge and one another witness. Gukwi told Chief Seuge "let us go to lake Kindai and I will show you where the body is." He led Chief Seuge to the lake, and pointed out a place where he said the body had been thrown. At that place was found Changa's submerged body, tied to tree under water.

Held: "(Yundu's) statement (to the police) was admissible to discredit her evidence given at the trial, but its contents could not be imported into the trial and used as substantive evidence to be take into consideration in deciding whether or not Mbua was guilty. In relying on the contents of this statement convict Mbua, the learned trial judge was, with respect, clearly in error. (Irere alias Sheingo s/o Nawiga v. R. VIII E.A.C.A 61). The question to be decided is whether, after eliminating the contents of Yundu's statement, there remains sufficient evidence to support Mbua's conviction. There was evidence that, shortly before Changa's death, Mbua snatched a bill-hook from one Kilongo, saying he needed it to dig up plants to use for medicine. This bill-hook was subsequently found buried outside Mbua's house in a dismantled condition. When Changa's body was found, two deep incised wounds wee apparent on her head. These circumstances

undoubtedly raise suspicion that Mbua was implicated in the murder of Changa, but in our opinion they are insufficient evidence to justify Mbua's conviction for that murder. We accordingly allow his appeal, quash the conviction for murder and set aside the sentence of death passed on him, and order that he set aside the sentence of death passed on him, and order that he be released from custody unless detained on some other charge." (2) "(The) evidence (against Gukwi) clearly implicates Gukwi as having participated in disposing of Changa's body. Whether it justifies his conviction for murder depends on whether or not Changa was still alive when her body was tied under water. This question was not considered in the court below, and in our view it would not be safe on the evidence available to allow Gukwi's conviction for murder to stand. He is however clearly guilty of the offence of being an accessory after the fact to murder, contrary to section 213 as read with section 387 of the Penal Code. We accordingly allow his appeal to this extent: the conviction for murder and the sentence of death passed on him are respectively quashed and set aside, and there will be substituted a conviction for being an accessory after the fact to murder, contrary to section 213 of the Penal Code, and a sentence of three(3) years imprisonment."

109. R. v. Palutengano Crim. Rev. 36-D-72; 18/3/72 Mwakasendo, Ag. JU.

The accuseds were charged with unlawful wounding c/s 228 of the Penal Code. After accuseds had made a few appearances in court, the Court made an order in the following terms; "As the complainant wants to be reconciled and as the parties have agreed to a settlement where no compensation is to be paid to the complainant, proceedings are stayed under section 134 of the Criminal Procedure Code."

Held (1) "It is not open to the Court to invoke the provisions of Section 134 of the Criminal Procedure Code in a case where the accuseds faces a charge of unlawful wounding c/s 228 of the Penal Code. In this connection the Trial Court

Is referred to what was said by this Court on inspection of the case of R. v. Abedi Criminal Case 88 – Newala – 71; (1971) H.C.D. 470. The Court in that case citing the case of Republic v. Said Ibrahim (1960) E.A. 1048 at p. 1060 was of the view that on a proper construction of Section 134 of the Criminal Procedure Code, a Magistrate has no power to stay proceedings and try to reconcile the parties under Section 134 of the C. P.C. when the accused stands charged with the commission of a felony or a misdemeanour which has been specifically or by necessary implication excluded from the application of Section 134 of the Criminal Procedure Code." (2) "The order staying the proceedings is quashed and set aside and it is directed that the Magistrate proceed to hear the case and determine it on the morits."

110. R. v. Samweli, Crim, App. 453-A-71; 10/3/72; Bramble J.

The accused in this case was charged with stealing by agent c/s 213 (b) of the Penal Code and trial magistrate dismissed the case without calling on the accused. The accused was a member of a Kijiji cha Ujamaa; the chairman gave him Shs. 100/= to buy a cow to be slaughtered for the Kijiji; the accused did not buy the cow nor did he return the money. The trial magistrate ruled that a case had not been made out in that the accused, being a member of the Kijiji, was a general owner of the money and had a claim of right; that the remedy for recovering the money was civil rather than criminal. He relied on the definition of theft in Section 258 (1) of the Penal Code and it is – "A person who fraudulently and without a claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or special owner thereof, anything capable of being stolen, is said to steal that thing."

Held: (1) "Without going into the merits of the argument that the respondent was general owner I would draw attention to section 263 of the Penal Code which reads: 'When any person takes or converts anything capable of being stolen, under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein, or that he

himself is the owner of the thing taken or converted subject to some special property or interest of some other person therein, or that he is one of two or mere joint owners of the thing etc.' There was little evidence from which the interest of the accused in the Shs. 100/= could be positively inferred and if anything could be inferred it is that he was a joint owner with other members of the Kijiji and this brings the matter squarely within the provision of section 263 quoted above." (2) "There was a case to answer and under my powers of revisional order that the case be remitted to the lower court and direct the trial magistrate to call the respondent and finally decide the matter."

111. Elias v. R. Crim. App. 115-Dodoma-71; 20/1/72; Kwikima Ag. J.

The appellant was found with a stolen watch and money bag three days after they were stolen from the complainant. The appellant was convicted of housebreaking and stealing following the doctrine of recent possession and the appellant's failure to give a reasonable account as to how he came in possession thereof. The High Court upheld his conviction and his sentence on these two counts. When the appellant's house was searched some poisonous drugs in the form of procaine penicillin were found besides other suspect articles. The drugs were seized and taken to form the basis for the third charge brought under Cap. 409 section 36 (1) to wit practicing medicine without due licence.

Held: (1) The prosecution committed a serious blunder in bringing the charge on the third count "in the same charge as they brought the offence of breaking and stealing. This was clearly wrong in terms of section 136 Criminal Procedure Code Cap. 20 which reads: 'Any offences whether felonies or misdemeanours, may be charged together in the same charge of information if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character'. It cannot be said from this definition that the offence of practicing medicine was properly joined with that of housebreaking and stealing since it could not have been founded on the same

facts nor was it in any way similar to the offence of housebreaking stealing. In this sense therefore, the appellant's conviction on the offence of unlawfully practicing medicine was bad for misjoinder even assuming there was evidence in support of it …. There was insufficient evidence upon which to hold the appellant guilty of practicing medicine unlawfully. It would not therefore be fair to allow his conviction on this count to stand since such defect is not curable under section 346 of the Criminal Procedure Code. Consequently it is hereby quashed and the sentence thereof set aside. To this extent the appeal is allowed." (2) "What should have been done was for the prosecution to charge the appellant with the offence of unlawfully possessing poisons under the appropriate ordinance. They had all the evidence to secure his conviction had they done so."

112. Majige v. R. (PC) Crim. App. 395-M-1970; 9/2/72; Makame, J.

The appellant, a Ward Executive Officer, found the complainant at a funeral and asked him to accompany him to the primary court. There he locked him up for two days without any food. The former was charged and convicted of unlawful confinement. On appeal he argued that his actions were for the Ward Development Committee. There were allegations that the complainant had failed to pay a fine under traditional custom thought it was not clear for what offence, the court intimating that it was either for abusing a cell-leader or for persuading

young lady not to give her hand in marriage to a particular person.

Held: (1) "Be it as it may, as a Justice of the Peace the appellant had no power to arrest without a warrant in the first place, for which ever of the two the complainant was alleged to have done was not cognizable offence. As the Executive Officer for the Ward Development Committee he should have known that a Ward Development Committee has no power to lock up a person. The

most that it can do is to report to the Area Commissioner a person's failure to pay a fine for lack of co-operation. It was established that the appellant confined the complainant and, as the East African Court of Appeal said in the case of Mwaitabele v. The Republic (1970) H.C.D. 294 the onus is on the accused to establish, if only on a balance of probabilities, that the confinement was lawful. The appellant in the present case unlawfully curtained the complainant's liberty and he was quite properly convicted and sentenced." (2) Appeal dismissed.

113. R. v. Ramadhani Crim. Rev. 10-D-72; 29/1/72; Biro, J.

The accused was charged with causing grievous harm. A number of witnesses gave evidence to the effect that the accused assaulted his wife or concubine with an axe and there was also evidence from the accused's relations indicating mental instability on the part of the accused. When the accused first appeared in court he said "I was provoked and cut her with an axe." This was entered as a 'plea of not guilty'. The magistrate acting under s. 168 A of C.P.C ordered the accused person to be detained in a mental hospital for medical examination. Later after the prosecution had closed its case the magistrate made an order under s. 168(4)" The medical report on which the magistrate based his order was signed by Consultant Psychiatrist which narrated accused's past record of mental instability but there was no further medical examination despite the magistrate's earlier direction in that respect.

Held: (1) The provocation is no defence to any charge of assault or any other offence involving violence and a plea of guilty should have been recorded. (2) The magistrate could not have acted under s. 168A of C. P. C for the court can only make a special finding of 'mental instability' after a proper trial. "There was not trial, as only the prosecution side was heard and no evidence was adduced by or on behalf of the accused. (The judge referred to ss. 164, 165 and 168 of C.P.C.) When a court has reason to believe that a person is of unsound mind and consequently incapable of making his defence, the court can proceed to hear the prosecution evidence in respect of the offence and if it finds a prima

facie case against him, can commit him to a mental institution for further examination and if he is eventually found to be insane, the court should record

a finding to that effect. But this does not constitute a special finding, which it cannot be overstressed, is made only after a trial. However, when after a proper trial, which means that the defence has been heard and that would only apply where the accused, although he may have been insane when he committed the act with which he is charged, sufficiently lucid to understand the nature of the proceedings and conduct his defence, the court then, if it is satisfied that the accused committed the act with which he was charged, but he was insane at the time, could make a special finding as provided for in section 168(1).” (2) “Further, the medical report produced at the hearing is not really admissible in evidence. As the magistrate will not from the wording of section 168A (2) the medical report must be signed by the officer in charge of the mental hospital; wherein the accused was examined. In this instant case the so called medical report is signed by one ‘J.C. Hauli for Consultant Psychiatrist’. It is therefore inadmissible in evidence.” (3) “It is therefore directed that whether before or after the defence has been put before the court but preferably after, the accused is to be medically examined again as to his mental condition, particularly as at the date he committed the alleged offence and in this respect, in order to assist the medical officer a copy of the evidence for and on behalf of the accused should be made available to the medical officer. When the trial has been finally completed, the court should then write a judgment and made a finding whether or not it! Has been established that the accused committed the act with which he is charged, and if so whether he was insane at the time. And if the court so finds that he did commit the act, but was insane at the time, it should then make a special finding as provided for in the provisions referred to. The proceedings should then be forwarded to this Court for onward transmission to the Minister.”

114. R. v. Midaula Crim. Rev. 193-D-71; 15/3/72, Biron, J.

The accused was one of three men who were together convicted on their own pleas on two counts: of stealing goods in transit and of entering and remaining in the harbour area without lawful business or permission, and they were all bound over on probation for twelve months. Notice to show cause why the sentence should not be enhanced was ordered to issue by a another Judge at the High Court and only one man, who appeared before the Court, had been served, the other two were apparently away at sea

Held: (1) No reviewing tribunal would, I venture to say, interfere with a sentence imposed by a convicting court merely because if the tribunal in question had dealt with the case, it would have imposed a different sentence. A tribunal should, in my view, only interfere with a sentence imposed it the sentence is bad in law, as would be the case for example, if the particular offence attracted a mandatory sentence, or if in imposing the sentence the court erred in principle, or that the sentence award is either so manifestly inadequate or excessive, that it cannot in

Reason be sustained, which last incidentally can, I think, be regarded as a corollary of the second case, in that it indicates that in imposing such sentence the court must have erred in principle." (2) "Although the offences, particularly that of stealing goods in transit are serious, it cannot be said that the order placing the accused on probation was so unreasonable that it cannot be sustained. The accused was a first offender, and all the property had been recovered. There is actually a school of thought that first offenders, except in very serious cases, should not be sent to prison, but be given another chance." (3) "I am not persuaded that this Court would be justified in interfering with the course taken by the convicting court. It is therefore not proposed to interfere with the order of the District Court."

115. Ally and Another v. R. Crim. Rev. 20-D-72; 15/2/72; Mwakasendo, Ag. J.

The accused were convicted on their own plea of guilty of selling beer after authorized hours c/s 12 and 65 of the Intoxicating Liquors Act, 1968 (Act 28 of 1968). The accused, both of whom are first offenders, were then sentenced to a fine of Shs. 500/= each or one months imprisonment in default and (b) twenty days' imprisonment. The court further ordered the "Trading Licence be withdrawn", and the two bottles of beer be confiscated.

Held: "I find it difficult to accept the principle of imposing on an individual a sentence whose severity does not fit his crime and guilt, the only justification being that the court thinks that others might be deterred thereby. Were the accused hard-core or even second offenders there might have been an explanation for the severity of the sentence. There are no doubt sound and good reasons for considerably reducing the hours of drinking alcoholic beverages in premises popularly known as 'beer stores' but that as far as I am aware, does not make the contravention of the authorized hours a serious offence that must be visited on its first contravention with the full rigours of the law. The offence does no in the least involve any opprobrium or any moral turpitude, a factor to be taken into account by a court when considering whether to send a person to jail or not. The sentence of 20 day's imprisonment shall accordingly be quashed and set aside." (2) "The perusal of the record shows a marked disregard of the accepted judicial approach to sentencing. Not only did the Magistrate completely fail to inquire into the accused's means to pay the fine but also the accused were given no opportunity to speak against either the forfeiture of trading licence or the confiscation of their property. The procedure adopted is to say the least arbitrary. I find that the order of forfeiture is ultra vires the provisions of the Act. The trial court is only empowered to order a forfeiture of a trading licence if the case before him falls within the ambit of the provisions of either sub-section (1) or (2) of section 87 of the Intoxicating Liquors Act, 1968. On a proper construction of both sub-sections I fail to see how the present

Case could be brought within the context of the section. I will accordingly quash and set aside the order of forfeiture and direct that the trading licence be restored to the owners unless there are other lawful grounds for with-holding it." (3) "Now the order of for feature of the subject-matter of the offence, to wit, the bottles of beer, this can only be done in terms of the provisions of section 88 of the Intoxicating Liquors Act, 1968. (The judge quoted s. 88 and continued).No order of forfeiture can be considered judicially made if the court neither hears the person interested in the property nor gives any reasons why it thinks fit that the intoxicating liquor in question should be forfeited to the government. This the trial court did not do and were I satisfied that quash in the order made thereon would serve any useful purpose I would have not hesitated doing so. But it is now so late in the day that reversing the order forfeiting the Intoxicating liquor in question will only give rise to unnecessary inconvenience both in time and money." (4) "Apart from what I have already said on the procedure that must be followed a Court may properly impose a sentence for the payment of a fine, I am wholly satisfied that the fine imposed is quite adequate to meet the justice of the case. The Director of Public Prosecutions, who has been consulted, fully concurs with the orders made herein."

116. R. v. Mavunge Crim. Rev. 214-D-71; 3/3/72; Biron, J.

The accused who was employed as a Branch Assistant Secretary of the TANU Youth League at Mikumi, was convicted of stealing Shs. 82/70 the property of the Youth League and he was sentenced to imprisonment for twelve months. The accused was a first offender. On revision of his sentence the accused in his memorandum submitted to the High Court stated that he had an aged mother, a wife and child 6 months' old to look after.

Held: (1) "According to the Act before a court can exercise its discretion and impose a sentence less than the prescribed minimum on a conviction for a scheduled offence, there must be three factors present. They are:- (1) that the

accused is a first offender; (2) that the value of the property involved does not exceed Shs. 100/=; and (3) that there are special circumstances. There is a conflict of view amongst the judges of this court as to whether the low value of the property involved can in itself constitute special circumstances, one school of thought holding that where the value of the property involved is so low and minimal that in itself can constitute special circumstances, thus providing the third factor in addition to constituting the second factor that the amount involved does not exceed one hundred shillings; whilst the other school of thought is of the view that the value of the amount involved cannot serve in such dual capacity, but the special circumstances must be made up of factors other than the value of the amount involved. The magistrate would appear to have followed the former view in sentencing the accused. However, I very much doubt whether more than eighty per cent of the prescribed minimum value can be regarded as so minimal even according to the former judicial view as to constitute in itself special circumstances, as would be the case, to take an extreme example, if the value of the property involved was no more than a shilling or two." (2) "The accused

Has certainly put up a very good case for not enhancing the sentence, though it is arguable whether the case put up by him constitutes special circumstances within the meaning of the Act. In all the circumstances, without committing myself to either school of thought referred to above, I am not persuaded that this court would be justified in enhancing the sentence awarded by the convicting court, it accordingly stands as imposed."

117. Amina and Another v. R. Crim. Sass. 169-D-71; undated; Kwikima, Ag. J.

The accused Amina was charged with the murder of one Zaina. [The second accused was acquitted by the court holding that the prosecution had failed to establish any case against her]. The court found that the deceased had accused Amina of having has an affair with her husband. Amina was pregnant and in a

fighting which followed the deceased felled Amina down and set on her stomach intending to squeeze the focus out of her. Amina. Then stabbed the deceased with a knife.

Held: (1) There was “enough reason for Amina to retaliate with all means at her disposal in order to avert probable death if the deceased was allowed to squeeze her pregnancy out. This alone would have justified Amina Killing the deceased even if the latter had not gone further to take out a knife from her clothing and using it on Amina. In R. v. Nyakaho 1970 H.C.D. 344. Saudi J. (as he formerly was) held that it was justifiable for a woman to kill the person attempting the rape her. It is my considered opinion that a pregnant woman has more reason and justification to kill the person attempting to abort her by physical force as the deceased did in this case. There would be no question of her using excessive force to defend would be no question of her using excessive force to defend herself. I am left in no doubt that the deceased was the author of her own demise when, through jealousy, she set out to look for Amina in order to give her a beating when she learned that Amina had gone with her husband.” (2) Accused acquitted.

118. R. v. Mashauri Crim. Rev. 19-M-72; 22/3/72; Kisanga, Ag. J.

The accused was charged with burglary and stealing contrary to Sections 294 (1) and 265 respectively of the Penal Code. At the close of the prosecution case the trial court addressed the accused in terms of Section 206(1) of the Criminal Procedure Code whereupon the accused elected to defend him on oath and had not witnesses to call. The matter was then adjourned to another date for defence case. The accused in the meantime escaped from the Remand Prison and therefore he did not appear on the appointed date. The case was thus adjourned several times On the last occasion it came up for mention before a magistrate other than the magistrate who tried the case and on application by the prosecution that magistrate allowed the withdrawal of the charge under section 86 (a) of the Criminal Procedure Code. Some 6 months later

The accused was traced, re-arrested and brought before the court. The magistrate who had tried the case was in doubt whether he could continue to hear the case after the charge was withdrawn and thus the record was referred to the High Court to consider the propriety of the order of the subsequent magistrate allowing the prosecution to withdraw the charge Section 86(a) as indicated above. For the Republic it was contended that once the accused called upon to make his defence, the Magistrate could no longer allow the prosecution to withdraw under Section 86(a) because that sub-section allows withdrawal from the prosecution only if the application to do so is made before the accused is called upon to made his defence therefore the High Court should set aside the order of the magistrate granting leave to withdraw as being erroneous and remit the case banc to the District Court had not been made.

Held: (1) "I think that the expression '……before the accused person is called upon to made his defence… Which occur in Sub-section 86(a) should not be construed literally; it should be construed in such a way as to give that sub-section its true meaning. It seems to me that that expression should be construed to mean 'when the accused has not in fact said something in answer to the charge' and the true test to be applied is whether the accused has made his defence known to the court such that without such a reply or defence the matter before the court could not be determined on its merits. It should be noted that where the accused is called upon to make his defence and he says that he does not wish to say anything, this is his reply to the charge. At that stage the defence position is known and the court can proceed to determine the case on its merits, so that the prosecution could no longer withdraw under Section 86(a) Thus I am of the view that the present case fell within Section 86(a) of the Criminal Procedure Code and that the order of the court permitting the prosecution to withdraw under that provision was properly made." (2) "To my mind such withdrawal from prosecution under Section 86(a) puts an end to the particular complaint or charge. It means that the complaint or charge is no longer before

the court and consequently the accused is discharged. Hence it would seem that there could be no suggestion that this court should make an order directing the trial court to continue the proceedings because at the moment there is not complaint or charge laid before the court against the accused. I therefore think that the course open to the prosecution now is to bring a fresh charge against the accused. Under the same Section 86(a) the prosecution would be entitled o do this because the discharge of the accused in the circumstances did not operate as a bar to subsequent proceedings against him on account of the same facts. Accordingly the case is remitted back to the lower court with a direction that the accused by arraigned afresh on a fresh charge to be filed by the prosecution.

119. R. v. Ally and Another Misc. Crim. Cause 3-Musoma-72, 3/3/73, Kisanga, Ag. J.

The application for bail was first lodged in the Resident Magistrate's court which refused it, hence the application to the High Court. The two applicants were jointly charged with

stealing by servant c/s 271 and 265 of the Penal Code. It was alleged that the applicants who were employed by the State Trading Corporation as store keepers stole some 100 corrugated iron sheets valued at Shs. 996/= being the property of their employer. The Republic opposed the application on the sole ground that the investigation was incomplete and that if the applicants were released they would interfere with that investigation. It was further stated that there was strong likelihood that the applicants would be charged with stealing property valued as much as Shs. 40,000/= and therefore the application should be denied until the investigation had been completed.

Held: (1) "When the court is called upon to exercise its discretion whether or not to admit an accused person to bail, I think it should exercise that discretion with reference only to the nature of the offence stated in the information and the

allegations contained therein. I am therefore of the view that it would not be competent to consider the allegation by the persecution that it is likely that the applicants will be charged with stealing large amounts of property in the tune of Shs. 40,000/-. To my mind such an allegation is too vague almost amounting to speculation, and the court could not take cognizance of it in as much as there is no mention of it in the information." (2) "As stated earlier the charge is that of stealing by servant property valued at Shs. 996/=. When the application was before the lower court both applicants stated that the property alleged to have been stolen is in the hands of the Police, and this was not denied by the prosecution. As far as the charge stand, therefore, the contention by the prosecution that the applicants would interfere with investigation if released on bail is untenable because the property is already recovered; and even if those 100 corrugated iron sheets had not been recovered that would not in my opinion be sufficient ground on which to refuse the application." (3) "In the circumstances, therefore, I would allow the application. The matter is remitted back to the lower court with a direction to admit the applicants to bail on such terms and condition as that court may think fit."

120. R. v. Dionis Crim. Rev. 99-D-71; 9/2/72; Onyiuke, J.

The accused, a learner driver was convicted on his own plea of guilty of driving a motor vehicle without a road licence, without motor vehicle insurance, without being accompanied by a qualified driver, and without displaying learner plate all offences against the Traffic Ordinance Cap. 168 and the Motor Vehicle Insurance Ordinance Cap. 169. The accused was fined but the trial magistrate declined to make an order of disqualification on the ground that since the accused was a learner "It would not help disqualifying him from holding a driving licence". On revision of his sentence by the High Court the accused stated that on the material date he was taking his sick child to hospital and on the way the police challenged him and charged him with these offences and that he was compelled to use the car in order to save the life of his child who was very ill. The Republic accepted these facts but contended

That they did not amount to special reasons so as to warrant exemption from disqualification because the reasons given were “reasons personal to the accused offender but were not special to the offence charged.”

Held: (1) “The order of disqualification is automatic on conviction under Section 4(1) unless the court finds special reasons to order otherwise. The order of disqualification prescribed by the sub-section is from holding or obtaining a driving licence. The learned magistrate was clearly wrong in declining to make an order on the ground that the accused was learner driver, and, by implication, did not hold a driving licence in respect of which an order could be made. The order of disqualification he is obliged to make is from either holding driving licence or obtaining one. A learner driver can be disqualified from obtaining a driving licence.” (2) “In Aloys v. Kamuzora v. R. (1968) H.C.D. 486 Seaton J. adopting the reasoning in Whittall v. Kirby (1946) 2 All. E. R. 552, stated that a special reason for not ordering a disqualification is one which is special to the facts which constitute the offence and not one which is special to the offender as distinguished from the offence. What does this mean? I am of the view that the reason must relate to the circumstances in which the offence was committed and to the facts on which the offence was founded. The reason may not amount in law to a defence but should be relevant as a mitigating or extenuating circumstance. It should be noted however that is not every fact which can be urged in mitigation of sentence that amounts to a special reason within the meaning of Section 4(2) of the Ordinance. Thus, the fact that the accused is a first offender or is of good character or that disqualification would entail great hardship on his family cannot amount to a special reason because it has nothing to do with the commission of the offence of driving without motor vehicle insurance. The fact however that a reason is personal to an offender does not necessarily mean that it may not also be special to the facts which constitute the offence. For example, a doctor who exceeds a speed limit while driving a motor

vehicle to attend an emergency may in a sense be said to be giving a reason personal to himself but he is also adducing a reason which is special to the facts constituting the offence. In view of the foregoing I hold that the facts adduced by the accused in this case amount to special to the offender but were also special to the facts which constitute the offence of driving without a motor vehicle insurance. I therefore decline to make an order of disqualification. “

121. Makusi and Another v. R. Crim. App. 520-D-7; 15/3/72; Biron, J.

The two appellant were together convicted on several counts of stealing by servant and a number of counts of fraudulent false accounting, and were sentenced to various terms of imprisonment ranging from three months to three years on the most serious charge, that of stealing Shs. 50,00/=, and they were also awarded the statutory twenty-four strokes

corporal punishment, under the Minimum Sentence Act, 1963. The trial court also made an order for compensation in the sum of Shs. 50,000/= to be paid to the Morogoro Region Cooperative Union by which the appellants were employed and from which Union the money was stolen. In the course of their investigation, the police had seized numerous and a varied assortment of items of property, including two motor cars, one from each appellant, a motor-cycle, a radiogram, a refrigerator and other expensive household items of furniture and household equipment, some, if not most of which, had been bought in the names of various relatives. The trial court ordered that these items of property should be sold and the proceeds from the sale of such property should be applied towards the payment of the compensation awarded to the Union. The appellant did not appeal against convictions or sentences but only against the order of compensation and the order of the sale of the various items of property seized. The appellant’s iter-alia contended that it was usual for the court to make a compensation order effective after the release of convicted accused from prison.

Held: “It must be conceded that I have observed that some courts do make a compensation order to take effect as from the release of the convicted accused. However, there is no authority for so suspending the order, in fact not only is it contrary to law but extremely unwise, even foolish in the extreme, as such suspension given an opportunity to friends or relatives of convicted person to dispose of their property, so that the person or body in whose favour the compensation order is made rarely, if ever, receives any compensation, the order for which is usually not worth the paper on which it is written. It is therefore to be hoped that this practice of suspending orders for compensation will be discontinued.” (2) The judge cited s. 6(2) of the Minimum Sentences Act, 1963 (now s. 7(3) of the Minimum Sentences Act, 1972) and s. 179 of the Criminal Procedure Code ….. the later section inter-alia empowers the court to order that ‘any property taken (from a convict) or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged’ and held that the trial court had right to order the sale of the property seized and that the proceeds of such sale should be applied towards the payment of the compensation ordered. (3) “With regard to the third complaint, that some of the property seized belongs to third parties; there is also provision for that made in the Criminal Procedure code. Section 297 of the Criminal Procedure Code sets out the procedure to be followed by a claimant to any property seized and ordered to be sold by the court The property owners or objectors to such seizure can, it they have any real claim to the property, proceed in accordance with the procedure laid down in the section referred to.” (4) Appeals dismissed.

122. Regachwa v. Joel (PC) Civ. App. 26-M-70; 9/3/72, Kisanga, Ag. J.

The appellant Daniel Rugachwa filed a suit in the Primary Court at Kalabagaine against Miss. Kazia Joel, for the recovery of Shs. 155/= being compensation in respect of 118 trees cut down by the respondent. The plaint was subsequently amended and a claim of Shs. 315/= was substituted. The trees belonged to the

appellant whose land had been re-allocated to the respondent. The Primary Court found for the appellant the respondent. The Primary Court found for the appellant. The respondent appealed to the District Court. Her appeal was allowed. Consequently Daniel Rugachwa (appellant) appealed to the High Court. In considering the appeal the High Court proceeded to determine the issue or ownership of land before it decided on the right to compensation.

Held: (1) "This court has held on may occasions that where land is already occupied, the Village Development Committee must have very strong reasons for reallocating it to another person" [Cited: Masubo Kareka v. Marwa Nyanonkwa, [1967] H.C.D. n. 436 and Thadeus Chacha v. Robi Mkiba [1970] H.C.D. n. 109] (2) "There was sufficient evidence to show that the disputed land belonged to the appellant." (3) Appeal allowed with costs. (4) Case remitted to the District Court for assessment of proper compensation.

123. Nyambari v. Kibira, (P.C) Civ. App. 196-M-70, 30/3/72, El-Kindy, J.

The appellant, Augustine Nyambari, successfully sued for refund of 20 head of cattle as bride-wealth paid by his deceased brother. He was awarded judgment by the Nyamwanga Primary Court. On appeal, the Mara District Court allowed the appeal and set aside the original order. On appeal to the High Court, against the District Court's decision, the appellant argued that the Appellate District Court had no jurisdiction to consider new issues and call extra evidence, not originally brought before the court and not contained in the original record. These issues were whether Augustine Nyambari being a brother of the deceased who had been survived by children, was competent heir according to Kurya Customary Law.

Held: (1) "In the ordinary course of events, an appellate court is bound to consider the appeal in the light of the evidence recorded …… [but] the appellate court can seek further clarification on matters in issue by receiving additional evidence". (2) "It may well be that the locus standi of the appellant was not specifically considered at the trial, but it was there and, by implication … that was why it permitted him to proceed with the suit … In practice a legal issue such as

this one is not dealt with unless it is raised b one of the parties." (3) "by clause 29 of the [Inheritance] Declaration (G.N. 436 of 1963), the appellant would be an heir bearing in mind that the recovered bride wealth would go to the estate of the deceased brother of the appellant." (4) Appeal dismissed with costs.

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124. Kagera Saw Mills Limited v. The Commissioner General of Income Tax, Misc. Civ. App., 20 and 210 DSM-1971, 30/3/72, Biron, J.

In each of these two consolidated appeals, one in respect of the assessment of income tax for the year of income 1967 and the other for the year 1968, the appellant company, is appealing – (a) against the allowance by the Commissioner-General of Income Tax, on the capital expenditure incurred in the purchase and installation of an irrigation system, and (b) against the refusal of the Commissioner to allow an investment deduction on the capital expenditure incurred in the purchase and installation of machinery an necessary alterations to the building's housing such machinery, in respect of a sugar factory operating on the company's land. (a) In assessing the income tax the Commissioner allowed in respect of the irrigation system $12^1/_2$ of the cost, treating this system as machinery under paragraph 9 of Part 11 of the Second Schedule to the Act. It is contended by the company that part of this system constitutes farm works, on the purchase and installation of which there should be allowed a deduction of 20% of the cost for the first year and in each of the following four years, as laid down in paragraph 25 of the Part 1V of the Second Schedule to the Act. The irrigation system consists of a caterpillar diesel engine, a pump and a series of interconnected pipes of diminishing dimensions, ending up in a network of sprinklers. The pump, which derives its power from the diesel engine, draws up water from the Kagera River, which is then forced through a series of inter-connected pipes to connected sprinklers, forming a network of about four miles of overhead sprinklers, which irrigate the sugar plantation up to a mile from the main source of supply. Mr. Muli, who appeared for the Commissioner, submitted

that this irrigation system constitutes but one unit and is machinery coming under paragraph 9 (2) (iii) above cited entitling the company to an allowance of $12^{1}/_{2}\%$ for wear and tear. Mr. Riegels, who appeared for the company, conceded that the prime mover, the diesel engine, is machinery, coming under paragraph 9(2) (iii), but contended that the pipes which convey the water from the pump, and the sprinklers, constitute farm works within the meaning of paragraph 25 above cited. As for the pump, Mr. Riegels allowed that it was in an intermediary position, that is mid-way between the diesel engine, which he concedes is machinery under paragraph 9(2)(iii) and the pipes and sprinklers, which he contends, are farm works, and come under paragraph 25. (b) With respect to the second point there are two issues; one, whether the company was carrying on but one trade, that of the growing of sugar cane, or whether it was carrying on two trades, that of husbandry, and the manufacture of defined sugar, and two, if the company can be held to be carrying on two trades, whether the second trade, that of the manufacture of refined sugar, consists in the subjection of goods or materials of local origin to a process, within the meaning of sub-paragraph 27(e) of Part V of the Second Schedule to

the Act. It is submitted by Mr. Muli that the company was engaged solely in the trade of husbandry, that is the growing of sugar cane and that the reduction of sugar cane into refined sugar as the end product of the sugar cane grown was part and parcel of the trade of husbandry, therefore the company was not entitled to any investment deduction in respect of the capital expenditure on the deduction in respect of the capital expenditure on the purchase and installation of the machinery in the buildings and the necessary alterations to such building, as claimed by it. The company's case is that it is engaged in two trades; that of growing sugar cane, and the manufacture of refined sugar, which constitutes the subjection of goods or materials of local origin to a process, within the meaning of sub-paragraph 27(e). The company possesses 18,000 acres of land, of which

10,000 acres have been developed and were producing sugar cane. The factory which manufactures the refined sugar, occupies about ten acres of this developed land. There were about three hundred men employed in the sugar factory, these included engineers, technicians, chemists and analysts, and they were under the over-all supervision of two expert technicians. The manufacture of refined sugar consists of a number of complex and protracted processes involving the use of sophisticated machinery. In addition to refining the sugar cane grown on its land, the company also buys sugar cane from other growers, which it processes. In 1967 it bought sugar cane to the value of Shs. 99,839/=, in 1968 to the value of Shs. 186,553/-, and this quantity of outside sugar cane bought by the company is ever increasing, in that in 1969 the company bought sugar cane to the value of Shs. 280,400/= and in 1970 to the value of Shs. 434,236/=

Held: (1) Machinery is defined in par. 34. Part VI, Second Schedule to the Act as follows: "'machinery' includes ships and plant used in carrying on any trade." "Farm works" are defined in par. 26 as follows: "'farm works' means farmhouses, labour quarters, any on the immovable buildings necessary for the proper operation of the farm, fences, dips, drains, water and electricity supply works other than machinery, windbreaks, and other works necessary for the proper operation of the farm." In construing words and expressions used in statutes, definitions in dictionaries and similar works are certainly of great help, but they are by no means conclusive, as it has been held that the same word occurring in the very same act has different meanings. Words and expressions used in enactments must be construed in the context of the particular passage in the act wherein they appear, irrespective of the definitions given to such words or expressions in dictionaries and similar works. [Citing: Bourne vs. Norwich Crematorium, Ltd. (1967) 2 All E. R. 576.]…. It is often said that a fiscal statute, such as a tax act, must be construed strictly as against the tax authority. However, Knonstam on 'The law of Income Tax' (twelfth edition) at paragraph 8 somewhat qualifies this approach. "It is often said that a taxing Act must be

Construed strictly in favour of the subject; it may perhaps be more correct to say that a taxing Act must be construed against either the Crown or the person sought to be charged, with perfect strictness – so far as the language of the Act enables the judges to discover the intention of the Legislature."……. The question that immediately poses itself is, how does one ascertain what the Legislature must have intended. It is trite to observe that Income Tax Acts are enacted for the purpose of raising revenue. At the same time the Legislature makes allowances for capital expenditure in order, I venture to say, to encourage economic development. Therefore, in construing an enactment dealing with allowances one should, I think, strike a balance between these two objects, which do not really conflict in the intention, though they may appear to do so in practice ….. To my mind, if the definition [of "farm works"] did not include "water and electricity supply works" and "other works necessary for the proper operation of the farm," it could be argued that for any plant, to use as wide and innocuous an expression as possible, to constitute farm works it should be same kind of immovable fixture, like a farmhouse, labour quarters or any other immovable building, but this narrow construction is, in my view, rule out by the express inclusion of 'water and electricity supply works' and' other works necessary for the proper operation of the farm', which need not necessarily be permanent fixtures. It can also be argued, I think, that the expression 'water and electricity supply works other than machinery', would in itself imply that such works, although connected to machinery, are severable and need not necessarily be treated together with the machinery to which they are connected, as one unit. In fact, electricity supply works could certainly not exist in isolation, as there must be some machinery in Words and Phrases Judicially Defined, which excludes "anything that is merely a reservoir or conduit, although connected with something which is …..a machine."] It cannot, I think, be disputed that the pipes and sprinklers are no more than conduits; therefore, although connected through the pump with the diesel engine, which is a machine, they do not constitute

machinery. I therefore have no hesitation in finding that the component parts of this irrigation system are severable, actually into three distinct sections – the diesel engine, the pump and the pipes and sprinklers. I have already remarked that the pipes and sprinklers are no more than conduits. They can therefore be equated with water supply works in the definition of farm works, and so I find them to constitute farm works within the meaning of paragraph 25. The prime mover the diesel engine, as conceded by Mr. Riegels, cannot be regarded as other than machinery within the meaning of paragraph 9. The pump, which Mr. Riegels himself admits facts midway between the position of the diesel engine and the pipes and sprinklers, presents

considerable difficulty. In fact, I think either contention, that it is machinery, or farm works, could be argued and supported with equal force ……. Therefore, as its classification is so equivocal, and, as any doubt in a case of this nature must, I consider, be resolved in the taxpayer's favour, I find myself constrained to hold, albeit unconvinced, but as pointed out, I need not be convinced, that the pump likewise constitutes farm works within the meaning of paragraph 25. In the circumstances, I am disposed to allow the company's appeal in respect of the pump, the pipes and sprinklers that hey constitute farm works with the meaning of paragraph 25, there by attracting an allowance of 20% of the cost of their purchase and installation, in the assessment of income tax for the years 1967 and 1968." (2) With respect to the second point, whether the company was carrying on one trade or two, the following cases were referred to by counsel; Commissioners of Inland Revenue v. The Cavan Central Co-Operative Agricultural and Dairy Society, 12 T.C.1; Loan and Dickson v. Ball, 10 T.C 341; Peter Reid v. Commissioners of Inland Revenue, 28 T.C. 451; Earl of Derby v. Bassom, 42 T.L.R. 380; J. F. McLaughlin v. Mrs. Blance Bailey, 7 T.C. 508; Commissioner of Inland Revenue v. William Ranson & Son Ltd., 12T.C. 21; Commissioners of Inland Revenue v. Maxse, 12 T.C. 41; J.J. Farrel v.

Sunderland Steamship Co. Ltd., 4 T.C. 605. “I have deliberately left the last case cited, actually by both parties, to the last, as it is the only case really binding on this Court, the English decisions no longer being binding, as stated by Sir Charles Newbold, P. in Rashid Moledina & Co. (Mombasa) Ltd. And others v. Hoima Gimmers Ltd. (1967) E.A 645 at page 655. The case, on which, as remarked, both sides rely, is that of Commissioner General of Income Tax v. Kiganga Estates Ltd. (1968) E.A. 464. The facts of that case as set out in the head note were as follows: “The respondents carried on the business of growing and preparing to the marketable stage tea, and all such activities were conceded to be for the purpose of husbandry. In terms of Prt 1V, Para. 25 of the Second Schedule to the East African Income Tax (Management) Act 1958, one fifth of the capital expenditure incurred for the purpose of husbandry on the construction of farm works on agricultural land might be deducted in each of five consecutive years. The Company claimed and was granted such a deduction in respect of expenditure on the construction and extension of a tea factory. The company conceded that it carried on only one business which was for the purpose of husbandry; but in addition it claimed an investment allowance under Part V, Para. 27 of the Second Schedule to the Act for capital expenditure for the purpose of a trade in processing goods or materials of local origin. The Commissioner-General refused to allow this investment allowance” ……. It was there held ….. that the company was carrying on only one trade, that of husbandry and therefore the company was not entitled to an investment deduction under paragraph 27. Mr Muli submitted that in this case likewise, the company was carrying on only one trade, that of husbandry and therefore was not entitled to an investment deduction under

Paragraph 27. Mr Muli further submitted that the Court of Appeal case also supported his contention that in the manufacture of refined sugar, the company was not engaged in a trade which consists in ‘the subjection of goods or

materials of local origin to any process' as required by paragraph 27(e), to entitle it to an investment deduction, as he equated the processing tea to the processing of sugar. In my view, the Court of Appeal case is easily distinguishable from this instant case on both aspects – on the question of the severability of the trades carried on by a company and on what constitutes 'the subjection of goods or materials of local origin to any process'. In the Court of Appeal case, as expressly stated in the headnote above quoted, the company conceded that it carried on only one business, which was 'for the purpose of husbandry', and in his judgment sir Charles Newbold, P. stated, at p. 466: "In this case the company has accepted that it is carrying on one business, the growing and preparing for the market of tea. That business is the business of husbandry and expenditure therein is for the purposes of husbandry. An integral and integrated part of that business is the processing of the green tea leaf into made tea. I cannot see that the company can be said in those circumstances to be carrying on the trade of the subjection of material of local origin to any process merely because that activity forms one party of the may other activities which in conjunction form one business of husbandry carried on by the company." In this instant case, as expressly stated in the statement of Facts above set out, he company's land was and I quote: "…… agricultural land being utilized b the appellant mainly for the purposes of husbandry, that is to say, the growing of sugar cane." It is hardly necessary to point out that there is all the difference in the world between 'mainly' and 'solely' Further, in its Statement of Facts, the company states with reference to its claim for an investment deduction on the purchase and installation of the machinery under paragraph 27(e): "The said buildings are owned by the Appellant and the said machinery and buildings are used for the purposes of a trade which consists of subjecting goods of local origin to a process that is to say, the refining and manufacture of sugar from sugar cane." It therefore cannot be said, as was said in the Court of Appeal case, that this refining and manufacture of sugar from the sugar cane forms, in words of Sir Charles New bold, P, 'an integrated part' of the growing of sugar cane, which although as pointed out, is the company' main trade, is not necessarily its sole trade. In fact, there is a

passage in Sir Charles Newbold's judgment actually a continuation of the passage above quoted, which to my mind, supports the contention that the manufacture of sugar is not an integral part of the company's trade of husbandry but a separate and distinct one. Continuing the passage above quoted, Sir Charles Newbold went on to say: "In different circumstances, for example, if the company carried on its processing activities in the factory quite separate from its growing activities, the company might be said to be carrying on the trade of processing local material; but that is not the position in this case." In

My view, as I think, sufficiently demonstrated, that is the position in this case. With regard to the other submission of Mr. Muli, that this Court of Appeal case is also an authority for his proposition that the refining and manufacture of sugar from sugar cane does not constitute the subjection of goods or materials of local origin to any process etc., as he manufacture of tea from tea leaves was held not to constitute such a processing, to my mind, it is a far cry from turning tea leaves into made tea, to the manufacture of refined sugar from sugar cane, having regard to the very involved and highly technical process described by Mr. Fernandes in his evidence Further, the Court of Appeal did not lay down that the processing of tea could not come within paragraph 27. All it laid down was that such processing was merely an integrals part of the company's sole trade of husbandry. Therefore, the Court of Appeal case is not authority for either of Mr. Muli's submissions, but rather supports those of Mr. Riegels, for the company. Mr. Muli further submitted that before a company can be said to carry on different trades or ventures, it must show them separately in its accounts. With respect, I am very far from persuaded that the failure to have different accounts for each trade or venture operated by a company would be fatal to treating them separately, either for the assessment of tax or for allowances or deductions, provided of course, that they can be ascertainable individually. And that view is, to my mind, supported by the cases cited, particularly by the last one, that of the

Court of appeal for East Africa. Mr. Riegels submitted that in construing the various provisions of the Act, the Court should take into consideration a speech made by the Minister for Finance in the National Assembly on the 16th of January, 1964, as an indication of the Legislature 's intent ….. The Minister's remarks do, I agree with Mr. Riegels, indicate that the Legislature was aiming at encouraging development in general and in particular, the manufacture and processing of the agricultural produce of the country. However, it is doubtful how far this speech could influence the construction of the Act, particularly as the Act was enacted in 1958 and the speech was made in 1964. But I think that the intention of the Legislature can be ascertained from the Act itself, without calling in aid such extraneous matter as the Minister's speech. As, I think, sufficiently demonstrated, the authorities are all in favour of the company's contention that its operations are severable into two trades, its main trade, the cultivation of sugar cane, being that of husbandry, and its other trade, the manufacture of refined sugar, consists in the subjection of goods or materials of local origin to a process, thus entitling it to an investment deduction of 20% on the expenditure incurred in the purchase and installation of the machinery and the alteration to the buildings housing such machinery, as claimed by it. In the result, I allow both appeals with costs to the company ……."

125. Kisuda v. Akunaay and Anor., Civ. App. 1-DDm-72, 20/4/72, Mnzavas, J.

The appellant and the two respondents signed a contract on 13/1/71 whereby two respondents were to build a house for the appellant in Singida Township. The total cost was agreed

At Shs. 10,000/=. The parties further agreed that the building should be completed and handed over on 30/4/70. In due course however, there was some extension of time granted to the respondents to hand over the house on 30/7/71. By the fore mentioned date, the building had been half completed except a suit

against the respondents before Singida District Court alleging branch of contract and praying for decision of the contract and payment by the respondents of Shs. 9,800/=, a sum paid as consideration for the construction of the building. The respondents contended that the appellant was also in breach of the contract as he had not paid Shs. 200/=, a sum due on the contract. It was further contended that the variation of the contract as to the date of completion had also varied other terms of the contract by implication. The District Court dismissed the suit on the ground that both parties had not honoured the terms of the contract. On appeal to the High Court.

Held: (1) “With due respect to the learned Resident Magistrate I do not agree with him that this later agreement varied to other terms of contract stipulated tin the original written agreement dated 13/1/70. The later agreement only varied the completion date. If it purported to vary the other terms of contract e.g. the mode of payment of the agreed cost of the house, the variation should have been in writing as it was when the date of completion was varied. A written term of contract is usually varied by a written new agreement. It is unusual to vary it by a word of mouth nor can a variation be implied unless the evidence is such as would entitle the court to come to the conclusion that the written term of contract had been varied.” (2) “Having found that the completion date was varied to 30/7/71 and taking into account the fact that the respondents had not completed the house on 24/8/71 the day the appellant filed the suit against them, and the undisputed fact that the appellant had already paid to the respondents a total of Shs. 9,800/= leaving a balance of Shs. 200/= unpaid; I do not wholly agree with the learned trial magistrate when he says that the appellant also failed to honour his obligations under the contract. In my view he more than honoured his obligations under the contract. Under the original written contract the appellant was to pay the respondents up to Shs. 8,000/= leaving a balance of Shs. 200/= to be paid on the day the respondents handed the completed house to him. The appellant has more than fulfilled his promise in that he did not only pay the agreed paid to them a total of Shs. 9,800/= The respondents on the other hand have not honoured their obligation under the contract in that they failed to

complete the house on 30/7/71 as later agreed. They were clearly in breach of the contract. (3) “As to the question whether the appellant was entitled to damages the court held that even if there was a breach of the contract by the original defendants he would not award damages against them because the appellant did not claim for damages. I agree that damages cannot be ordered in favour of the appellant as he did not claim for damages in his plaint. What he wanted

The court to order was that he was entitled to rescind the contract and claim back his Shs. 9,800/= which he had already paid to the respondents.” (4) “Much as I would have liked to order rescission of the contract by the appellant as prayed I feel that such a step would not be wise in the circumstances of this case. The respondents have already constructed the whole house except the roof on the appellant’s plot …… They have indeed done most of the work they were required to do under the contract despite their dilatoriness. Such an order will not benefit any of the parties.” (5) Costs of Shs. 1,000/= awarded to appellant and respondents ordered to complete the house by 31/7/72 and hand it over on or before 1/8/72

126. Issa v. Bura (P.C.) Civ. App. 21-DDM-71; 1/5/72; Mnzavas, J.

The appellant, Mohamed Issa, received two head of cattle from Seleman as refund of his bridewealth. The appellant who had paid three head of cattle and wished the third beast to be refunded in kind, rejected Shs. 100/= which Seleman had offered in lieu of the beast. The appellant believed that Seleman was not telling the truth in saying that the beast had been sold to Bura. He therefore filed a claim in the Primary Court and was awarded judgment and an order directing Seleman to hand over the beast from Seleman, after unsuccessfully suing Seleman, finally sued Mohamed Issa (appellant), and claiming the same beast.

He lost the claim. Consequently he appealed to the District Court and his appeal was allowed. On appeal to the High court.

Held; (1) “Under Section 41 of the law of Persons, Govt. Notice No. 279/63, “the son-in-law can demand that the original beasts of bridewealth are returned to him if they are still in the possession of the father-in-law.” (2) “From the above evidence it is amply clear that at the time of the claim of refund of dowry by the appellant Seleman had sold the third head of cattle to the respondent who had in turn exchanged it for another head of cattle when he decided to exchange it for another beast. As the head of cattle was no longer in the possession of Seleman Sachu, at the time the appellant claimed for refund of dowry the best he could did was to claim money in lieu of the cow. Under section 11 A. Of Government Notice No. 279/1963 he is entitled to Shs. 100/= refund by Seleman Sachu as value of the third head of cattle which has not been paid to him. The learned district magistrate’s decision is in harmony with the evidence and is hereby upheld.”

127. Assi v. Yusufu (P.C.) Civ. App., 37-DDM-71; 4/5/72; Kwikima, Ag. J.
The appellant Zainabu Assi petitioned her husband for divorce. They were a Muslim couple. The Primary Court applying Muslim Law found the husband guilty of constructive desertion and cruelty. The respondent husband was accordingly ordered to pronounce talak and divorce his wife. The wife still

appealed to the District Court which again confirmed that the husband should divorce his wife by talak. The District Magistrate in an obiter added that if the husband should wish to claim refund of bridewealth it was open to him to institute another suit. The appellant still appealed to the High Court which held:-

Held: (1) “The court order compelling the respondent to pronounce the talak on the appellant was incompetent and illegal. It is hereby declared null and set aside.” (2) “The trial court should have inquired into the alleged matrimonial

offence and thereafter dissolved the marriage by TASHKI if it satisfied itself what the offence was proved." (3) "The is not order against which the appellant is appealing since her desire to get a talak was endorsed by the two courts. The appeal was therefore incompetent and it is hereby dismissed with no order as to cost."

128. Iddi Omari Juda v. Gabriel Nkacha, Civ. App. 59-DDM-71, 9/5/72; Kwikima, Ag. J.

The appellant was awarded costs in a civil suit and in order to enforce this award he lodge the present suit in the primary court. His bill of costs was approved there, but on appeal to the district court, it was significantly reduced on the grounds that money spent on obtaining secretarial services could not be charged to the other party as it was not advocate's fees.

Held: (1) "It should be pointed out at the outset that …… the award was enforceable in the same case as it was made. All the appellant had to do was to present his bill of costs to the original court for taxation. This error must have been induced on him by the same court which received and filed the present claim, thereby involving the appellant into unnecessary and uncalled-for expense." (2) "It would be unfair to deny the appellant costs simply because those from whom he sought assistance were not advocates. Having proved that the expenses incurred in seeking that assistance appertained to the case, he was entitled to be reimbursed by his unsuccessful adversary, whether or not the services paid for were supplied by advocates." (3) Bill of costs altered accordingly.

129. Ramadhani Hassani v. Ramadhani Iddi, Civ. App. 69-DDM-71; 12/5/72; Kwikima Ag. J.

The appellant was convicted in a criminal case of burning down the respondent's house and in addition to being imprisoned was ordered to pay Shs. 250/= to the respondent as compensation for his loss. The respondent then sued the appellant civilly in the primary court which dismissed the suit on grounds that the

matter had already been disposed of in the criminal case. On appeal to the district court, however, the respondent was awarded Shs. 990/= as damages.

(1972) H.C.D. - 13 0 –

Held: (1) "In the case of Abdullah Ramadhani v. Aninate Kimomwe, (1969) H.C.D. n. 24 it was pointed out that; - "The civil action was not barred by the …… criminal proceeding, for the basis of liability is different." It should be emphasized, for the sake of clarity that the High Court order for compensation in criminal case No. 188/66 did not affect the respondent's right to sue the appellant in a civil suit." (2) Appeal dismissed.

130. In the Matter of Williamson Education Fund and Barclays Bank (Dominion Colonial and Overseas) Limited , Misc. Civ. Cause, 15-DSM-72, 15/5/72, Mwakasendo, Ag. J.

The Petitioner, Barclays Bank (Dominion Colonial and Overseas) of 54 Lombard Street, London, E.C. 5, ("The Petitioner"), were the trustees of the Williamson Education Fund ("the Fund"), which was set up by Williamson Diamonds Limited of Mwadui, Tanganyika ("the Settlor") for the purpose of promoting the education of students of promise of pure European descent belonging to the Tanganyika Territory. The Petitioner asked the Court for he sanction of a scheme, outlined in the Petition, by which the Fund (the benefits of which were hitherto restricted to Tanganyika students of pure European descent) might be administered as part of a wider charity for the benefit of all Tanganyika students regardless of their racial origin.

Held: (1) "As both Messrs Tampi and Kami representing the Attorney General and the Petitioner respectively have observed, at the time when the fund was set up Tanganyika was a dependent country in which many things including education were run on racial lines. In the atmosphere existing at the time when the Fund was set up, the testator had little, if any, choice but to confine the application of the Fund to students of pure European descent. But times have

changed with the Independence of Tanganyika. Education in Tanganyika is no longer run along racial lines. All Tanzanians of all colours, religions and races go to the same schools and receive the same type of instructions. It is conceded by the Petitioner that the presence of elements of 'colour bar' in the objects of the Fund is contrary to public policy and should therefore be removed. It is further conceded that the removal of the 'colour bar' from the objects of the Fund would not defeat the objects of the Fund, whereas if it is not removed it may defeat the very object for which it was constituted and may create unnecessary racial disharmony between citizens of African origin and those of European descent. If that were to happen our aim as a nation of building here a non-racial nation, to which people of all races will be proud to belong would be frustrated. Furthermore, the primary intention of the Fund was and still is to be, to promote the education of Tanganyika students of promise in certain fields of education with a specific bias towards scientific education. The change in the objects or the fund will in no way affect those Tanzania citizen of European descent who were originally intended to benefit from

the Fund by the Settlor. They will receive not less benefit but more, in that the removal of colour bar will cement the bonds of goodwill and trust between our peoples rather than weaken them. Mr. Mukami for the Petitioner has referred me to the case of Dominion Students' Hall Trust, (1947) Ch. D, 183. I agree with him that on the authority of the Dominion Students' Hall Trust case, this Court has power to deal with this matter. It would therefore follow that this Court may, if satisfied that the original intention of the settler has become impossible of execution, sanction the scheme as outlined in the Petitioner's application. I am happy to say hat after hearing both Counsels and considering the facts as set out in the Petition, I am satisfied that it is right and proper that this Court sanction the scheme proposed by the Petitioner. The Hon. The Attorney General has whole-heartedly welcomed this application and has therefore not offered any opposition.

I accordingly approve the scheme proposed in the Petition." (2) "The second amendment seeks to delete from clause 13 the words "the Union of South Africa". I am told by the Counsel for the Petitioner that it would be contrary to public policy for the trustees to do business with a county which believes in apartheid, a bigoted doctrine which preaches the supremacy of the white man over all other peoples of colour. I believe that this amendment too is consequential to the approval I have given to the scheme proposed by the Petitioner." (3) "The third and last amendment sought is to delete from clause 16 of the deed the words "Fifty Pounds". And substitute therefore the words Two Hundred Pounds". Counsel for the Petitioner has stated clearly that costs of administering the Trust Fund have sharply risen from that they were in 1964. I am satisfied that it is just and equitable that the trusted' remuneration should be increased to the figure asked for." (4) Indenture to be amended in the manner proposed by the Petitioner. Costs to be paid out of the Trust Fund.

131. Mourtaza A. Tadjee v. Commissioner-General of Income Tax, Misc. Civ. App., 1-Tanga-1971, 16/5/1972, Bramble, J.

This is an appeal against a Confirming Notice whereby the Commissioner-General of Income Tax has refused to amend an assessment made in respect of appellant's income tax for the year 1967. The brief facts are that the appellant's father used to carry on the Ngamiani Petrol Station at Tanga. In 1962 he transferred the business with all assets and liabilities to the appellant in consideration of natural love and affection. In 1967 the sum of Shs. 47,228/10 was received b the Petrol Station from Tanganyika Shell Ltd. in respect of discounts which had been withheld over a number of years. Of this sum Shs. 20,590/= was for a period ending on 30th June, 1961; Shs. 23,187/90 for 1962 to 1966 and Shs. 4,450/10 for 1967. The appellant's father died in 1967 and at the time was indebted to the Petrol Station in the sum of Shs. 15,286/71, which he had obtained as a friendly loan. The Court has been asked to determine the following issued:-

(a) Whether a lump sum received in one years could be spread over previous years i.e. whether the receipt of Shs. 22,187/90 by the appellant from Shell (Tanzania) Ltd. is taxable as income tax for 1967 as income for the years 1962 to 1966 in accordance with section 4 (c) of the East African Income Tax Management Act:- (b) Whether the receipt of Shs. 20,590/= is taxable as income received by the appellant or as income of the previous owner; (c) Whether the total amount outstanding in the father's account i.e. Shs. 15,284/71, should be set off against a credit of Shs. 20,590/=.

Held: (1) "As to the first issue the appellant relied on the Proviso to Section 4 (e) of the relevant Act ….. Assuming that the money received by the appellant came within the provisions of the Section the question of division of the sum in equal portions and spreading back over the years is a matter in the discretion of the Commissioner-General and this must be invoked by a request in writing by the tax –payer. No such request was made but the tax-payer's accountant made the decision of his own accord and made revised returns. With particular reference to the sum of Shs. 22,197/90 this was released in 1967 and although it was money retained during the year 1962 to 19666 it became income for 1967, the year in which it was released. Sine it has not been shown that the discretion of the Commissioner-General was requested or that he exercised his discretion wrongly it cannot be said that the assessment for 1967, which considered that money as income, was excessive.' (2) "As to the sum of Shs. 20,590/= paid for the period ending 30th June, 1961 this represented a debt due to the Ngamiani Service Station. It was admitted that when the Service Station was transferred withal the assets and liabilities the previous owner would have no claim on these assets. At the time of the transfer there were other debts outstanding and it has not been suggested that the provision owner could claim them when they were paid to the present owner. There is not any difference between those debts which, when paid became real assets of he present proprietor. I hold, therefore, that the Shs. 20,590/= is taxable as income of the

appellant and for the reasons advanced in the last paragraph it was income for 1967. Since this was not the income of the former proprietor it could not be credited to his account to affect a debt of Shs. 15,286/71. Even if this could be done this latter amount would still be income of the appellant for 1967 and would not fall within section 4 (e) of the Act in order to warrant a request for spreading over." (3) Appeal dismissed with costs.

132. Anna Samson v. Richard Odera Aduda (PC) Civ. App. 11-DSM_72, 4/8/72, Mfalila, Ag. J.

The appellant filed an action against her husband the respondent claiming the child Poba who allegedly had been taken away from her by the respondent. The parties were married by civil marriage on 21st May, 1971 but the child Poba was born on 1/9/70. The problems between them started when the respondent who is a Kenya national decided to return

To Kenya with the appellant who is a Tanzanian national. The appellant declared her unwillingness to go to Kenya saying it was a condition of their marriage that should the respondent wish to return to his native country, the appellant would remain in Tanzania. The appellant also insisted that the child Poba should remain with her because she is not the respondent's child as she was made pregnant by another man, on Dickson, before she met the respondent. The appellant obtained judgment in the Primary Court declaring that the respondent was not Poba's father and that therefore the child Poba should be and remain with her mother. The respondent successfully appealed to the Distinct Court at Ilala where the court held in his but in view of the child's Poba was his but in view of the child's tender age, it was ordered that it should remain in its mother' custody. The appellant now appeals.

Held: (1) "This was a case concerning child of the marriage between these parties and the birth of this child had been registered in accordance with the law,

the court was therefore, simply called upon to declare the status of this child in law, and its custody since its parents were living separately. This then was a Matrimonial proceeding pure and simple under s. 81(a) and s. 77(4) of the Law of Marriage Act 1971. This then automatically affects the appeal in the District Court …… S.80 of the Marriage Act, 1971, modified the tier of appeals provided under the Magistrate's Courts Act in that under the Marriage Act there is a right of appeal directly to the High Court from all the Magistrates' courts. District courts have no jurisdiction in Matrimonial proceedings to hear appeals from Primary Courts. The proceedings before the District court were therefore a nullity.' (2) "As to the paternity of the child the birth certificate speaks for itself. It is recorded thereon that Poba was born on 1/9/70 and that her father is one Richard Odera Aduda. The birth certificate, then she can only do so by swearing an affidavit to that effect stating therein why she had earlier given false information. She will certainly be prosecuted if she does so, but she may think it worth her while if she is convinced that Poba is not the respondent's child. But in the meantime all the evidence points to the fact that the respondent Abuda is Poda's father and this fellow Dickson does not feature anywhere. I would therefore find and declare Richard Odera Adudd father of the child Poba." (3) "I will next consider the question of who will have the custody of this child, the appellant mother or the respondent father. It is agreed that the parties are no longer living together. I have also considered the circumstances of each of them and their respective abilities to look after the child. The mother is unemployed, in fact the may be working as a casual barmaid in various bars and beer stores. Her mother with whom

she is staying is in the same position. On the other hand the father has good job, he has a stead home, his first wife who has no children of her own assured this court that she is able and willing to look after Poba like her own child. In these circumstances I think that the presumption under s. 125 (3) that it is for the good

of the infant below the age of seven to be with his or her mother has been sufficiently rebutted. The atmosphere at the father's home is more conducive to the proper mental, physical and moral development of the child Poba than that prevailing at the mother's home. Poba is now almost two years old. Considering the mother's selfish attitude it is proper that the child Poba revert to the father's custody without delay. The respondent will therefore have custody of the child with liberty to the mother to visit her as often as she wishes."

133. Walter Jager v. Cordura Ltd. t/a Tanganyika Tourist Hotels and Oyster Bay Hotel, Civ. Case 120-DSM-71, 1/6/72, Onyiuke, J.

The plaintiff is an Austrian national residing in Dar es Salaam. The defendant is a limited liability company incorporated in Bermuda but registered as a foreign company in Tanzania. I carries on business in Tanzania and runs a hotel in Dar es Salaam in the name of Oyster Bay Hotel. The plaintiff was employed as a Restaurant Manager of the Oyster Bay Hotel. He brings this action against the defendant claiming special and general damages for wrongful dismissal. Mr. Jussa, Counsel for the defendant, submitted that the defendant's action was for summary dismissal, and section 28 of the Security of Employment Act Cap. 574 oust the jurisdiction of this Court to entertain the suit. The plaintiffs' remedy, he submitted, was to refer the matter to a conciliation board under section 23 of the Act. Mr. Versi, Counsel for the plaintiff, in reply made two submissions, namely: (a) that section 28 did not apply in as much as the present claim was not based on summary dismissal but was based on the wrongful termination of a contract. The contract of service was for two years and the defendant had committed a breach of that contract by terminating it before the two years had expired. The claim, he maintained, was based on contract and should not be put in the category of summary dismissal which was a tort. (b) He submitted, in the alternative, that section 28 did not apply because the plaintiff did not come within the definition of employee as used in that Act.

Held: (1) "I accept Mr. Jussa's submission that this case has to be decided according to the laws of Tanzania. Although the contract of service was between

a foreign national and a foreign company, it was made in Tanzania to be performed in Tanzania and the alleged breach occurred in Tanzania. The jurisdiction of this court to entertain this suit is governed by the laws of Tanzania." (2) "I am unable to accept the first arm of

Mr. Versi's submission, namely, that section 28 did not apply because the present action was based on contract for wrongful dismissal and was not an action for summary dismissal as contemplated by the Security of Employment Act. The term 'summary dismissal' is not defined by the Act but has been judicially defined. I refer to the case of Kitundu Sisal Estate v. Shingo and Others, (1970) E. A. 557 …… See also the decision of this Court in Mohamedi and Others v. The Manager, Kunduchi Sisal Estate, (1971) H.C.D. n. 430. The decision of the Court of Appeal referred to above established that dismissal without notice was summary dismissal. Does the fact that the plaintiff in the instant case was alleging, not that the contract was terminated without notice, but that it was terminated before the two years had run out, make any difference? In may view it does not. To terminate a contract of service before it has run out its course is as much a summary dismissal as to terminate a contract of service without notice when notice was provided or in the contract. The complaint in both cases is the breach of contract. The argument which sought to distinguish the present case from the case of summary dismissal on the ground that the latter case the remedy was only to sue for wages in lieu of notice is unsound. The remedy for summary dismissal is an action for damages which may be general and/or special. The important thing is the cause of action and not the remedy sought. Finally, to argue that summary dismissal is based on tort and not on contract is equally unsound. Every action for summary dismissal is based on a contract of service expressed or implied. An action for summary dismissal is not and action in tort but is an action for breach of contract of service." (3) "I accept the argument that section 28 of the Security of Employment Act does not apply to

this case if the plaintiff does not fall within the category of employees to which the Act applies. Section 4(2) of the Act provides that the Act shall be read as on with the Employment Ordinance, Cap. 336. Section 4(1) of the Act provides that the term 'employee' shall have the meaning assigned to it by the Employment Ordinance subject to certain exceptions ……. Section 2 of the Employment Ordinance defines an employee as "any person who has enterer into or works under a contract of service with an employer whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied or is oral or in writing." Section 1(3) of the Employment Ordinance provides that the President may by order in the Gazette exempt any person or class of persons from the operation of the Employment Ordinance or any provision thereof or of any regulation or order made there under. By Government Notice Number 26 of 1961 the provisions of the Employment Ordinance including section 37 which governs summary dismissal were made inapplicable to persons in receipt of wages exceeding 80,000/= per annum or the equivalent monthly rate. This means that a person in receipt of such wages is not an employee for the purposes of Section 28 of the Security of Employment Act …… The attention of this Court has

However, been directed to an amendment to [section 4] introduced by the Security of Employment (Amendment) Act 1969 No. 45 of 1969. It adds a new sub-section 4(e). The effect of this amendment is that the amount of wage received is not now the criterion. Section 4 (e) provides that "Any employee who, in the opinion of the labour officer, is employed in the management of the business of his employer," is not an employee for the purposes of the Security of Employment Act. This amendment has introduced some uncertainty in this case because the question whether the plaintiff, as the Restaurant Manager of the Oyster Bay Hotel comes under section 28 of the Security of Employment Act does not now depend on any objective standard but on the subjective opinion of

the labour officer ….. This can hardly be regarded as a healthy or satisfactory state for the law to be in. The jurisdiction of this court to entertain the present suit has been put in issue and in view of the present state of the law remains in issue. I think the proper order to make in the circumstances is to stay the suit leaving it open to either party to obtain the opinion of the labour officer under section 4 (e) of the Security of Employment Act as amended by the Security of Employment (Amendment) Act, No. 45 of 1969." (4) Suit stayed until the opinion of the labour officer is obtained.

134. Francis Ngaire v. National Insurance Corporation of Tanzania Ltd., Civ. Case 130-DSM-70, 5/6/72, Biron, J.

On 15 April 1968, plaintiff was involved in a car accident with a vehicle owned by one Mr. Mushi and driven by his driver, Mr. Mohamedi, and as a result lost his right arm. The driver was subsequently convicted of various traffic offences arising from the accident. On 6 arch 1969, plaintiff's advocate, Mr. Chakera, telephoned the offices of the National Insurance Corporation (NIC) and was told by Mr. Mwaikambo, the clerk in charge of the motor claims department, that Mr. Mushi's vehicle was insured as against third party risks with the NIC at the material time and was requested to send a copy of the police report, which was done on the same day. On 17 March 1969, the claims manager of the NIC sent Mr. Chakera a letter in which he stated: "As no information received by this office regarding the accident, we would suggest if you could contact the owner of the vehicle who will in turn if at all the vehicle was insured with us at the date of the accident will report to us." Mr. Chakera took the step suggested with no apparent results. On 14 April 1969, the plaintiff instituted civil proceedings against Mr. Mushi and Mr. Mohamedi. The NIC was informed of this by letter on 15 April 1969, to which the claims manager replied in a letter of 3 June 1969 that "we would advise you that to – date we do not have any intimation from our insured and we are unable to confirm anything." On 13 September 1969 judgment was rendered in favour of the plaintiff and his damages were assessed as Shs.

50,000/=, with neither Mr. Mohamedi nor Mr. Mushi being represented by counsel. Plaintiff subsequently attempted to recover these damages from

the NIC, as the defendants were not men of substance, but the NIC, in a letter of 15 December 1969, denied that he vehicle was insured with them on the material date and repudiated all liability. In fact the vehicle was insured with British India Insurance Company at the material time, but plaintiff's claim against them was by now time-barred. Plaintiff then filed this action in tort against the NIC, claiming damages for the negligent mis-statements of their employees that the vehicle was insured with the NIC. The court found as a matter of fact that Mr. Mwaikambo, the claims clerk, in the telephone conversation of 6 March 1969 "categorically told, or at the very lowest, led Mr. Chakera to believe beyond and doubt, that Mr. Mushi's vehicle was insured with the Corporation at the date of the accident." The court further found that this was confirmed by the letter of 3 June 1969, in which the claims manager of the NIC referred to Mr. Mushi as "our insured". As for the letter of 17 March 1969, in which the claims manager had said, "If at all the vehicle was insured with us," the court held that , in the context, a reasonable man would construe this not as a reference to the possibility that perhaps the vehicle was not insured with the NIC, because this had already been confirmed, but rather as an intimation that the NIC could not as yet confirmed it liability, in that the negligence of the insured or his employee had not yet been determined. On these findings of fact, the court held as follows.

Held: (1) "As remarked by Lord Macmillan in Doncghue (or McAlister) v. Stevenson (1932) A.C. 562, the categories of negligence are never closed. Although authorities have distinguished between injury or damage resulting from statements whether oral or written, and physical acts in this respect, I think, there is a divergence of view and attitude adopted by Australian courts, and the American courts are much more liberal than are the English ones, I must confess my inability to distinguish between statements and other physical acts, as after

all, a statement is a physical act whether oral or written, and to quote the old adage, the open is mightier than the sword, to which I would add, that the tongue could be equally as mischievous as the pen. However, in England the matter has now, I think, been finally settled by the House of words case of Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd. (1963) 2 All E.R. 575, a case incidentally, cited by both Counsel. Although Mr. Kinariwalla has quoted in extenso from this case, I think it is sufficient to quoted in extenso from this case, I think it is sufficient to quote from the headnote as follows: "If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under a contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply;

and for a failure to exercise that care an action for negligence will lie if damage results." For the record I ought to add that, although English authorities are no longer binding on this Court, I see no reason for holding that the law as laid down by the House of Lords, is any different in this country, but on the contrary, I have not the slightest hesitation in holding that it is the same." (2) "There is even statutory authority to the point. By section 123 of the Evidence Act, 1967: "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing". And we that I would add, that when that declaration is made by an employee in the ordinary course of his duties, his employer is liable for

such declaration." (3) "It cannot be gainsaid that Mr. Mwaikambo was acting in the ordinary accurse of his principal's business or affairs when he gave the false information to Mr. Chakera, which incidentally, as I have demonstrated, was confirmed by the Corporation's letter or the 17th March, 1969, Exhibit 'C' I therefore cannot be gainsaid that having accepted Mr. Chakera's question and taken it upon himself to reply to it, naturally on behalf of the Corporation, he was under a duty to take care to ensure that the information he gave was true and correct." (4) "I would go even further. As an owner or a driver of a vehicle is compelled by law to take out a policy of third party insurance, as laid down in the Motor Vehicles Insurance Ordinance (Revised) (Cap. 169 – Supp. 60), and it constitutes a criminal offence for am owner or a driver of a vehicle to use the vehicle on a public road without there being in force a policy of third party insurance, and as this legislation is obviously intended for the benefit of any member of the public who may sustain injury or damage caused by a motor vehicle driven on the road, there is, to my mind, conversely an obligation oust on insurance companies to ensure that when such member of the public inquires from an insurance company as to whether the particular vehicle which caused the damage, is insured with it, to exercise the utmost care and diligence in giving correct information." (5) "I would go even further still that, in view of the wording of section 10(2) (a) of the Ordinance referred to, that: "10(2) No sum shall be payable by an insurer under the foregoing provisions of this section (a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;" there is a duty cast on an insurance company from whom an inquiry is made as to whether a certain vehicle is covered by that company, to exercise the utmost care and diligence to five the correct information, as a failure to do so would occasion loss and damage to the inquirer. I would even go as far as to say that the law has established a relationship between the public and insurance companies and laid a fiduciary obligation

on the part of insurance companies, to exercise all due care and diligence in giving proper and true information (6) “Therefore I have not the slightest hesitation in holding that the Corporation was under a duty to exercise due care and diligence in giving Mr. Chakera a true answer to his inquiry, as to whether the vehicle which was involved in the accident, which caused so much damage and injury to the plaintiff, was insured with the Corporation at the material time. And it cannot be gainsaid that Mr. Mwaikambo was extremely negligent in giving the false information he did, for according to Mr. Salehmohamed, all he ha to do was to look up the policy file where in it would have shown that the vehicle was insured by the Corporation only as from the 20th April, 1968 to the 19th April, 1969.” (7) “With regard to ……. Whether the plaintiff suffered loss and damage as a result of such negligence, as already noted, his claim against the British India General Insurance Company had become time-barred. Mr. Kinariwalla sought to raise a defence to this issue that the plaintiff could and should have applied or execution of the judgment he obtained, against Mr. Mushi and his driver, Mr. Mohamedi, and having failed to do so, he cannot claim from the Corporation. First of all, I doubt whether it is open to Mr. Kinariwalla to set up such a defence at all, in view of the provisions of Order V111, Rules 2 and 3 of the Civil Procedure Code, 1966 …… doubt very much whether this defence is at all open to the corporation, and if necessary I would rule to the contrary. Further, as submitted by Mr. Lakha, if such defence had been raised, he could easily have led evidence that not only the driver but the owner of the vehicle, Mr. Mushi, was also a man of straw, his assets being apparently limited to the vehicle involved in the accident, which vehicle as a result of the accident, was a write-off. Therefore, it would have been a waste of time and money to have proceeded to execution of the judgment against the defendants, Mr. Mushi and his driver, Mr. Mohamedi. I therefore without any hesitation reject such defence …….” (8) Damages of Shs. 50,000/- awarded.

135. City Painters v. Guisepee Licalsi t/a Italian Builder Contractor, Bankruptcy Cause 1-DSM-71, 6/672, Biron, J.

On 16 November 1971, the respondent debtor was, on his own petition, adjudged bankrupt and a receiver was appointed. On 10 February 1972, the applicant creditor filed an application that the receiving order be rescinded on the grounds that the respondent had failed to comply with certain formalities or the Bankruptcy Ordinance, Cap. 25, Spp. 58. Advocate for the respondent submitted that the application was time barred, arguing that, since s. 103 of the Bankruptcy Ordinance prescribed no time limit for the Court rescinding orders made by it, Art. 21 of the Third Part of the first Schedule to the Law of Limitation Act, 1971 and s. 43 of the Act would apply, prescribing a time limit of 60 days. The following cases were also cited in support Re John Zavellas, the debtor, 1 T.L.R. 495; Re Cohen (A Bankrupt) Ex parte the Bankrupt v. Inland

Revenue Commissioners and Another (1952) 2 All E.R. 36. The relevant law, s. 103 (1), Bankruptcy Ordinance, reads: “The court may at any time review, rescind or vary any order made by it.”

Held: (1) “I do not consider either case to the point, or even of any assistance in resolving this present issue. To take the local case first, that of John Zavellas, the debtor, that case was decided under section 100 of the Bankruptcy Ordinance, 1930, the date 1931 incidentally given in the report of the case, being no doubt a mistake. Section 100 of the Ordinance read: “100. (1) The court may review, rescind or vary any order made by it ……” This section was amended by the Bankruptcy (Amendment) Ordinance, 1958, section 17, which reads: “17. Section 100 of the principal Ordinance is hereby amended by inserting immediately after the words “The court may’ in subsection (1) thereof the words ‘at any time’.” Likewise, the English case is of no assistance, as it was decided under section 100 of the Bankruptcy Act 1914 …… As noted, neither section 100 of the Bankruptcy Ordinance, 1930 nor the English Bankruptcy Act, 1914 contain the words ‘at any time’, which were added to the section b the

Bankruptcy (Amendment) Ordinance, 1958. Pausing there, if it were held that section 103 of the Bankruptcy Ordinance does not provide any time for the bringing of an application to review, rescind or vary an order made by it, the words 'at any time' would not only be superfluous but meaningless. And it is not irrelevant, in fact extremely material, to point out that the legislature went out of its way and expressly amended the old section by the addition of the words 'at any time'. I must confess I have consulted the Bill of the Amendment Act to ascertain whether any reason was given in the Bill for the amendment, but although reasons are given for the various other amendments, no reason at all has been given for the amendment provided for in section 17, adding the words "at any time' probably because the reason is self-evident …… I therefore have not the slightest hesitation in holding that section 103 prescribes a period for the review, rescission or variation by the court of an order made by it, and the period provided is unlimited in time ……. I hold that the application is not time-barred and now propose to deal with it on its merits." (2) "Mr. Lakha bases his application for the rescission of the receiving order on two grounds. The first is that the statement of Affairs was filed on the 8th November, 1971 and this offends section 16(2) of the Ordinance ….. The second is that the Petition when filed was neither signed nor attested by the debtor and this is not disputed, he was apparently away at the time. Moreover, the Petition has not as yet been attested, and this offends Rule 109 of the Bankruptcy Rules ……. Mr. Lakha sumits that these formalities are mandatory and because of the debtor's failure to observe them, the receiving order should be rescinded. Even accepting that these provisions are mandatory, by section 104(3) of the Ordinance: "The court may at any time amend any written process or

Proceeding under this Ordinance upon such terms, if any as it may think fit to impose." And by section 132 (1): "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before

which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by an order of the court." This section is mandatory, that the Court shall not invalidate any proceeding on account of any formal defect irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity …. It is submitted by Mr. Lakha that if the application for rescission is rejected the applicant creditor would suffer, for if the receiving order is upheld, it would have he effect of releasing the surety entered into by the debtor's wife and so cause injustice to the applicant ……That loss however is only a side effect of the receiving order made. I cannot, therefore, be said that the loss has been or would be, occasioned by any defect or irregularity set up in the application." (3) Application rejected.

136. Jayantilal D. Desai v. The Commissioner General for Income Tax, Misc. Civ. App. 2-Tanga-71, 13/6/72, Bramble, J.

The appellant is a doctor employed with Cargo Handling Service and also carrying on private practice. He also carried on a money lending business. In his return for 1967 he claimed as an allowable deduction from income (a) expenses incurred in scientific and medical research and (b) bad debts in the money-lending business. The agreed issues were whether the appeal was time barred and, if not, whether the expenses for scientific and medical research and the bad debts as alleged by the appellant were deduct able.

Held: (1) "It was conceded by the appellant that the last date for presentation of the appeal was the 14th January, 1971. The record shows that it was filed on the 18th January, 1971. Rule 6 of the income Tax (Appeal to the Tanganyika High Court) Rules 1955 provides that: "Where a memorandum of appeal is lodged the Registrar shall than cause to be endorsed thereon the date of presentation and the appeal shall be entered in the register of appeals in accordance with the provisions of Order 41, rule 9 of the Code of Civil Procedure as applied to Tanganyika." The endorsement on the memorandum of appeal in this case is "filed on 18th January, 1971" and this is the only endorsement. The

order referred to above was under the Indian Civil Procedure Code. Order 41 rule 9 under the code is now Order 39 rule 9 of the Tanzania Civil Procedure code which is now in force and states: “Where a memorandum of appeal is admitted the Court or proper officer shall endorse thereon the date of presentation and shall register the appeal in a book to be kept for that purpose.” As far as the record is concerned it is a question of whether the date endorsed on the memorandum of appeal is the date of presentation since the word used is “filed” and not “presented”. In the first place the endorsement

Is an official act and the maxim “omnia praesumuntur rite esse act” applies. It is the only official endorsement and it must be presumed to have been properly done. In the second place the term “filed” and “presented” seem to be loosely interchangeable. Indeed in the 3rd edition of Stroud’s Judicial Dictionary a document is “filed” when delivered to the proper officer to be filed. In Rustomji’s Fourth Edition of the Law of Limitation, page 31, it is stated that “Limitation is checked only when the plaint is actually presented in the proper court and not when, by mistake or design, it was filed in an incompetent Court.” Here “filed” and “presented” are used in the same sense. I hold, therefore, that the endorsement on the memorandum of appeal shows the date of presentation.” (2) “An advocate in the firm which presented the appeal swore to an affidavit to the effect that the relevant documents were presented for filing on the 11th January, 1971, and the fees were paid by a cheque of the same date; that the appeal was not filed and entered in the appropriate register until the 18th January, 1971, as evidenced by a court receipt of even date; that the date of presentation would be deemed to be the date of filing and that it is a common practice that in the particular registry papers are actually filed some days after presentation. The affidavit ended by stating; “That what is stated above is true to the best of my knowledge, information and belief.” Mr. Ferro for the respondent submitted that the affidavit could not b e acted upon since the deponent did not state what facts

were within his own knowledge and observation and which were a result of information given to him by someone. The leading case on this point is Standard Goods Corporation Ltd. v. Harakchand Nather & Co., (1950) 17E.A.C.A. 99. In that case an application was made for attachment before that "the facts stated herein were within the knowledge of the deponent.' Paragraph 7 was "what is stated above is true and correct to the best of my knowledge and information. The judgment states in part: "As regards paragraph 2, 1 would observe that facts can be within a person's knowledge in two ways (1) by his own physical observation, or (2) by information given to him by someone else. It is clear that reading paragraphs 2 and 7 of the affidavit together, the deponent was stating facts without stating which were from his own observation and which from information. An affidavit of that kind ought never to be accepted by a court as justifying an order based on the so called facts." The principle has been followed in a line of cases and I hold that the affidavit in the instant case cannot be acted upon and the result is that the appeal is time-barred. "(3) "The next issue is whether the sum of Shs. 3608/= claimed for scientific and medical research is an allowable deduction. The appellant said that he was industrial Medical Officer for the East African Cargo Handling Services between 1963 and 1969; he became interested in the hazards and medical problems of dock workers and he decided to do a survey and research in that field …… Deductions were allowable to a taxi-prayer for expenditure on scientific research incurred for the purpose of a trade carried on by him. The question is whether the appellant was carrying on a trade. He was a

Medical practitioner and was carrying on a profession ……. I hold therefore that the appellant was not carrying on a trade for the purposes of the Act." [Referring to the definition of "profession" in Halsbury's Laws of England, 3rd ed., Vol. 20, p. 243 and definition of "trade" in the Income Tax Act. (4) It was conceded that the appellant carried on a money lending business. It was shown

in cross-examination that a few loans were made without interest but not the specific items. These latter were real business transactions so it cannot be said that the debts were not trading debts. I would therefore, hold that the taxable income should have been reduced by the sum of Shs. 12,600/=." (5) "The position is that since I have held that the appeal is time-barred I must dismiss it with costs to be taxed and I so order."

137. Wangwe Muhere v. Mogaya Chacha, Civ. App. 36-M-71, 27/5/72, Kisanga, J.

The appellant was sued for the recovery of compensation in the sum of shillings 2,000/= for assaulting the respondent. The claim was allowed to the extent of shillings 1,900/= only, the Court taking into account the sum of shillings 100/= which the respondent had recovered as compensation against the appellant during criminal proceeding in respect of the same assault. The appellant now appeal against the award. Item (6) of the First Schedule to the Law of Limitation Act, 1971 provides that the period of limitation in respect of a suit founded on tort is three years. The present suit which is founded on tort was instituted just under five years after the right to sue accrued. The respondent when asked to explain the delay said that after being wounded by the appellant he was in pain and therefore unable to work in order to raise the money which was necessary as Court fees for filing the suit. Following the injury inflicted by the appellant, he was admitted in hospital for a month after which he continued to receive treatment as an out-patient for a further period of one and a half months. Section 15 of the Law of Limitation Act provides that, "If on the date on which a right of action for a suit …..accrues, the person to whom it accrues is under a disability, the action may be brought at any time before the expiry of the period of limitation prescribed for such action computed from the date when the person ceases to be under a disability ……."

Held: (1) "I am prepared to hold that the respondent was under a disability during the one month when he was admitted in hospital because at that time not only was he unable physically to move from one place to another but he was also

unable to work in order to raise the necessary Court fees, for filing the action. As regards the one and a half months during which he continued to receive treatment as an out-patient it seems arguable whether he could properly be said to be under disability within the meaning of this section. Because although he might still be in pain and therefore unable to work for money, he could have approached the Court and apply to sue as a pauper. This, however, he did not do. Even if it were to be assumed in his favour that he was under disability during

the whole period ……this means that only two and a half months are to be excluded in computing the period of limitation but even then the suit would still be time barred by more than twelve months. And finally, as indicated earlier on, the respondent recovered shillings 100/= compensation against the appellant during the criminal proceedings in respect of the same assault. But the Court fees which he paid to institute this suit is shillings 74/= only. Thus he could have spent part of the compensation money to bring this suit and therefore he cannot properly be heard to say that he did not have the necessary Court fees." (2) Appeal allowed.

138. The Commissioner of Income Tax v. Tarmal Industries Limited Misc. Civ. App. 6-DSM-71, 20/6/71, Mwakasendo, Ag. J.

The Commissioner General of Income Tax, the appellant in Misc. Civil Appeal No. 6 of 1971, applied to the court for an order under 0.39 Rule 19 of the Civil Procedure Code 1966, for re-admission of an appeal dismissed for default. The application was resisted by the respondent company, Tarmal Industries Ltd., on two major grounds: (a) that the application is incompetent on account of its being time barred by virtue s. 3(1), Law of Limitation Act, 1971, and Part 111, item 9, First Schedule to the act; and (b) that no sufficient cause has been shown by the applicant / appellant for his non-appearance on the date when the appeal was called for hearing, to warrant this court to exercise its discretion under rule 19 of order 39."

Held: (1) Construing paragraph (c) of section 43, Law of Limitation Act with the aid of section 2, I think there and be little doubt that this application by the Commissioner General of Income Tax is a "proceeding by the Government for the recovery of tax". It would follow therefore, that the provisions of the Law of limitation Act, 1971, do not affect or apply to the present proceedings instituted by the Commissioner General o Income Tax. The result of this finding is that respondent Counsel's first argument fails." (2) "It would seem to me ….. That for a party to prove that some sufficient cause prevented his appearance when his case was called on for hearing, he must show that his failure to act in the matter was caused by some agency extraneous to his will. In the instant case, there is nothing to indicate that the appellant was prevented from instructing his advocates in good time before the case was called or for hearing by some agency extraneous to his will. His default to appear was in my view due solely to his own inaction or dilatoriness. And in this circumstance I do not think it would be right to say that he was prevented from appearing by "sufficient cause". He merely prevented himself and that tin my opinion cannot amount to a "sufficient cause" for non-appearance at the hearing of the case." (3) "Further, learned Counsel for the appellant has invited me

Consider the comparatively large amount of tax that would be lost as a result of an adverse ruling, and to say that, because of this, perhaps some extra indulgence should be extended to him. But I do not think that would be either proper or just to do. As my learned brother the late Mamlyn, J. said in the case of Commissioner General of Customs & Excise vs. Tarmal Industries Ltd. (EACA) Misc. Civil Case Application No. 12 of 1963, "……. I do not consider that it would be in any way proper to extend latitude on such grounds to a Community litigant which would be withheld from a private application and the matter must be decided purely upon the merits of the application, and upon whether "sufficient reason" has been shown ……." With respect I find myself in complete

agreement with these remarks by my late learned brother Hamlyn, J. Were this court to bend the Civil Procedure rules, as I am invited to do by the learned Council for the applicant on the sole ground that the applicant, a public institution, would stand to lose a substantial sum in tax if an adverse ruling is handed out, I feel that I would be setting a dangerous precedent which would in the long run nullify the very provisions of the law I am required to administer ……. I have not the slightest doubts in my mind that neither the comparatively large sum of money involved in this case nor the fact that the litigant is the community, should in any way enter into consideration of the basic question whether or not the appellant/applicant was "prevented by sufficient cause" form showing an appearance on the 16th day of September, 1971". (4) "While the question whether the appeal in fact involves any significant point of law or not, must remain the subject of considerable argument, I cannot see how the importance or otherwise of the legal issues arising out of the appeal, have anything to do with the question whether or not the applicant was "prevented by sufficient cause" from appearing on the date fixed for the hearing of the appeal … In any case, I would find it hard on the facts of this case to hold that the legal points at issue were such as to constitute "sufficient cause" for applicant's default of appearance on the 16th day of September 1971." [Citing: The Commissioner of Transport v. The A. G. of Uganda, (1959) E.A. 329]. (5) "In conclusion therefore, I am satisfied that the applicant/appellant has failed to prove to my satisfaction that he was prevented by any "sufficient cause" from appearing when his appeal was called on for hearing on the 16th day of September, 1971. This application is accordingly dismissed with cost."

139. Lasack s/o Nguvumali v. Petro s/o Bikulako (substituted by Mtalikwa s/o Bikulako), (LC)) Civ. App. 1-DSM-67, 22/6/72, Onyiuke, J.

The suit was instituted in 1961 at the Kalinzi Local Court in Kigoma District. It was a claim for trespass to a shamba. The original plaintiff was one Petro s/o Bikulako who has since died. His representative is Mtalikwa Bikulako who is the respondent in this appeal. The original defendant, Issack s/o Nguvumali, is the

appellant. The local court gave judgment for the plaintiff but ordered him to pay Shs. 100/= to the defendant as compensation for the improvements

he had made while occupying the shamba. The plaintiff's case was that he inherited the shamba from his father Ntore who had originally cleared it of bush. He claimed that he had planted coffee trees on the shamba. The defendant claimed that he inherited the shamba from his guardian Mtango. He claimed to have been using it for 30 years. An appeal was lodged by the plaintiff against the decision to award 100/= to the unsuccessful defendant. The appeal was lodged in the Kigoma Federation Appeal Court. The court dismissed the appeal against compensation, but confirmed Petro's title. Then the defendant appealed to the Regional Local Courts Officer, on the ground that in a previous suit – Kilinzi Civil Case 88/1960 – he had been awarded the shamba and that decision bound the court in the present case. He also appealed on the ground of undisturbed possession for 31 years. It appeared that case 88/1960 had been brought by Issack against the present plaintiff's brother, not the plaintiff himself. The court in that case gave judgment for issack on the ground that he had cultivated the shamba when his guardians, one of whom was Mtango, died. The Region Local Courts Officer dismissed the argument of res judicata on the grounds that Petrol was not a party of the previous case and that the judgment did not give issack title against 'all comers' that is to say, against the whole world. On the ground of undisturbed possession, it was the unanimous opinion of the assessors that : 'The title of the original land-holder and his heir is invariably superior to that of any secondary land-holder or tenant no matter how long the latter may have been in possession'. Issack then applied for leave to appeal to the High Court. Before this was granted the Local Courts Appeals Officer, by order, required additional evidence to the taken by the Primary Court of Kalinzi .The primary Court inspected the area and drew up a map. Additional evidence was given as to the shamba in dispute. Two elderly witnesses, called by Issack, the issues of

the late Mtango, said that Issack could not inherit the shamba from Mtango, because he was in no way related and was in fact Mtango's servant.

Held: (1) "It is clear on the evidence that the respondent could not inherit Mtango's property assuming that the shamba belonged to him. Furthermore Mtango's title to the shamba was tenuous and was based on the fact that he cultivated the shamba once and apparently did not live long enough to reap the harvest. On the other hand the evidence of Ntore's title to the shamba was considerable and was given by elderly witnesses who had nothing to gain by telling lies. Ntore was a member of the village in which the shamba was situated as opposed to Mtango who belonged to a different village. I hold on the evidence that the shamba in dispute originally belonged to Ntore. Mtango's alleged cultivation of the shamba for one season could not defeat Ntore's title to it. The opinions of the Assessors who sat with the Regional Local Courts Appeals Officer confirmed this

view. The appellant cannot therefore base his claim to the shamba on Mtango's alleged title." (2) "I now turn to the second ground of appeal which was founded on suit 88/60. The respondent as far as the record was concerned was not a party to the case but Mrisho who was alleged to be his brother was. The question for consideration is whether the respondent was bound by the decision in that case. I have studied the available record of that case. The boundaries of the plots of shamba in suit 88/60, one on which he stated he planted Eucalypty trees and the other coffee trees. The appellant based his claim to these plots of shamba on the fact that the inherited them from Mtango, Bugabo and Barunguza whom he claimed were his guardians. The Local Court gave Judgment for the appellant on the ground that he cultivated the plots after his guardians' death. Mrisho, be it noted, did not defend the case on behalf of Ntore's family, nor was Ntore's title put in issue in that case. It is difficult therefore to see how the present respondent can be bound by that decision simply because the person who was

alleged to be his brother was the defendant in the case. It is however contended that Mrisho's failure to plead Ntore's title amounted, in effect, to a declaration against interest which should be binding on the respondent. A declaration against interest is an admission but not a conclusive admission. It does not amount to estoppels. Secondly the respondent was not claiming through Mrisho but was rather claiming independent of him. Thirdly the boundaries of the plots in dispute in suit 88/60 were not clearly defined and it could not be said with any degree of certainty that Mrisho knew that Ntore's land was involved in the case. The sketch map drawn by the Primary Court showed that the shamba in which the appellant planted Eucalyptus trees, shamba G, which was one of the plots involved in suit 88/60 was not being claimed by the respondent. This apparently was the plot claimed by Mrisho to belong to Rungo and Barunguza. It is noteworthy that the appellant based his claim on the title of mtango, Bugabo and Barunguza (his alleged guardians) without specifying which plot belonged to whom. Lastly, the appellant based his claim on the long user of the shamba without interruption. There was evidence, however, that he occupied the shamba in the respondent's absence and against all warnings. He had notice therefore of Petro's title. Petro had effectively re-asserted his title by planting coffee trees on the shamba which had matured. The award of 100/= was designed to compensate the appellant for whatever improvements he might have made on the plot of land and I hold, as the lower courts did, that this was fair enough (3) "In the final result I will dismiss this appeal and confirm the decision of the Kalinzi Local Court awarding the shamba in dispute to Petro and his heir. I will also confirm the award of 100/= to the appellant."

140. Swalehe v. Salim, (PC) Civ. App. 36-DDM-71, 24/6/72, Kwikima, Ag. J.

The appellant sought to evict the respondent whom he alleged to have encroached upon his shamba. The parties occupied adjoining plots. The appellant contended that the respondent encroached upon his land to the extent

of 37 acres. When the dispute first arose some village elders were summoned to the shamba where an indaba was held. Therese elders told the trial court that they heard the respondent admit encroaching upon his neighbour's (the appellants) land. The indaba then declared the disputed land to be the appellant's and apparently a document was drawn up to show the boundaries of the respective shambas of the parties. This document was not produced at the trial and despite weighty evidence to support his claim, the appellant lost at the trial and on his first appeal. The respondent called fewer witnesses than did his adversary and not all of those supported his case. Most of them knew little or nothing about the dispute and they said so in court.

Held: (1)"The appellant's magnanimity seems to be the real source of his trouble on the whole. For, when the indaba resolved that the respondent had encroached upon him, the appellant agreed to let the respondent occupy as a mere invitee. Little did he know that his invitee would turn against him and claim the shamba when called upon to vacate. On this aspect of the dispute, the learned appeal magistrate observed; "Appellant insists only that he lent the piece of land to respondent. But it must be remembered that even if appellant lent his piece of land to respondent, but respondent has developed it ……." This was clearly misdirection on his part, because, as this court has consistently held, no invitee can exclude his host whatever the length of his occupancy (Mkakofia Merianangа v. Asha Ndisia (1969) H.C.D. n 204). That the respondent was occupying and had even made unexhausted improvements on the shamba was not reason for him to oust the appellant who had invited him ex gratia." (2) "The record clearly shows that the appellant proved his case at the trial and that undue regard was had to his failure to produce the document drawn at the indaba. He lost his first appeal because the appeal magistrate misdirected himself in law while the same time falling into the same mistake of placing undue importance on the document which was not all that crucial really." (3) Appeal allowed with costs. Respondent to give vacant possession of the shamba to the appellant and if there are permanent crops grown by the respondent, appellant to compensate him at the appropriate rate.

141. Jan Mohamed v. Registrar of Buildings, Civ. Case, 21-A-72; 24/6/72, Patel, Ag. J.

Plaintiff has filed a suit in High Court, Arusha, for declaring him to be a lawful tenant of the suit premises. Plaintiff says he is harassed by the defendant and, fearing he would be forced t vacate the suit premises before the

Suit is finally disposed of, he has filed an application under Order 37 of Civil Procedure Code seeking the following Court's order; "That the defendant and/or their servants, agents or otherwise be restrained from evicting or otherwise interfering with the peaceful tenancy by the plaintiff." The defendant at the same time submits that this suit (and not the application) should have been filed before the District Court of Arusha and not the High Court, Arusha and as such this suit should be sent to the District Court of Arusha for hearing. Plaintiff has filed a declaratory suit. He also filed an application seeking an injunction Order against the defendant. A day is fixed for hearing this application. The defendant has no objection to the application being granted. But in addition he says the suit should have been filed before the District Court of Arusha and not the High Court and this suit should be sent to the District Court of Arusha for hearing. Is this Court at this stage competent to entertain the defendant's request and grant it? Is it within the scope of the present application to decide whether this suit should be heard by High Court or District Court of Arusha?

Held: "As far as the present application is concerned, the defendant has no objection to it and gives what the applicant seeks. If it is so is it permissible to go beyond this application and consider the question of the correct court before which the present suit should be filed and make an order accordingly?" This question is beyond the scope of the present application and the court has no power at this stage to make any findings on it. Application granted.

142. Gregory Nikitas v. Blandyna Nikitas, Matrim. Cause 4-DSM-72, 4/7/72, Onyiuke, J.

This is a chamber application for directions in a matrimonial cause. The petitioner filed a petition for dissolution of his marriage with his wife on the grounds of desertion. The marriage was contracted in 1948 at the office of the Registrar of Marriages at Lushoto. Section 101 of the Law of Marriage Act, 1971, provides that "No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board and the Board had certified that it has failed to reconcile the parties.' There are certain exceptions which are not applicable to this case. Section 106(2) of he Act requires every petition for a decree of divorce to be accompanied by a certificate by a Board, issued not more than 6 months before the filing of the petition. The petitioner filed his petition for divorce unaccompanied y a certificate by a Board and without first referring the matrimonial dispute to a Board. Counsel for the petitioner /applicant submitted that Section 101 did not apply to this marriage. His argument can be summarized thus: - (i) The parties to this marriage were married according to Greed Orthodox rites. (ii) The Greek Orthodox religion is not a specified religion under Section 25 (2) of the Act.

(iii) The Greed Orthodox Church has not established a marriage conciliatory board and (iv) Therefore a marriage according to the rites of the Greek Orthodox religion falls outside the purview of Section 101 of the Act.

Held: (1) "The simple answer to that is that if the religion is not recognized then the marriage according to the rites of hat religion cannot be recognized and there is no marriage for the Court to dissolve. The Court can only dissolve a marriage which comes under the Law of Marriage Act. (2) "The contention was not borne out by the facts. The marriage certificate showed that the marriage was contracted in a Marriage Registry and in a civil form." (3) "It is doubtful, to say the least, whether it is correct to say that marriage contracted according to the rites

of the Greed Orthodox church is not recognized under the Law of Marriage Act. It appears to me to be a marriage in Christian form within the meaning of Section 25 (2) (b) which defines a marriage in Christian Form as a marriage celebrated in a church in the manner recognized by Christian faith or by any denomination of sect of that faith ……. Specified religion is defined by Section 2 to mean Christianity or a religion specified in an order made by Minister under Section 25. As the Greed Orthodox religion is a sect of the Christian faith it is a specified religion." (4) "Lastly the contention that the Greek Orthodox Church has not established a Conciliatory Committee for its adherents and therefore section 101 does not apply is unsound. Section 102(1) of the Act empowers the Minister to establish in every ward a Board to be known as a Marriage Conciliatory Board. Section 102(2) empowers the Minister where he is satisfied that any community in Tanganyika has established for itself a Committee or a body of persons to perform the functions of a Marriage Conciliatory Board and that it is desirable that such Committee be designated a Conciliatory Board for the purposes of that Act so to designate such Committee or body of persons. Acting under Section 102(1) the Minister by Government Notice No. 108 of 1971, appointed every Arbitration Tribunal established under the Tribunal Regulations 1969 as a Marriage Conciliatory Board for the area over which such Tribunal has jurisdiction. By Regulation 3 of the Arbitration Tribunals Regulation 1969(Government Notice No. 219 of 1969) a tribunal was established in every ward as delineated under the Local Government (Elections) Act 1966. Acting under Section 102(2) of the Law of Marriage Act the Minister by various Governments (elections) Act 1966. Acting under Section 102(2) of the Law of Marriage Act the Minister by various Government Notices published from time to time (e.g. Nos. 196, 211 and 245 of 1971) designated certain Committees or bodies of persons established by various religious communities as Marriage conciliatory Boards for such Communities. It is clear therefore that the fact that the Greed Orthodox community has not established a committee or that their committee has not been designated under Section 102(2) does not exempt the adherents of that religion

from referring their matrimonial disputes to the Arbitration Tribunals for their wards under Section 102(1) of the Act." (5) Petition rejected.

143. A. W. Mapugilo v. J.F.K. Gunza, Civ. App. 6-DDM-72, 30/6/72, Kwikima, J.
The appellant sought to obtain Shs. 2000/= from the respondent whom he alleged to have seduced, deflowered and enticed from

home his 15 year old daughter. The Mbeya Resident Magistrate with whom the claim was lodged dismissed it because, in his words, 'the plaintiff ……. failed to establish a cause of action."

Held: (1) "In dismissing the suit, the learned magistrate very rightly relied upon Abraham v. Owden (1971) H.C.D. n. 426, a case the facts of which are in no way dissimilar to those in the current case. Like the present case, Abraham's case hinged on the time-honoured Nyakyusa custom of KUPOSOLA" by which custom men used to enrich themselves by exacting penalties from adulterers and even those who deflowered or even supply fornicated with their daughters. The learned judge who decided the Abraham case hammered the final nail into the coffin of "LUPOSO" (i.e. the penalty payable upon "KUPOSOLWA) when he observed: "It could perhaps be justifiably argued that the law as it is does not provide sufficient protection to innocent girls who are glibly persuaded to go to bed with men who have no intention to marry them. But these are issues for which this court can provide not answer …… the law has spoken with a clear voice……. That no action lies in enticement or for loss of one's daughter's virginity." That, it is feared, happens to be the exact position in this case. The learned judge who dismissed Abraham's appeal was in much the same position as this Court is now. The law as it stands just does not afford aggrieved father any remedy." (2) "In his memorandum the appellant relies on the case of Saidi Sefu v. Aidan Mwambeta (1967) H.C.D. n. 180 in which Said, J. (as he formerly was held: "Damages can be claimed by the parents for injured feelings and for

the dishonour to the daughter and the family caused by the seducer." The report in the High Court Digest is so brief that one cannot tell what tribe Saudi and Aidan were. In this case it appears that customary law was applicable. That was why the learned Resident Magistrate relied on Abraham's case. Again it is hard to see how the decision in Haidi Sefu was arrived at in view of Rule 89 of the Customary law Declaration which does not support the ruling which was made in Saidi Sefu's case. In Abraham's case, my learned brother Mr. Justice Mwakasondo, had this to say about Rule 89; "From a proper reading of the above provision it seems to me that for an action of enticement (which in Kiswahili is "Kumshawishi msichana aliye chini ya miaka 21 aliye chini ya ulinzi wa baba yake ahame kwao na kukaa na mwanaume anayedaiwa, kinyumba)to succeed the plaintiff has to establish …. The following: (a) that the defendant enticed the girl who is his daughter, (b) that his daughter is or was under the age of 21 and (c) that the daughter was prior to the enticement living with him under custody. I would go further and add that the plaintiff must also show to the satisfaction of the court that the defendant entitled the daughter and took her away to live with him in concubinage (i.e. Kinyumba). In the present case it was found as a fact that the girl Keta was living with one woman called Mage during the time of her disappearance from home. The appellant failed miserably to show that the respondent was keeping Keta as his concubine and in this view I am reinforced with the African custom of bride price. An enticer who took a daughter in concubinage would deprive her father of the brideprice. He would at the same time be unjustly enjoying the girl's favours and services without paying for them as is ordinarily the case. To my mind, damages would only lie if the seducer enticed a daughter.

Into concubinage and no less. For this reason and without intending any disrespect to my senior colleague, I would accept Mr. Justice Mwakasendo's interpretation of the law as the more persuasive …. I would therefore hold that no

action lies on the grounds as presented by the appellant and dismiss the appeal." (3) "Not that this would be the only reason for my decision. There is another reason why I would not entertain this appeal. In the case of Kulthum Kara v. Yasin Osman, (1968) H.C.D. n.340, Georges C.J. (as he then was) held: "Under section 57 (1) of the Magistrates Courts Act, proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof" must ordinarily begin in Primary Courts unless the High Court grants leave for their commencement in some other court." As I have already said, this claim was preferred under customary law as can be inferred from the Mbeya Resident Magistrate's ruling. Otherwise the claim has no basis within the received English common law. If Osman's case is anything to go by, the suit was brought in the wrong Court. The Resident Magistrate had therefore no jurisdiction to try it without authorization by the High Court. In the result, the trial court acted without jurisdiction and the entire proceedings were null and void." (4) Appeal dismissed with costs.

144. Nikupala v. Kasambala, (PC) Civ. App. 21-DDM-72, 30/6/62, Mnzvas, J.
The appellant sued his father-in-law for the refund of bridewealth. Before divorce the appellant's wife had born him two children. The appellant's claim of 18 head of cattle and Shs. 180/= was reduced by the Masebe Primary Court to 4 head of cattle and Shs. 100/= in its exercise of original jurisdiction. The appellant's appeal against the original award was dismissed by the District Court. On appeal to the High Court.

Held: (1) "In dismissing the appeal, the learned District Magistrate relied on the provisions of ss. 528 and 54 of G .N. No. 279/1963. I agree with the District Court's decision that where children have been born in a marriage, the question as to how much of the dowry is to be refunded in the case of divorce is a mother to be decided by the court taking into account all the circumstances of the case." (2) "The court's discretionary powers under section 54 of the Government Notice have to be reasonably and judicially exercised, always taking

into account the degree of guilt in respect of each party." (3) "The appeal is incompetent and accordingly fails."

145. Salim Omari v. Jackton Ongea, Tanga Civ. App. 2-A-71; 31/7/72, Bramble, J.

The appellant gave the respondent permission to use part of his land. When clearing this portion the respondent not ire to the grass and in spite of precautions taken the fire escaped because of strong winds and burnt the whole of the appellant's shamba. The issue was whether the respondent was liable in damages in these circumstances.

(1972) H.C.D. - 153 –

Held: (1) "The learned Resident Magistrate relied on a passage by Biron Ag. C .J. in Rehmtulla v. The commissioner of Transport (1969) H.C.D. n. 293 which reads as follows ……. "It is, I consider, well established in law that to hold an occupier of premises liable in damages for fire breaking out on such premises, there must be positively established, negligence in his part." This statement of the law was induced by the Five Prevention (Metropolis) Act 1771, which provided that "no action, suit or process whatsoever shall be entertained or prosecuted against any person on whose house, chamber, stable, barn or other building or on whose estate any fire shall -------- accidentally begin." …… At common law a person was bound to make good any damage caused by a fire which started on his premises and moved to another. The Act quoted above restricted this absolute liability only in so far as a fire was accidental i.e. produced merely by chance or where the cause could not be traced. The passage in the judgment cited above was not a comprehensive statement of the law. The rule I Rylands vs Eletcher (1866) L.R. 1 Ex 265 still applies. There Blackburn J. said "We think that the true rule of law is that the Peron no for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does not do so, is prima facie

answerable for all the damages which is the natural consequence of its escape." There are exceptions to the rule in the case where damage is caused by an Act of God, default of the Plaintiff, or act of a third party at statutory authority. Subject to these exceptions if an occupier of lands starts a fire intentionally or by negligence he is under a duty at his peril to prevent it from doing damage to others." (2) "What was set up a defence was that the damage was due to an Act of God in that reasonable precautions were taken to confine the fire to the respondent's land but it was blown into the adjourning shamba. The learned trial magistrate considered this to be an Act of God. There was no evidence to show what the intensity of the wind was or that it was anything in the nature of a storm. An ordinary high wind is something quite usual or natural and the precautions taken should have been such as to anticipate a high wind. I consider, with due respect to the trial magistrate, that the circumstances did not show an Act of God as would absolve the respondent form liability. He was negligent in that he did not guard against a foreseeable eventuality and for this reason I allowed the appeal with costs."

146. Zuberi Gige v. The Returning Officer, Babati, and The Hon. Peter Marke, Misc. Civ. Cause 10-A-70, 8/7/72, Patel, Ag. J.

This matter arose out of an election petition under the Election Act, 1970, by an unsuccessful parliamentary candidate who is the present applicant. In the original petition, the returning officer was the respondent, and the successful candidate, Mr. Marke, was later joined as the second respondent. The petitioner lost his case and costs were awarded against him. The respondents bill of costs as accepted by the taxing master included (inter alia) instruction fees ostensibly paid to a state attorney who

represented the respondents. Moreover no bills or voucher were attached to support the disbursements claimed. The applicant now attacks the taxing master's decision.

Held: (1) By virtue of s. 132 (2) Election Act, 1970. The provisions of s. 45, First Schedule, Civil Procedure Code, relating to the awarding of costs, apply mutatis mutandis to election petitions. (2) Applicant's counsel submitted that a state attorney is not an "advocate" as defined by s. 2, Advocates Ordinance, Cap. 341, as "any person whose name is duly entered as an advocate upon the Roll". However "a state attorney is an advocate under section 3 of the Advocates Ordinance as he is entitled to practice as an advocate in the High court or any court subordinate there to provided he does so in connection with the duties of his office." (3) "The question arises whether Instruction Fees are included in the order of the court when it awarded costs to the respondent, who in the present Bill of costs is the Returning Officer and not the successful candidate ….. It is a fact that neither of the respondents paid any fees to the sated attorney who represented them at the hearing of the partition, who again is paid a salary by the Republic and he represented the Attorney General and normally represents the Attorney General in Courts. ….. Is the Attorney General or the Republic entitled to instruction fees amounting to Shs. 2,000/= when in fact this sum is not shown to have been spent by anyone to anybody? Or did the state attorney argue the petition as part of his normal duties? I refer to Para 585 of Halsbury's Laws of England, 3rd edition Vo, 14, on page 320-320. It says: "The Director of Public Prosecutions and his assistant or representatives are to be paid such allowances as the Treasury may approve for expenses for the purposes of Part 111 of the Representation of the Peoples Act 1949 other than his general duties of making inquiries into corrupt or illegal practices which he is informed have occurred and of instituting prosecutions which appear to be required. The costs incurred in defraying the expenses of the Director of Public Prosecutions incurred for those purposes including the remuneration of his representative are in the first instance, to be paid by the Treasury." The operative words have been underlined by me which are "expenses " "other than his general duties" and "costs incurred".

The word “expenses” suggests money actually spent and not “instruction fees.” As for “other than his general duties”, are not instructions to the state attorney, who is a representative of the Attorney General, to defend the petition and conduct the hearing of the petition a part of his general duties as a state attorney? The words “costs incurred” would mean money actually spent and not instruction fees. [Citing as the closest precedent R. v. Michael Mhuto, (1970) H.C.D. n. 212] ……. For these reasons, though the petition was dismissed with costs, this order for costs does not and cannot include instruction fees as claimed by the respondent and the respondent and the respondent is not entitled to it.” (4) “Now I will deal with the second leg of Mr. Kirrita’s arguments which is on disbursements claimed. The main claimed were attached to the said bill of costs as required by Rule 53 of the advocates Remuneration and Taxation of costs Rules, Cap. 9 Vol. 1 of the Applied Laws ….. Going through the bill of costs it can be seen that not only has the respondent failed to submit supporting bills and vouchers

but the amount claimed as disbursements is not correctly itemized ….. Moreover under Rule 60 of Cap. 9 it is mandatory for an advocate to make a signed statement when claiming witnesses’ expenses containing many details … The taxing master just did not have sufficient material before him to enable him to decide which disbursements to allow and how much and in respect of whom …. This Court as a rule does not interfere with the decision of the taxing master on a question of fact or amount but where the taxing master has not had reasonably sufficient material before him or has not taken into account matters that he should have considered, this court can order a Review. For this I refer to Halsbury’s Laws of England, 3rd edition, Vo, 14, paragraph 821 on page 838-439. For these reasons I order that a Review of Respondent’s Bill of Costs as regards disbursements only be conducted before another taxing master.”

147. Leon Van Der Watt v. The Commissioner General for Income Tax, Misc. Civ. App. 34-DSM-71, 11/7/72, Mwakasendo, J.

This is a preliminary point arising from six consolidated appeals brought under s. 101 (1)(b) (ii), East African Income Tax Management Act, Cap. 24. The appellant, Mr. Van der Watt, is acting in his capacity as the receiver for the Permanent Housing Finance Comp. (T) Ltd., and the Tanzania Legal Corporation purports to appear on his behalf. The respondents object that the said Corporation has no locus standi in prosecuting the appeal on behalf of the appellant.

Held: (1) "It is not disputed that the Tanzania Legal Corporation makes an appearance in this matter by virtue of paragraph 4 (1) (a) of the Tanzania Legal Corporation (Establishment) Order, 1970, G. N. No. 32 of 1971 which enjoins it 'to provide legal service to parastatal organizations on such terms and conditions as may be agreed upon between the Corporation and the parastatal organizations'. It is however contended by the respondent that the appellant, Mr. Leo Biljon Van Der Watt, in his capacity as receiver or otherwise is not such a parastatal organization as may properly avail itself of the services of the Tanzania Corporation in terms of the aforesaid Order. The aforesaid Order …… envisages only body corporate as the proper entities which could utilize the legal service provided by the Tanzania Legal Corporation. In cases where the entity concerned is a body of persons whether corporate or unincorporated, sub paragraph (c) of paragraph 2 of the Order provides that such a body of persons must be designated by the Minster responsible for legal affairs by Notice in the Gazette to be a parastatal organization for the purposes of the Order. With respect, I find it difficult to resist the force of Mr. Bishota's [respondent's counsel] arguments on this matter But Mr. Mukami of the Tanzania Legal Corporation argues equally forcefully that the construction of the order as canvassed by the respondent is the wrong one. It is submitted by him that the Tanzania Legal Corporation, who are advocates by virtue of the aforesaid Order, are duty bound to safeguard the interests of their clients, in this case, the permanent Housing Finance Company (T) Ltd., which

as commonly admitted, is parastatal organisation … Mr. Mikami argues that as the sums of money which would be paid to the Commissioner General of Income Tax by the appellant, in the event of this appeal failing, are the same sums as would be paid by him in his capacity as a receiver to the Permanent Housing Finance Company (T) Ltd., the Tanzania Legal Corporation as legal Counsel to this parastatal organisation are entitled to appear in this matter in order to see that their client's interests in the matter are not adversely affected …. I must clearly confess my inability to understand how a client – advocate relationship is created between the appellant and the Tanzania Legal Corporation. While it is under stand able that the Permanent Housing Finance Company (T) Ltd. should be most interested in the result of these proceedings, I cannot see how their interest in the matter would entitle them to appear before this Court by advocate or otherwise least of all, can I comprehend how these same advocates while claiming to act for the Permanent Housing finance Company (T) Ltd can at the same time act for or appear on behalf of the appellant receiver. It is abundantly clear in my opinion, that if one puts a proper and reasonable construction on the relevant provisions of the Tanzania Legal Corporation (Establishment) Order, 1970, one would inevitably reach the sound and logical conclusion …… that the appellant in this case is not and can not be an entity which can avail itself of the services rendered by the Tanzania Legal Corporation." (2) Preliminary point upheld.

148. David Sasson & Comp. Ltd. v. Navichandra Patel and Others, Civ. Case 184-DSM-71, 13/7/72, Mwakasendo, Ag. J.

This was an application upon affidavits brought under rule 3 of Order 35 for leave to appear and defend a suit upon a bill of exchange. The applicant advanced various arguments to show that the bill of exchange did not concern him. In the

course of deciding that the case should go to trial, the court made the following observations on its role at this stage.

Held: (1) “My role in these proceedings is fairly limited. It is simply to decide upon the affidavits filed by the applicant, whether there is disclosed any issue fit to go for trial and no more. [Citing Jacobs vs. Booths Distillery Company (1901) 85 LT. 262] …… Now, in the instant case and upon the affidavits filed by the applicant, can this Court say to the applicant, “You have no defenced whatsoever against the plaintiff’s claim.” I do not think so. It would clearly appear from the arguments canvassed by both counsels that in this suit there is more than one triable issue that should be allowed to go before the appropriate tribunal. What chances the applicant has of succeeding in the end, is not for me to say ….. (2) Application granted.

149. Lemayani v. Mhavi, Civ. App. 136-A-71, 15/7/72; Bramble, J.

This was second appeal against a judgment of a Primary Court awarding possession of a parcel of land to the respondent. The appellant’s case was that his father moved to the land in 1958 and gave it to him as his inheritance in 1967. He stated that, according to custom, inheritance is given in the presence of the whole family but no one was present in this case. The respondent gave evidence that he lent the land to appellant’s father in 1960. The later asked for an extension of the term in 1964 and it was granted; he died in 1967 and the appellant was requested to vacate. The respondent was supported by several witnesses. Both the lower courts found the facts as the respondent alleged.

Held: (1) “The only point taken at the hearing of this appeal was that since the appellant was in possession for more than thirteen years he should not be disturbed. He did not prove that he inherited the land legally from his father so that the period of his father’s possession could count in his favour. Moreover, the trial court found that the father went into possession in 1960 so possession

adverse to the respondent was not more than eleven years, and this was not [long enough] for [appellant] to establish his claim." (3) Appeal dismissed with costs.

150. Mandi s/o Mtaturu v. Mtinangi s/o Mtinangi, (PC) Civ. Applic. 2-DDM-72, 24/5/72, Mwikima, Ag. J.

The appellant originally sued the respondent for recovery of brideprice and obtained judgment ex parte in the Merya Primary Court. When it was being executed, the respondent went to the Singida District Court requesting leave to appeal out of time, which proceeded to decide the appeal on its merits in favour of the respondent.

Held: (1) "In its error the Singida District Court embarked on deciding the appeal on its merits without first determining whether the delay was excusable or not. The decision it ….. Made reviewing the original court judgment was therefore made without jurisdiction. The appeal court would have been competent to look into the merits of the appeal only after deciding whether or not to grant the respondent leave to appeal out of time." (2)"Furthermore the application was brought prematurely since the only way to seek to avoid a judgment ex parte is to apply to the very court which made the order. In this case, if the respondent was aggrieved by the ex parte judgment against him, he had to approach the Merya Primary Court and convince it that he had sufficient cause to be absent at the trial and if he succeeded, then the matter would be determined in the same court without resorting to a court of appeal." (3) "In the event therefore, the Singida District Court decision is overruled and set aside. The original Judgment ex parte will hold until the Merya Primary Court has decided whether to set it aside and hear the parties afresh or not.

151. Jonas Saul and others v. R., Crim. App. 244-M-71, 22/1/72, Kisanga, Ag . J.

The appellant in question were convicted of being members of an unlawful society c/s 20, Societies Ordinance. In their defences they claimed that they belonged to the Witnesses of Jehovah, whereas the particulars of the charge alleged that they were members of the Watch Tower Bible Society.

Held: (1) “It is clear that the appellants were charged under the correct section i.e. section 20 of the Societies Ordinance for being members of an unlawful society. Under Government Notice No. 287 of 1965 both the Watch Tower Bible Society and the Society of Jehovah’s Witnesses are made unlawful, so that the appellants were equally guilty for being members of the Society of Jehovah’s Witnesses. Indeed there was an irregularity in the trial in that the moment it became apparent on the evidence that the appellants were members of the society of Jehovah’s Witnesses the particulars should have been amended to accord with the evidence by alleging that the appellants were members of the society of Johavah’s Witnesses. I am satisfied, however, that this irregularity did not occasion a failure of justice because the conviction was for an offence created by the same Section 20 of the societies Ordinance under which the appellants were charged. Indeed the appellants Jolo Kiswanta and Sweet Bert Kiswanta while admitting membership of the society y of Jehovah’s Witnesses contended that they did not know that that society was unlawful because no notice was published by the Government to that effect. Thus even if the particulars had been amended to accord with the evidence, it is clear that these appellants had absolutely no defence and this, to my mind, increasingly adds to the view that the failure to amend he particulars to accord with the evidence cannot have occasioned any failure of justice.” (2) “I would therefore uphold the convictions of these three appellants and the sentences imposed on them cannot be said to be excessive.”

152. Dominico Simon v .R., (PC) Crim. App 141-M-71, 4/2/72, El-Kindy, J.

The appellant was convicted of house-breaking and stealing c/ss 294 (1) and 265, Penal Code. During the course of his trial the two original assessors were replaced by others who did not hear all the evidence presented.

Held: (1)"Section 8 of the Magistrates Courts' Act. Cap. 537, as amended by S. 2 of the Magistrates' Courts (Amendment) Act, 1969, being Act No. 18 of 1969, provides that trial in primary courts shall be with at least two assessors. In this case the trial commenced with Gabrial and Blasio as assessors. These assessors heard the whole evidence, but on an adjourned date John and Paulo sat as assessors and it was recorded that the appellant did not wish to have the witnesses, who gave evidence, recalled.

This may have been so. But can it be said that the court was properly constituted by a total change of assessors? The Magistrate Courts Act, Cap. 537 has not provided for such an eventuality. It has, however provided, that the trial can proceed to conclusion with one assessor if the other assessor was unable to attend and a conviction on such basis is not to be set aside because of this. It is understandable why it should be so in such a case …. There is not total break of continuity. But in the case, there was a total break, and the fresh assessors had not had the valuable advantage hearing the witnesses although they may have heard the summing up of the case. Sometimes, and I cannot say that this case was not one of them, the demeanour of witnesses and what impression they make in a court can be the determinant factor ……in a case. Hence …..the necessity of the Court listening to all the witnesses whenever that is practicable. In my view, therefore, the fresh assessors could not be substituted for the original assessors even if the charged person raised no objection. No reason appears on record why the original assessors did not appear. In the absence of the original assessors, the trial court was not properly constituted as required by section 8(10 of the Magistrates Court's Act, Cap. 537, and therefore the trial of the appellant was a nullity (see Kiwelesi v. R. (1969) E.A. 227)." (2) "In normal circumstances I would have ordered a retrial, but for a number of reasons I do not propose to do so. In the first place, even if the court was properly constituted, the evidence on record would not have sustained his conviction. Secondly, the appellant has

almost completed serving his term of imprisonment and it is highly unjustified to put him again through the null of trial. And that the value of stolen goods was so negligible." (3) Appeal allowed.

153. R. v. Masharubu Ntarima, Crim. Rev. 109-M-71, 28/2/72, El-Kindy, j.

The accused was convicted of non-attendance as a witness c/s 150(1), Criminal Procedure Code. He was summoned to give evidence in a criminal case on a certain day, but did not attend. When charge with this failure he replied "I failed to turn (up) I admit, but I had a reason. The reason was that I was attending a funeral for burial of my mother." This was entered as a guilty plea, and appellant was convicted and given an absolute discharge. S. 150(1), Criminal Procedure Code, sanctions non-attendance as a witness "without lawful excuse."

Held: "In my view, the accused's statement in reply to the charge left no reasonable doubt that the accused was not pleading guilty as he had an excuse which was, in the circumstance, lawful. As the learned Senior State Attorney rightly pointed out a person who has lost his mother would not be expected to attend to court when funeral proceedings were going on as he would be expected to be present. The purported plea was therefore null and void, and the conviction is accordingly quashed."

154. R. v. Amina @ Mohabe d/o Nyanguru, Crim. Case 30-Tarime-72, 10/6/72, Kisanga, J.

The accused was convicted of robbery with violence and sentenced to 7 years' imprisonment under s. 5(b), Minimum Sentences Act, 1972. Unsure as to the propriety of the sentence, the magistrate referred the record to the High Court for opinion as to whether sub-sections 5(b) and 5(c) of the Minimum Sentences Act are dependent on sub-section 5(a).

Held: "Sub-section 5(a) means that where a person is convicted of a scheduled offence and has a previous conviction of the nature as described by

that subsection, then in passing sentence the court must disregard the minima prescribed for various offences in section 4 and impose a minimum sentence of 5 years' imprisonment. Similarly subsection 5(b) means that upon a conviction for robbery the court must disregard the minima prescribed for the various offences in section 4 and impose a minimum sentence of 7 years imprisonment; and likewise subsection 5(c) means that upon a conviction for cattle theft the court must impose a minimum sentence of 5 years imprisonment. It seems clear to me that each of these there subsections (a), (b), and (c) is to be read independently of each other, and there is nothing to suggest that subsection (b) and (c) should be read in conjunction with subsection (a). In other words upon a conviction for robbery the court must impose a minimum sentence of 7 years in any event, and it is immaterial whether or not the prisoner has a past record."

155. Gerald Karoli and another v. R., Crim. App. 500-M-71, 24/3/72, Kisanga, Ag. J.

The appellants who were charged jointly with others who were acquitted were convicted of breaking into a building and stealing there from c/s 296(1), Penal code and breaking into a building with intent to steel there from c/s 297, Penal Code. They allegedly broke into the office of a petrol station where they were employed, and took away some keys. With these, they opened the store of the petrol station, removed 53 tins of kerosene, and sold them to the 3rd accused, but did not account for the proceeds of the sale to the management. They I were convicted on the sole evidence of PW7 who said he was visiting the station at the time and witnessed the transaction. Two other employees who were at the station at the time were not called as prosecution witnesses and appear to have numbered originally among the accused. The 3rd accused was acquitted because he produced a receipt for the sale and there was doubt as to whether he knew of its irregularity. He failed to identify the appellants as hose who had sold the kerosene, saying it was other workers at the petrol station.

Held: (1) "To my mind the learned trial magistrate very properly found that the explanation of the third accused raised some doubt as to his guilt and

therefore acquitted him accordingly. It seems further to me that that same explanation considered together with other evidence in the case as a whole was sufficient to cast a reasonable doubt as to the guilt of the

appellants. The third accused said that the kerosene was sold to him not by the appellants but by other persons at the petrol station …….. PW 7 said that in addition to the appellants there were two other employees at the petrol station. Thus his evidence is consistent with that of the third accused when he said that he found on duty at the petrol station some two people other than the appellants; and therefore the possibility is created that the kerosene may will have been sold by the said two people who were on duty working at the station at the time and not by the appellants who were then off duty during the lunch break ….. What is really puzzling is why were these two people not called as witnesses? ….. Had they been called it is not possible to say now whether they would support the story as given by PW 7 or by defence". (2) "At this stage Mr. Rahim who appeared for the Republic at the hearing of these appeals raised an interesting point. He submitted with great persuasion that it would be competent for this court acting under section 322(1) of the Criminal Procedure Code to hear additional evidence from the said two employees even though this would amount the filling a gap in the prosecution case and in support of that submission he cited the case of Francis Mtunguja v. R. (1970) H.C.D. 181. In that case the question before the court was whether the prisoner had deposited with the bank the unpaid salaries of his fellow employees. George c. J. stated the present law as laid down by the Court of Appeal in the cases of R. v. Sirasi Bachumeira (1936) 3 E.A.C.A.40 and R. v. Yakobo Mayego (1945) 12 E.A.C.A which is to the effect that additional evidence may be ordered if it was required merely to elucidate some evidence or matter which is already on the record, but not for the purpose of filling a gap in the prosecution case. Commenting on this law the learned chief Justice observed that this interpretation tended to narrow the

powers conferred by section 332 of the Criminal Procedure Code. He considered that it was desirable that the powers conferred by that section should be given the widest possible interpretation. Having made that observation, however, he held that the case under review fell within the narrow interpretation as laid down by the court of Appeal, and hence he called for additional evidence which fully supported the persecution case and consequently he dismissed the appeal. On the face of it the position as remarked by the learned Chief Justice is not free from difficulty. Admittedly it is desirable that section 322 should be construed widely so as to enable the appellate court to apply it in order to ensure the acquittal of the innocent and the conviction of the guilty. But to my mind the practical difficulty that arises is where does one stop? In other words although a first appeal from the subordinate court is in law an appeal by way of re-hearing then should the first appellate court admit every kind of evidence which was omitted by the prosecution during the first hearing? While I think that the power conferred by section 322 ought to be exercised with care, I also think that the court of Appeal in the case of Mohamed Hussein v. Price Controller (1943) 10E.A.C.A. 72 does provide some guide as to how the court should approach the whole matter. On page 74 of the report the judgment reads: “Every case of this kind has to be considered on its own particular facts and circumstances

and the courts should refrain from laying down a hard and fast rule which might result in miscarriage of justice in individual cases”. It is pertinent to not that the court of appeal was distinguishing the case from its own earlier decision in the case of R. v. Sirasi Bachumira cited above in which it was held without any qualification that additional evidence should not be called for fill a gap in the prosecution case. Thus it would seem that the interpretation in Mohamed Hussein’s case of the powers conferred by section 322 allows the court considerable latitude and flexibility. The court is required to consider the fact and circumstances of each individual case and to my mind, the primary question

would be to determine what facts and circumstances exist in the particular case which would warrant taking additional evidence. Against that background therefore perhaps one may attempt to reconcile the interpretation of the powers under section 322 by the court of Appeal and the observation made by Georges C. J., and to say that the learned chief Justice was not expressing any views which were basically different from those of the Court of Appeal but that what he was really saying was that in considering the facts and circumstances of each particular case the court should place a broad construction on what would amount to facts and circumstances which would justify taking additional evidence in the matter." (3) "Having said that I now turn to consider whether, as urged by Mr. Rahim, this is a fit case in which to take additional evidence of the said two employees. It is quite clear that these two employees are suspects in this case. The third accused said that they were originally charged. This appears to be supported by the evidence of the second appellant who said that originally two other persons were jointly charged in the same information but the charge was withdrawn against those two persons. It is therefore clear that the two employees are suspects who have been charged with these offences, and as such they would have every reason to tell lies in order to shift the blame on the appellants and to safeguard their own position as employees of the petrol station. Thus even on the widest construction possible I think that there are no facts or circumstances which would justify taking additional evidence in the matter. On the contrary I think that such a course might result in a failure of justice in that it may lead to the conviction of the innocent. I therefore think that the court should not direct the taking additional evidence where such additional evidence might lead to the conviction of the innocent, and accordingly I decline to make an order for taking additional evidence in this case." (4) "Considering all the circumstances of the case the prosecution evidence was far too thin to support the convictions. The appeal is therefore allowed……" (5) "There is one other matter which requires mention here. This is in respect of the procedure followed in connection with the third accused who was acquitted. At the close of the prosecution case the learned trial magistrate addressed the accused in terms of section 206 of the

Criminal Procedure Code and in answer to the court he advocate for the accused said that the accused had no witnesses to call, and this was recorded on behalf of the accused. Later on during cross-examination the prosecution asked the accused

If he did not tell the court that he had no witnesses to call. Whereupon the advocate for the accused said that what he said to the court on behalf of the accused should not have been recorded as being the reply of the accused, and therefore he contended that the accused had not answered the question at all. The learned trial magistrate however, held that the answer by the advocate on beheld of his client could be and was properly taken as the answer of the prisoner himself. I find it rather difficult to agree with this view. Section 206 of the Criminal Procedure Code provides: - [the court then proceeded to quote the section in full]. All the references to the accused in that section are to the accused person personally and not to his counsel. For my part therefore I find nothing in that section which would be construed to mean that any reply given under the section may properly be given by an advocate on behalf of his client. Of course the advocate has a duty to give the best guidance and advice to his client at every stage of the proceedings, and indeed it would be competent for him to advise whether or not to call witnesses. But it seems that he actual reply under section 206 must come from the prisoner himself and where, as in this case, counsel intimate to the court that the accused does not wish to call witnesses then the court must ask the accused to confirm it. For, it is possible for a prisoner to disagree with his counsel on whether or not to call witnesses for the defence, and where this happens I would be inclined to think that the prisoners own choice should prevail. In the present case therefore it is not known whether the prisoner wanted to exercise his right to call witnesses and to the extent that that position was not ascertained I think that there was an irregularity. It is now not necessary to consider whether that irregularity was fatal because the

accused was acquitted anyway, but I think that in a proper case such an irregularity may well be considered a sufficient ground which would warrant an appellate court to interfere."

156. Matele s/o Lelego v. R. Crim. App. 147-M-71, 24/3/72, Kisanga J.

The appellant was convicted of cattle theft c/ss 268 and 265, Penal Code and was sentence to 3 years' imprisonment without strokes of corporal punishment as he was above 45 years of age. He has now appealed. The complainant (PW1) said that one night his cattle numbering 40 were stolen. On the following day they traced the foot marks and they were joined by police in this search. They eventually came to the home of PW4 where they found a herd of cattle form which PW1 identified 4 of his stolen cattle. PW4 testified that the cattle in question were brought to his home at night by the appellant and two other persons whose names he also mentioned and that they told him that they bought them at an auction. When the police arrived at his home during the investigation the appellant was present but ran away and escaped as he saw the police car approaching. The appellant in his defence denied the charge. He said that the cattle were stolen by other people, and he mentioned some of them. In answer to the court he said that he mentioned the thieves to PW3, the Village Chief, in the presence of PW4.

Held: (1) "Mr. Rahim who appeared for the Republic did not seed to support the conviction. He submitted that the only evidence implicating the appellant is that of PW4. But since PW4 was found in possession of the cattle, he was a person with an interest of his own to serve in the matter and therefore his evidence required corroboration. There was no such corroboration and therefore the conviction was bad. Mr. Rahim also cited the case of Dengwa Masiku v. R. (1967) H.C.D. n. 454 in support of this submission. I agree that where a witness is shown to be a suspect then his evidence would require corroboration. But it

should be noted that it is not in every case that a witness will be a suspect merely because he is found in possession of the stolen property. In some cases possession by a witness of the stolen property may be quite innocent, and where on full consideration of all the circumstances it is shown that the witness was not a suspect then it is clear to me that there would be not basis for applying the rule in Dengwa's case mentioned above because in such circumstances the witness is not, for purposes of the rule, a person with an interest of his own to serve in the matter". (2) "It would seem that the facts of the preset case do not bring PW4 within the rule in Dengwa's case. PW4 himself said that the cattle were brought to his home by the appellant and two other persons who told him that they bought them from the auction. The appellant in his defence alleged that he knew the thieves, and he mentioned some names. He necessarily excluded PW4 because he does not mention his name as one of the thieves, and also because according to him he mentioned the names of the thieves in the presence of he Village Chief (PW3) and PW4 himself. This to my mind completely clears PW4 because since the appellant knew the thieves but he does not include PW4 cannot be a suspect; if he were then at least the appellant would have mentioned him. Thus I am satisfied that PW4 was not a suspect and consequently the need for corroboration of his evidence would not arise." (3) "The complainant (PW1) adequately identified the cattle and the evidence of PW4 …..Sufficiently implicates the appellant with the offence,, and the sentence imposed is the minimum prescribed by law. In the result the appeal is dismissed in its entirety.

157. Rule s/o Kimwana v. R. Crim. App. 14-DDM-72, 4/4/72, Mnzavas, J.

The appellant was charged with cattle-theft but convicted of receiving the cattle knowing it to be stolen c/s 311(1) of the Penal Code. The complainant's three head of cattle were stolen from his boma in September 1970; in July 1971 one of the animals was found in the boma of one Momve who gave evidence that it had been brought to him b the appellant for safe keeping as there was an epidemic among the cattle in his, appellant's village. The appellant denied that he had given the animal to Momve. The animal was not produced before the trial Court.

Held: (1) “On the facts Momve was person who had an interest of his own to serve …… In Kenneth Frank Prat v. R. (1960) 44C.A.R. 83, the Court dealing with a similar situation

had this to say: ‘Where it appears that a witness, whether a co-prisoner or a crown witness, may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence …..Whether the witness can properly be classed as an accomplice or not’. I agree with the Republic that there was sufficient confirmatory evidence of Momve’s testimony that it was the accused who sent complainant head of cattle to his homestead”. (2) “Production of alleged stolen property can only b dispensed with when there is other cogent and sufficient evidence regarding identification of the property and where the accused does not challenge the description as to identification given by prosecution witnesses ……. As there was sufficient identification of the head of cattle by the complainant as well as complainant’s neighbours and this evidence has not been challenged by the accused. Production of the head of cattle was not necessary”.

158. R. v. Sylvester s/o Kasigara, Crim. Rev. 9-M-72, 22/3/72, Kisanga, Ag. J.

The accused was charged with malicious damage to property contrary to Section 326 (1) of the Penal Code. When he appeared in Court the Trial Magistrate formed the opinion that he was of unsound mind and consequently incapable of making his defence. Acting on the provisions of Section 164(1) of the Criminal Procedure Code he permitted the prosecution adduce evidence in support of the charge. At the close of the prosecution case he held that a case was made out against the accused. Then he proceeded to inquire into the unsoundness of mind of the accused and for this purpose he committed the accused to Kahama Government Hospital for observation. He went on to say that because the

accused had not relatives or proper persons to take care of him the accused should be remanded in custody pending receipt of the medical report. The case was then mentioned several times and at the last occasion a report from the District Medical Officer was received in evidence which shows that the accused was of unsound mind. Pursuant to this report the Trial Magistrate ordered the accused person be detained at Kahama Prison and that the record be transmitted to the Minister for his further directions.

Held: (1) "It seems that the correct procedure was not followed when ….. The Trial Magistrate remanded the accused in custody. The law applicable at that stage is contained in section 164(3) of the Criminal Procedure Code which provides; - 'If at the close of the evidence in support of the charge it appears to the court that a case has been made out against the accused person it shall then proceed to inquire into the fact of the unsoundness of mind of the accused and for this purpose may order him to be detained in a mental hospital for medical examination or, in a case where bail may be granted, may admit him to bail on sufficient security as to his personal safety and that of the public and on condition the submits himself to medical examination or observation by a Medical Officer as may be directed by the Court.' On reading that sub-section it seems clear that where the trial Magistrate in

the exercise of his discretion decides not to release the accused on bail but to detain him for the purpose of the medical examination then he can only order the detention of the accused in a mental hospital. There is nothing in that subsection which appears to authorize the detention of the accused in a remark prison during such medical examination. I am therefore of the view that the order of the trial court remanding the accused in custody during such medical examination was irregular. However, I do not think that this error was fatal. It did not occasion a miscarriage of justice ……" (2) "It should be noted that the trial Magistrate after finding the accused to be of unsound mind, properly acted under Section

164 (6) of the Criminal Procedure Code and remanded the accused in custody. For, that sub-section authorizes him to order the detention of the accused in safe custody in such place and manner as he may think fit. He also properly transmitted the record of the proceedings to the Minister".

159. Juma Mndewa v. R., Crim. App. 291-M-71, 11/3/72, El-Kindly, J.

The appellant, presumably on medical grounds, wished to retire from the service of his employers, East African Railways Corporation. He was told he would have to obtain a medical certificate. He persuaded one Dodo, whom he gave 20/=, to pass himself off as the appellant and report for medical examination with a sick sheet in the appellant's name. Dodo did so representing to the medical officer that he was the Juma Mndewa and was admitted to Hospital with "advanced bronchitis". The appellant was charged and convicted of attempting to procure a certificate by false pretences c/s 309 of the Penal Code.

Held; (1) "There was no false representation [by the appellant] at all, whether to the authority – meaning the East African Railways Corporation or to the hospital. The appellant was not the one who faced the doctor. The one who faced the doctor was indeed sick". (2) "Conspiracy to commit a misdemeanour c/s 385 of the Penal Code and willfully procuring or attempting to procure a certificate by false pretences c/o 309 of the Penal Code are misdemeanours. In the latter offence the maximum term of imprisonment is one year, while in the former offence the maximum term of imprisonment is unspecified. Therefore according to section 35 of the Penal Code the maximum would be a term of imprisonment not exceeding two years or a fine-unspecified-or both ……. It appears that this Court cannot substitute a conviction as it was urged, on the well-established principle that a conviction for a serious offence cannot be substituted for a minor offence". (3) Appeal allowed and conviction quashed.

160. Jumanne s/o Mohamedi and another v. R., Crim. Sass. 217-M-71, 1/3/72, El-Kindy, J.

The accused were charged with murder c/s 196 of the Penal Code. Evidence was given of a confession made to a TANU Youth Leader and of a statement made by the deceased in hospital to a Police Officer after the assault on him and five days before he died.

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Held: (1) “Having examined the constitution of the TANU Youth League produced to this Court by the District Secretary of the TANU Youth League, I am satisfied that members of the TANU Youth League do not have powers of arrest nor are they supposed to act as police officers. In the circumstances I find that they have powers of arrest similar to those of ordinary citizens and therefore a confession to them would be admissible in law”. (2) “A dying declaration needs material corroboration as a matter of practice and not as a matter of law. In my view, although I do not find that there is any need of corroboration, I find corroboration in the evidence of Saudi Mkumbi. Some corroboration is also found in the fact that the deceased was found 5 paces from the house of the accused …….. Repetition to other witnesses is evidence of consistency only but re-in forces the dying declaration”. (3) The evidence, however does not establish either murder or manslaughter. Accused convicted of common assault and sentenced to one year a piece.

161. R. v. Ahmedi Panju and another, Misc. Crim. Cause 5-M-72, 8/4/72, El-Kindy, J.

This is an application for bail pending trial. The applicant, Ahmed s/o Panju, was charged together with another (herein after referred to as “co-accused”) with the offence of removing property under lawful seizure c/s 118, Penal Code. The charge alleged that they had jointly remove 400 tins of cooking oil and 1,400 hides from Tarime Police Station, and that these goods had been lawfully seized. Both accuseds denied the charge. The applicant’s co-accused was charged alone for such an offence on 19 February 1972 when he was remanded in

custody, but on 26 February 1972, with the positive effort of the prosecution, he was released on bail upon signing a bond of Shs. 1,000/= with two sureties each for a similar amount. On 2 March 1972, the Magistrate dealt with the applicant's bail. The applicant was then unrepresented. He held that the appellant could not be granted bail because "Accused No. 2 has no surety". The applicant was accordingly remanded in custody to 17 March 1972. On 11 March 1972, Mr. Tukunjoba appeared for the applicant as well and he was brief in his bail application having regard to what the trial Court had already said on the 2nd of March 1972. The prosecution raised objection to bail because (a) the State Attorney from Mwanza said objection should be raised, (b) that the case was serious as it involved property worth Shs. 60,000/=, (c) the "Accuseds" were influencing witnesses to move away and therefore it was a problem to get the witnesses together. The trial court held that the reasons given wee sufficient to deny bail, and it was accordingly withheld. A third attempt was made on 17 March 1972, When Mr. Sandhu, advocate, appeared for the applicant. The objection was based as follows. That the applicant "will" be charged with another offence. "Others" too will be joined. The applicant will interfere "with other suspects who have not been arrested hither to". It was no longer alleged that the applicant will interfere with witnesses. In support of the application, it was argued that the applicant was a permanent resident of Utegi village that it was unlikely that he would abscond. It was submitted that the fact that the applicant "will" be charged with "others" is another speculation

It was argued that the allegation of "interference" was not substantiated as it should and could have been done if it had any substance. It was said that the applicant was an old man. His age, in the charge sheet, is given as 51 years. That keeping him in remand does not prevent him meeting people. In other words, the applicant could meet people if he wanted to irrespective of where he was. It was also alleged that the applicant was sickly although it was not

substantiated. It was further argued that if bail could be granted to co-accused, there was no reason for the applicant to be denied, and that it was "unfair" that one person should be granted bail while the other is denied it. The prosecution in reply alleged that as the applicant was near the border he could escape to Kenya. The Magistrate gave a short written ruling in which he refused to grant bail because the applicant was likely to escape.

Held: "It is well established that the test to be applied is whether the person to be granted bail would appear to take his trial if he granted bail ….. Having regard to the test to be applied in such cases, I take into account that the offence for which the applicant is charged is a felony and carries with it a maximum term of imprisonment for 3 years. The learned Magistrate did not think that it was a serious offence as it can be gathered from the bail terms made in favour of the co-accused. I cannot see myself justifying holding a different view. These goods, so I was told from the bar, were taken from the Police Station at Tarime. Having regard to the very nature of the alleged goods – 400 tins of cooking oil and 1,400 hides – it is really suspicious as to how such goods could be taken out of Police Station without their immediate knowledge. This takes me to the very nature of investigations involved. If the particulars are what they are, then the investigation of the case should be completed easily as the majority of witnesses would be Police Officers. Such being the case, the investigation of this case should not have taken such along time. It is also a factor to be taken into account that the co-accused is on bail and as I have already stated no reason was given for such a discriminatory distinction. Both accuseds have equal reasons or temptations to escape …. It is also a factor to be taken into account that so far the value of the alleged removed property is unknown. As for the allegation of interference with witnesses, I would say that is not substantiated. It should not have been difficult to do this if such an allegation has any base. The investigator could have sworn an affidavit explaining what he has done and who he had contacted and what had been the results so far. Before any one can say there would be interference with vital witnesses, at least some facts should be led to the court otherwise it is asking the Courts of Law to speculate. (Citing:

Bhagwanzi Kakubhai v. R., 1 T.L.R. 143]…. The applicant is alleged to be 51 years and he has been in custody since the 2nd of March, 1972. He is living at Utega village in Tarime area. I agree that the most important factor to be taken into account is the fact that his residential area is near the borer with the Republic of Kenya but his by itself is not a sufficient ground for denying bail. Having regard to all these matters, I exercise my discretion and grant bail to the applicant on following terms: (1) That the applicant should deposit cash in the sum of Shs. 2,000/= with this Court,

(2) That 2 sureties should sign a bond of Shs. 2,000/= each; (3) That the applicant should report at the Police Station, Tarime every day at 8.30 a.m. and 6 p.m. Upon complying with these terms the applicant should be released from remand custody."

162. Piru Bhahram Mohamed v. R., Crim. App. 56-DSM-72, 12/4/72, Mwakasendo, Ag. J.

The appellant was convicted on four counts alleging breaches of various provisions of Labour enactments. The learned judge described the charges as "so badly drafted as to be almost incomprehensible."

Held: (1) "[The fifth count] alleges failure to prepare or cause to be prepared and maintained a record of Oral Contract of service in respect of an employee contrary to section 35 (1), (2) and (3) of the Employment Ordinance, Cap. 366 ….. [In Mambo Shoor Bar v. R. (1971) H.C.D. n. 230] my learned brother Onyiuke, J. said at page 3 of his judgment: 'Coming to count I of the charge there appears to be a case of duplicity. 3 separate offences were lumped together in one count. Failure to prepare or maintain or issue a copy of an oral contract is each a separate offence. The charge as it stood must have gravely embarrassed the appellant …..' I entirely agree with my learned brother that the section under which the appellant in this case was charged creates not one but

three separate offences which must be preferred separately if the prosecution wish to prosecute an accused person on all three, although he need for this course of action would rarely arise in practice".(2) "Looking at the facts of the present case I cannot see that there is anything to distinguish the present case from [D.P.P. v. Gymkhana Club Arusha Criminal Appeal 411 of 1964 and D.P.P. v. Fazal Nazerali & Co. Ltd. Dar es Salaam Crim. App. 479 of 1964]. In this case, as in the two earlier cases the offence alleged under on single count was a failure to pay the prescribed minimum wages over a period of many months, in fact thirty-nine months. If the Republic wished to proceed against the accused in respect of all thirty-nine months, there were two courses open to them. One, the more cumbersome of the two, would have been for them to frame a charge in respect of each alleged failure, making a total of thirty-nine counts altogether. The other method, which is simpler and neater than the first, would be or the prosecution to frame one charge in respect of the alleged failure to pay the minimum wages and then give "notice of intention" to the accused that on his being found guilty on the preferred charge, evidence of any like contravention on the part of the accused shall be given before the court in respect of any period during the twelve months immediately preceding the date of the offence – vide sub-section (3) of section 12 of the Regulation of Wages and Terms of Employment Ordinance ….. I see no alternative to declaring the proceedings on Count 2 a complete nullity." (3) "…….. Count No. 1 …….. alleged failure to pay wages to an employee contrary to sections 194 (a) and 1954 of the Employment Ordinance. In this count as in count 2 the prosecution charged the accused with the failure to pay wages to an employee, in one single count, what ought to have been fifteen separate counts. There can be no dispute that this count, like count 2, is bad for duplicity". (3) Appeal allowed and convictions quashed.

163. Juma Salum and another v. R., Crim. App. 408-M-71; 14/4/72; El-Kindy, J.

The appellant were jointly charged with and convicted of robbery with violence c/ss 285 and 286, Penal Code and each appellant was sentenced to imprisonment for 2 years with 24 strokes. Each appellant was ordered to compensate the complainant in the sum of Shs. 32/=

Held: (1) “Having regard to the nature of the case against both appellants, it is necessary to review the evidence …… As it was said in the cases of Peters v. Sunday Post (1958) E.A. 424, Shantilal M. Ruwala v. R. (1957) E.A. 570 and Pandya v. R. (1957) E.A. 336, as approved recently by the same court of appeal in the case of David Shisia Okeno v. R., Cr. App. No. 72 of 1971 (not yet reported), and I quote:- “It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to t support the lower court’s findings and conclusions; it (the appellate court) must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.” (2) The court then reviewed the evidence and, finding that it supported the charges, dismissed the appeals against conviction. (3) “The second appellant was 18 years old, and in my view the learned Magistrate properly imposed the minimum sentence. I see not reason to interfere with the sentence imposed on the second appellant (Charles John.). This appeal against sentence, by the second appellant, is also dismissed. However, I am unable to uphold the sentence imposed on the first appellant due to his age. He was 15 years old. Therefore, he was a juvenile in terms of Section 3 of the Minimum sentences Act, 1963 Cap. 526 as it was and as it still is after the enactment of the Minimum sentences Act, 1972, being Act No. 1 of 1972. In terms of both Acts, the provisions of the Minimum Sentences Acts do not apply to juveniles …. The sentence and order imposed on the first appellant was unlawful and is accordingly set aside. Except for the issue of age, the position of the first appellant is the same as that of the second appellant. In the circumstances there would be no justification for imposing a sentence which is wildly different from that imposed on the second appellant. It is correct that in normal circumstances a

juvenile is not sent to prison, but in this case I think such a course is fully justified. Having regard to the facts and the circumstances of this case, and their age difference, I substitute therefore a sentence of imprisonment of 20 months on the first appellant, and I order that the first appellant compensate the complainant in the sum of Shs. 32/=".

164. Tobias s/o Mtondi v. R. Crim. App. 601-M-71; 19/4/72; El-Kindy, J.
The appellant was convicted of unlawful wounding contrary to Section 228 (1) of the Penal Code Cap. 16, and sentenced to imprisonment for 12 months. The judgment of the trial court reads as follows: - "Judgment: Accused is charged for unlawful

Wounding c/s 228 (1) P.C. Evidence has been given in presence and hearing of accused. Accused has in no way raised any dispute in his defence over the charge against him. I find prosecution case proved beyond all doubts of reason. I find accused guilty, and convict him of the offence as charged." The State Attorney argued that there was failure to comply with section 171(1) of the C.P.C., Cap. 20, requiring a reasoned judgment, but he submitted that there was adequate evidence on which this Court could deal with the appeal on its merits and in his view the appeal has not merit whatsoever.

Held: (1) "The Court of Appeal for Eastern Africa has on several occasions in cases of varying facts, dealt with the problem such as the one in hand. The view it has held, and that view is binding on this Court in the light of its decision in the case of Kagoye s/o Bundala v. R. (1959) E.A. 900, is that such noncompliance is not necessarily fatal to the conviction if there is sufficient material on which the appeal can be dealt with on its merits (see the case supra and Willy John v. Reginam, (1956) 23A.C.A. 509, Desiderio Kawunya v. Reginam, (1953) 20 E.A.C.A. 281). I agree that the approach is in keeping with common sense. I see no reason for such defect to be fatal if there is adequate

evidence on record to enable the appellate court to deal with the appeal on its merits having regard to the duties of the appellate court, as it has been established in the cases of Pandya v. R. (1957) E.A p. 336 and David Shisia Okene v. R. Cr. App. No. 72 of 1971 (unreported?) With due respect, I agree with the learned State Attorney that the judgment of the trial court I the appeal in hand is too brief to be said to have complied with the requirements of Section 171 (1) of C.P.C. Cap. 20. Apart from generalization, there was no reference to the evidence led, the issues involved, and the findings on them. However, the evidence before me is enough to warrant this appeal to be dealt wit on its merit." (2) The court proceeded to review he evidence and held that the magistrate would still have come to the same conclusion had he complied with s. 171(1), C.P.C. Appeal dismissed.

165. Ezekiel s/o Peter v. R., Crim. App. 20-DSM-72, -/-/72, Mwakasendo, Ag. J. The appellant was convicted of burglary and robbery with violence and now appeals. The conviction was based in part upon the identification of accused at an identification parade, which was described b the police officer who arranged it as follows: "I arranged an identification parade on the morning of 19/6/1971 and Ezekiel Peter was identified by Teckler and her two children."

Held: (1) "This piece of evidence is far from being satisfactory. If an identification parade is to be of any value at all in identifying the perpetrator of a crime under investigation it is necessary for a detailed description of the method followed in conducting the parade, the participants, the names of the officer /officers conducting the parade and the names of the identifying witnesses to be given in evidence. The method of identification that should be followed is as set out in the case of Rex vs. Mwango s/o Nanaa (1936) E.A.C.A 29. "Instruction for identification parades: (1) that the accused person is always informed that he may have a solicitor or friend present when the parade takes place. (2) That the officer in charge of the

case, although he may be present, does not carry out the identification. (3) That the witnesses do not see the accused before the parade. (4) That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself. (5) That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires. (6) Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade. (7) Exclude every person who has no business there. (8) Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstance. (9) If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this. (10) See that the witness touches the person he identifies. (11) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and makes a note of his reply. (12) In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person don't say, "Pick out somebody", or influence him in any way whatever. (13) Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably". The whole object of conforming strictly to the rules on identification is to remove any chance of error. It is in short a precaution against error. In the instant case, I am far from being certain that the three identifying witnesses could not have been mistaken in their identification of the accused". (2) Appeal allowed and conviction quashed.

166. Ester d/o Zacharia v. R., Crim. App. 72-DDM-71, 16/5/72, Mnzavas, J.

The appellant was convicted of burglary and theft c/ss 294, Penal Code and sentenced to concurrent terms of 2 years and 6 months respectively. On 26/6/71 she was found in possession of a radio stolen in the course of a burglary which occurred some $3^{1}/_{2}$ months previously, on 8/3/71. The radio was found under

appellant's bed and her various explanations as to how it was obtained proved bed and her various explanation as to how it was obtained proved false.

Held: (1) "As I mentioned when admitting this appeal for hearing the learned resident Magistrate failed to discuss the doctrine of recent possession in his judgment. Under the doctrine of recent possession if a person is found in possession of recently stolen property he is, in he absence of a reasonable deemed to be either the thief or a guilty receiver. The question the court had to decided was whether the period between the stealing of the radio and the finding or it in the possession of the accused was so recent as to entitle the court to come to the conclusion that the accused was the thief and consequently also the burgler. In the case of Musa Alli Mahambi v. R., (1968) H.C.D. n. 157, which is almost on all fours with the present case, the accused was found guilty of stealing a radio when the same was found in his possession a month after I had been stolen. It was held that the interval was short enough to support the conclusion that the accused was the thief. In Gaspar s/o Jovin v. R., (1968) H.C.D. n. 483 an accused was found

in possession of a watch four months after it had been stolen. The period was held to be too long o be considered "recent" in order to raise the presumption that the accused was the thief. In the present case the radio was stolen from complainant's room (after the room was broken into) on 8/3/71; about four months later (26/6/71) the radio was found in appellant's house. In the light of the above decisions by this court I am inclined to say that the period was too long to warrant ….The presumption that the appellant was the thief as well as the burgler. A better inference would have been that of receiving stolen property knowing it to have been stolen. The convictions for burglary and stealing are accordingly set aside and he appellant is found guilty of receiving the radio knowing it t have been stolen" (2) Nothing in the evidence suggests that he appellant knew that the radio was stolen after a burglary. But, as was held in

Said Meke v. R., (1967) H.C.D. n. 37, under the Minimum Sentences Act an accused may be given the scheduled sentence for receiving stolen goods feloniously taken; he need not have known that they were taken in the course of an offence set out in Part I of the schedule to the act. (Citing also: R. v. Mohamed Naweka, (1964) E.A. 353 and Shah Ali v. R. (1968) H.C.D. n. 474. Declining to follow Samson s/o Karuwana v. R., (1967) H.C.D. n. 317). "I with respect agree with the learned state attorney that the receiving of the radio by the appellant after it had been stolen in the commission of a burglary is an offence punishable under the Minimum Sentences Act notwithstanding the fact that the appellant did not know that a burglary had been committed before it was stolen. The appellant was under section 6A of the old Minimum Sentences Act liable to suffer 2 years imprisonment. The sentences of two years and six months imprisonment imposed by the trial court are hereby set aside. The appellant will suffer 2 years imprisonment."

167. Mohamed s/o Waziri v. R., Crim. App. 520-M-71, 17/5/72, El-Kindy, J.

The appellant was convicted of driving while impaired and reckless driving c/ss 49(1), 45(1) and 70, Traffic Ordinance, and (inter alia) was disqualified from driving for 12 months. Appellant alleged that he had 30 dependents and that driving was his only means of supporting them.

Held: The reasons advanced for not imposing a disqualification order relate to the offender rather than to the offence and therefore are not "special reasons" for not imposing such an order. Appeal dismissed.

168. R. v. Rev. Father John Rwechungura, Crim. Rev. 101-M-71, 19/5/72, Kisanga, J.

The appellant, a Catholic Priest, was convicted of common assault c/s 240 Penal Code. It appears that the complainant wished to marry a young man by the name of Augustine. The wedding was to take place in church, but difficulties arose when no record of Augustine's alleged baptism could be traced. Advised by church authorities that he could not have a Christian marriage unless he was baptized first, Augustine

refused to comply on the grounds that he had already been baptized. The parties then decided to get married under customary law. On the day appointed for the wedding, the appellant was sent by his superior to persuade the complainant's father not to give away his daughter in a non-Christian marriage. On the way, the appellant met the complainant in her wedding, dress being escorted by a group of women to her groom's house. There was conflicting evidence as to what occurred. Prosecution witnesses alleged that the appellant slapped the complainant in the face and hit her with a stick below the eye, cutting her; then he dragged her back towards her father's home. The appellant and his witnesses, however, testified that on meeting the complainant the appellant asked her to go back to her father but at first she refused and sat down in protest. Whereupon the appellant lifted her up by the arm and led her back towards her father's home. The trial Magistrate accepted the defence version on this point. In the meantime the complainant's father was informed of the appellant's intervention in the matter and so he and his relatives set out and met the appellant leading the complainant back to her father's home. They set upon the appellant and beat him up causing him to sustain a fracture of the ulna of the right arm and several other wounds and injuries on the head, arms and shoulder. The marriage which was thus interrupted could not longer take place that day. The trial Magistrate found that the appellant did lift up the complainant and led her back towards her father's home against her wish. He then held that the force thus employed by the appellant was sufficient to constitute an unlawful assault.

Held: (1) "Mr. Rugarabamu who represented the appellant submitted that considering the appellant's position as a spiritual father it cannot properly be said that his conduct amounted to an unlawful assault because it did not involve the necessary "mens rea". Mr. Ntabaye for the Republic, however, contended that the complainant was exercising her right to marry under customary law so that the appellant's conduct was unlawful assault because it consisted of using

physical force to prevent the complainant from doing what the law allowed her to do. The conduct of the appellant which is being complained of would appear to be what in English Law is called battery which is a form of assault. Section 240 of our Penal Code which creates the offence of assault does not define that offence. Arch bold 35th edition at paragraph 2633 defines battery, which as already stated is a form of assault, as follows: “A battery, in the legal acceptance of the words, includes beating and wounding. To beat, also in the legal accept ion of the term, means not merely to strike forcibly with the hand, or a stick, or the like, but includes every touching or laying hold (however trifling) of another’s person or clothes, in an angry, revengeful, rude, insolent, or hostile manner: ……; as for instance thrusting or pushing him in anger: …….; holding him by the arm; ……;” The learned author has also cited a number of cases decided by English Courts on this point but I have not been able to lay my hands on the actual authorities. However it would seem clear that in order to establish a battery it is necessary to prove two ingredients, (a) beating or touching of another person and (b)

that the beating or touching was done in an angry, revengeful, rude, insolent or hostile manner, which adjectives can note an evil mind. Proof of (a) alone would not suffice; it is necessary to go farther and show that in touching the complainant the appellant did so with an evil mind as shown above. In other words the touching must be accompanied with “mens rea”. (2) “It is against that back ground that the conduct of the appellant in this case should be looked at. There was sufficient evidence to show that the complainant sat down in protest, but the appellant lifted her up by her hand and led her back towards her father’s home. I am satisfied that this evidence was sufficient to establish the first ingredient as shown above. The next question to consider is whether the appellant in handling the complainant he did so with an evil mind. In his sworn evidence the appellant stated that his only concern that day was to try to see that

the complainant celebrated a Christian marriage. When he met the complainant on the material day he realized that she was going to contract a marriage outside the Church Law. Thus he became sorry for her because in doing so the complainant was committing a sin the punishment of which might be eternal condemnation. While thus feeling sorry for her he lifted her up by the hand and led her back towards her father's home; he did this kindly, calmly and without any violence. The idea at this late stage was to ask the complainant's father to hold on for a while in order to allow the appellant to driver to the Bishop's residence and to ask for Bishop's dispensation to marry the complainant to a person who was not baptized. The learned trial Magistrate accepted the evidence of the appellant because at page 10 of his judgment he said that he had no reason to disbelieve the appellant. If the appellant's evidence is accepted, it would seem that the handling of the complainant by the appellant was not accompanied by an evil mind. The appellant as a spiritual father considered himself as owing a spiritual duty to the complainant and it would seem that all that he was doing was in fulfillment of that duty. He did not at any stage seek to deny the complainant the right to marry, but all that he was doing at all time was to try to ensure that the complainant was married in accordance with Church Law and thus to save her spiritually. In so doing he acted kindly and calmly and without violence. In his evidence which was believed there is nothing to suggest that he acted in a manner that was angry, revengeful, rude, insolent or hostile. In such circumstances therefore I am unable to say that the element of "mens rea" was established. As pointed out earlier, Mr. Ntabaye submitted that the complainant was entitled in law to marry under customary law and I fully appreciate that view. However the point really is that the appellant who owed a spiritual duty to the complainant sought to ensure that the complainant was married in church and thus to save her spiritually, and that in his Endeavour to achieve that and he acted without any "mens rea". (3) Appeal allowed and conviction quashed.

169. Lenderito s/o Laidosoli v. R., (PC) Crim. App. 499-A-71, 19/5/72, Bramble, J.

The appellant was convicted of burglary, stealing and unlawful wounding c/ss 294,265 and 228(1), Penal Code and was sentenced to two years' imprisonment, six months imprisonment and a fine

of Shs. 200/= respectively. The facts are that PW3 was a tenant of the appellant and he left without paying rent. PW3 rented another house and on the 10th May, 1971 the appellant asked for his rent. PW 3 did not pay and the appellant told him that he would see the consequences in the evening. At about 10.30 that evening PW 3 had gone out and PW1 heard a bang on his door and saw people coming from his room; the appellant was standing near the door and attacked PW 1 when the raised an alarm and he sustained a lacerated wound on his head. PW 3 found two suitcases and bed sheets missing.

Held: (1) "With reference to the charge of burglary, PW 3 did not say that he left his door closed when he went out nor did any of the witnesses see it closed. PW 1 came to the conclusion that there was a breading into the room in question because he heard a bang on the door. This was not conclusive evidence of breaking for the purposes of the offence charged." (2) "As to the charge for stealing, the case for the prosecution was that the appellant took the goods of PW 3 because he refused to pay his rent. The obvious conclusion is that the appellant acted under a claim of right. Stated Attorney argued that section 263 of the Penal code should be applied. It reads in part: - "When any person takes or converts anything capable of being stolen, under circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein". He maintained that by taking the goods the appellant was holding it as a security for his rent. By this argument the appellant acquired a special property or interest, if any, after he had taken possession of the goods. In any case to establish stealing there must be established (a) a fraudulent taking and (b) no claim of right. I do not see the relevant of the section mentioned to the facts of this case. The rash action of the appellant may expose him to damages

in a civil suit but there is not the mens rea necessary to bring home the criminal offence of stealing." (3) "There was no defence to the charge of unlawful wounding and no reason to interfere with the sentence". (4) Appeals from convictions on the first two counts upheld, and appeal from the third count dismissed.

170. Athumani Nyambo and another v. R., Crim. App. 1-DSM-72, 24/5/72, Onyiuke, J.

The 1st appellant was convicted of various offences against the Fauna Conservation Ordinance. Notice was served upon the 2nd appellant, the reputed owner of the rifle used by the first appellant, to show cause why it should not be forfeited under s. 53 of the Ordinance.

Held: (1) "Mr. Raithatha, learned Counsel for the appellant has attacked the order of forfeiture as being had in law and unjustified in the circumstances of the case. In arguing the appeal Mr. Raithatha referred to certain documents tendered in the case. There was a General Game licence issued to the 1st appellant which entitled him to hunt animals of the kind specified in the 3rd Schedule to the Ordinance but this

did not authorize him to hunt in a Game reserve. The 1st appellant had also a licence to bear firearms. The 2nd appellant had a valid licence to bear arms and had also a valid permit for temporary transfer of the rifle to the 1st appellant. Mr. Raithatha's contention was that the transfer of the rifle to the 1st appellant was lawful and that the transfer was in the nature of a loan and not an absolute transfer and that the 2nd appellant remained the owner of the rifle; that there was nothing to show that the 2nd appellant connived in the commissioner of the offences by the 1st appellant and that since the 1st appellant could lawfully use the rifle without necessarily committing the said offences it was wrong to order that the rifle should be forfeited. He cited R. v. Musa (1967) H.C.D. 299 and R. v.

Saidi (1970) H.C.D. 149. In R. v. Musa (supra) Hamlyn J. held that it would be unjust to penalize the owner of a gun who in no way connived in the commission of the offence by another person and in respect of an offence committed without his knowledge. The facts in that case were that the accused person was charged under Section 12 of the Fauna Conservation Ordinance Cap. 302 with hunting an animal without a game licence and was convicted. An order was made forfeiting the gun with which he went hunting. The owner of the gun filed an affidavit in the High court stating that he was out of town when the accused, without his permission, used his gun and that he knew nothing about the events constituting the offence. In R. v. Saidi (supra) the order of forfeiture was made without giving the owner of the gun an opportunity to be heard. Georges C.J. in setting aside the order and remitting the case for further consideration by the District Court stated as follows: - "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" The present case is clearly distinguishable from these two cases. In R. v. Musa the gun was used without the knowledge and consent of the owner by a person who had not game licence. The statement by Hamlyn J. must be considered in the context of the particular case. In R. v. Saidi the owner of the gun was not given any opportunity to be heard before the order for forfeiture was made. In the present case the owner of the gun voluntarily transferred or loaned the gun to the 1st appellant for purposes of hunting game. It would, in my view, defeat the object of Section 53 of the Fauna Conservation Ordinance to make it a condition that the owner of a gun should connive in the commission of an offence by the person to whom he loaned the gun, that is to say, that he must be aware of all the facts constituting the offence before an order of forfeiture can be validly made. Such a condition that the owner of a gun should connive in the commission of an offence by the person to whom he loaned the gun, that is to say, that he must be aware of all the facts constituting the offence before an order of forfeiture can be validly made. Such a condition would require, in the instant case, proof that the 2nd

appellant knew that the 1st appellant proposed or intended to hunt in a game reserve or to enter therein before an order of forfeiture could be validly made. This can rarely be proved and it is difficult to conceive that the legislature intended to impose such an intolerable burden on the prosecution. The fact that the rifle may be used in circumstances in which the 1st appellant used it ought to be apparent to the and appellant and was a normal risk which an owner ran by transferring or loaning his rifle to another." (2) Appeal dismissed.

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171. Ahmed Mwinyiamani v. R., Crim. App. 26-DSM-72, 25/5/72, Mwakasendo, Ag., J.

The applicant was convicted of conspiracy to commit a felony c/s 384 and two counts or robbery with violence c/s 286, Penal Code. On 17 May 1971 he applied for a copy of judgment, which he received only on 8 November 1971, although his counsel received a copy on 1 November. No appeal was filed until the period of limitation had elapsed as computed from the time the applicant received his copy of judgment. This is an application to appeal out of time by virtue of s. 314, Criminal Procedure Code, which provides in part, that the High Court may "for good cause" admit an appeal when the period of limitation has elapsed.

Held: (1) "As the applicant only received copy of judgment on 8th November 1971, it would seem to me that for the purpose of appeal, time began to run as from the date of receipt of the copy of judgment." (2) "According to the learned Counsel for the applicant the only reason for delay in filing the petition of appeal in this case is that Counsel honestly felt that the only way he could assist the applicant effectively in lodging an appeal against the trial Court's judgment was by going through the proceedings of the case. As he did not have this at the time, he decided to write to the Resident Magistrate's Court for a copy. However no copy of proceedings was received from the trial Court until well after the period of limitation had elapsed. I can well understand the reasons for Counsels' feeling diffident to take up an appeal brief without first assuring themselves that

their clients have sufficient grounds of complaint against the decision or order of the trial court. But well grounded as this occasional feeling of doubt may be, it is not, in my opinion, a sufficient cause to warrant this court to order for an extension of time for lodging an appeal. The law is clear enough. The vital document that an advocate must go through before lodging an appeal is the copy of judgment or order and not the copy of proceedings I am sure that if Parliament wished the time requisite for obtaining a copy of proceedings to be excluded from the prescribed periods of limitation, there was nothing to stop it from saying so in clear terms. I am accordingly unable to accept Counsel's arguments that the delay in obtaining a copy of the proceedings without more is a good cause for not lodging an appeal within the period of limitation. My attention has been drawn to a case of this Court – R. v. Hamood Nassoro (1972)) H.C.D. n. 30. In that case the Republic applied for leave to appeal out of time against the decision of the Magistrate on the ground that although the ruling was delivered on 14th July, 1971` a copy of same was not supplied until 29th September, 1971 and up to the hearing of the application a copy of the proceedings had not yet been received. My learned brother, Makame, J., held: "(a). It is meet that the matter should be considered by High Court ….. In Kiomboi Criminal Case No. 42/66 Rep. v. Yusufu Daudi & 3 others my learned brother Biron expressed the view that it is arguable whether the tying of a person's hands is wrongful confinement;" and (b) the delay by the Republic is understandable. Leave was granted. I must confess that, unlike my learned brother Makame J, I cannot comprehend how the delay by the Republic in the Hamood Nassoro case could be to be understandable in the circumstances justifying the Republic's delay in lodging an appeal in the case. There was however as I perceive, a good cause for

granting leave in that case and that is, the Magistrate's decision or order involved a legal issue of paramount importance. It was therefore meet and proper in those circumstances for the court to exercise its direction to admit appeal

notwithstanding that the prescribed periods of limitation had long elapsed. The present case is clearly to be distinguished from the Hamood Nassoro case in that the instant case unlike the Hamood Nassoro case raises no legal issue of any substance. There is thus in this case no compelling ground to warrant this court's exercise of its discretion under Section 314 of the Criminal Procedure Code. Accordingly, refusal of leave in this case would not occasion any failure of justice as no doubt might have been the case if the application in the Hamood Nassoro case had been refused." (3) Application rejected.

172. R. v. Rajab s/o Ayub, Crim. Rev. 5-M- 72, 26/5, Jonathan, Ag., J.

The accused was convicted on his own plea of causing death by dangerous driving contrary to Section 44 A of the Traffic Ordinance and sentenced to one year's imprisonment. He was also disqualified from driving for a period of 4 years. The particulars of the offence alleged that, on the material day at about 10.00 a. m the accused drove a motor vehicle on a public road in a manner which was dangerous having regard to the circumstances that existed, thereby causing the death of one Mushimo s/o Ntungi. After the charge was duly read and explained to the accused, he is recorded as saying "It is true", following which the learned Resident Magistrate entered a plea of guilty to the charge.

Held: (1) "As so often reminded by this Court, the words "It is true" are not a satisfactory form of pleading so as to ground a conviction, and in the particular case the accuseds plea was clearly equivocal, the more so as the particulars did not state the negligence that the accused committed which constituted dangerous driving." (2) "The prosecution then stated the facts. Unfortunately, these, too, did not throw sufficient light on the matter. All that was stated was that the accident occurred on a tarmac adamised road at a point where a maximum speed limit of 30 m. p. h. was indicated, and that the accused failed to stop his vehicle in time, thereby knocking down the deceased, a school boy who was crossing the road ……. With respect to the lower Court, the facts did not necessarily constitute the offence charged and, as agreed by the Republic, the conviction was glaringly erroneous. It was a serious charge that faced the

accused, and it was imperative for the court to satisfy itself that particulars of negligence were clearly stated which constituted dangerous driving before proceeding to convict for causing death b dangerous driving. It may well be that the accused was merely careless, but that would not, in itself, ground a conviction for the offence charged." (3) Appeal allowed and conviction quashed.

173. R. v. Tadeo s/o Mngereza, Crim. Rev. 152-DSM-71, 31/5/72, Mwakasendo, Ag, J.

The accused, the second accused at the trial, was convicted pursuant to Section 311(1) of the Penal Code or receiving stolen property and was placed on probation for a period of

twelve months. At the trial it was proved that the property received by the second accused had been stolen by the first accused in the course of committing an offence falling under section 296(1) of the Penal Code, to wit, breaking and entering a school house and committing a felony therein, that is, theft. It was also proved that he second accused knew or had reason to believe that the property had been stolen, but it was not proved that he knew or had reason to believe that it had been stolen in the course of committing an offence under Section 296(1) of the Penal Code. The trial Magistrate appears to have found as a fact that the second accused, when receiving the property from the first accused, knew or had reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of. The Magistrate was also of the view that for the provisions of the Minimum sentences act, 1963 to apply to the second accused, it was incumbent on the prosecution to prove that he knew or had reason to believe that the property had been stolen in the course of committing an offence under section 296 (1) of the Penal Code. As the Magistrate thought the prosecution had not so proved, He held that the provisions of the Minimum Sentences Act 1963 did not apply to the second accused.

Held: (1) “While it is true that in the present case no evidence was led to show that the second accused knew or had reason to believe that the property he was receiving from the first accused had been obtained in the course of committing an offence under Section 296 (1) of the Penal Code, I do not think it is necessary for the prosecution to prove either that the receiver knew or had reason to believe that the property received was feloniously obtained or obtained in the commission of an offence under Section 296 (1) of the Penal Code. There is, no doubt, to be found dicta to the contrary in a number of the decided cases, but I think the question at issue was finally settled by the decision of a full Bench of this Court in the case of Republic v. Mohamedi Naweka (1964) E.A. 353. At page 356, Sir Ralph Windham C.J., delivering the judgment of the court, said:- “For the sake of clarity we would state that we construe items 6 A and 3, when read together, to mean that, if an accused person has been convicted of receiving stolen ……. property contrary to section 311(1) of the Penal Code, and if it is sought to show that the property was stolen in the course of the commission of the offence mentioned in item 3, then it is incumbent on the prosecution to have proved two things only in relation to guilty knowledge: first, of course, that the receiver knew or had reason to believe that it had been feloniously stolen, taken, extorted, obtained or disposed or, this being the requirement of Section 311(1) itself and the necessary pre-requisite to conviction under that section: and secondly, that the thief (i.e. the “offender” under item 3) knew or ought to have known that the thing stolen was the property of the government or other body mentioned in item 3. It is not necessary, in our view, to prove either that the receiver knew or that he knew that the thief knew, that the thing stolen was the property of the Government or other such body.” Again at page 358 the court said: - “The accused in the present case had such a guilty mind or guilty intent,

In that he received the stolen goods knowing or having reason to believe that they were stolen. Whether he knew or had reason to believe that they had been stolen in the commission of the burglary goes beyond any general requirement of the law regarding the necessity for mens rea; nor as we have said, does anything in the Minimum Sentences Act, 1963, make it necessary to prove any such additional kind of guilty knowledge in order to bring this accused within item 6A read together with item 5, or indeed any accused within item 6A read together with any of the other items from 1 to 6 inclusive, of Part I of the Schedule to that Act". On the principles laid down in the Mohamedi Naweka case, it is obvious that the learned trial Magistrate was wrong in requiring the prosecution, for the purposes of the Minimum Sentences Act, 1963, to prove that the receiver, i.e. the second accused, knew or had reason to believe that the property in question had been stolen in the commission of an offence under section 296(1) of the Penal Code. That, as was said in the Mohamedi Naweka case, goes beyond any general requirement of the law regarding the necessity for mens rea. The learned trial Magistrate ought therefore to have held that the provision of the Minimum Sentences Act 1963, applied in respect of the second accused. That he did not do so was a grievous error on his part. Accordingly, the order placing the accused on probation id set aside." (2) "I will then turn to the question of sentence. Accused who was given an opportunity to adduce reasons why sentence prescribed by law should not be imposed upon him, told the court that he was a married man with three children. Both his parents were dead and he was left alone to fend for his young brothers and an old grandmother. He owned a 'duka' and was a first offender. Accused ended by praying for leniency …… There is, I think, abundant authority to indicate that the fact that an accused person is a married man with a number of relatives depending on him is not a factor amounting to "special circumstances" under the Minimum Sentences Act, 1963." (3) "It may however be argued that the question of sentence to be imposed upon the second accused is no longer governed by the repealed provisions of the Minimum Sentence Act, 1963. Sub-section (2) of section 12 of the Minimum Sentences Act, 1972, (Act No. 1 of 1972) provides: "(2) Where

before the coming into operation of this Act, a person has been convicted of a Scheduled offence and sentence is not passed until after the commencement o this Act, the Court shall pass a sentence in accordance with the provision of this Act." The question next to be decided is whether or not the accused in this case can be said to have been convicted but not sentenced before the coming into operation of the Minimum Sentences Act, 1972. There is I think no dispute as to the accused having been convicted of a Scheduled offence. But as regards sentence one has to consider the effect of a probation order – whether or not a probation order is a sentence. In the case of Juma Shabani Keshallilla v. Republic (1963) E.A. 184, the Court of Appeal for East Africa said: "Mr. Jadeja, who appeared for the appellant, in a clear and concise argument, submitted that when a resident magistrate made a probation order under Section 305 no sentence was imposed on the offender. We agree with him. If any support were needed

for that submission in addition to the clear words of Section 305 (1), Section 306 (2) which empowers the Court when the offender is subsequently brought before it to "pass sentence", which sentence must be the sentence on the original conviction." On the authority of the Keshallilla case I would hold that no sentence was ever imposed upon the second accused by the trial court. His case can therefore be dealt with under the provisions of the Minimum Sentences act 1972." (4) "Although the second accused is undoubtedly a first offender, and there are circumstances in this case which would make it just and equitable for the court not to apply the provisions of the Minimum Sentences act 1972, unfortunately, the accused cannot b saved from having to suffer the penalty prescribed under the new Act for he simple reason that the value of the property obtained by him in the course of the commission of the offence for which he stands convicted, exceeds one hundred shillings; it is in fact Shs. 1050/= The accused is therefore liable to the minimum sentence prescribed by Section 4 of

the Minimum sentences Act, 1972." Accused sentenced to 3 years' imprisonment.

174. R. v. Petro Kamili, Crim. Rev. 2-M-72, 24/5/72, Kisanga, J.

The accused was convicted of two traffic offences one of which was carrying passengers for hire or reward without a public service licence contrary to sections 27(1) and 70 of the Traffic Ordinance. He was sentenced on this count to pay shillings 60/= fine or one month's imprisonment in default. There was a further order that shillings 20/= which the accused had received by way of fares be forfeited to the Republic. The matter was admitted in revision only to consider the correctness of such order

Held (1) "It is not apparent under what provision of the law this order was made. On perusing the Traffic Ordinance which creates the offence I have not been able to discover any provision authorizing such forfeiture. The Penal Code authorizes forfeiture in certain circumstances …. It is quite clear, however, that the offence under review is not within the category of offences specified by these sections of the Penal Code." (2) Order of forfeiture set aside.

175. Bhaya s/o Mohamed v. R., Crim. App. 29-DDM-72, 1/6/72, Mnzavas, J.

The appellant was convicted of assault causing grievous bodily harm contrary to section 225 of the Penal Code and sentenced to 9 months imprisonment and ordered to pay Shs. 300/= compensation to the complainant. It is not in dispute that the accused assaulted the complainant and caused her to lose one tooth. Equally it is not in dispute that the assault was unlawful. It has …. Been argued by the defence counsel that the trial magistrate misdirected himself when the held that loss of a tooth amounted to grievous harm. In support of his argument the counsel referred the court to the decision in R. vs. Mipaa s/o Mananjimia (1968) H.C.D. n. 265 in which Seaton, held that loss of one tooth could not amount to grievous harm as such loss did not amount to permanent or serious injury or disfigurement. In coming tot his decision the learned judge followed the decision in Regina vs. Ali s/s Fakili 2 T.L. R. 44.

Held: (1) “Clearly the assault of the complainant by the appellant did not amount to grievous harm. For an assault to amount to grievous harm the injuries suffered by a complainant must amount to a main or a dangerous harm or seriously or permanently injure health or the injury must extend to permanent disfigurement as defined in section 5 of the Penal Code. On this point I would strongly advise the learned district magistrate to read the above quoted decisions as well as the recent decision in Sebastian Gilbert vs. R. (1970) H. C. D. n. 281.” (2) “I agree with the defence counsel that in the circumstances of this case the injury suffered by the complainant as a result of the assault only amounted to assault causing actual bodily harm contrary to section 241 of the Penal Code.” (3) “As for the sentence of 9 months imprisonment I agree with the learned district Magistrate that prison sentence was indicated but with respect it is my view that 9 months imprisonment for a first offender was unduly severe. I note that the appellant has already been in prison for over 4 months. This is adequate punishment. I accordingly reduce the sentence of 9 months imprisonment to such term of imprisonment as would result in the immediate release of the accused.” (4) “As for the compensation order I must say that I am unable to follow the learned defence counsel’s argument that the trial magistrate should have left the complainant to file a suit for compensation for her injuries. The compensation order was properly ordered under section 176 of the Criminal Procedure Code. There is nothing wrong with it. The Shs. 300/= compensation order stands.”

176. Salehe s/o Mohamed v. R., Crim. App. 99-DSM-72, 2/6/72, Onyiuke, J.

The appellant was charged on 3 counts with minor offences against the Traffic Ordinance and Rules made there under. In the 4th Count he was charged with an offence c/s 3(2) of the Prevention of Corruption Act (No. 16 of 1971). The particulars of the offence in this 4th Count were as follows: - “Salehe s/o Mohamed charged on the 3rd day of January 1972 at about 07.30 p.m. along

Morogoro Road did corruptly give Shs. 29/30 to No. B. 1008 P.C. John as an inducement in order that the said Police constable could excuse him in Traffic Offences he was being charged." The appellant pleaded guilty on all the counts but the subject of this appeal concerns Count 4. To the charged in Count 4 the appellant was recorded as saying as follows; - "It is true I gave Shs. 29/30 as a bribe." The Public Prosecutor then narrated the facts of the case as follows:- "Facts:- The accused is a driver employed M/S Murjia & Sons Co. Ltd. On 3/1/72 at about 7.30 a.m. accused was driving d/v no. TDS 725 make Fiat with a Trailer No. TDU 393 along the Morogoro Road. As he was driving along this road, a police vehicle was following him from behind. In it was some Traffic policemen's to wit, B 1008 P.C. John. When they reached at one garage, the policemen asked the accused to take his vehicle to a garage for a repair because it was making too much noise and smoke was coming out heavily. After giving these instructions the policemen took off. But just as they these instructions the policemen took off. But just as they were pulling away from him, the accused followed them. He

Stopped them and entered into their van. The accused took Shs. 29/30 and handed the same to P.C. John as to induce John not to prosecute him for the offences he had committed. John accepted the money and subsequently charged him. The money is now lying at the Police Station. Arrangements are being made to bring it."

Held: (1) "Learned Counsel for the appellant relied on two grounds of appeal, namely, (i) 'That the plea was equivocal and/or not voluntary' (ii) 'That the facts as laid by the Prosecution do not disclose an offence and' or do not disclose that the receiver of the alleged bribe was at the material time acting in the principal's affairs.' In developing the submission on ground (iii) Mr. Raithatha referred to Section 3(2) and stated that the essentials of the offence under that subsection were as follows;- The person charged must be shown that (a) he

corruptly gave or offered to give (b) an advantage (c) to any person(d) as an inducement to or reward for or otherwise on account of (e) doing or forbearing to do or having done or fore borne to do (f) anything (g) in relation to his principal's affairs or business. The particulars of offence showed that the basis of the case of the prosecution was that the bribe was given or offered as an inducement in order that the said police constable 'could excuse him in the traffic offence he was being charged.' This charge was not borne out by the facts as stated by the prosecution. The facts as stated indicated that the appellant was merely asked to take his vehicle for repairs as it was emitting too much smoke and making too much noise. It was an admonition and nothing more. This was the end of the matter as far as the police constable was concerned. The appellant was not charged with giving the bribe on account the police constable's having forborne to charge the appellant, (and the facts could not even support such a charge), but with giving a bribe so that the police constable may forebear to prosecute. On the facts as stated the constituents (e) (f) and (g) of the offence were lacking. There was nothing pending in relation to the principal's affairs or business in respect of which a bribe was given or could be given. This, in substance, was the learned Counsel's submission." (2) in substance, was the learned Counsel's submission." (2) "It appears to me that either the facts were mis-stated or the charge was not properly framed. Section 203(1) of the Criminal Procedure Code dealing with an accused person's plea requires that "the substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge." It was stated by the Court of Appeal for Eastern Africa in Kato v. R., (1971) E.A. 542 at 543 that it is only if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged that a court can properly enter a plea of guilty. The Court of Appeal in that case cited with approval the following passages in R. v. Ynasani Egalu (1942) 9 E.A. C.A. 65 at 67: "In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable

not only that every constituent of the charge should be explained to the accused but hat he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal Court that he fully understood the charge and pleaded guilty to every element

of it unequivocally." In Simon Joseph s/o Magangira v. R., (1968) H.C.D. No. 466 the accused was charged with corrupt solicitation of money c/s 3(1) of the Prevention of Corruption Ordinance, cap. 400, and on his pleading guilty to the charge the prosecution out-lined the facts which the accused admitted. He was convicted on his own plea. On appeal against conviction the High Court (Seaton, J) found that the statement of facts 'was either meaningless or indicates a set of circumstances that do not support the charge.' He held that although such a statement of facts was not a statutory requirement it had become an 'invariable' practice. The learned Judge allowed the appeal and stated that "because of the confusion in the statement of facts the accused could not with comprehension have pleaded guilty to them." (3) "The principles that emerge from these cases are that a trial Court should not record a plea of guilty on which to base a conviction unless it is satisfied – a condition which can be objectively demonstrated by the facts appearing on the record – that the accused intended to plead guilty and to admit facts which constitute the offence charged. The great merit in this practice of requiring the prosecution to give a statement of facts which an accused person is required to admit or deny is to remove any doubt that may attach to the accused's plea of guilty and ensure that he intends to admit facts which constitute the offence as charged. A real responsibility rests on the prosecution to state facts which it would have relied upon were the case to proceed for trial. A plea of guilty relieves the prosecution of the burden of calling witnesses to prove the charge but it does not, in my view relieve it of the duty to state the facts correctly and enough to support the offence as laid in the charge. If an accused person pleads guilty to a charge and the facts which the

prosecution narrates in support of the charge do not constitute the offence the quality of the accused's plea is there by impacted and the plea itself is rendered nugatory because he can not be taken to intend to plead guilty to a non-existent offence." (4) Appeal allowed and conviction for a corrupt transaction set aside. Order that case be tried on its merits.

177. Mohamed Ramadhani v. R., Crim. App. 96-A-72, 3/6/72, Patel, Ag. J.
Appellant was convicted of causing death by dangerous driving c/s 44(A), Traffic Ordinance and was sentenced to eighteen months' imprisonment. The appellant was driving Peugot saloon car along the Arusha/Dodoma road. The deceased – a school girl – was walking along the road towards Arusha. It was alleged by the prosecution before the lower court that the appellant drive at an excessive speed and on his extreme left and knocked the deceased who died later as a result of injuries received. Two eye witnesses to the incident as prosecution witnesses said hey saw the deceased walking on the edge of the road coming towards Arusha when the appellant came from Dodoma side at high speed from behind the deceased. The vehicle knocked down the deceased who was thrown off the road. Both said the vehicle did not stop after the accident. The appellant in his sworn statement said he was driving his vehicle along Arusha-Dodoma road

and while he was approaching a bridge he heard a knock on the left side. He stopped and saw a child had fallen. At that time there were two persons sitting in the said vehicle. Both were called as defense witness and they said the deceased came running and tried to cross the road from the left side and was hit b the vehicle in which they were sitting. The trial magistrate accepted the testimony of the prosecution witnesses and then proceeded to convict the appellant.

Held: (1) "Mr. Behal for the appellant submitted that the trial magistrate made no finding of facts and gave no reasons for his conclusion. He further

submitted that trial magistrate did not consider the defence and did not weigh the evidence at all. He submitted that this is incurable and the appeal should be allowed. He referred to the following authority in support of his Submission: Lockhart Smith vs. Republic, (1965) E.A. 211… The learned trial magistrate, after referring to what the appellant said in his sworn evidence, said as follows: - “The accused called the other two people with whom he was in the car at the time of accident. The two witnesses Husseing Salahe and Mohamed Masangi said that before the accident he saw the deceased suddenly cross the road from the left side of the road and accused’s vehicle knocked the child.” This is the only reference the trial magistrate made to the defence. Thereafter he dealt with the evidence of P.W. 5 and P.W. 7 and after giving reasons and arguments went on to accepts their testimony as truthful. Then straightaway and without considering the evidence they said, he concluded as following: - “As the evidence stands I am fully satisfied that the accused was driving in a very reckless and dangerous manner, otherwise this accident would not have occurred. On the evidence I am satisfied that the prosecutions have proved the case beyond all reasonable doubt. I find the accused guilty as charged.” (2) “Thus it can be seen that the trial magistrate dealt with the evidence of prosecution witnesses thoroughly and in detail before accepting their testimony as truthful. But he did not deal at all with the evidence of the appellant and his two defence witnesses. Nowhere in his Judgment does he say he rejects the evidence in defence, leave it aside, or give any reasons for doing so. In fact he had not considered it at all and …… he proceeded to make a finding to the effect that the appellant was driving in a very reckless and dangerous manner and convict him. He did not consider the explanation given by the appellant and his witnesses and made a finding of fact and in this he failed to evaluate the evidence correctly fact and in this he failed to evaluate the evidence correctly as he ought to have done and thus he misdirected himself seriously. (Citing: Lockhart Smith v. R., (1965) E.A. 211) … Thus the counsel’s main ground of appeal is valid. It is for the prosecution to rove the case beyond all reasonable doubts and the court cannot do so unless the evidence given by or on behalf of the accused is put into balance and weighed

against that adduced by the prosecution. The question is whether anything the accused has said or which has been said on his behalf introduces that reasonable doubt which entitles him to his acquittal." (3) Appeal allowed and conviction

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178. Henry Ebrahim v. R., Crim. App. 31-DDM-72, 10/6/72, Mnzavas, J.

The accused was convicted of stealing by person employed in the public service c/ss 270, Penal Code and of conversion not amounting to theft c/s 284, Penal Code. He was alleged to have stolen, in his capacity as a public servant in Com works, a dyamo, a voltage regular and a battery belonging to the government. All three items were found in the accused's car, the first two loose, and the last actually attached to the car. The first two items were identified as government property on the grounds that identical items bearing the same catalogue numbers were received by Dodoma Comworks from government stores. Witnesses Juma (PW. 4) and Ahmed (P.W. 5) who were alleged by the prosecution to be present when the accused took all three items were taken by the accused and who gave them to him. The accused himself alleged he had bought the first two items from one Patel (P.W. 3) and that battery had been given to him, as a loan by Ahmed (P.W. 5) from Comworks.

Held: (1) "There can be no doubt that the conviction under section 284 of the Penal Code was bad and cannot be supported. Had the learned district magistrate cared to read section 284 carefully he would no doubt have four that the section talks of moving objects. It talks of such things as draught or riding animals or any vehicle or cycle however propelled, or any vessel. A car battery is not among such objects." (2) "As already stated there is no dispute that the dynamo and the voltage regulator were found in accused's vehicle. The only question which the trial court had to decide was whether the two items were sufficiently identified as the same items alleged to have been ordered from Government Stores by Comworks… There can be no doubt that the trial

magistrate accepted the ……. Numbers found on the two items, which numbers were apparently shown on the Issue notes received by Comworks from Government stores ….. as sufficient identification of the items found in accused's car as the same dynamo and voltage regulator ordered by Comworks from Government Stores. It has however been amply proved by the learned defence counsel, and indeed accepted by the learned state attorney, that the above quoted numbers relied on by the learned district magistrate in identifying the two items were catalogue numbers and not serial numbers …… Catalogue numbers of motor –vehicle spare parts cannot be of any help where the question of identification is in issue as hundred of similar spare-parts may bear the same catalogue number. (3) "The learned state attorney however argued that there was other evidence leading to sufficient identification of the two items notwithstanding the learned magistrate's misdirection. It was argued that the fact that Comworks had ordered a brand new dynamo and a voltage regulator and the fact that Juma (P.W. 4) told the court that the accused took the same item and that the fact that similar brand new items were found in accused's car, and the further fact that accused's story that he had bought the two items from one, Patel (P.W.3. was rejected by Patel entitled the learned magistrate to infer that the dynamo and the voltage regulator found in accused's car were the same items ordered by Comworks

from Government Stores. I would accept that this evidence spoke against the accused; but, on the other hand it would be unfair to the accused for Republic to unduly capitalize on it. I do not think the above evidence can be used to replace the standard of sureness and certainty which must in any case be reached before an accused person can be convicted of criminal charge. From the testimony of Juma (P.W. 4) it would appear that Ahmed (P.W. 5) was present when, as alleged by P.W. 4, the accused took the dynamo and the voltage regulator. Ahmed (P.W. 5) does not mention anything about the dynamo or the

voltage regulator in his evidence. Juma (P.W.4) told the court that he heard the accused asking for a battery from Ahmed (P.W.5). Ahmed's evidence is to the effect that it was Juma (P.W.4) who gave the battery to the accused. It was argued by the Republic that this contradiction as to who handed the battery to the accused was resolved by the accused when he said in his defence that the battery was given to him by Ahmed (P.W.5). It is true that the contradiction was resolved by the accused; but, as rightly argued by the defence the fact that the contradiction was resolved by the accused does not remove the fact that the two witnesses contradicted each other. The prosecution cannot rely on the defense case to fill gaps in its evidence. As to the evidence of Patel (P.W. 3) who denied selling the two items to the accused it is true that if Patel is to be believe, the accused' story that he bought the two items from him would be lies. But as it was held in Moshi d/o Rajabu (1967) H.C.D. n. 384, a magistrate's refusal to accept a defence as truthful is not a proper basis for a conviction. "It is not necessary to accept the evidence of the accused in order to find him not guilty. All that an accused need do is to raise a reasonable doubt as to his guilt." – Fanuel s/o Kiula vs. R. (1967) H. C. D. n. 369. In …….the typed copy of judgment the trial magistrate says: "What has surprised this court during cross-examination was that accused bout dynamo and voltage regulator for his vehicle DO 1855 between July and August 1971 – so why did he not fix them in his vehicle until they were found in the vehicle on 22/11/71"? This was, as argued by the defence misdirection. The fact that the accused failed to fix the two items in his car as soon as he bought them does not necessarily mean that he stole them. The crucial question was whether the two items belonged to the Government as alleged by the Republic. At this juncture I would like to refer to the case in Bamari s/o Abedi vs. R. (1967) H.C.D. n. 11 (quoted by the defence counsel) in which the question of identification of stolen khangas was in issue and Saudi J. (as he then was) held: "Exhibition of a pair of khanga not distinguishable from other such items b special marks or features will not support a finding that they are the same as those stolen. The burden is not upon the accused to the his defence, but is upon the prosecution to disprove it beyond reasonable doubt." In a recent

case – Kimbunga vs. R. (1970) n. 243, El-Kindy Ag. J. (as he then was) said as follows on the question of identification of goods alleged to have been stolen “It is not a question of choosing to believe one side as against the other, as if it were a case of determination of rights 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 is the same with

This case the question was whether the dynamo and the voltage regulator found with the appellant were those of the complainant, the Government. It is extremely difficult to say that they were; the learned district magistrate having erroneously accepted catalogue numbers instead of serial numbers as the basis of identification of the dynamo and the voltage regulator. There can be no doubt that there is a lot of suspicion against the accused; but as it has, time and again, been held by this court, suspicion no matter how strong cannot be the basis of a conviction in a criminal charge.” (4) Appeal allowed and conviction quashed.

179. Temange s/o Sambi v. R., Crim. Sass. 26-DDM-72, 12/6/72, Kwikima, Ag. J. The accused was charged with the murder of a man whom for a long time he had suspected of having an illicit affair with his wife. The accused confessed to having killed the deceased but retracted his confession at his trial the court held on the facts that the accused had borrowed a friend’s bow and arrows and set out for the deceased’s house 3 miles away, where he suspected his wife had gone. Arriving at night, he heard his wife speaking to the deceased inside the house. The conversation appeared to link the couple in adultery. The accused then shot the deceased in the chest with the bow and arrow, causing his death.

Held: (1) “The accused confessed to have killed the deceased and then retracted at his trial. When a trial within trial was conducted I was satisfied that the confession was made voluntarily and that its subsequent retraction was an afterthought. I therefore admitted his confession …… in his submission, the learned state attorney urged the court could convict on a retracted confession

even if it was not corroborated. He relied in his submission on Tuwamoi v. Uganda (1967) E.A. 84. With all respect to the learned gentleman I doubt if that case means anything of the sort. That case is a follow up of a list of cases including R. v. Keishemeiza 7 E.A.C.A. 277. I have come to understand the rule in Tuwamoi's case to mean that; "It is unsafe to convict on a retracted confession if there is no independent evidence to support the confession." That was what I said in R. v. Melanyi (1971) H.C.D. n. 398 and I still say so. I am therefore unable to hold that by confessing the accused has helped the prosecution to discharge its burden of proving his guilt beyond reasonable doubt." (2) In the circumstances, however, there is sufficient corroboration for the accused's confession. (3) The question now is whether there was any provocation for the killing. "The accused has related in his extra judicial statement how his wife left him to go to Sepuka in spite of his having refused her permission. The accused later heard that she was putting up with the deceased. The sketch plan drawn by the investigating officer shows that it is three miles from the accused's house to the deceased's. In going to the deceased armed with a bow and arrows the accused may not have been going to kill him necessarily. It should be conceded from the outset that the accused suspected that the deceased was cuckolding him. But even [so] the court have repeatedly held that; "Prior

Knowledge by a husband of his wife's adultery with a paramour does not necessarily and in all cases disable the husband from pleading provocation and reducing the offence to manslaughter, if the killing was done upon finding his wife and her paramour in the act of adultery….. Each case must depend on its own facts, and the question in ……. Each case is whether or not, upon the facts, of the particular case. The killing was done) in the heat of passion caused by sudden provocation ……. And before there was time for the passion to cool (Yokoladi Omer v. R., (1960) E.A. 323). This proposition has been put more succinctly by Lutta J.A. in Nyadundo v. R. (1971) H.C.D. n. 280 when he said; "If

the killing was done when the husband found his wife with her paramour in the act of adultery, the husband would not be precluded from setting up provocation as a defence, not with-standing his prior knowledge of adultery between them." In the current case, the accused simply suspected the deceased. A fortiori, his plea to have been provoked would be justified. In Yolamu Arua v. R., (1960) E.A. 146 it was held; "Suspicion is not knowledge, and to find his wife ….in an act of adultery might well, not withstanding prior suspicion, engender ungovernable rage and constitute grave and sudden provocation sufficient o reduce the killing to manslaughter." In that case, the appellant had threatened to kill his suspect and when eventually he found him in compromising circumstances with his elder wife, he fought and killed him. It must be pointed out, however, that unlike the accused in the present case. Yolamu did not carry any weapon. The stick with which he struck and killed the deceased was picked up at the scene of the fight. But I am not persuaded that in this case the accused is precluded from pleading provocation simply because he carried a bow and arrows to the scene. For, had he not hears his wife speaking with the deceased at night in his house, I cannot say that he would certainly have killed him. I am unable to rule out the possibility of the accused being enraged beyond control on finding the deceased and his wife in very compromising circumstances indeed; There was the deceased in his house at night with the accused's wife holding a conversation which could have led any reasonable holding a conversation which could have led any reasonable man to conclude that they were committing, had committed or were going to commit adultery. The prosecution have not shown that the accused had no reason to believe that his wife was closeted with the deceased in his house that night or that he knew so when he set out. I would therefore be reluctant to hold that the accused is precluded from pleading provocation. Accordingly I would agree with the assessors and find the accused not guilty of murder. The accused is found guilty of manslaughter c/s 195 P.C. for which offence I convict him." (4) Accused sentenced to 9 years' imprisonment.

180. Samson Bagazora v. R., Crim. App. 471-M-71, 17/5/72, El-Kindy, J.

The appellant was convicted of arson c/s 319(a), Penal Code, in relation to the burning down of the complainant's grass house. He was convicted on the complainant's evidence alone. She alleged that on the night in question the accused had knocked several times at her house, identified himself as

"Samson", and asked to be admitted. She said that she recognized the voice as that of the appellant. She then opened a window and in the light of her torch said she saw the appellant setting fire to the roof and running away. An alarm was raised, but no attempt was made to arrest the appellant that might.

Held: (1) The evidence which tended to convict the appellant with the charge came from the complainant alone, and the issue involved was one of identification. As it was said by the Court of Appeal for Eastern Africa in the case of Abdalla bin Wendo and Another v. Reginam, 20 E.A.C.A. 166 at 167. "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error." This requirement was accepted by this Court in the case of Rajabu s/o Mahaza v. R. (1968) H.C.D. n. 102. This is therefore binding on the trial court in this case." (2) "With due respect to the learned trial Magistrate, the evidence …. Of the complainant was not of such a nature that the trial court could safely accept it without some other evidence tending to confirm her story and establish the guilt on the appellant beyond reasonable doubt …. It is not in keeping with the conduct of an arsonist to (a) knock at the intended house, and (d) stand in such a way that the complainant could see him. This is nearly incredible. And the

non-arrest of the appellant immediately after the incident and the infrequency of visits of the appellant did raise further doubt on the credibility of the complainant's evidence. It is for these reasons that the conviction could not be upheld and not because it was evidence of a single witness." (3)Appeal allowed and conviction quashed.

181. R. v. Nelson Kimanga and Another, Crim. Rev. 33-DDM-72, 15/6/72, Mnzavas,

The accuseds were, or their own plea of guilty, convicted of using absences language is such a manner as was likely to cause a breach of the peace c/s 89 (1) (a), Penal Code, and each sentenced to six months imprisonment. The first accused, a post master at Chunya, and the second accused, a health Inspector, were at a pombe-shop when they heard about the death of the late First Vice-President of Tanzania. On hearing the sad news, they uttered derogatory remarks about the late First Vice-President in the presence of three police officers who had gone there to order the closure of the pombe-shop on hearing of the sad news.

Held: (1) "That the remarks uttered by the two accused about the late Sheikh Karume were obscene and abusive, there can be no doubt." (2) "But the vital question which had to be decided b the trial court was whether the remarks were, on the facts of this case, likely to cause a breach of the peace. As rightly mentioned by the learned state attorney, the High court decisions on the interpretation of section 89(1) (a) and (b) of the Penal Code are conflicting. One view of the interpretation of section 89 (1) (a) is that of Hamlyn J. in R. vs. John s/o Augustino, (1967) H.C.D. n. 61. The facts in that case were that the accused, while under the influence of alcohol, verbally deprecated the President of Tanzania, and said that he would burn down the house of anyone who disagreed with him. The learned judge in his judgment held: - "the statute is aimed at

preventing incitements to physical violence. Here annoyance or displeasure among the listeners is not sufficient …… the breach of the peace referred to by the statute contemplates only action by the listeners." Directly contradicting this decision is the decision in Volter Hopp vs. R. (1967) H.C.D. n. 91……. The Republic argued that the interpretation by Hamlyn J. was the right interpretation as it has since been supported by subsequent judgments. In Salum s/o Sefu vs. R., (1969) H.C.D. n. 177 four accuseds were among other offences convicted of brawling and creating disturbance in such a manner as likely to cause a breach of the peace c/s 89(1) (b). The facts showed that the accused did in fact create disturbances in the police station in the presence of police officers. The question was whether their behaviour in the presence of police officers was likely to cause a breach of the peace. Duff J. in allowing the appeal said: - "The persons present who could have been provoked were the police, and it could not be suggested that hey could act with anything but due professional restraint … it follows that in all the circumstances of this case it was most unlikely that there was a threat to the piece." Another decision n support of the interpretation of section 89 (1) (a) of the Penal Code by Mamlyn J. is the decision in Mdeha vs. R., (1970) H.C.D. n. 310. …… In the present case the facts clearly show that the obscene utterances were made by the accused in the presence of police officers. The record does not show that there were other people apart from the three police officers. This being the position, and the facts being similar to the two decisions by Hamlyn and Biron JJ quoted above, it is most unlikely, indeed most inconceivable, that the three police officers would have, on hearing the utterances of the accused, resorted to physical violence and thereby created a breach of the peace …….. The utterances of the accuseds, thought undoubtly most irresponsible and stupid, did not, on the facts as found by the learned resident magistrate, amount to an offence under section 89(1) (a) of the Penal Code." (3) Appeals allowed and convictions quashed.

182. R. v. Abdurahaman s/o Sima, Crim. Rev. 10-DDM-72, 16/6/72, Mnzavas, J.

The accused, a landlord, was, on his own plea of guilty, convicted of subjecting a tenant to annoyance c/s 32 of the Rent Restriction Act, Cap. 479, and sentenced to Shs. 200/= fine or 3 months imprisonment in default. On 4/1/72, in the morning,

the accused went to his tenant's room and locked the door to his room in an attempt to compel the tenant to vacate the premises. The accused appears to have done this after having failed to persuade the tenant to vacate the premises voluntarily. The question of sentence was discussed on revision.

Held: (1) "The sentence of Shs. 200/= or 3 months imprisonment cannot be said to be lenient. But the vital question is not whether the sentence is excessive but whether it is so manifestly excessive as to warrant reduction by this court." [Citing: R. v. Jonathan s/o Chamade, (1968) H.C.D. n. 237; Hadija d/o Omari v. R., (1970) H.C.D. 158; Arell &Hocken v. R., (1970) H.C.D. n. 159]. (2) "In the present case, it cannot in my view, the forcibly said that the sentence of Shs. 200/= fine or 3 months imprisonment is so excessive as to be unsustainable. The main purpose of the Rent Restriction Act is to safeguard innocent tenants from unscrupulous landlords like the accused. That the offence is not a minor one is reflected by the fact that the Ordinance provides a penalty of Shs. 2000/= fine or six months imprisonment or both such fine and imprisonment. I agree that the learned trial magistrate did not inquire as to the financial ability of the accused to pay the fine. But the fact that the accused in landlord and readily paid the fine shows that the accused was not all that a man of little means. In the circumstances I tend to agree with the learned state attorney that the sentence of Shs. 200/= fine, though severe to a first offender, is not so manifestly excessive as to call for interference by this court." (3) Sentence upheld

183. Omari Saudi and Another v. R., Crim. Rev. 43-DSM-72, 16/6/72, Mfalila, Ag. J.

The two accused were convicted of corrupt transactions with agent c/s 3(2), Prevention of Corruption Ordinance, Cap. 400. The Ordinance was repealed and replaced by the Prevention of Corruption Act, 1971, which came into force on 7/5/71. The accused were charged under the old law on 1/10/71, subsequent to its repeal. The main question before the court was what effect this had on the convictions.

Held: "If it is discovered that the accused persons were prejudiced by this oversight, the proceedings in the lower court must be declared a nullity. However, a closer examination of the repealed S. 3(2) of Cap. 400 and the new S. 3(2) of the Prevention of Corruption Act, 1971, reveal that, apart from very minor details they are identical. In these circumstances it cannot be suggested that the accused persons were in any way prejudiced by charging them under the repealed legislation. The English Court of Appeal, grappling with the same problem In R. v. Tuttle (1929) 45 T.L.R. 357, held: "When it appears as it does that the offence under the earlier Act of 1861 was in the same word as the offence under the consolidation Act of 1916, it is clear that the appellant could not have been prejudiced and that no injustice could have been done to any defence which he had by this amendment ….." These observations were quoted with approval by the Court of appeal for Eastern

Africa in Matu s/o Gichumu (1951) 18 E.A.C.A. 311, where the appellants had been charged and convicted under a repealed Rule, holding that the appellant was in no way prejudiced by the citation of the repealed rule since the prohibition was re-enacted in identical words in the current rules and that therefore the necessary amendment could have been made. Since I have held that the accused persons on this case were not prejudiced by the citation of a repealed legislation, the defect in the charge is curable under S. 346 C.P.C., as amended by G. N. 170/71, by amending the charge and cite it under S. 3(2) of the Prevention of Corruption Act 1971 and to regard the accused persons as having

been charged and convicted under that Act. The charge is amended accordingly."

184. Cornel Samson v. R., Crim. App. 19-DSM-72, 16/6/72. Mfalila, Ag. J.
The appellant was convicted of arson and sentenced to five years imprisonment. The complainant, Aloni Mwaisela, invited his fellow villagers to help him reap his sorghum, and for the occasion he had prepared pombe for entertaining his working quests. At about 6 p .m as the quest were seated drinking their well earned pombe, the accused appeared and went straight to the kitchen where his concubine Mary Mwailula was. The accused asked her to come with him to his house, but Mary refused because the accused had not paid any dowry for her. Thereupon the accused became angry and abusive and threatened that unless Mary came with him he would either kill somebody or set the houses on fire. The accused then went away. During the same night Mwaisela's house was set on fire and completely burnt. The accused was arrested the following morning on the basis of his earlier threat, which was the only thing connecting him with the offence.

Held: (1) "A threat may be strong circumstantial evidence, but it cannot by itself unsupported by and other connecting evidence form the basis of a conviction. The admissibility and probative value of threats was considered by the court of Appeal in Wahi & Another vs. Uganda (1968) E.A. 270 in which the accused had been heard a month before the killing, threat ending to kill the deceased. In considering the value of this threat as evidence Spry J. a. held: "Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it was spoken bitterly or impulsively in sudden anger or jokingly and reason for the threat if given and the length of time between the threat and the killing is also material." In the case before him Spry J. a. held that the earlier threat was of great evidential value because it corroborates d the accuseds confession, who had also been found in

possession of property belonging to the deceased. It follows therefore that a threat is of the highest value when it corroborated some other evidence in order to link the accused with the offence charged. It is weakest when on its own, for

It is then reduced to mere circumstantial evidence in the form of a disconnected chain. The rules governing courts before they can act on circumstantial evidence to the detriment of the accused have been well settle in particular in the well known case of Simoni Musoke vs. R., (1950) E.A. 715 in which it was held: “In a case depending exclusively on circumstantial evidence the court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty.” Further there should be no there co-existing circumstances which would make or destroy the inference; in other words, as a learned author put it; “The circumstance must be such as to produce moral certainty, to the exclusion of any reasonable doubt.: (2) “Applying these tests to this case it is clear that the threat falls far short of these requirements. The threat appears to have been given on an impulse; there must therefore be something tangible other than the occurrence of the threatened act to indicate that the appellant did carry out his threat. The fire could have been caused by numerous other causes besides the appellant i.e. a flying spark, a malicious fellow who had heard the appellant utter the threat etc.” (3) Appeal allowed and conviction quashed.

185. R. v. Alphonce Mwendagungi and Others, Crim. App. 37-DDM-72, 2/6/72, Mnzavas, J.

The four respondents were jointly charged with various offences against the Fauna Conservation Ordinance, Cap. 302, including five counts of unlawful possession of government trophies c/ss 49(1) (2), 47(1) (e) and 53 (1) (a) (i). They were acquitted on all counts, the trial court holding, inter alia, that the

charges had not been proved beyond reasonable doubt. Appeal by the Republic against the acquittals on the charges of unlawful possession.

Held: (1) “With respect I agree with the learned magistrate that in criminal cases the burden of proof is, (unless there is a provision to the contract), always on the prosecution to prove a charge against an accused beyond all reasonable doubt. But with even greater respect to the learned magistrate it is clear from his judgment that he totally failed to see that section 49(2) of Cap. 302 tilts the burden of proof to the disadvantage of an accused charged with being in unlawful possession of Government trophy c/s 49(1). Section 49(2) of Cap. 302 says: “In ay proceedings against any person for an offence under this section the onus of proving lawful possession or dealing shall be upon such person.” As it was held by the court of appeal in R. vs. Francis Kioko (1971) H.C.D. n. 431, when there is a specific provision in a statute putting the burden of proof on an accused, an accused has the duty to prove his innocence on a balance of probabilities not merely to establish that his story is more likely to be true.” (2) Appeals against acquittals allowed as regards three of the accused and record returned to trial court with directions to convict.

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186. Ally Kassam v. R., Crim. App. 97-DSM-72, 6/7/72.

ONYIUKE, J. The appellant was charged in the District Court of Mtwara ….with Corrupt Transaction with Agent c/s 3(2) of the Prevention of Corruption Act No. 16 of 1971 …….. When the case came up for trial …. The charge was read out to the appellant who pleaded thereto in the following words: - “It is true!” The Public Prosecutor gave a statement of the facts as follows: - “The facts of the case are as follows: - The accused is called Ally Mohamed Pirbhai Kassam aged 38 years. He is a merchant of Commercial area Mtwara. He is charged with the offence of corrupt transaction with an agent c/s 3(2) of the Prevention of Corrupt Transaction Act No. 16 of 1971. It happened on 15th of December, 1971. On such day the accused approached A.S.P Mbawala the Regional C.I.D. Officer Mtwara and asked him if he could do favour to him if he could get him a

certificate of good character from the Officer-in-charge Identification Bureau, Dar es Salaam, in order to enable the accused to get a clearance pass to travel to America. The accused at the same time produced a list of eleven other persons for whom he also pleaded to get such certificate of good character, for the same purpose. I now produce in court such list of other eleven persons. E.P.1. I also produce a draft certificate which the accused gave to the said Mbawala which was intended to be the form of the certificate. The accused also promised to offer Shs. 100/= for each of the persons listed by him on the list given to the said Mbawala. E.P.2. Upon that the said Mbawala told the accused that he was going to consider about it and therefore asked the accused to come later. The accused did not return to Mbawala yesterday. This morning the 16th December 1971 at about 9.40 hours the accused went to Ligula Government Quarters and entered the house of Mr. Mbawala who is at the moment on leave. Mr. Mbawala asked the accused why he got there against and the accused replied that he had got there for the same request he had made yesterday and that he had Shs. 200/= to offer to him. By then Mr. Mbawala had invited some Police officers to his house and they hid in different rooms. Then the accused offered Shs. 200/= two notes of Shs. 100/= each which I now produce in court being Nos. C. 116855 and D.408516 E.P. 3. As soon as Mr. Mbawala had received Shs. 200/= he coughed, after which other Police Officers approached where Mr. Mbawala was with the accused. They found the accused and Mr. Mbawala in possession of Shs. 200/=. Immediately Mr. Mbawala reported to such other police Officers that the accused had brought him Shs. 200/= after which the accused was arrested and taken to the police station this morning and charged with the offence in question."

To these facts the appellant stated as follows: - "What has been stated by the prosecution is correct." The learned Magistrate thereupon proceeded to convict the appellant upon his own plea and sentenced him to the statutory minimum sentence of 2 years' imprisonment and

to 24 strokes corporal punishment. The appellant has now appealed to this Court against his conviction on the ground that “the learned Magistrate erred in law in convicting the appellant on the facts set out by the prosecution in as much as the facts did not disclose that the act complained of was done corruptly ……” Mr. Lakha, learned Counsel for the appellant in arguing the appeal advanced the following arguments:;- “(i) That the net result of the facts as stated was that the appellant gave Shs. 200/= to the police officer so that he would issue him a certificate of good record with which the appellant could procure a clearance certificate to travel to America. (ii) There was nothing in the statement of facts that he had a bad record. (iii) On the contrary, the fact that the appellant was a first offender showed that he had not previous bad record. (iv) There was nothing in the statement of facts to show the appellant was acting dishonestly. (v) The prosecution has to show in a charge under Section 3(2) of the Prevention of Corruption Act that the appellant offered the money corruptly, that is to say, with evil mind. The statement of facts, the admission of which was relied upon an evil mind but this has not been disclosed.”

For the purposes of this appeal and of the arguments it was assumed on both sides that it was the function of the police officer, Assistant Superintendent of Police of the Regional C.I.P. Officer Mtwara, Mr. Mbawala, to issue a certificate of good record. The contention was that the appellant had in fact a good record and was entitled to a certificate of good record. It was the duty of the police officer to issue him a certificate of good record. All that the appellant did was to offer and to give him Shs. 200/= to do his duty. The money offered or given in these circumstances could not be said to be offered or given corruptly. Mr. Lakha relied on the decision of Hamlyn j. in MAKUBI v. REPUBLIC, (1968) E.A. 667 at 668 for the proposition that in a case where an accused pleads guilty to a charge of corrupt transaction with an agent he must be shown to admit the essential ingredient of his act being corruptly done, that is to say, with an evil mind. In that case the appellant was charged with an offence of corruption c/s 3(2) of the Prevention Corruption Ordinance (which is identical to the section with which the present appellant was charged in the instant case). The facts of that

case were that the appellant was a herdsman and on the material date was visited by the village executive officer for the purpose of counting the appellant's livestock. It appeared that in the locality, a local rate was imposed by the council, based on the number of cattle owned by each person. The village executive officer informed the appellant of what he intended to do and proceeded with his count. The appellant informed him however that the herd contained the cattle of neighbours and that consequently the assessment should be based only upon these beasts which were his property. The village executive officer told the appellant that once the cattle were all in his 'kraal' he

would be assessed upon the total number found there. Whereupon the appellant handed the village executive officer a Shs. 20/= currency note with the request that he abstain from including the cattle said to belong to the neighbours in the total count. The village executive officer thereupon arrested the appellant and he was later charged ….. under Section 3(2) of the Prevention of Corruption Ordinance. In his plea the appellant was recorded as saying: - "I gave the 20/= because he wanted to count my cattle including some of another man which happened to come to my group of cattle. I wanted him not to count them. I gave him the money as an inducement not to include the other cattle which were of another man." The learned Magistrate entered a plea. Hamlyn, J. in dealing with the appeal against conviction stated as follows: - "Section 3(2) of the Prevention or Corruption Ordinance makes it an offence for any person corruptly to give, promise or offer any consideration as an inducement or reward for an agent to do or forbear to do anything in relation to his principal's affairs. A necessary ingredient of the offence is that the act shall be done 'corruptly'. Is it clear that the act of the appellant in hading to the village executive officer the Shs. 20/= was a corrupt act? It is certainly a most injudicious one and the appellant's remedy was clearly to appeal to some higher authority against a count and assessment which he claimed to be incorrect." The learned Judge stated that the Ordinance did not

contain an interpretation of ‘corruptly, but referred to R. v. AKBARALI K. JETHA (1945) 14 E.A.C.A. 122 where the court of Appeal observed that ‘the crux of the offence of official corruption is the motive which animates the giver’ and to MANDIA v. REPUBLIC (1966) E.A. 315 where the court of appeal said “that the appellant’s state of mind, which in our view includes motive and intention seems to be an essential and material factor in determining whether in making the payment, he was acting corruptly or not.” The learned Judge concluded by saying: - “In the instant case it seems clear that there was no evil mind on the part of the appellant. The dictionary meaning of ‘corrupt’ in this sense is to induce to act dishonestly or unfaithfully and in no sense can the appellant be said to have acted thus. It is true that his offer of the Shs. 20/= laid itself open to such interpretation at first sight and the trial Magistrate clearly interpreted it in such manner. The reply of the appellant to the charge was not in fact an unequivocal plea of guilty for no where does he admit to the essential element of his act being ‘corruptly done’.” In the final event he allowed the appeal and set aside the conviction and sentence.

Section 3(2) of the Prevention of Corruption act No. 16 of 1971 under which the present appellant was charged provides as follows:- “3(2): Any person who by himself or by or in conjunction with any other person, corruptly gives, promises or offers any advantage to any person,

whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of, any agent (whether or not such agent is the person to whom such advantage is given, promises or offered) doing or forbearing to do, or having done or foreborne to do, anything in relation to his principal’s affairs or business, shall be guilty of an offence.”….. To establish an offence under this subsection in so far as it is material to this appeal it must be proved (i) that the person charged, offered or gave a consideration to a agent (ii) that he offered or gave it an inducement or reward for his doing or fore bearing to

do something in relation to his principal's affairs (iii) that he offered or gave that consideration corruptly.

Subsection (2) and indeed the whole of section 3, as I understand it, applies to any agent whether he is a public officer or a private person and to the affairs of a principal whether it is a public authority or a private person. Before I deal with subsection (2) of Section 3 I would refer to section 6 of the Act. It provides that "Any person being a public officer, solicits, accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any advantage without lawful consideration or for a lawful consideration which he knows or has reason to believe to e inadequate, from any person whom he knows or has reason to believe to have been or to be or to be likely or about to be concerned in any matter of transaction with himself as a public officer …… shall be guilty of an offence ….." It does not make it an offence for the giver to offer or give the advantage unlike Section 3 of the Act. It will be noted that in section 6 nothing was said about soliciting or accepting or obtaining the advantage corruptly. It is designed to discourage and penalise the taking of presents by a public functionary when a transaction or matter is pending or likely to the pending between him in his official capacity and the person from whom the accepts or obtains the present or advantage. The difference between section 3 and Section 6 of the act was explained by Dr. Gour in his work on the Penal Law of India 2nd Edition Vol. 1 at P. 825 Paragraph 1451 when commenting on the corresponding sections in the Indian Criminal Law as follows: - "The difference between the acceptance of a bribe made punishable by Section 161 (which corresponds to our Section 3) and this section (our Section 6) is this. Under the former section the present is taken as a motive or reward for abuse of office; under this section the question of motive or reward for abuse of office; under this section the question of motive or reward is holly irrelevant, and the acceptance of a present is forbidden because, though ostensibly taken for no consideration, it is in reality a bid for an official favour, the refusal of which after acceptance of the present may not be always possible." Section 6 was designed to cover situations where it cannot be proved that presets were taken by a public officer corruptly. It

says in effect that a public officer should not accept gifts from people with whom he is likely to deal in the course of his official duties even if he is not shown to be acting corruptly. I refer also to section 10 of the Act which deals with a presumption of corruptness in certain cases. It provides that 'where in

any proceedings under Section 3, it is proved that any advantage has been offered, promised or given to, or solicited, accepted or obtained or agreed to be accepted or obtained by a public officer by or from a person or agent of a person, holding or seeking to obtain a contract from a specified authority, the advantage shall be deemed to have been offered, promised or give and solicited, accepted or obtained or agreed to be accepted or obtained corruptly as such inducement or reward is as mentioned in section 3 unless the contrary is proved." The position then is that unless a case under section 3 falls within Section 10 nothing is presumed and the three ingredients outlined above in regard to section 3(2) must be established beyond reasonable doubt b the prosecution. Lastly I will refer to a decision which deals with the essentials of a plea of guilty. In R. v. YONASANI EGALU & OTHERS (1944) 9 E.A.C.A. 65, Wilson, J. in delivering the judgment of the court of Appeal stated at p. 67 as follows:- "In any casein which a conviction is likely to proceed on a plea of guilty (in other words, then an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element to it unequivocally."

I will now address my mind to Mr. Lakha's submissions in the light of the foregoing. As I understand it what he was saying was that it was not enough to establish that the appellant gave Shs. 200/= to the police officer as an

inducement to do something in relation to his principal's affairs or business, to wit, to issue him a certificate of good conduct or record but that he must give the Shs. 200/= corruptly. The decision of the court of appeal for eastern Africa (MANDLA v. R., (1966) E.A. 315) has established that consideration corruptness involves an inquiry into the state of mind which covers intention and motive. The mind which is material to be established is 'evil mind'. Both intention and motive must therefore be shown to be evil or dishonest. Evil mind in the context of the present case would require proof that the appellant intended to induce the police officer to go against his duty, that is to say, to do what his duty forbids him to do or to omit what his duty enjoins him to do; in other words that the appellant gave the police officer money as an inducement to sway or deflect him from the honest and impartial discharge of his duties or that he gave the money as a bribe for corruption or its price. This meant that it must appear from the statement of facts given by the prosecution in the instant case that the appellant had no good record but that he gave the money to the police officer as an inducement to give him a certificate of good record. If then the appellant had a god record and he gave the police officer the money to issue him a

Certificate of good then his motive was not dishonest because the police officer was merely asked to do his duty. It was in this connection that Mr. Lakha cited the decision of Hamlyn, J. in MAKUBI v. R., (1968) E.A. 667 in support of this contention. Although he did not say so in so man words he seemed to suggest that if the police officer had accepted the money he would have committed an offence under section 6 and not under section 3 of the Act and then section 6 did not make it an offence for a private person to give an advantage when a matter is pending between him and a public officer in his official capacity.

I have however to relate these interesting submissions t the fact of the instant case, I did not think I am called upon to give judgment of legal propositions in the abstract. This case relates to an offer of money and to money

given to a public officer and I will deal with it in that light. A public officer is expected to carry out his duties (using duties to cover the whole range of his official activities) honestly and impartially and to show loyalty to his employer ad this he cannot do it he is affected by consideration to show favour in the performance of his duties or to act contrary to his duty. I think it is in this light the word ‘corruptly’ or evil mind should be considered. Where a person! Offers or gives an advantage to a public officer with a view to sway or deflect him from the honest and impartial discharge of his duties or to wheedle him from his loyalty to his employer in the handling of his affairs he opens himself to the charge that he is acting corruptly. Turning to the facts of this case it was established that the appellant approached the public officer and requested a favour from him in his handling of the affairs of his employer. The favour was to issue him a certificate of good record in his capacity as an officer n charge of the Police Identification Bureau. He gave the officer a specimen of the certificate he wanted. He requested the same certificate for each of the eleven persons whose names he submitted to him. For doing this favour he stated he was prepared to pay Shs. 100/= in respect of each certificate issued. He went beyond mere promises. He actually gave the police officer Shs. 200/= to induce him to issue the certificates. The appellant admitted all these facts. It seems to me on these facts that the appellant intended to buy the officer’s loyalty and to get him to act in the way he wanted him to act irrespective of whatever might have been the officer’s obligations to his employer. The money was not meant to be a fee. It was the price he was prepared to pay to get the officer to do his bidding; in other words he was tempting the officer with money to do his bidding. At first sight this appears to be dishonest. It was then argued that if the intention appeared to dishonest it must be shown that the motive

was also dishonest. What does motive mean? Motive is said to relate to the end, and intention to the means for achieving that end. Motive is something that

animates an intentional act – the ulterior intention, an intention with which an intentional act is done. (Glanville Williams, Criminal Law, The General Part, 2nd Edition, Section 21), Assuming the word 'corruptly' requires' consideration of an ulterior intention the question that arises for consideration in this case is what was the appellant's ulterior intention? He had personally not said anything about his motive in his plea. His counsel however made certain statements in his plea in mitigation of sentence. The substance of his submissions was that the appellant acted our of ignorance and out of fear of he police. As to ignorance, the position then was that the appellant did not know he was legally entitled to a certificate of good record from the police. His motive then was to buy it, that is to say, to get the police officer to give it to him for a bribe. As to fear, the position then was that he intended to warm himself into police confidence by buying their loyalty. Either way, it seems to me that the motive was anything but honest. Can it be said that because in getting the police officer to do his bidding it turned out that the police officer happened to be doing his duty also that the intention and motive was the less corrupt? I do not think so.

The view I hold of the facts of this case makes it unnecessary for me to consider the principle which was alleged to have been established by Hamlyn J. in MAKUBI v. REPUBLIC (1968) E.A. 667, namely, that the giving of money to a public officer to do his duty cannot amount to a corrupt act. I can only hope that the Court of appeal for East Africa may one day throw some light on this matter. Finally, I have to mention that the learned State attorney who appeared for the Republic indicated that the Republic did not support the conviction. I feel, however, impelled by the reasons I have given above to sustain the conviction. In the final result I will hold that the appellant's plea was unequivocal, that he admitted the essential ingredients that constituted the offence with which he was charged and that he statement of facts given by the prosecution covered the essential ingredients of the offence. I will therefore dismiss this appeal as incompetent under section 313(1) of the Criminal Procedure Code.

187. Commissioner-General of Income Tax v. Kagera Saw Mills Ltd. E.A.C.A. Civ. App. 29-DSM-72, 19/8/72.

MUSTAFA, J. A. – The respondent company (hereinafter called the company) was assessed to income tax in respect of the years of income 1967 and 1968 by the appellant commissioner General of Income Tax (hereinafter called the Commissioner). The Company was dissatisfied with the assessments and unsuccessfully appealed to the local committee against such assessment. The company then appealed to the High Court which allowed its appeals, [(1972) H.C.D. n. 124] and the Commissioner now appeals to this Court.

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The facts in the case are not in dispute. The Company owns 18,000 acres of land, 10,000 acres of which are under sugar cane cultivation, the other 8,000 acres being undeveloped. The Company owns and operates a sugar mill and factory for the manufacture and processing of refined sugar from sugar cane. The sugar mill occupies about 10 acres of land in the sugar plantation the cost of the sugar mill was about 10 million shillings and it employs 300 people, of whom 20 to 25 are highly skilled workers. The sugar mill processes the Company's sugar canes and also that purchased from other sugar cane growers. In 1966, 3.3% of sugar cane was supplied by outside growers, in 1967 4.9% and in 1968 10.5%. In 1967 the mill purchased outside sugar cane to the value of Shs. 99,839; in 1968 – Shs. 186.553; in 1969 – Shs. 280,400; and in 1970 – Shs. 434,236/-. The Company commenced growing sugar canes from 1956 and commenced building the sugar mill in 1957. The Company has two departments, the timber department and the sugar department which comprises both the sugar mill and the sugar plantation there is only one set of books for the sugar department. In the timber department the labour force is 135; in the sugar department it is 1,400.

During the financial years 1967 the Company incurred capital expenditure to the extent of Shs. 1,601,579/= on the construction of an irrigation system on its

land. The Commissioner allowed a deduction of $12^{1}/_{2}$% on the said capital expenditure by way of a "wear and tear" allowance on machinery under paragraph 9(2) (iii) of Part 11 of the Second Schedule to the East African Income Tax Management Act 1958 (hereinafter referred to as the Act.) The Company contended that the Commissioner should have allowed a deduction of 20% on the said capital expenditure by way or deduction on "farm words" on agricultural land under paragraph 25 of the Part 1V of the Second Schedule to the Act.

Similarly during the financial year 1967 the Company incurred capital expenditure to the extent of Shs. 144,707/= in the purchase and installation machinery in buildings of the sugar mill and the necessary alterations thereto. The Commissioner refused any deduction for such capital expenditure on the ground that the company was engaged solely in the trade of husbandry, that is to say, the growing sugar cane and the manufacture and processing of sugar cane into refined sugar was only part and parcel of the trade of husbandry and therefore the Company was not entitled to any investment deduction in respect of such capital expenditure. The Company claimed that it was engaged in the separate and distinct trades, that of growing sugar canes and that of the manufacture and refining of sugar which constitutes the subjection of goods or material of local origin to a process, within the meaning of Paragraph 27(e) of Part V of the Second Schedule to the Act. The Company claimed an "investment deduction" of 20% of the capital expenditure in terms of paragraph 27 (e) (ii) of Part V of the Act.

The same state of affairs applied to the financial year 1968, except for some difference in the sums for capital expenditure.

I will deal with the irrigation system first. The irrigation system consists of a caterpillar diesel engine, apparently housed in a building, linked to a pump which is affixed to the ground, and a series of interconnected pipes of diminishing sizes and dimensions ending in a network of sprinklers connected at intervals to the

pipes of the smallest dimensions. The pipes are all above ground and can be disconnected and moved about. The diesel engine is the prime mover, and operates the pump which draws water from a river and by the operation of its valve it pumps and forced water through the series of interconnected pipes to the sprinklers which irrigate about 2000 acres of the sugar plantation. The Commissioner submitted that the irrigation system constitutes but one unit and is machinery coming under paragraph 9(2) (iii) of Part 11 of the Second Schedule to the Act, entitling the Company to an allowance of $12^{1}/_{2}$% for wear and tear. The Company contended that apart from the diesel engine which is machinery, the rest of the equipment is "farm works" within the meaning of paragraph 25 of Part 1V of the Second Schedule to the Act and qualifies for a 20% deduction. Machinery is defined in paragraph 34 of Part V1 of the Second Schedule to the Act as – "34(1) In this Schedule, except where the context otherwise requires – 'Machinery' includes ships and plant used in carrying on any trade", "Farm works" is defined in paragraph 26 of Part 1V of the Second Schedule to the Act as – "'farm works' means farmhouses, labour quarters, any other immovable buildings necessary for the proper operation of the farm, fences, dips, drains water and electricity supply works other than machinery, windbreaks, and other works necessary for the proper operation of the farm."

In Auckland City Corporation City Corporation v. Auckland Gas Company Ltd. (1919) N.Z.L.R. 561 at p. 561 at p. 586, quoted in Words and Phrases Legally Defined (Second Edition) – "a machine in its popular sense is a piece of mechanism, which by means of its inter-related parts, serves to utilize or apply power, but does not include anything that is merely a reservoir or conduit, although connected with something which is without doubt a machine."

The trial judge found that the components of the irrigation system were severable and he divided them into 3 sections, the diesel engine, the pump and the pipes and sprinklers. He found that the diesel engine was machinery, but that the pump and the pipes and sprinklers were "farm works". In the course of this appeal, Mr. Wilkinson for the Company conceded that pump would be "machinery". That would leave for decision only the pipes and sprinklers.

Reading “farm works” as defined in paragraph 26 of Part 1V of the Second Schedule to the act, especially the phrase “water and electricity supply works other than machinery”,

I am satisfied that the pipes and sprinklers must be farm works. “Water…… supply works other than machinery” must cannote the means or conduits by which water is carried, just as “……. electricity supply works other than machinery “must cannote the cables and lines and posts by which electricity is carried. Mr. Khaminwa for the Commissioner referred to an unreported case of this Court being Civil Appeal No. 47 of 1970 (Kenya) The Commissioner General of Customs and Excise v. Elliot’s Bakeries Ltd, where it was held that baking pans were an integral part of the bread baking machinery. In that case the pans were regarded as part of the machine because the machine could not operate without them. Here the facts are different. The engine and the pump could extract and pump water from the river without the pipes and sprinklers, the water pumped out could be carried away in wagons or flow away to the field through channels. I agree with the trial judge that the irrigation system here is severable, between what is machinery and farm works, although the system is operated as one unit. This does not necessarily conflict with the wide definition of machinery in paragraph 34 of Part V1 of the Second Schedule to the act because this definition contains the words “……..where the context otherwise requires”.

I now come to the issue whether the Company was engaged solely in the trade of husbandry, that is the growing of sugar cane was the mainland substantial trade, with the manufacturing and refining of sugar being only ancillary and incidental part of such husbandry, or whether the company was engaged in two separate and distinct trades, that of growing and planting sugar canes and that of manufacturing and processing and refining sugar from sugar canes. Commissioner General of Income Tax v. Kiganga Estates Ltd., (1968) E.A. 464 for the proposition that the Company was only carrying on one trade,

that of sugar planting husbandry. He submitted that as the sugar factory was situated on the sugar plantation the presumption must be that the trade of manufacturing and refining sugar from sugar cane was only ancillary that of growing sugar.

Trade is defined in Section 2 of the Act as – "'trade' includes every trade, manufacture adventure or concern in the nature of trade." It is thus clear that the manufacture and refining of sugar is a trade, the only question being whether it is a separate and distinct trade or is merely a part of the trade of husbandry. In dealing with such a question, the particular facts of each case have to be looked at, and ultimately it is a question degree.

In this case the sugar mill cost 10 million shillings, a not inconsiderable sum. It has a labour force of 300, of whom 20 to 25 are highly skilled. It has chemist analysts, engineers, samplers and highly specialized sugar experts imported from Mauritius. The process of manufacturing and refining sugar is highly complex and technical involving liming, "sulphuration" clarifying heating boiling, and crystallization and so on. It is

true that, in the sugar mill, the rendering sugar cane from the fields into refined sugar is a continuous, extensive and complex process. However the sugar mill has been purchasing sugar canes from other growers on an increasing scale: in 1966 it was 3.3%; in 1967 it was 4.9% and in 1968 it was 10.5%. In terms of cash the purchases of outside sugar cane were as follows – in 1967 it was Shs. 99,839; in 1968 it was Shs. 186,553; in 1969 it was Shs. 280,400 and in 1970 it was Shs. 434,236. it is a considerable undertaking in its own right. This case is easily distinguishable from the Kiganga Estates case. In the Kiganga case it was agreed that the Kiganga Estates case. In the Kiganga case it was agreed that the Kiganga Estates was only carrying on one business, which was the growing and preparing to marketable stage of tea, and that all of such activities were "for the purposes of husbandry". In the instant case the company claims it is carrying on

two separate and distinct trades in the Kiganga case there was no evidence as to whether the preparation of tea grown on the estate to a marketable stage was a complex process or not. It would seem that the drying of tea leaves and its process to a marketable stage must be comparatively a simple operation. The processing, manufacturing and refining of sugar is a highly technical, delicate and complex process. There was no evidence in the Kiganga case that the Estates bought any tea grown from other tea growers for processing, whereas in the instant case there is evidence that the Company was purchasing

Sugar canes from other sources for processing into refined sugar. From the evidence adduced the sugar mill of the Company could exist by itself by processing sugar canes from other sources without necessarily relying on sugar canes grown on the Company's land. It would appear that the situation was different in the Kiganga case.

Mr. Khaminwa submitted that the Company has admitted that its main trade was husbandry. I have perused the passages in the proceedings referred to by Mr. Khaminwa as supporting that proposition, but with respect, I cannot find any such admission. The Company has consistently asserted that it has two separate and distinct trades. It is true that there was only one set of accounts covering both the sugar cane growing and the manufacture of refined sugar, but it is not necessary to have two separate sets of accounts to establish two separate trades, see Commissioner of Inland Revenue v. William Ramson & Son Ltd. 12 T.C. p. 21. Taking all the facts into consideration, and considering the size, investment, complexity and independent standing of the sugar mill, I am of opinion that the manufacturing of refined sugar, that is, the subjection of goods or materials of local origin to a process, was a separate and distinct trade from that of sugar cane growing. As I have said earlier, in deciding such a matter, it is a question of degree. I believe that the Company was carrying on its processing activities in the sugar mill separate from its sugar cane growing activities. As was said by Newbold, P. in the Kiganga Estates case -

"In different circumstances, for example,
If the company carried on it's processing
Activities in the factory quite separate
From its growing activities, the company
Might be said to be carrying on the trade
Of processing local material ……."

Before concluding I think I should comment on an observation made by Mr. Wilkinson in the course of arguing his appeal. He laid particular stress on a ministerial statement in Parliament as indicating the intention of the Legislature on the construction of the Act. I doubt whether such a statement could influence a court in the construction of an enactment. I would have thought the intention or Parliament should be ascertained from the enactment and legislation itself.

The Company has rightly conceded that the pump is machinery. I would amend the judgment and decree of the High Court accordingly. Apart from this amendment I would affirm the judgment and decree of the High Court, and would dismiss the appeal. [Spry, V-P., and Duffus, P., concurred].

188. Ahmed Mohamed v. Tanganyika Clearing & Forwarding House Ltd., Misc. Civ. App. 2-DSM-71, 30/8/72.

SAUDI, C. J. – This an appeal against the ruling of the learned Resident Magistrate of Dar es Salaam dismissing the claim of the appellant against the respondents for Shs. 8,910/= comprising arrears of wages, severance allowance any payment of one mother's wages in lieu of notice of dismissal. The ruling seems to be based on two grounds: firstly that the court had no jurisdiction In the matter by virtue of S. 28 of the Security of Employment Act, Cap. 574 of the Laws of Tanzania and secondly that the claim was res judicata by reason of the fact that it had been adjudicated upon by the Dar es Salaam Conciliation Board on 28th February, 1969 under. S. 24 of the Security of Employment Act.

Mr. Versi who appeared for the respondents supported the ruling of the learned Resident Magistrate and added that the law was clear on his matter in

that issues of summary dismissal are governed by S. 28 of the Security of Employment Act which specifically ousts the jurisdiction of all Courts and leaves such matters in the hands of Conciliation Boards. Section 28 provides that : “No suit or other civil proceeding (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Paper) shall be entertained in any civil court with regard to the summary dismissal or proposed summary dismissal, or a deduction by way of a disciplinary penalty from the wages, of an employee.” In Kitundu Sisal Estate v. Shingo and others (197)) E.A. 557 a similar issue arose and it was held that the Court had no jurisdiction.

Mr. Cenge who appeared for the appellant agreed that in so far as the issue of summary dismissal is concerned the Court has no jurisdiction. He contended however that there

Were other aspects of the case e.g. the question of arrears of wages, payment of less than the minimum wages and severance allowances, which were outside the four walls of S. 28 of the Security of Employment Act and on these other matters he asked the Court to reconsider the claim of the appellant.

At the hearing of this appeal questioned the appellant and he stated that he was awaiting payment of the total sum of Shs. 9,000/= from the respondents. This sum must certainly include arrears of wages, the difference of the wages paid and the minimum wage and severance allowances as the claim put forward on his behalf by the Labour Office totaled Shs. 8,910/= for all these aspects.

I therefore see no merit in this appeal and I dismiss it. Following the decision in the case of Kitundu I would direct that each party should bear its own costs.

189. R. v. Juma s/o Rashid, Crim. Rev. 36-DDM-72, 3/6/72.

MNZAVZS, J. The two accuseds were charged with and convicted of stealing from motor-vehicle c/ss 269 (c) and 265 of the Penal Code and each

sentenced to 2 years imprisonment. There can be no doubt that the conviction was based on clear and ample evidence. This court is not however all that sure that the sentence in respect of the 1st accused, in the surrounding circumstances of the case ought to have been the same as that imposed on the 2nd accused. The amount of property and money stolen was no doubt big. The total value amounted to Shs. 3,118/=. Because of this, severe sentences were clearly indicated. But, notwithstanding this aggravating circumstance, the learned resident magistrate failed to see that the first accused needed to be treated more leniently than the 2nd accused. The record shows that the 1st accused was a first offender whereas the 2nd accused had a similar previous conviction last year. Some leniency in sentencing should always be exercised in respect of first offenders. The sentence in respect of the 1st accused, which sentence is not supported by the Republic is reduced to 18 moths imprisonment. The sentence in respect of the 2nd accused is to stand and is hereby confirmed.

190. Joseph s/o Masumbuko v. R., (and seven other appeals), Crim. App.. 243-A-71, 6/10/72.

BRAMBLE, J. These appeals have been consolidated as they have one common factor. Because of a fire at the Court House, Moshi, the records have been destroyed and there are no notes of evidence by which the judgments could be assessed. In most of these cases the appellants have completed or almost completed the terms of imprisonment.

While the judgments may be sound the absence of the notes of evidence and the exhibits is likely to prejudice the appellants in the prosecution of their appeals. In R. v.

Abdi May and others, (1948) 15 E.A.C.A. 86 the Court of Appeal held that in such circumstances a new trial ought to be ordered but in the particular case declined to do so as the appellants had served or nearly served the terms of imprisonment

laid down in default of the payment of the fines imposed. In another case Haiderali Lakhoo Zaver v. R. (1952) E.A.C.A. 244 when the record was lost before the hearing of the appeal before the High Court of Kenya a Judge ordered a retrial and this was upheld by the Court of Appeal and part of the judgment reads: “The Courts must in this matter try to hold the scales of justice evenly between the parties, and, whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of affairs as this appeal disclosed, we think that the course followed by the learned Judges in first appeal was on the balance the fairest and most just, and is the only solution which offers an opportunity for a judicial determination on the merits of the case.”

It is not possible to judicially assess the merit of these appeals without the notes of evidence and exhibits and the Petitions of Appeal cannot be a proper guide, more particularly as they are prepared by laymen. It would be unjust to base any decision on these taken together with the judgments only I will, therefore, be guided by the two cases cited above. I note that –

(a) In appeals No. 243/71, 244/71, 312/71 and 434/71 the appellants have Completed the terms imposed on them.

(b) in appeals No. 13/72, 59/72 and 61/72 the appellants have almost Completed the terms imposed on them;

(c) In appeal No. 382/71 the fine has been paid; and

(d) In appeal No. 409/71 and 410/71 the appellants have served only a small portion of the sentence.

I allow the appeals in all the cases mentioned in (a) and (b) above, quash the convictions against each of the appellants and order these who are still in custody to be immediately released.

As to (c) and (d) I order that there be a new trial soon as possible as no injustice is likely to occur. It a conviction is secured in (d) an application can be immediately made to the competent authority for remission of part of the minimum sentence.

191. Gadi Athumani v. Elinati Aminiel, (PC) Civ. App. 85-A-72.

BRAMBLE, J. The respondent/plaintiff brought a claim against the appellant / defendant in the Same Primary Court for damages for deflowering her and pregnancy maintenance.

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The court found that the respondent did not prove that the appellant deflowered her but that he made her pregnant as a result of which she gave birth to a child. From the record the respondent was about 18 years old at the time. An order was made that the appellant pay to the respondent Shs. 100/- for pregnancy maintenance and Shs. 30/- monthly for the maintenance of the child until it attained the age of seven years.

Both parties appealed to the District Court, the defendant against the whole order, and the plaintiff on the inadequacy of the maintenance for the child and the failure to award damages for deflowering her. The District Court substantially upheld the judgment of the Primary Court but increased the maintenance for the child to Shs. 40/- per month until it was fourteen years old or until the father took custody. This is an appeal against that decision.

The suit was brought in the Primary Court and consequently Customary Law applied. The appellant agreed that the respondent was his fiancé and that he had an affair with her but claimed that she was then pregnant. Clauses 183 and 184 of the Local customary Law G.N. 436 of 1963 are on the point. “183. The 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 the woman.” 184. Even if the woman had more than one lover at the time of conception, the one whom the woman names may not deny paternity of the child.”…… From the evidence and the law it was safe to conclude that the appellant was the father of the respondent’s illegitimate child.

There was no strict proof of the expenses connected with the pregnancy and child-birth but this has not been challenged in the court and I see no reason to interfere with it. I do not see on what authority an order was made against the

appellant for the maintenance and education of the child. The customary Law is that children not born in wedlock belong to their maternal family. This implies that the responsibility for their upbringing rests on the maternal family. It is possible for a father to legitimate his illegitimate child and according to Clause 182 of the Customary Law mentioned above he is then responsible for its maintenance wherever it is brought up.

The claim was very specific and nowhere in it was there a request for maintenance of the child nor was this in any way mentioned in the evidence. The trial magistrate was quite wrong to make any such order. He had no jurisdiction to do so. An order of this kind would be proper under customary Law where a child has been legitimated. If this has not been done it is possible for a woman to seek such an order under the Affiliation Ordinance, but she would have to move a District Court.

For these reasons I will allow the appeal in part and set aside the order for maintenance of the child. There will be no order as to costs in this court."

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Ed. Note: This case should be compared with the following apparently conflicting judgments: Mguya v. Mbaga, (1967) H.C.D. n. 326; Pius v. Tehabyona, (1971) H.C.D. n. 174.

192. Ezekia s/o Simbamkali and another v. R., E.A.C.A Crim. App. 30-DSM-72, 19/7/72.

SPRY, V. P. The two appellants were convicted of murder and sentenced to death. They were alleged jointly to have killed on Zachariya s/o Simbamkali

The case against the first appellant, Ezekia s/o Simbamkali, a brother of the deceased, depended almost entirely on a confession he is alleged to have made to a Justice of the Peace, Allen Mbuke. No question was raised by the advocate for the appellant, Mr. Patel, when this witness began to testify, indeed, it would seem from the record as a whole that he cannot have received proper

instructions. The witness is recorded as saying that Ezekia was taken to his office to make a statement. He went on “I recorded the transaction as per notes I took which I produce” and these were admitted as Exh. P.1. This was gravely irregular for a start. The witness might have been permitted to use the notes to refresh his memory but they were not, in themselves, admissibly in evidence.

The learned judge then asked Mr. Patel if he wished to object to the introduction of the statement and received a negative reply. Ezekia himself however, said that he had made the statement because he was beaten. The learned judge rightly decided to hold a trial within a trial. Ezekia was called to give evidence, although Allen Mbuke had given no evidence as to the circumstances in which the statement was made, the defence had had no opportunity to cross-examine him and the interpreter who had acted in the matter had not been called.

When Ezekia had given evidence in chief, the learned judge gave his ruling. So far as the record goes, Ezekia had not been cross-examined and had not been asked if he wished to call an witness. The learned judge remarked that the Justice of the Peace had given evidence that he had been satisfied Ezekia was a free agent and had no recent marks of injury on his body. This, according to the record, is not true; presumably, it is a reference to the “notes”. He concluded that as Ezekia could not name or identify the people he alleged had beaten him “and in view of the unreasonableness of his story”, the confession was to be admitted.

With respect we think these grounds are unsatisfactory. If an ordinary, humble, citizen is beaten by police or local authority askaris it is very likely that he would not know the names of the individuals involved and although the beating of prisoners is most reprehensible, we know that it does happen and therefore that such allegations cannot lightly be dismissed.

What is, however, much more serious is, as Mr. Lakha, who appeared for the appellants, submitted, that it is impossible, from a perusal of the record, to avoid the conclusion that the learned judge placed the burden on Ezekia of proving that his statement was not voluntary. It is well established that where the prosecution seeks to rely on a confession, the burden is entirely on the prosecution to prove that it was voluntary. This was a most grave error.

It ma be desirable to set out again the procedure to be followed at these trials within trials. Immediately it is known that he admissibility of a statement is to be challenged, the assessors should be asked to retire. This should whenever possible, happen before any mention of a statement has been made, the usual procedure being for defence counsel to inform the court that question of law needs to be considered. The prosecution then calls all the witnesses available to prove that the statement was made voluntarily and according to law, including the person to whom the statement was made, the interpreter, if any, and any other persons who can give relevant evidence. The defence has the right to cross-examine these witnesses in the usual way. The accused then has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. On this issue, the burden of proof is wholly on the prosecution the judge gives his ruling in the absence of the assessors, who then return to court. If the statement has been held to be admissible, the prosecution evidence regarding it is given again and the witnesses are again cross-examined, because, although the issue of admissibility has been decided, the circumstances in which the statement was taken may affect the weight to be attached to it and for this reason the assessors are concerned with them.

If this confession is excluded, as we think it must be, very, little evidence against Ezekia remains. It appears that, after the body of the deceased had been found, some three months after the murder, Ezekia handed to the police a hammer and a rungu which were in his house and which are alleged to have been used in the killing even on this mater, there is some conflict of evidence between two police witnesses. Ezekia was also implicated in a confession made

by his co-accused and ultimately retracted. It is well established that such a confession can only add the final assurance to an already strong case. It could not serve to establish common intent and if Ezekia's confession is excluded, there is no substantial evidence to prove any common intent and the only direct evidence is that Ezekia entered the house of the deceased after the latter had been assaulted by the second appellant and received what may well have been the fatal wound

Ezekia elected to make an unsworn statement from the dock. In his summing-up to the assessors, the learned

Judge described this as adoption of his earlier confession. With respect, we cannot agree. We do not, of course, know the actual words he used in his own language but as interpreted and recorded we think the substance of his statement was, that as the court had accepted the alleged confession it was useless for him to say more.

In view of the apparent misdirection on the onus of proof in the trial within a trial, and the lack of evidence that the alleged confession was voluntary, and the paucity of other evidence against Ezekia, it would clearly not be safe to allow his conviction to stand. The case against him raises a very grave suspicion, but that is not enough. His conviction is quashed, and the sentence passed on him is set aside.

[The appeal of the second appellant, Iddi s/o Mangula, was dismissed].

193. Nhuvya s/o Subajiwa v. Jackson s/o Chilewa, Civ. Case 32-DDM-72, 24/8/72.

MNZAVAS, J. This is an appeal against the judgment and order of Dodoma Resident Magistrate's Court in Civil Case No. 201 of 1971.

The appellant (original defendant) was adjudged to pay a total of Shs. 1,150/= to the respondent (original plaintiff) as compensation for injuries he caused to him and consequent material loss the respondent suffered as a result of the injuries.

Before this court the appellant admitted assaulting the respondent for which he was tried and convicted in Dodoma District Court Criminal Case No. 225 of 1971 and sentenced to Shs. 200/= fine or 4 months imprisonment in default.

He, however, argued that the award of Shs. 1,150/= compensation to the respondent was excessive and prayed that the sum be reduced. In coming to his decision as to what amount of money should be awarded to the respondent the learned trial magistrate says in paragraph four of his judgment:- “The plaintiff, as the evidence shows, suffered material loss as well as serious personal injury as the result of the defendant’s attack on him.” The learned resident magistrate also described the injuries suffered by the plaintiff (present respondent) as “substantial”

To satisfy itself as to the nature and extent of injuries inflicted on the respondent by the appellant this court had to call for the record in Dodoma Criminal Case No. 225 of 1971. The medical report which was produced before the lower court in connection with the above criminal case and admitted as exhibit ‘A’ shows that the respondent suffered compound fracture of the first metatarsal bone of his left little finger as well as a cut wound on the fore-head. The injuries are collectively put in the category of harm.

This being the report of the doctor who examined the respondent soon after he was assaulted I fail to understand how the trial magistrate came to the bold conclusion that the respondent suffered serious personal injuries.

There was no evidence to suggest, leave alone to show that the injuries suffered by the respondent would incapacitate him permanently and thereby

reduce his earning power as a peasant. On the contrary, when the respondent was interrogated by this court he replied that he was now fully cured of his injuries. So much for the nature and extent of the injuries suffered by the respondent.

As for the material loss suffered by the respondent, the lower court found that as a result of the injuries the respondent was unable to cultivate his eight-acre shamba and as a result he was deprived of twelve up to eighteen bags of "harvest" that year. It was also found that the respondent was only able to cultivate $3^1/_2$ acres of his shamba the following year.

It would appear from the evidence that the respondent used to cultivate such crops as cassava, ground-nuts, millet and beans. The learned resident magistrate awarded Shs. 600/= to the respondent as damages resulting from his failure to cultivate his eight-acre shamba and Shs. 300/= damages in respect of the following year when the respondent cultivated only $3^1/_2$ acres of his shamba.

Both the evidence and the judgment do not give any clue as to how the above figures were arrived at. The judgment is silent as to what kind of crops the "12 to 15 bags of harvest" refers to. Whether the estimated bag of harvest were bags of millet or of ground-nuts or of beans or of cassava or of a collection of all these crops is, to say the least, beyond my comprehension.

And, even if, for the sake of argument the lower court had specified the bags to be of say ground-nuts or millet, it would still be impossible to say how the figures of Shs. 600/= and Shs. 300/= were arrived at as there would still remain the important question – What was the price of a bag of ground-nuts or of millet at the material time?

In some cases it may be difficult to assess the amount of damages payable to a plaintiff but it is always important that the trial court assesses as best as it can what it considers to be an adequate recompense for the loss suffered by the plaintiff and the mode of assessment should form part of the record.

There can be no doubt that the respondent's failure to cultivate his shamba was caused by the appellant's unsocial conduct. The only question to be

finally decided is whether the consequent loss incurred by him as a direct result of his failure to cultivate his shamba qualifies for compensation. According to the famous decision in Hadley v. Baxendale (1954) 9 EXCH 341: "The

Only kind of damage for which compensation is recoverable is that which arises naturally and in the usual course of things from the defendant's acts". In my view when a peasant is incapacitated as result of an assault, the usual consequences are that he will be unable to cultivate his shamba and thereby suffer loss of crops which he would have harvested had he not been incapacitated by the assault.

Pure logic may speak against such reasoning but practical commonsense demands that the respondent be compensated for what he has lost as a result of his failure to cultivate his shamba. His failure to do so was a direct result of the assault or him by the appellant.

Taking into account the fact that the respondent's shamba was of eight acres, I am of the view that the sum of Shs. 600/= and Shs. 300/= awarded as compensation for his failure to cultivate the shamba in the first year and cultivate only part of it in the following year was not excessive and was no more that should have been awarded if the learned resident magistrate had showed how he arrived at the figures.

The amount of Shs. 150/= awarded as compensation for the injuries suffered by the respondent is in no way excessive.

I would, however, like to draw to the attention of the trial magistrate that Shs. 1,150/= taken as the total of Shs. 600/= plus Shs. 300/= plus Shs. 150/= is clearly wrong. The total of the above figures appears to me to be Shs. 1,050/=only.

The appellant is to pay Shs. 1,050/= only to the respondent as compensation. Save for the above variation this appeal fails. No order as to costs.

194. Andengelile Mwambebule v. Ngatele Mwijala, (PC) Civ. App. 51-DDM-72 26/7/72.

KWIKIMA, AG. J. This is an appeal by Andengelile the husband of Tulimwalo from whose brother Ngatele he sought to recover 6 cows, a bull, and Shs. 70/= being the brideprice he paid when he married Tulimwalo in 1947……. In an earlier case, Katumba Civil Case No. 202/71, Andengelile was sued by his wife [Tulimwalo] who had deserted him. The Court dissolved the marriage, holding Tulimwalo responsible for the break up. It was established in the same case, i.e. No. 202/71 that the marriage had endured for 24 years without there being any issue at all. Tulimwalo was found guilty of deserting her husband. Andengelile thereby commenced this suit against his brother-in-law who is customarily the person to refund the bridewealth.

The Katumba Primary Court allowed Andengelile's claim to the extent of three cows, on bull and Shs. 70/= only, although the claim was for the return of the full brideprice of 6 cows, a bull and Shs. 70/=. Both the parties appealed.

whereupon the Tukuyu District Magistrate awarded Andengelile three cows and Shs. 110/= only being what the learned magistrate considered to be half the brideprice originally paid. Rules 52A, 54 and 55 of the Declaration of Customary Law G.N. 279/63 were cited as authority for this decision.

These rules empower the court to exercise its discretion as to what should be refunded in the case of a long-subsisting marriage. On the other hand, rule 68 makes it crystal clear that if the wife is the party responsible for the break up then the full bride-price is refundable and the grant of the divorce is conditional upon the completion of the refund. Rule 61 goes further to make the guilty party liable for the costs of the suit. In view of this, a court of law and especially on appeal court should take pains to evaluate the circumstances and relate them to the law before deciding to exercise its discretion.

In this dispute, the fault for the break-up of the marriage was entirely Tulimwalo's who went as far as instituting a suit for the dissolution of her marriage to Andengelile. Her husband was still eager to take her back but she would not agree. She deserted him, refused to return to him and brought a suit to divorce him. In his memorandum, her brother argues that she is now too old to remarry. So her husband should not be entitled to a full refund of the brideprice he paid when he married her some 24 years ago.

Poor prospects to re-marry and old age have been held to be enough reason to reduce the brideprice refundable even if the wife be the guilty party in Manyoni Witare v. Palapala Kakoro (1967) H.C.D. n. 86. But Seaton, J., was emphatic that a recalcitrant wife cannot hope for a reduction just because the marriage endured for long. The learned judge denied the wife any relief in Nyakasara Kimiro v. Marwa Mwita (1968) H.C.D. n. 6 where the marriage had endured for 14 years. There is therefore considerable weight in Andengelile's argument that he should receive the full price from his brother-in-law. Ngatele should not expect relief if his sister, old and unlikely to remarry though she may be, chooses to jilt the man who has loved her and got used to her company for so long. The jilted husband should at least be given back his cattle so that he could look elsewhere for company. In the circumstances of this case, it would be like adding insult to injury if the husband, after being put to grief and embarrassment by his wife, was again denied his full brideprice. Indeed the divorce ought not to have been granted to Tulimwalo before her brother had paid back all the cattle and money.

It would be unfair for the court to use its discretion to put Andengelile to further disadvantage when all the fault is his wife's. She is free to return to the

man who still loves her and has been caring for her for 24 years. The question of her chances to re-marry should not arise because her husband still wanted her

when she sought to divorce him. If she had any marital ambitions, she should not have so wantonly broken up her marriage in the first place.

Looked at this way, Andengelile's case becomes the more forceful of the two. In the event therefore, his appeal is allowed with an order that Ngatele should pay him six (6) cows, one bull and Shs. 70/= plus costs throughout this case. If he cannot obtain the beasts then Ngatele should be made to pay their equivalent in money. At the same time Ngatele's appeal is dismissed.

195. Saka Langaia v. Idi Athumani, (PC) Civ. App. 34-DDM-71; 25/8/72.

MNZAVAS, J. The appellant sued the respondent claiming one head of cattle. The primary Court gave judgment in his favour. The respondent was dissatisfied and appealed to the district court. His appeal was upheld. The appellant has now appealed to this court.

The following are the facts which made the appellant (original plaintiff) sue the respondent (original defendant). Sometime in 1970, the appellant sent his daughter to the respondent for treatment. The daughter was suffering from some mental aberration and the respondent, who is a native doctor, promised to cure her on condition that the appellant pays him Shs. 50/= as medical fees. The appellant happened to be out of funds at the time and instead of paying the money he surrendered his head of cattle to the respondent as a security on an understanding that he was to have his head of cattle back once he paid the Shs. 50/= to the respondent. The respondent took appellants daughter to his house and started treating her but he appellant decided to take his daughter home after only ten days of treatment, saying that the respondent had failed to cure her. He then demanded his head of cattle from the respondent. The respondent refused to return the beast to him.

From the facts as found by the lower courts, it is clear that there was no time limit specified in which the respondent was required to cure the patient of her malady. The appellant removed his daughter from respondent's home while the latter was still treating her. This being the position the appellant's removal of her daughter from the respondent's home amounted to a breach of contract by

the appellant. The breach substantially prevented the respondent from performing his duty of treating appellant's daughter.

Generally speaking any breach of contract which prevents substantial performance is a cause of discharge. On the facts of this case, the respondent was entitled in law either to ignore the breach and insist upon

Performance or accept the repudiation by the appellant and treat himself discharged from further liability. The respondent has chosen the latter and as such he cannot be penalized for the unilateral acts of the appellant. The District Magistrate's decision is sound and is hereby upheld: the appeal fails. Costs against the appellant.

196. Mashauri Masaba v. R., Crim. App. 630-M-71, 19/5/72.

JONATHANI, AG. J. The appellant was convicted on his own plea of driving while his efficiency was impaired by drinks contrary to Section 49(1) of the Traffic Ordinance and sentenced to a fine of Shs. 400/= or 4 months' imprisonment in default. He was also disqualified from holding or obtaining a driving licence for a period of 18 months. The fine was paid

The appeal is only against the sentence and order of disqualification. The facts as outlined b the prosecution and admitted by the appellant were briefly that, on the 31st October, 1971 in the township of Musoma, a Police Constable stopped the appellant who was driving a Government Land drover, because judging from his manner of driving he suspected him of being under the influence of alcohol. The appellant admitted to him that he was drunk while the medical report, vague as it is would seem to bear this out. On these facts he was convicted. I am satisfied the conviction was proper.

The appellant said nothing in mitigation regarding sentence, but when asked if he had cause to show why his licence should not be suspended, he is recorded as stating tersely thus: "It is bad luck". The Court then proceeded to

pass the sentence and to make the order. In his petition the appellant has stated not only that he had a clean record of driving dating back to 1956 but also that he had a family of ten to support on no more than his monthly salary of Shs. 160/=, and that but for a relative of his who advanced him the money for paying the fine, he would have gone to prison. I have no doubt that, if these were the circumstances and he had made them known to the Magistrate, which he did not, the fine which I would consider excessive, would not have been imposed.

While the appellant should have said something in mitigation, it was also incumbent upon the court to find out the appellant's means so as to enable it to arrive at a proper sentence, for if the Magistrate was minded that the appellant should not go to prison, he should have sentenced him to such fine as was within his ability to pay, which he could have ascertained only after making due inquiry. In the event, I would consider it unlikely that he would have imposed the fine had he found the appellant was a person of lowly circumstances, and for this reason and also for another reason which will be apparent presently, I would grant the petition and reduce the fine to a sum of Shs. 150/=. Accordingly, it is ordered that Shs. 250/= out of the fine paid should be returned to the appellant.

And now to the order of disqualification. It is raised in the petition that, the material day being a Sunday when he was off duty, he had been drinking when he received an order from his superior officer that he should convey back in that landdrover some students of the Home Economics Training Centre, Buhare some four miles from Musoma Government Hospital where they had been receiving some training in nursing. He says that was an order with which he had to comply lest he should lose his job. Although this is belated explanation, it cannot lightly be dismissed. I have had a look at a calendar for last year and, contrary to what learned State Attorney said at the hearing of this appeal, it does appear that the date when the offence was committed was, in fact, a Sunday which is normally a public holiday. It the appellant was off duty as he claims, he

was entitled to drink. In the light of this, I think there is reason to accept his explanation that he was sent for while he was drinking and asked to drive the trainees back to their institution, which order he felt obliged to carry out. It may very well have bee in those circumstances that he was found driving. In my view, if such were the circumstances in which the offence was committed, the lower court would not have made the order of disqualification. Accordingly, the disqualification rescinded.

Ed. Note: The court's ruling in relation to the disqualification order is consistent with that laid down in Eli Sambila v. R., (1969) H.C.D. n. 63.

197. Samson Ndegeleki v. R., Crim. App. 527-M-71, 29/6/72.

JONATHAN. AG. J. The appellant was convicted on a charge of stealing by servant c/ss 271 and 265 of the Penal Code and sentenced to 2 years' imprisonment and 24 strokes, being ordered also to pay a compensation of Shs. 2905/45 to the Mwanza District Council, his employer, whom he is alleged to have swindled.

A good deal of the evidence is not in dispute and can be summarized thus: The appellant was employed as a clerk b the Mwanza District Council and posted to Masanza I Primary Court. Among his duties was collection of personal tax as agent, it seen, of the Internal Revenue Office, Mwanza, for which he was issued with receipt books out of which to issues receipts to tax payers. He was supposed to remit such revenue to the Internal Revenue Office twice monthly.

On the 16th September, 1970, P.W. 2 a revenue inspector issued a personal tax receipt book, which I shall call the receipt book, to the appellant. On the 5th of April, 1971, he was sent a letter of dismissal by his employer, and he was required to hand over his duties to another clerk of the Council called Mihayo (P.W. 3). This was done on the 8th April, 1971, in the presence of P.W. 4, an accounts clerk at the Council's headquarters. I may as well say here, in advance, that his is also a defence witness (D.W. 1). A handing – over certificate was made out and duly signed by both the appellant and Mihayo, as did D.W.1.

It is the prosecution's case that although the appellant handed over to Mihayo three cash boxes, on of them had no key, the appellant promising Mihayo that he would hand it in on the following day, which he never did. It was proved and not disputed that the receipt book had not been accounted for to the Internal Revenue office. Initially, criminal proceedings were instituted against the appellant because investigations revealed that some people had made payments and been issued with receipts out of that book. After the particular cash box was produced and put in as exhibit, the court ordered that the service of a locksmith should be sought to get it broken open. This was done and P.W. 12, a locksmith opened the box in the presence of several witnesses who duly testified. However, though asked, the appellant refused to be present when the cash box was being opened. In it the receipt book was found, among other things, but there was no money. In the receipt book as much as Shs. 2905/45 had been received. At that stage the prosecution successfully applied to withdraw the previous charge substituting therefore the present charge …….

At the close of the prosecution's case the appellant, in answer to the provisions of S. 206 of the C.P.C., elected to give evidence from the dock and to call one witness (D.W.1). He stated that after receiving the letter of dismissal he handed over all Government property he had in his charge to Mihayo in the presence of Mashimba (P.W. 2 or D.W. 1) and that they completed a handing – over not. The court then seems to have gone completely out of its way and cross-examined the appellant. The learned resident magistrate must have overlooked the provisions of S. 206 which make it clear that, in the event of an accused person making an unsworn statement he is not liable to cross-examination. That means he is not liable to cross-examination by the prosecution and the court (including assessors) alike. Though occasions rarely arise, of course, there is nothing improper for a court to put in a brief question to an accused person when making his statement, if to do so would give sense to what is otherwise incomprehensible, which indulgence, in my view, is desirable and

certainly in the interests of the accused and justice in that it affords him assistance to communicate reasonably intelligibly. Here this was not the case, for the court asked questions which were not calculated merely to clarify what was otherwise unintelligible. Though the procedure adopted here was unlawful, I am satisfied that it did not cause a failure of justice and is a curable irregularity. The evidence thus elicited by the court shows, among other things, that the appellant handed over to Mihayo 3 cash boxes and one key for each cash box. D.W.1 was, however, clear that one cash box had no key and that for that reason he had specifically ordered that it should be sent to his office where arrangements could then be made to have it opened.

As will have been apparent, the defence case was that the appellant handed over the money which is the subject of the charge to Mihayo. For reasons which will be reverted

to a little later, the learned resident magistrate found as a fact that the appellant handed over Mihayo one key for each cash box. However, having regard to the absence of any reference in the handing-over certificate, to the receipt book and the cash collected therein, he came to the conclusion that the appellant did not hand over the money to Mihayo. With respect, this conclusion would appear insupportable in view of the magistrates finding that the appellant handed over the relevant cash box to Mihayo together with the key. When the cashbox was forced open the receipt book was found in it. Even though it was not included in the handing-over certificate. In that case what reason was there for ruling it a possibility, and even a likelihood, that the money may have been in the cash-box together with the receipt book at the time of handing over? No reason to this effect is disclosed in the trial court's judgment and, in my view, the appellant should have been given the benefit of doubt resulting in his acquittal.

It remains, however, to consider of on a proper approach on the evidence before it the trial court ought not to have convicted the appellant. To answer this

question it would be necessary to review the finding of the lower court that the appellant handed over to Mihayo the key to the particular cash box. This begs a question: has this court power to review the evidence in support of that finding, it being a finding in appellant's favour, and if necessary to reverse it?

A first appeal is in the nature of a rehearing and, as observed by Biron, J. in Mhina Athumani v. Republic (1970) H.C.D. n. 151 where-in he followed a decision of the East Africa Court of Appeal in Dinkerrai Ramkrishan Pandya v. R., (1957) EA 336, a first appellate court has an obligation to re-evaluate the evidence as a whole and then to make its own decision on it, not discounting, of course, the fact that the trial court was the better placed in assessing credibility. In the case of Pandya v. R., the Court of Appeal referred to the decision of the English Court of Appeal in Glannibanta, (1876) 1 P.D. 283, part of a paragraph of which decision reads, and I would quote: "But the parties to the cause are nevertheless entitled, as well as on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inference and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

The case before the English Court of Appeal would appear to have been a civil matter while the East African Court of Appeal was dealing with an appeal from a conviction for an offence and not with a finding of fact in favour of the appellant in that case. I am, however, of the view as was my brother Judge in the decision of this court above referred to, though his seems to have been stated only in

obiter, that the above quoted dictum of the English Court which was adopted by the East African Court of Appeal, applies with equal force to the case now under consideration especially, again as pointed out by Biron J., in view of the fact that the Republic now enjoys the same rights as an accused person in matters

pertaining to criminal appeals. I would hold, therefore, that it is open to this court to re-examine the evidence and to reach its own decision whether the finding of the lower court hat the appellant handed over key to the particular cash box was reasonable on the evidence.

[The court then proceeded to review the evidence and found that, contrary to the finding of the trial court, the accused did not hand over the key to the cash box in question, and therefore rejected the defence which this finding supported. The conviction was upheld and the appeal dismissed].

Ed. Note: The court's holding with respect to cross-examination of an accused making an unsworn statement is identical with that of Leonard s/o Kaseko v. R., (1968) H.C.D. n. 45.

198. R. v. John Olale, Misc. Crim. Cause, 14-M-72, 2/8/72. JONATHAN AG. J. This is a second application filed by Messrs Tukunjoba & Company, Advocates based in Mwanza under Section 123(3) of the Criminal Procedure Code for the release on bail of their client, one John s/o Olale, a national of Kenya who stands charged before the North Mara District Court with removal of property under lawful seizure c/s 118 of the Penal Code.

It will be necessary to set out, in brief, the history of the matter. On the 24th March, 1972 the accused – John s/o Olale – was charged with removing, on or about the 17th February, 1972, 400 tins of cooking oil and 4,500 hides and skins from the Police Station, Tarime where they were lawfully seized and kept as exhibits pending, it seems, the institution criminal proceedings against some one or some people for the unlawful exportation of these goods. The accused denied the charge, following which he was remanded in custody after the prosecution stated that investigations were incomplete and that as a non-citizen as well as a non-resident of Tanzania the accused might abscond. A week later Mr. Tukunjoba of the aforementioned firm of advocates traveled to Tarime where he personally applied to the resident magistrate to have the accused released on bail the police public prosecutor at Tarime was then sent for to have the application heard. He would not, however, enter a formal appearance because,

as he stated on oath before the resident magistrate, he had been told specifically by the investigating Assistant commissioner at the Police Headquarters, dare s Salaam, not to appear in any bail application that might be made b or on behalf of the accused. In the result, the resident magistrate felt precluded from hearing he application. Arising from this, on the 3rd of April Mr. Tukunjoba applied to this court to have his client granted bail.

On the 24th of April this first application was heard before my learned brother, Makame, J. who deplored the attitude of the police chief in the matter. I agree, with respect, that the situation posed by the police in making it at least difficult for the district court to give a hearing to the application, was totally inexplicable and, in the event, quite unfair to the accused. However, after hearing arguments both from Mr. Tukunjoba and the Senior State Attorney appearing for the Republic, my brother Judge refused the application in order to afford the police reasonable time to investigate. That was on the 6th of May.

On or about the 10th of July Mr. Tukunjoba filed this second application stating in his affidavit that the prosecutions have and sufficient time to complete their investigations. At its hearing five days ago he vigorously urged that the application should this time be refused only if the prosecution showed very good reasons for doing so. Resisting it, Mr. Mbilinyi learned State Attorney argued for the Republic that the circumstances have not changed, as the case is a complicated one requiring a careful investigation which is being conducted by a senior police officer, apparently the same officer that is alleged to have instructed the public prosecutor at Tarime not to appear in answer to a bail application that might be made. Unfortunately, at the hearing of the matter, the public was not in a position to say how far the investigations had gone as the Police Headquarters in Dar es Salaam had not as yet informed the Senior State Attorney's Chambers, Mwanza of progress already made. It was, however, submitted for the Republic

that, in view of he gravity of the offence and considering that the accused is a man of substance and influence, to grant bail in this case might impede its investigation. It is also argued that the accused might flee from justice and that, in such an event, it would not be easy to get him brought back as he is a national and resident of Kenya.

Mr. Tukunoba referred me …… to the case of Mohamed Alibhai v. Rex 1 T.L.R. 138, wherein Wilson Ag. C. J. set out some of the principals to be had in mind in deciding whether or not to grant bail. Those principles were followed in the case of Abdullah Nassor v. Rex, 1 T.L.R. 289 where the some Judge restated them more comprehensively. I respectfully agree with the principles therein contained and it is noteworthy that they appear to have been generally endorsed in numerous decisions of this court. The reasons given in opposing this application are among those laid down in the above cases. They do not appear to have been substantiated when the first application was heard. I think this was understandable then as there had not been much opportunity to have the Senior State Attorney fully briefed by the police in resisting the application. It is disquieting, however, that three months later the Republic can still go no further than to repeat its

Apprehensions if the accused is admitted to bail. Nor is there any indication of how much more there is still to be done before the accused is brought to trial, if at all……. It seems …… that the main reason for objecting to bail is that investigations would be “greatly impeded” if the accused is left at large. As I said earlier, this has yet to be substantiated, and in any case, there is no explanation now forthcoming for the considerable delay there has been in concluding the investigations.

After carefully considering the matter I am not satisfied that sufficient grounds have been advanced for continuing to deny the accused bail, and being satisfied that his appearance to take trial can be adequately secured, I would

direct the resident magistrate, Tarime, to release him on bail upon his depositing a cash bond for Shs. 20,000/= and furnishing three sureties each in the sum of Shs. 30,000/=, whose means to pay such sum should be ascertained preferably through the co-operation of the Police."

199. R. v. Stephano Alois, Crim. Sass. 24-LINDI-72, 18/5/72.

ONYIUKE, J. – The accused, Stephano Alois, stands charged with the murder of Mohamed s/o Rashidi alias Kionjo. The case of the prosecution was that the accused fatally stabbed the deceased with a dagger on Sunday the 17th October, 1971 in the premises of on Mohamed Chorogo …… There was a mass circumcision of the boys in the village and many people gathered at the house of Mohamed Chorogo to celebrate the occasion. As is usual on such occasions there was plenty of free drink and people helped themselves liberally to the pombe. Among the guests were the deceased and the accused …… The revelry affected many people including such responsible persons as the Rural Medical Aid of Nanguru Joseph Ndunguru (P.W. 1) and a teacher by the name of Blasius Makota who in a sense set in motion a chain of events that culminated in the tragedy. These two gentlemen embarked on a childish prank, snatching the bowl of pombe one from the other, which started as a joke but which was fast developing into a quarrel until P.W. 4 intervened to stop it. This incident apparently attracted the attention of the deceased and he moved forward to inquire into the cause of the quarrel. By this time the accused was leaning on the outside of the wall of the house. He confronted the deceased and asked him what was his concern with the quarrel. The deceased replied that where people quarreled it was not out of place to ask the cause. The accused became aggressive and abused the deceased and threatened to beat him up. The deceased moved nearer to him and asked him what was the reason for his wanting to beat him. (The deceased). Thereupon the accused drew his dagger from its scabbard and fatally stabbed the deceased. The dagger was tendered in evidence and was a vicious looking piece of sharp and pointed metal encased in a scabbard that (P.W. 2.) this lethal weapon must have penetrated 4 inches into

the deceased's body. It went through the ribs and ruptured part of the left lung. The deceased died of shock and severe hemorrhage as a result of this injury on the 4th day of the incident.

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The accused in his unsworn statement denied that the dagger belonged to him or that he had anything to do with it and further stated that he was so drunk on that Sunday afternoon that he had no recollection of what happened and was unaware that he stabbed anyone. It was only when he became sober the following day that he found himself in custody in the office of the ward Executive Officer and on inquiry was informed he was being held for stabbing the deceased.

I have no hesitation whatsoever in accepting the evidence of the eye-witnesses to this incident and I hold as a fact that the dagger belonged to the accused and that he used that dagger to stab the deceased and that the deceased died from that stab wound. The only possible defence in this case is intoxication…… Although the accused did not give evidence on oath it was clear that he drank a lot of pombe at this ceremony and that he was drunk. The witnesses for the prosecution said almost as much. The evidence showed that the accused had no previous ill will against the deceased. There was nothing in the deceased's conduct to provoke him that day. There was no motive for the killing. Motive is of course not an ingredient of the offence of murder. Its presence however tends to strengthen the prosecution case just as its absence tends to weaken it. Why then did the accused behave in such reckless and senseless manner. I am satisfied that he took more pombe than he could cope with and that he acted in such reckless and wanton manner because he was acting under the influence of intoxication and that he did not intend to kill or cause grievous bodily harm to the deceased ……

I feel I must dispose of an argument which was advanced by the counsel for the defence in this case. It has been suggested in this case that if the

deceased had been rushed to Lindi hospital his life might have been saved. It is unfortunate that the Rural Medical Aid of Nangaru dispensary, Joseph Ndunguru, who found it difficult to regard himself other than as a doctor and behaved as such was guilty of an error of judgment, to say the least, in not sending the case to Lindi Government hospital for treatment and in not allowing the relatives of the deceased who pressed for it to send the case to that hospital. As it turned our the nature of the injury was such that that the Lindi Government hospital did not appear to have had the equipment for lung operation which the case required ….Be that as it may, the legal position is clear, the fact that the life of the deceased might have been saved if he had received good medical attention cannot affect the legal responsibility of the accused for the death of the deceased. It was the wound he inflicted on the deceased that caused his death. He cannot shift the responsibility to another person whose connection with the deceased was that he endeavored to save his life which was put in peril by the accused. That the deceased's life could have been saved if the case were handled by a more competent person cannot be a defence in law or snap the chain of causation. The death of the deceased remains the responsibility of the accused.

In the final result I will find the accused not guilty of murder but guilty of manslaughter and I hereby convict him accordingly." [Accused sentenced to 14 years' imprisonment].

Ed. Note: The court's ruling on causation in this case appears to illustrate the application of Section 203, Penal Code, where "causing death" is defined. It may usefully be compared to R. v. Atupelye d/o Lividiko, (1`967) H.C.D. n. 389.

200. R. v. Sheraz Alidina, Crim. Traffic Rev. 67-DSM-72, 2/8/72.

MWAKASENDO, AG. J. – The accused in this case was charged before the District Court of Kilosa with five Counts relating to the mechanical defects of his motor vehicle registered No. TDH 586. He pleaded guilty to four of the Counts charged and not guilty to the remaining count, which need not concern us any further as it was subsequently withdrawn on the application of the public prosecutor. The learned Resident Magistrate duly convicted the accused in respect of each of the counts to which a plea of guilty hand been entered.

However, on accused being called upon to say something in mitigation, he advanced a contention which indicated that his plea of guilty was made under a misapprehension. It is not clear from the record what the learned Resident Magistrate thought of this volte-face, but it would seem he wanted some time to consider the matter and therefore adjourned the case for ten days. While this court fully appreciates the need for the Magistrate wanting time to reflect over the unexpected development, I do not think that the problem that had cropped up was o such complexity and magnitude as to require ten full days for contemplation. It would seem to me that this lengthy adjournment was wholly unjustified in the circumstances of this case. Be that as it may, on the resumption of the case, accused changed his plea of guilty tone of no guilty in respect of each of the four counts. The learned Resident Magistrate rightly, in my opinion, accepted this change of plea, as he was bound to do under the law. The then adjourned the case to another date for hearing.

Then comes the day fixed for the hearing of the case. Unfortunately the case did not come before the same Magistrate and it is doubtful whether I would be called upon to deal with this matter if the case instead of being sent to another Magistrate had come before the same Magistrate who had made the earlier orders. However, to turn to the problem referred to this Court, the district Court Magistrate is uncertain whether he should proceed to sentence the accused or go on with the trial of the case as the Resident Magistrate before him, had ordered.

The law on this point appears now to be well settled. And although there are man cases decided on this point, I do not think it is necessary for the purpose of this order to

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refer to all these authorities. I will refer only to one case of this court: Hussein s/o Hassani, 1 T.L.R. 355. The accused in that case was charged before the Resident Magistrate's Court with stealing two drums of petrol, the property of his employer contrary to sections 265 and 271 of the Penal Code. When he first appeared before the court he unequivocally pleaded guilty to the charge he was convicted on his plea and remanded in custody for sentence. When the hearing was resumed a different Resident Magistrate presided over the court. The appellant then stated that he did not steal the property and a plea of not guilty was entered. The case was tried and the accused was ultimately convicted. On appeal, Sinclair, J. held, on very good authority, that where an accused person has pleaded guilty to a charge and has been convicted on his plea, the court has jurisdiction to allow him, before sentence, to withdraw his plea and not guilty.

On the authority of this case therefore, it would seem to me abundantly clear that the course taken by the learned Resident Magistrate was perfectly correct and the trial of the case ought properly to have been proceeded with in the normal way. The record of this case will therefore be returned to the trial court with a direction to hear the case and determine it in accordance with the law.

201. Magaigwa s/o Chacha and another v. R., Crim. Apps. 47-D-72 and 43-D-72, 17/5/72.

EL-KINDY, J.: - The appellants Magaigwa s/o Chacha, who is the first appellant, and Mendo s/o Kitekero, who is the second appellant, were jointly charged with an convicted of unlawful wounding contrary to Section 228(1) of the Penal Code Cap. 16 and they were sentenced to imprisonment for two years

each, subject to confirmation by the High court. They were also ordered" to compensate the complainant in the sum of Shs. 100/=".They appealed against convictions, sentences and orders. Their appeals were consolidated and heard together…….

The record showed that on the 16th of April, 1971 the first appellant appeared in the District Court of North Mara sitting in Tarime, before the learned Magistrate, Mr. A.G.G. Korosso, Resident Magistrate, when he was charged with the offence of grievous harm contrary to section 225 of the Penal Code cap. 16. His plea was taken and he pleaded not guilty to the charge. The first appellant was remanded in custody until the 30th of April, 1971 but he was produced in the same court before the learned Magistrate on the 20th of April, 1971 when, upon application by the prosecution, the original charge was withdrawn and a fresh charge was substituted therefore. This procedure was quite proper as it is specifically provided for by section 209 of the Criminal Procedure code Cap. 20. The fresh charge was that of unlawful wounding contrary to Section 228 (1) of the Penal Code Cap. 16. On this date, the second appellant was joined in as a co-accused. The charge was read over and explained to the appellant and took their respective pleas. Each appellant denied the charge against him, and the learned Magistrate entered them as pleas of not

guilty to the charge. The appellants were then remanded in custody until the 30th of April, 1971. They were produced on this date before the same learned Magistrate, but the hearing of the evidence did not proceed as the prosecution alleged that investigations of the case had not yet been completed. They were then remanded until the 14th of May, 1971 for hearing, but, again, the hearing did not proceed. Thereafter, they were remanded in custody continuously until the 27th of May, 1971 when the appellants were released on bail. They continued to attend court as directed until the 29th of October, 1971 when hearing commenced. It was again before the same learned Magistrate, but this time the

charge was not read an explained to the two appellants before the learned Magistrate proceeded to hear the evidence. In other words, at that stage the plea of the appellants was not taken. The first issue, therefore on appeal, is whether the omission to take pleas before hearing of the evidence was an irregularity and if so whether this irregularity was so fatal so as to render the proceedings a nullity. However, to complete the description of the record, on this date (the 29th of October, 1971), the learned Magistrate heard the evidence of one witness Malwa s/o Chacha (W.1) before the case was adjourned to the 3rd of November, 1971 and the bails extended similarly. The hearing of the case of the prosecution was continued and completed on the adjourned date when two more witnesses, Robi s/o Kitekero (P.W.2) and Krano s/o Marasi (P.W. 3) gave their evidence. And on the same day, the appellants gave their evidence on oath against the charge. Judgment was reserved for the 15th of November, 1971 and the appellant continued on bail. But when the learned Magistrate was considering the case, he noticed, when he was perusing the record, that the first appellant, who expressed a wish to call two witnesses in his defence, had not been granted the opportunity to call them. Therefore he decides that the defence case should be re-opened for this purpose and on the 15th of November, 1971, the first appellant was reminded of his wish to summon witnesses. The first appellant availed himself of this opportunity and called on Masiaga s/o Chacha (P.W. 1), who gave evidence in his favour but he abandoned the second witness. He said the latter was on safari ad he did not wish to wait for him. The defence case was then closed and judgment was reserved for the 25th of November, 1971. The judgment was delivered as promised and the appellants were found guilty as charged. The second issue, therefore, is whether the learned trial Magistrate could re-open the case after the defence case is closed at that stage.

With regard to the first issue …. It is clear that where no plea was taken at all, whether by the same Magistrate or by the “hearing” Magistrate, the proceedings would be held to be a nullity (see, DAMJI v. REGINA 2 TLR (R) 137). It is also well established that where there was a change of Magistrates, the Magistrate who hears the evidence “must again call upon the accused to

plead" (see the case of REGINA v. RAJABU s/o RAMADHANI 2 TLR (R) 49) I have already expressed my doubts about that judgment in the case of REPUBLIC v. ANGELO (1971) H.C.D. n. 136.

still say that where a previous Magistrate had already taken a plea, it is slightly pedantic to require the second Magistrate to take a plea again before he proceeds to hear the evidence if the aim of preferring the charge is to bring to the notice of the accused the nature of the case he is to face. If that was the case, then the accused had notice of the nature of the charge against him form the time he pleaded before the other Magistrate and therefore the second taking of the plea achieves nothing. It may be argued that an accused needs to be reminded of the charge before him but no accused could ever forget the charge against him. Or it may be argued that, it is necessary for the Magistrate who hears the case to be certain that the accused still stands by his previous plea. Again this is unnecessary as an accused who wants to change his stand in the case can tell the court as it is normally done. It may also be said that by reading the charge to the accused the second Magistrate would also inform himself of the case he is hearing and the plea of the charged person, but this can be achieved by merely looking at the charge sheet and the recorded plea. This is usually done whether by the same Magistrate or another Magistrate and the problem is more or less non existent. While it is easy to hold that the non-taking of a plea at all is fatal to the conviction, it is much more difficult to appreciate the idea behind a decision where at one stage a plea was omitted by the same or another Magistrate. I have had occasions to discuss with my brother Judges this problem an I feel that the decision of Ramadhani's (supra) case is inconvenient if not wrong and impracticable. However this decision is still binding as it is a unanimous decision of this Court. As a result of this decision the case in hand becomes unduly difficult. If it was necessary for he second Magistrate to take a plea in the same manner before hearing the evidence. This should be a

necessary inference. It is for this reason that as a matter of practice and to avoid problems like the case in hand that it is essential that pleas should be taken against, whether by the same Magistrate or another, just before hearing of the case begins (see Damji's case supra and Stephen s/o Simbila R. (1971) H.C.D. n. 433). And the issue in this case is whether the omission to take plea in that manner was so fatal so as to render the proceedings a nullity. It is my view that the trial of a case begins from the time the accused is produced in court and is charged with the offence. It is not just when the hearing of the evidence begins. Therefore, the trial Magistrate, in this case, did take plea of the appellants and, therefore, the subsequent omission is a mere irregularity which did not affect the proceedings of this case and which did not occasion failure of justice. This interpretation is, in my view, in keeping with natural justice as enacted in the amended Section 4 of the Penal Code. Cap. 16.

As for the second issue, the trial Magistrate was seized of the case and since he had not yet determined the case, he could still re-open the case to allow the

Defence to complete its case. One of the appellants had not yet exercised his right of calling witnesses under Section 206 (2) of Criminal Procedure Code, Cap 20, and not allowing him to summon his witnesses would amount to denying him this right and would have amounted to a failure of natural justice and affected the convictions. ……. [The court then discussed the cases on their merits and dismissed the appeals, confirming the sentences}.

202. Aluwi Sharric v. R., Crim. App. 57-DDM-72, 11/7/72.

MNZAVAS, J. – This is an appeal from the decision of the District Court of Mbeya in Criminal Case No. 87 of 1972 in which the appellant was convicted of Causing death by dangerous driving c/s 44A (1) (a) of the Traffic Ordinance, Cap. 168 of the Laws.

On the 12/1/72 at about 2 a. m the accused was driving his motor vehicle, Ford Escort Car, registration number IR 3824, along Tunduma – Mbeya road – He was coming from Tunduma and was heading to Mbeya. When he reached a place called Songwe he saw in front of him a convoy of six Tipper vehicles which were also heading to Mbeya. The accused attempted to overtake the convoy of trucks in front of him. He managed to overtake the first truck in front of him but soon after he knocked his car against the rear of the next truck in front of him. As a result of the impact his car was extensively damaged and, worse still, one Salehe abdallah, who was at the material time a passenger in accused's car, was fatally injured ……. On the evidence the learned resident magistrate was satisfied that the prosecution had proved its case beyond all reasonable doubt against the accused and he found the accused guilty of the offence and sentenced him to a fine of Shs. 2,000/= or six months imprisonment in default.

Challenging the correctness of the learned Resident Magistrate's finding Mr. Dhebar, advocate for the accused, and has filed a long memorandum of appeal to this court. [The court then quoted the main grounds of appeal]. It will be noted from the above grounds of appeal that they all have one thing in common. They all stress that the accused caused the fatal accident because a blanket of fog suddenly appeared in front of him thereby blurring his vision, and that because of this he failed to see in time to enable him to stop that he was driving against the rear of the truck he knocked. In his judgment the learned trial magistrate fully analysed this defence and came to the conclusion that it was not plausible …….. I agree that the accused's vision may have been suddenly blurred by fog and hence the accident; but with even greater respect I would say that even if this was so it does not necessarily follow that the accused was not to blame for the accident. It has, times without number, been held by this court as well as courts of other jurisdictions that in considering the "circumstances" in a charge of causing death by dangerous driving the test to be applied is purely an objective one. [The court quoted from R. v. Evans, (1962) all E.R. 1086 and continued].

In GRAHAM LESLLE JOHN BALL and JOHN LOUGHLIN, (1966) 50 G. App. R. 266 at 270, a case of causing death by dangerous driving, Lord Chief Justice Parker had this to say: “It is, in the opinion of this court, perfectly clear that what is meant by “driving in a manner dangerous” is the manner of the actual driving …. It has been held time and again that an offence under this section is an absolute offence …… and if the result of his driving produced what the jury considered to be a dangerous situation, a dangerous manoeuvre, then even though he had been completely blameless he can be held liable ….. In the judgment of this court the “circumstances” there referred to are the circumstances outside the vehicle, circumstances not pertaining to the driver, but the circumstances outside on the road..... It is made clear that the only possible defence, once there is proved to have been a dangerous manoeuvre, applying the objective test, is where it can be said that the driver had been deprived of control of the motor vehicle by some sudden affliction of his person ….. or where the driver had been deprived by some defect in the mechanism of a car which had suddenly manifested itself through no blame on his part.”

In this case it cannot be said that the accused had been deprived of control of the motor vehicle by some sudden affliction of his person just before he caused the accident. Nor can it, on the evidence, be said that there was a defect in his car which had suddenly manifested itself just before the accident.

The defence is that the accused’s vision was blurred by fog and that this is what caused him to drive and knock at the rear of the moving truck in front of him. In SHAABAN SAIDI v. R., (1970) H.C.D. n. 43, a case not very dissimilar from the present one, Georges C. J. (as he then was) remarked when dealing with the degree of negligence on the part of the accused: “It must be clear that driving …. On the wrong side of the road through a cloud of dust which reduced visibility greatly is a serious act of negligence”…… A reasonable driver who finds that a sheet of fog has suddenly blurred his vision in front of him would certainly stop his car. To continue driving while visibility was blurred by fog was clearly

negligent on the part of the appellant. If he had stopped or even moderated his speed it is more than likely that this nasty accident would not happened.

By applying the objective test I tend to agree with the learned Resident Magistrate that the appellant was driving in a dangerous manner when he knocked against the rear of the moving truck and thereby causing the death of his passenger. Appeal dismissed and sentence confirmed].

203. Boniface s/o Malinga v. R., Crim. App. 235-A-72, 22/8/72.

BRAMBLE, J. – This is an appeal against conviction and sentence on a charge of stealing contrary to section 265 of the Penal Code. A sentence of twelve months imprisonment was imposed.

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The appellant was alleged to have been caught red-handed stealing yams in the complaint's shamba. He claimed that he had bought the yams in order to re-sell them at a profit. He gave the purchase price as Shs. 13/= and then Shs. 12/= and called no witness. The trial magistrate did not believe him. There was enough evidence to sustain the conviction.

The appellant contends that having regard to the fact that he is a first offender and the value of the goods is only Shs. 20/=, the sentence is manifestly excessive. The theft of crops is likely to affect the economy of the country which is largely agricultural and while the sentence is, perhaps, severe I cannot say that it is manifestly excessive.

I certify that after perusing the record I am satisfied that this appeal has been lodged without any sufficient ground of complaint and order that it be summarily rejected.

204. R. v. Nicholaus s/o Bugomola, Crim. Rev. 1-M-72, 17/8/72.

MAKAME, J. – This case concerns a Forest Assistant, Nicholaus s/o Bugomola, who was convicted of stealing Shs. 15/= by a public servant and

sentenced to a wholly suspended prison term of 18 months. It was admitted in revision, a Notice of Enhancement having been served on the accused.

The accused was found to have received from a firewood seller Shs. 18/= as a licence fee and to have acknowledged receipt of only Shs. 3/=. Following the decision in YESAYA GWESEKO v. (1970) H.C.D. n. 160 in which my brother Biron differed from the views of Spry, J. (as he then was) in Rajabu Mbaruku v. R. (1962) E.A. 699, the learned Resident Magistrate found that the accused in the present case received the difference of Shs. 15/= "by virtue of his employment" and convicted him accordingly. I am of the view that confining "by virtue of his employment" only to acts an accused person does other than in breach of what he is strictly employed to do is too narrow an interpretation and even spry, J. (as he then was) was of the same opinion – only that because of the times he felt constrained to follow the strict English interpretation. In the broad spirit of our day, and considering the evil aimed at by the Law, I think the words should be interpreted less narrowly, to include situations in which an accused person criminally comes by a thing which he would not have come by but for the semblance of his office. I am thus inclined to agree with the view of Biron, J. if an offence has been committed in the present case it would be within the ambit of section 270. [The court then proceeded to dismiss the appeal and enhance the sentence to six months' imprisonment, applying s. 5 of the now repealed Minimum Sentences Act, Cap. 526].

205. Nathan s/o Ruben v. R., Crim. App. 396-M-71, 31/5/72.

EL-KINDY, J. – Nathan s/o Ruben was charged with and convicted of rape contrary to sections 130 and 131 of the

Penal Code, Cap. 16, and he was sentenced to imprisonment for 18 months and to suffer corporal punishment of 20 strokes. He appealed against conviction, sentence and order ….. it appears that there was a party at Twiga Hostel, in

Mwadui, on the 25th of December, 1970. The party commenced at about 4 p.m. and ended at about 7.30 p.m. Amongst those who were present at the party were the complainant, Grace d/o Saudi (P.W. 1), the appellant, Nathan s/o Ruben, Florence d/o Kidongoi (P.W. 2), and Daniel s/o Kimaro (D.W.2). There was dancing and drinking. After the party, at about 8.30 p.m. these named people left the party hall. The two girls were then seen together with the appellant and Kimaro (D.W. 2) at a football ground which was about 30 paces from the intended bus stand. The appellant and the complainant retired into a place on the football ground and there they had sexual intercourse. Florence and Kimaro who were also paired, remained somewhere near where the other two who were having sexual intercourse. Thereafter the two girls went to the bus stop, boarded their bus and went away. The appellant and Kimaro went away also. It appears that there was nothing which led to the arrest of the appellant during that night. But while sexual intercourse was going on, William Francis Mgonja (P.W.3), who was with one Mbaga, passed through the football ground on his way to visit a friend of his when he heard “noises” from a distance, and he heard Florence say “release her, release her we want to go” and then he saw the complainant standing up from the ground off by a footpath. Ngonja and his friends were “dubious” of what was happening and they went away. The complainant then went to her parents and later, on the same day, she was examined by an Assistant Medical Officer (P.W.4), at Songwa .The Medical Officer assessed that the complainant was 15 years old and that her hymen was ruptured. The Medical Officer gave as his opinion that it was ruptured on the same day. He noted some bruises “on the external oss” but this description is, to me at least meaningless, as it seems to be in keeping with medical terminology which was not explained. The Medical Officer noted also that there “is a sign of Haematoma on both left and right elbow joints” and that there were some bruises on the back, and noticed “some leaves in the hair on the occipital region of head”. As I have said there is no dispute of sexual intercourse having taken place. The Medical Officer was of the opinion that the complainant was sexually assaulted” although, from a mere reading of his evidence, I am unable to see on what basis he reached that

conclusion. However, this is not an important point in this case although the existence of various injuries tends to lend support to the prosecution' s contention that violence was used in affecting sexual intercourse. The underpants, the black "simizi", the "shaft green" and underskirt were examined by a Chemist in Dar es Salaam and this report confirmed the undisputed fact of sexual intercourse. The evidence did not show when the appellant was arrested but there is no doubt that he was arrested for the offence of rape. [The court then quoted ss. 130-131 Penal Code, and continued].

The essence of the offence of rape is lack of consent on the part of the girl or woman. Therefore, for such a charge to succeed, the prosecution has to prove, beyond reasonable doubt, that the victim did not consent to the sexual intercourse. [The court then cited and quoted from the following cases as persuasive authority for this proposition: Ronald Hanling v. Rex, 26 Cr. App. R. 127; Robert Lesarian v. Rex, 50 Cr. App. R. 56]……..

And the issue, on appeal, is whether this burden of proof was discharged in this case. And, as the learned trial Magistrate properly directed himself, the issue was whether the sexual intercourse was performed without the consent of the complainant. He held there was no consent. I think, with due respect, this conclusion cannot be supported on the evidence, as it will be seen soon.

To begin with, the complainant told the trial court that while at the party the appellant approached her and requested her if she could dance with him, but she turned him down. Florence said that the appellant "had grown some interest with Grace" although she did not state when this liking began – whether it was before or after the party or at the bus stand. Nevertheless, it is an admission which tended to show that the appellant and the complainant were, at least, not meeting for the first time at the bus stand, if one accepted the words of Florence. The appellant, in his evidence, did not say anything about dancing with the complainant, but Kimaro (D.W. 2) said that he saw the appellant and the

complainant dancing together during the party. The learned trial Magistrate considered this aspect of the case, but reached no conclusion one way or the other. However, his comments – "(T)his is what the complainant and her friend (Florence) have invited me to believe" – indicated neutrality if not suspicion of what the two girls told him. There was, therefore, evidence which tended to suggest that probably the appellant and the complainant had met before as the appellant himself contended in his petition of appeal. He said that they had sexual intercourse before the evening following the party.

The complainant continued to say that the appellant and "another boy" followed them as they went to the bus stop, and that when they reached them, the appellant "pulled me (her) by the hand" but she resisted. She said he was "violent". This suggested that the appellant did not even talk to the complainant before he held her although his evidence suggested that they were well acquainted. She told the trial court that the appellant pulled her hand and forcibly led her to the football ground where he pushed her to the ground. She said the appellant told her that he would teach her a lesson, overpowered her, and pulled down her underpants. She said that although the football ground was only 30 paces away, nobody appeared in response although "eventually" tow people appeared where she was with the appellant. She said that the appellant then pulled himself up and went to stand with his friend. In other words, the appellant did not even run, or go far away so as to suggest that he was feeling guilty over something he did. She alleged that when the appellant was pulling her away, the appellant's friend, who is Kimaro (D.W. 2), was also pulling away Florence, but Florence denied that she was pulled away. The difference, minor though it appears, is not insignificant to the case. Later on she said, and I quote her evidence "It was after I had heard people speaking to Florence that I screamed". This part of her evidence is important, as it showed that the complainant did not begin to scream, I she did that at all, until she heard people approaching. The people referred to were Mngonja (P.W. 3) and his friend.

Florence gave evidence in support of her friend. She alleged that she saw the appellant pull away the complainant, undress her, and have sexual intercourse with her near the goal post at the football ground. She alleged that the appellant was accompanied by another man she did not know and yet she had been talking with this man (Kimaro) for sometime. However, later she admitted that the "other man was attempting to seduce me (her)". She said she sat down "screaming for help" and watched what was happening". She admitted that William Mgonja (P.W. 3) and his friend passed there but they advised her to take no steps. This was strange. If she had been really screaming and calling for help, it is inconceivable that Mgonja and his colleague would simply advise her to take no steps.

The next witness was Mgonja (P.W.3) He said that when he was passing through the football ground, he heard some noises somewhere on the ground and the somebody said "release her, release he we want to go". Mgonja said these words were said by Florence who he saw standing there. With due respect to the learned Magistrate, he misunderstood these words, as he thought that it was the complainant who said them. If he had carefully read the evidence of Mgonja, he would have avoided the error he fell into. In my view, this misunderstanding contributed to a large extent to the learned Magistrate's misapprehension of the evidence. It will be useful to quote further the evidence of Mr. Mgonja, whose evidence was relied on by the learned Magistrate. Mgonja continued to say:-

> "We asked her what was happening. She said the accused (appellant) was raping her friend a few paces from there. We were unable to see the accused and Grace as they were far off, at about 100 yards. <u>We asked her why she was not screaming for help. Florence would not answer</u>. As we were still wondering what to do we saw the two parting. Then Grace

came to us. We heard no screams from her,
even when she came to us she was not screaming,
nor crying she looked sad as if something
peculiar had happened to her".

Mgonja said that he did not see the appellant. And finally, he said that although the complainant "looked haggard" the circumstances in which they found the appellant and the complainant gave them "a dubious picture of what was happening", because if anything was serious, he and his friend would have heard cries. With respect, this evidence totally destroyed the case for the prosecution. The allegation of force is totally contradicted, and leaves the impression that the complainant must have agreed to the act of sexual intercourse, but she found herself embarrassed because they had been found out by Mgonja, and then show began to create a story so as to clear her name and reputation which could not be said to have been untainted. As it can be seen, the only independent witness, Mgonja, told a story which raised a serious doubt as to lack of consent on the part of the complainant. His description would have been entirely different, had he noticed the facts which the complainant and Florence alleged. If what the two girls told was the truth, Mgonja would not have failed to give

evidence on them. With what he saw, I am not surprised to see that he was "dubious" about what was happening. The appellant has all along maintained that he had sexual intercourse with her consent as she was his girl friend. Having regard to the evidence, it cannot be said that the defence had no substance at all. The prosecution, through the evidence of Mgonja, who was probably called to supply the necessary corroboration, led evidence which raised serious doubt on lack of consent. The prosecution did not discharge the burden of proof required to establish that Grace, the complainant, did not consent to the said sexual

intercourse. Also the fact that the complainant was medically examined soon after the incident, and took no steps to have the appellant arrested by people who must have been at the bus stop, reinforces the existing doubt. For these reasons, the conviction could not be upheld. And for the same reasons, the learned State Attorney, declined to support this conviction.

206. Meda s/o Mgazi v. R., Crim. App. 36-DDM-72, 11/7/72.

MNZAVAS, J. – These are appeals from the decision of the district court of Manyoni in Criminal Case No. 175 of 1971 in which the three appellants were jointly charged with and convicted of cattle theft c/ss 265 and 268 of the Penal Code …. The following facts are not at all in dispute. On the night of 27/9/71 – 28/9/71 10 head of cattle, the property of one William (P.W. 1), were stolen. An alarm was raised in the morning when the theft was discovered and villagers and neighbours participated in searching for the stolen cattle. It is also not seriously in dispute that the searching party divided itself into three groups. One of the groups included P.W. 1, P.W. 2 and P.W.4. According to the evidence, after this group had walked for some distance in the bush towards Bahi area the group spotted three people hustling ten head of cattle away. P.W.1, P.W.2 and P.W.4. Related to the court that they recognized the three people as the three appellants. They also testified to the court that they identified the ten head of cattle as those of the complainant (P.W.1). All the three appellants gave a defence of alibi and brought witnesses in support of their defence. The learned district magistrate in his judgment believed the prosecution case and convicted the appellants as charged ….. In the present case the question is whether there was sufficient identification of the appellants by the three prosecution witnesses as the people who were seen hustling the ten head of cattle; and whether the cattle belonged to P.W.1, the complainant.

The facts of this case are rather odd. On 28/9/72 the three prosecution witnesses saw three people hustling 10 head of cattle away. They alleged that they recognized the three people as the accuseds. They attempted to arrest

them but they were threatened by these people with lethal weapons – (bow and arrows and spears) and they

retreated. They did not raise an alarm for more help from the villagers. Instead they telephoned to the police. The police took about two weeks to investigate and arrest the accuseds. They were arrested but not one head of cattle was found with them.

There can be no doubt that the convictions of the appellants were wholly based on the testimony of P.W. 1, P.W. 2 and P.W.4 who related to the court that they saw and identified the three people as the accused. My reading of the evidence of these witnesses before the lower court does not show how they identified the accused as the three people they saw driving ten head of cattle away. They all merely said that they recognized the three people as the accuseds.

As it was held in LUDOVICO S/O KASHAKU v. R. (1967) H.C.D. n. 194 it is unsafe to support a conviction on the bare assertions of witnesses that they had recognized the accused. There ought to have been evidence by the three witnesses showing how they identified the appellants. A description of their attire and such other evidence in support of their testimony would have been of great help.

As the evidence stands the trial magistrate merely accepted the bare statements by the three witnesses that they recognized the accuseds.

[The court then discussed certain other undesirable features of the case and allowed the appeals].

207. Lameck s/o Kiteka v. R., Crim. Sass. 31-DDM-71, 24/1/72.

MNZAVAS, J. – The accused Lameck Kiteka is charged with murdering his wife by stabbing her with a knife in the chest penetrating right into her heart. Both is a free and voluntary statement to a justice of the peace and in an

unsworn statement from the dock, the accused has admitted having stabbed his wife and so caused her death, and from the nature and location of the injuries inflicted, together with the rebut able presumption that a man intends the natural and probable consequences of his acts, the only reasonable acceptable conclusion is that, at the moment when he stabbed her the accused probably intended to kill his wife or he at least intended to cause her grievous bodily harm. No question of self – defence arises in this case but the defence has argued that at the time the accused inflicted the fatal blow he was drunk. The defence also brought forward a defence of provocation.

From the evidence there can be no doubt that the accused was under the influence of alcohol when he fatally stabbed the deceased. But the evidence clearly shows that the accused was not under such intoxication as to excuse him from criminal liability …… Coming to the defence of provocation the defence argument is that notwithstanding that the accused killed the deceased with malice aforethought; he did so while acting under grave and sudden provocation, in the heat of passion, and while deprived of his self control. It is common ground in this case that the marriage between the

Accused and the deceased was not altogether a very happy one. From the evidence it can be said with some certainty that of the two the deceased shared greater blame for their domestic misunderstandings. More than two times she left the matrimonial home and went to live with neighbours or with her mother. When she left the matrimonial home and went to live with her mother the accused followed her and persuaded her to return to him. She became violent and assaulted the accused. She was charge with assault and was convicted and imprisoned for six months.

Apart from the above previous misunderstandings the only evidence of what happened, and how and why the accused came to kill his wife, is his own

long extra-judicial statement, corroborated by his very brief unsworn statement from the dock.

I may say at once that this extra-judicial statement, has, to my mind a ring of truth and attempts to conceal nothing. In it the accused, after relating to the antecedent history which I have already referred to above, he told the justice of the peace how he experienced domestic quarrels with the deceased, how on the fateful night he came back home at about mid-night and how he was served with cold stiff-porridge by his wife. He related to the Justice of the Peace that the asked the deceased to prepare fresh ugali for him as the one she had given him was already very cold. To this request the deceased is said to have told the accused that she was not going to cook fresh ugali for him and told the accused to cook himself or find another person to cook for him. After saying this the deceased left the house and went to one, Jackson's house where she forced the door open and got in.

The accused followed her and, according to his extra judicial statement, got into the house of Jackson and held the deceased by her arm and asked her to follow him home. As he was doing so the deceased violently pushed him and he hit his head against the wall and was injured. It was at this juncture that the accused pulled his knife and stabbed the deceased once in her chest.

After summing up to the assessors all of them were of the opinion that the refusal by the deceased to cook "Ugali" for the accused could not under Nyiramba customs amount to provocation and they found the accused guilty of murder as charge.

I tend to agree with the gentlemen assessors that the refusal by the deceased to cook food for the accused could not, by itself, amount to legal provocation. But in my view whether an act can be said to constitute sufficiently grave and sudden a provocation for the purposes of section 210 and 202 of the Penal Code should always be considered in the light of antecedent aggravating circumstances over a period, if such exist, so that a culminating "last straw" may be considered as provocation sufficiently grave, which might not have been so considered if it has been the first act of its kind.

So here the deceased's refusal to cook for her husband her running away from the house to Jackson's house and her pushing the accused and thereby causing him to suffer injury on his head being the last of many such wrongful acts were in my view sufficiently grave and sudden provocation to a wronged husband in the accused's walk of life to make him lose his self control and attack her.

Clearly this is not a very easy case to decide and it is with great reluctance that I have decided to differ with the unanimous opinion of the assessors. I however have doubts as to whether the facts warrant a conviction of murder. I at least entertain reasonable doubt. The accused is entitled to the benefit of that doubt. I therefore hold that the accused killed the deceased with malice aforethought but while acting under such grave and sudden provocation as to reduce his offence from murder to manslaughter. I find him guilty of the lesser offence of manslaughter c/s 195 of the Penal Code, and I accordingly convict him. [Accused sentenced to 12 years' imprisonment.].

208. Odilo Mugasha v. Samweli Mutelani, (PC) Civ. App. 33-M-72, 25/7/72.

JONATHAN, Ag. J. – This is a second appeal following a decision of the primary court ordering the appellant to hand over his land to the respondent in enforcement of an agreement by the parties to that effect.

One Mr. Marcis Mugyaburo working in the Ministry of Foreign Affairs in Dar es Salaam was desirous of selling his "Kibanja". For this purpose he arranged with the appellant to get him a buyer duly authorizing him to sell the land for Shs. 5,000/=. It seems approaches were made and the respondent agreed to but the land and in November, 1968, he made a deposit of Shs. 400/= followed by other payments of Shs. 1,600/= and 650/= respectively made in the months of February and May, 1969. The respondent then asked the appellant to let him take possession of the land while paying the balance by installments. It seems, however, that that was not possible just then because there was a

woman occupying that land who claimed that the Kibanja was Nyarubanja land so she could not be dispossessed of it. That seems to have made it necessary for Mr. Mugyabuso to take leave in July, 1970 to settle the dispute and then effect sale of the land.

The respondent and Mr. Mugyabuso met when the latter was informed that the respondent had already paid the appellant a total sum of Shs. 2,650/= towards the agreed price of the land. It transpired that the appellant had not paid the money over to Mr. Mugyabuso nor informed him of its receipt from the respondent. The trio then met and the appellant admitted receiving the money and converting it to his own use, whereupon Mr. Mugyabuso retracted from the arrangement. Upon the respondent demanding the money and threatening institute criminal proceedings, the appellant undertook to sell him his own land. Such under –taking was in writing and was duly witnessed by Mr.

Mugyabuso as Exhibit "A". The price was to be agreed on the next day, the 31st July, 1970 after an inspection of the land. This was done and according to the respondent another written agreement – exhibit "B" – was reached in the presence of witnesses whereby the appellant agreed to let him have his land for Shs. 3,250/=, that is to say, in view of the money he had given him, he had only to pay him a further sum of Shs. 600/= in order to have vacant possession of the land. The settlement was to be concluded on 30/8/70. On that day the respondent traveled from Bukoba township where he worked to the village where appellant lived to pay him the money and take possession of the land. But the appellant was not to be seen and although the respondent spent a night in the area and called at the appellant's house again on the next day, he could not be found.

Some days later the respondent traveled again to see the appellant. This time he was present, but when he gave him the agreed balance of Shs. 600/= the appellant refused to take delivery and promised instead to pay up by

installments. The respondent would not agree and would accept nothing short of immediate payment of the whole sum with interest thereon. That left the respondent with no alternative but to file civil proceedings.

As already indicated, there is no dispute that the appellant came to owe the respondent a sum of Shs. 2,650/= in the circumstances outlined above. The appellant's defence was, however, that he was coerced into signing the agreement to sell his land. It appears from the original proceedings that according to the appellant such coercion took the form of threats to use violence in that the respondent went to his house accompanied by several people when signing the second agreement. His two witnesses, however, do not seem to bear out this allegation. Significantly enough, this mode of coercion is not stated in the memorandum of appeal to the district court. There, the appellant claimed that he was made to sign the agreements after the respondent threatened to take legal action I am satisfied, as both the courts below seem to have been, that no violence was threatened when the appellant signed the agreements. It may be, as he says in his first memorandum, that he dreaded legal action, and if I may say so, certainly he had cause to know that, legal proceedings, civil or criminal, would not be in his best interest, after his indulgence in dishonesty. In my view threat to take legal action to which the respondent was entitled, did not in any way detract from the agreement, thereby entitling the appellant to avoid it, and I respectfully agree with the unanimous decisions (the district magistrate sat with assessors that it was just and proper to grant the respondent's claim.

At the hearing of his appeal the respondent was agreeable to the appellant paying the whole sums at one go within a reasonable time. Having regard to the remarkable patience he has shown all along, I would consider this a magnanimous overture. In view of this, while dismissing the appeal with costs, I would order that the appellant should

pay up within one month of delivery of this judgment the sum of Shs. 2,650/= plus interest thereon, at court rate, calculated from the 1st of July, 1970 to date of payment, failing which, the respondent shall be entitled to be put into possession of the land on payment to the appellant of Shs. 600/=

20. R. v. Fijisimundi s/o Komba, Crim. Rev. 25-DDM-72 , 3/7/72.

MNZAVAS, J. – The accused was on his own plea of guilty convicted of escaping from lawful custody c/s 116 of the Penal Code and sentenced to 10 months' imprisonment. In admitting the case for revision Kwikima Ag. J. minuted "Sentence manifestly excessive. To be revised".

Before me the learned state attorney has argued that the sentence of 10 months imprisonment could not be said to be so excessive as to warrant interference by this court because, he said, the accused was in custody charged with serious offences, namely burglary and insulting the modesty of a woman c/ss 294 and 135(3) of the Penal Code.

With respect to the learned state attorney I do not think that the nature of the charge or charges against an escapee have any relevance regarding what type of punishment should be imposed on him if he escapes from lawful custody. The charges at the time of his escaping from lawful custody are at the very most mere allegations against him. The allegations could or could not be true depending on the evidence which the prosecution would bring before the court at a later date.

It is therefore most improper to say that because the charges against the escapee were serious his escaping from lawful custody should be severely punished.

From the record the accused was a first offender. The offence is a misdemeanour and the accused readily pleaded guilty.

These being the facts I agree with my learned brother judge that the sentence of 10 months imprisonment was manifestly excessive. The sentence is reduced to one of 4 months imprisonment only.

210. R. v. Ignatus Kawala, Crim. Rev. 49-DDM-72, 22/7/72.

MNZAVAS, J. – In this case the accused was recorded as having pleaded guilty to two counts namely: (1) Transferring a firearm without permit signed by authorizing officer c/ss 15 and 31 (1)(4) of Arms and Ammunition Ordinance, Cap. 223; and (2) failure to observe precautions relating to the keeping in safe-custody of firearm c/ss 29(1) and 31(2)(3) and (4) of Cap. 223. He was, on the 1st count, sentenced to a fine of Shs. 200/= or 3 months' imprisonment in default and Shs. 100/= fine or 3 months' imprisonment in default on the second count. The record shows that when the prosecution was asked by the court to

state the facts leading to the charges he said: "Facts of the case as per charge sheet". It is not clear from the record whether the particulars of the charges were read to the accused but the accused is recorded to have answered – "Correct".

Dealing with the charge in 1st count the particulars were as follows: "The person charged on the 11th day of April 1972 at about 10 hours at Santamari village, within the District of Sumbawanga and Mbeya Region, in the United Republic of Tanzania, did transfer a firearm No. 33912 S/Gun make Spanish without a temporary transfer permit signed by authorizing officer." The learned District Magistrate accepted the particulars as constituting the offence under section 15 of cap. 223. As rightly stated by the learned state attorney this was a gross misdirection by the trial Magistrate. The particulars of the offence were incomplete in that they do not say whether the transfer was by way of gift or whether it was for a consideration. Neither is it clear whether the accused sold the shot-gun to the transferred.

If, for argument's sake, the accused had only lent the firearm to his friend he could not be said to have committed an offence under section 15 of Cap. 223. To commit an offence under section 15 of the Arms and Ammunitions Ordinance, Cap. 223, the transfer must be ejusdem generis with a sale or purchase, or it must be shown that the accused had given away his firearm as a gift to the

receiver. It is not clear from the record whether the above transfer of the firearm by the accused to his friend amounted to a sale or a gift. The learned district magistrate is strongly advised to read the decisions in R. v. MWALIMU s/o SAUDI (1959) E.A. 415, JOAKIM MICHAEL v. R., (1963) E.A. 235 and LULU v. R. (1971) H.C.D. n. 400 to mention but a few on this point. I agree with the learned state attorney that the trial magistrate was wrong in law to enter a plea of guilty. The trial was clearly a nullity. The conviction is accordingly quashed and the sentence is set aside.

As for the second count the Republic also argued against the conviction. It was argued that the facts accepted by the trial Magistrate did not amount to an offence under section 29(1) of Cap. 223. In support of his argument the learned counsel referred the court to the decision in SALATIEL v. R. (1971) H.C.D. n. 439. The particulars of the charge which the trial magistrate accepted as constituting an offence under section 29(1) were as follows: “The same person on the same date, time and place as mentioned on the 1st count, being a person who has in his possession or control of a firearm No. 33912 Spanish S/Gun, did fail to take reasonable precautions to prevent the said firearm falling into the possession of unauthorised person, to wit he deposited it with one Petro s/o Saudi a who is unauthorized person under the Arms and Ammunition Ordinance.” It is clear that the above particulars of the charge do not amount to an offence under section 29(1) of the Arms and Ammunition Ordinance.

The section is in my opinion meant for a situation whereby an owner of a firearm so carelessly keeps his firearm that it falls in the hands of an unauthorised person. It does not cover a situation whereby the owner of a firearm voluntarily gives away his firearm to another person as it was in this case. And, if I may add, the fact that the second count depends on the first count which has already been found to be misconceived, the conviction in the second count is equally bad. Like in the first count the conviction is quashed and the sentence is set aside. It

appears that the accused has already paid the fine vide Exchequer Receipt No. 218975. The fine of Shs. 300/= is to be refunded to the accused forthwith.

211. R. v. Nicodem s/o Luvintagu, Crim. Rev. 67-DDM-72, 5/9/72.

MNZAVAS, J. – One, Nicodem s/o Luvintagu was on 8/8/71 brought before Sumbawanga District Court and charged with stealing 26 bags of “dagaa” c/s 265 of the Penal Code. In his judgment delivered on 17/12/71 the learned District Magistrate found that there was not sufficient evidence implicating Nicodem with the offence and he accordingly acquitted him of the charge. After the acquittal the trial Magistrate proceeded and said: “It is not known who is the legal owner of these 26 bags of “dagaa”. I order that they be forfeited by the United Republic of Tanzania and be sold in Public auction and the money to be remitted to the Government.” Such an order was, I agree with the Honourable the Attorney General’s letter No. 1/C 190/3/819/10 of 1/5/72 addressed to the Registrar of the High Court, incompetent.

Though on the evidence, I agree with the learned trial magistrate that both the accused and the complainant failed to give a satisfactory proof regarding ownership of the “dagaa”, I would like to mention to the learned magistrate that, as between the two, the accused, Nicodemus s/o Luvintangu, had a better claim over the 26 bags of “dagaa”. He was in possession of the “dagaa”; and the complainant having failed to prove that he was the owner of the “dagaa” and there being no evidence to show that ownership lay with any other person other than the accused, accuded’s allegation that he was the owner of the same had not been challenged. Even if, for argument’s sake, there was evidence that ownership could have belonged to someone else the court had no power to order that the goods be forfeited to the Government. In such circumstances the proper procedure would have been for the “dagaa” to be treated as unclaimed property and be dealt with under section 44 of Cap. 322. on the evidence as found by the trial magistrate the accused’s claim of ownership over the 26 bags of “dagaa” was not effectively challenged. The learned magistrate’s order that the “dagaa” be forfeited to the Government was clearly ultra –vires and of no consequence.

The order is accordingly hereby set aside. The 26 bags of “dagaa” are to be handed to Nicodem s/o Luvintangu. If they have since been sold the proceeds thereof are to be paid to him.

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212. Saidi Mwamwindi v. R. Crim. Sass. 37-Iringa-72, 2/10/72.

ONYIUKE, J. – The information filed against the accused, SAUDI ABDALLAH MWAMWINDI, was that he murdered WILBERT KLERRUU on a Christmas day, the 25th December, 1971, in Mkungugu Ujamaa village in Ismani Division in Iringa District of Iringa Region. The deceased was at the time of this death the Regional Commissioner of Iringa Region and was residing at Iringa Township. The accused was at the time of the incident, the subject matter of these proceedings, a member of the Mkungugu Ujamaa Village and was residing there …..

The background of this case was that the accused pursued the calling of a motor driver and resided in Iringa township up to 1954. In that year he gave up driving as a career and turned to farming. He moved with his famil to Mkungugu village, some 23 miles away from Iringa township, to establish a shamba ….. the land on which the shamba was established was obtained in the customary way from the head of the village. The sizes of the shambas varied enormously – 15,20,50,60 to 100 and over. The evidence was that the smallest shamba was one acre and the largest 250 acres …. The accused stated that he started with 3 acres and at the initial stage was virtually living in the bush with his family. Later he was able to put up a hut and by dint of hard work, as he put it, he was able to clear and establish a 160-acre shamba.

According to D.W. 10 (Abubakar Hassan), the Regional Police Commander of Iringa Region at the time of the incident, the Ujamaa scheme was introduced in Iringa Region in early 1970 before the deceased came to Iringa as the Region Commissioner. I assumed that the assessors were conversant with the concept of ujamaa and how the scheme was operated but ‘ex abundanti

cautela' I quoted relevant excerpts from a pamphlet entitled SOCIALISM AND RURAL DEVELOPMENT written by the greatest living authority on the subject, Mwalimu Julius Nyerere, to illustrate the concept of ujamaa. Briefly, it is a major policy for the agricultural development of the rural areas on socialist principles and involves co-operative living and working for the good of all. Since agriculture is the mainstay of Tanzanian economy most of the farming would be done by groups of people who live in a community and work as a community – they would farm together, market together and undertake the provisions of local services and small local requirements as a community ……..

Although the ujamaa scheme was introduced in Iringa Region in early 1970 it did not affect Mkungugu village till October, 1971. The ujamaa scheme in Mkungugu village was officially inaugurated on the 1st November, 1971. By then the deceased had become the Regional Commissioner of Iringa Region. According to the evidence he was posted to Iringa as the Regional Commissioner in early 1971. It is only proper to point out that the account of how the scheme was introduced to Mkungugu village varied. [The court reviewed the various accounts and then continued]. As I told the assessors the picture that

emerged from the evidence was that, as in all novel schemes, the inhabitants of Mkungugu village did not particular fancy the idea of an ujamaa village. Later quite a number agreed to try the scheme of their own volition. The number of those willing to try it was fast increasing. It appeared they thought of trying out the scheme by opening up virgin lands and using them as communal shambas. It turned out that individual holdings were later required to be included in the scheme and that the scheme was projected to cover every inhabitant of the village. Some left but others including those who had much more to lose by quitting remained. The accused was one of them. He felt his shamba had been 'grabbed' as he put it, but he appeared to have reconciled himself to the new dispensation and decided to remain as a member or Mkungugu village and

actually registered as a member. It is in evidence that 3 of his wives together with his other relatives registered as members. The foregoing is a synopsis of the history of the establishment of Mkungugu ujamaa village as disclosed by the evidence.

The next point is to consider how the Mkungugu ujamaa village dealt with the vast area of land that had now become ujamaa land. The witnesses on this point were P.W.1 and P.W. 2 – the Chairman and Vice-Chairman of what one may call the management committee of the Mkungugu ujamaa village. The ujamaa scheme did not forbid individual shambas as such. I may here mention that the Iringa – Dodoma road runs through Mkungugu village. The villagers decided to reserve the area on the left side of that Road facing Dodoma for their collective farming or shambas. The rule was that each member, male or female, of the ujamaa was to be allotted 3 acres for his or her individual farming. Thus the accused and members of his family including his brother and sister who were also members of the ujamaa had something like 18 acres for individual farming.

As I have stated earlier on the Mkungugu ujamaa village was officially opened on the 1st November, 1971. The deceased gave his ruling that all former individual holdings should become part of ujamaa at the end of November, 1971. The main and presumably the sole crop that was planted in that area was maize. P.W.6 SALUM AHMED SAMILANI the Supervising Field Officer for Ismani Division, part of whose duties was to tender advice to peasant farmers on proper farming methods, testified that the best season to planting maize was between November and January and that maize planted outside this period was unlikely to yield a good harvest. P.W.2 testified that they intended to cultivate the whole area reserved for the communal shamba. They soon realized they just could not do it and they therefore decided as a temporary measure to parcel but portions of the communal shamba to individuals who could cultivate them on their own. The portion to be allotted to each individual in this area (communal area that is) was 3 acres under this arrangement. It was possible then for a member to own two individual shambas –

one on each side of the road. The accused was one of those that had his individual shambas on both sides of the road.

How did the accused's former holding stand in relation to Ujamaa scheme as a whole and in relation to his new holdings? The accused's former individual holding of 160 acres fell on both sides of the road. His residential premises which consisted of 2 main houses and some outhouses including his family grave-yard were on the left side of the road facing Dodoma. The fresh allocations of individual shambas made in the area reserved for individual farming were carved out of his former holding in that area. The rest was allotted to other members. The temporary individual shamba allotted to him in the area reserved for communal farming was again carved out of his former holding in that area. This shamba was about 350 feet from his own dwelling house and about 180 feet from his family grave-yard. There were no physical features separating this shamba from the accused residential premises or homestead. It was this shamba that the accused was ploughing with his tractor when the deceased met him in the afternoon of December 25, 1971. The deceased must have been there after 5 p.m. that day. Between 6 p.m. and 7 p.m. that day the accused drove into the Police Station Iringa township in the Regional Commissioner's official car carrying the dead body of Dr. Klerruu. He entered the police office and met P.W. 13 (Police Corporal Mbeta Kosonda), the officer on duty at the time. He said something to him, surrendered his double-barrel gun (Exhibit P.3) and gave himself up. The accused stated that he also surrendered the ignition key of the Regional Commissioner's car. A live shot gun cartridge was also recovered. There was some dispute as to whether the accused surrendered it also as he stated or whether it was removed by P.W.13 from one of the chambers of the double – barrel gun which the accused surrendered to him as P.W. 13 stated. As a result of what the accused told Corporal Ksonda he arrested him on a charge of murder and put him in custody. Corpora Kosonda also observed the jacket

(Exhibit P.5) the accused was wearing was blood- stained and he took possession of it also……..

To appreciate what had happened it will be necessary to consider the events of the previous day, the 24th December, 1971. This was told by P.W 6, the District Agricultural Field Officer in charge of Ismani Division of Iringa District. There were a number of ujamaa villages in Ismani Division or Iringa District. They included NDOLELA, TARAFANI, IGULU and the latest addition, MKUNGUGU ujamaa village. The planting season was on. The deceased was most desirous to help the ujamaa villagers plough their communal shambas and plant their maize seeds before the end of the planting season. He spared no efforts but went from one ujamaa village to another encouraging the villagers and personally helping them to cultivate their communal shambas. P.W. 6 was associated with the deceased in this task. He stated that when he arrived at TARAFANI ujamaa village in the morning of the 24th December the deceased was already there supervising the tractors ploughing the communal shamba. From there both of them left for Igulu ujamaa village to watch the progress in the cultivation of the communal shamba. From Igulu they went to Ndolela ujamaa village arriving there at

about 5 p.m. Work on the communal shamba was interrupted by rain and there was not much progress made on the communal shamba that day. The deceased then summoned a meeting of the villagers and asked them whether they were prepared to work the following day which was a Christmas day. The villagers agreed to work and the deceased promised to return to help them in their work. The following day, that is the 25th December, the deceased turned up as he promised. There were only 2 tractors available for work on the shamba. The deceased sent for more tractors and 5 more were brought. With a team of 90

villagers the got down to work - ploughing and planting maize seeds. They had no lunch. By 5.30 p. m according to P.W. 6, the villagers became tired and withdrew. By then 60 acres of shamba had been ploughed and planted with maize seeds. P.W. 6 left the shamba and proceeded to Ndolela village while the deceased drove alone in his official car towards Iringa township. D.W. 10, Abubakar, the Regional Police Commander stated that he was not informed as he should have been informed that the deceased was to go on Safari on the 25th December, 1971. The result was that the deceased was not provided a police escort.

To travel from Ndolela to Iringa township on the Iringa Dodoma road one has to pass Mkungugu village. The distance from Ndolela to Mkungugu was between 3 to 5 miles and according to P.W. 6 it was a matter of 3 to 5 minutes' drive by car. P.W.6 stated that he left Ndolela village finally that day about 30 minutes after the deceased drove from the communal shamba to return to Iringa township. P.W. 6. was traveling in a Government Land-Rover. He stated that when he got to Mkungugu he saw the accused's car parked near the road in a certain premises which were later identified as the accused's premises. He stated that he stopped and inquired about the deceased and as a result of what he was told he was apparently satisfied that every thing was in order and continued his journey ……

It is clear on the evidence that the deceased did not leave the accused's premises alive. The relevant witnesses to the events that took place in the accused's premises were P.W.7 (Yadi chaula) P.W. 9 (Charles Mwamalata), P.W. 10 (Joseph Kisava), D.W 6 (Mohamed Saudi Mwamwindi) and the accused himself. Yadi Chacula and Charles Mwamalata (P.W.7 and P.W.9) were employed by the accused to work on his shamba before the establishment of the ujamaa and thereafter registered as members thereof but continued to work for the accused at their spare time. Joseph Kisava was the accused's father-in-law as his daughter was one of the accused's wives. D.W.6 was one of the accused's sons. P.W. 9 had become a controversial witness as the court allowed the prosecution to treat him as a hostile witness and to cross-examine him. He was

duly cross-examined and he admitted the truth of the statements he made to the police as opposed to what he had stated earlier on in court. There was some argument by counsel as to the value of his evidence. The learned director of Public Prosecutions argued that the purpose of treating a witness as hostile is to get the truth from him. The fact that the witness was treated as a hostile witness did not ipso facto make his evidence unreliable. He quoted SAKAR 9th Edition Page 1184 2nd Paragraph and the decision of the Court of Appeal for East Africa in CRIMINAL APPEL NO. 175 of 1971 ALOWO ALIO RANAO

V. REPUBLIC in support of his submission. I took the view that by treating the witness as hostile witness the prosecution was putting his credibility in issue and was impliedly indicating that it had not much confidence in him as a witness of truth. The evidence of such witness was negligible if not entirely worthless.

As the stated by SPRY V. P. in the case quoted above; “The basis of leave to treat a witness as hostile is the conflict between the evidence which the witness is giving and some earlier statement which shows him or her to be unreliable and this makes his or her evidence negligible.” I directed the assessors not to countenance P.W. 9’s evidence on any important issue unless it was amply corroborated by other credible evidence. I told them I would continue to guide them on how to treat his evidence on each point. In the end nothing turned on this witness’s evidence.

P.W. 7 (Yadi Chaula) testified that in the afternoon of that fateful Christmas day he was working in the shamba with the accused, P.W.9 and D.W.6. The accused was driving the tractor and they were planting the maize seed. P.W. 9 later left to draw water from the water tap which was on the other side of the Iringa-Dodoma road while he & D.W.6 continued to plant maize seed. While the work was in progress he saw the deceased when he was already in the shamba. His estimates of distance varied …. The important thing however was that he stated that he did not hear what they said because he was for a away

from them. He also stated that he did not see the deceased carrying a stick but then admitted on cross examination that he did not observe the deceased closely because of the distance between them. He stated that the accused and the deceased talked for ‘a little long time’ and then left the shamba – the accused moving in front and the deceased following him behind at a distance of about 16 feet. He continued his work and then heard two gun shots in quick succession from the direction of the accused’s house. He left his work and proceeded towards the accused’s house. He left his work and proceeded towards the accused’s house. When he arrived at his house he saw a car and the deceased lying at the back seat of the car already dead. He saw the accused standing close by the side of the car which was about 16 feet from the house. The accused stood for a while and drove off in the car. P.W. 10 Joseph Kisava stated that he called at the accused’s at about 4 p. m that day. Here again his idea of time may not be accurate. It was clear however that this was sometime in the afternoon. He stated that the accused was not in the house and so he stopped to play with his grandsons. Then he heard two gun shots and he came out of the house. He saw a male adult lying dead in a pool of fresh blood on the ground and the accused standing near the dead body holding a double-barrel gun in his hands. On seeing this he ran back into the house. When he came out again he saw the accused driver away in the car. D.W.6, stated that he was working in the shamba with his father (the accused) P.W.7 &P.W.9. At about 5 p.m. stranger whom he later learnt was the Regional Commissioner came to the shamba. He saw him talking to the accused and heard some of what was said. He also saw the deceased poking his father with a walking stick several times. The next thing he saw was that the accused and the deceased had moved away

From the shamba. He continued with his work until he heard two gun shots and proceeded towards the accused’s house. When he got near the house the accused called out to him ‘Come here’. He went and the accused told him to help

him put the ‘stranger’ who was then lying on the ground ‘wounded’ as he put it, into the car. He did so and the accused drove off in the car. The accused in his testimony, in respect of which I shall go into great detail later when I come to deal with the issue of provocation, stated that he was in his shamba when the deceased came t him and, in effect, harassed and abused him and assaulted him with his walking stick and as a result he ‘lost his head’, went to his house, took his double-barrel (Exhibit P.3) and shot him and he fell down and died. He carried the dead body to the police station where he surrendered the gun and gave himself up.

[The court reviewed the evidence as to the cause of death and the weapon used and then continued]. I am satisfied beyond a reasonable doubt that the accused killed the deceased with his shot-gun (Exhibit P.3) and I so find. The accused admitted he leveled his gun at the deceased pulled his triggers and the deceased fell down and died. He admitted that before and after the shooting he did not hear any other gun shot. The suggestion that this imagined enemy might have been using a rifle with a silencer is the merest speculation and I reject it.

The defence then contended that if it was the accused who killed the deceased he was insane when he did it and therefore could not be criminally liable under Section 13 of the Penal Code. I have gone into this matter in depth in my swimming up to the assessors and the evidence I reviewed and the various aspects of the matter I touched upon in my summing up are still fresh in my mind and I do not intend to reproduce them here. Section 13 of the Penal Code provides that “a person is not criminally responsible for an act or omission if at the time of doing the act or making he omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission.” But that same section made it clear that a person can still be criminally liable for his act although his mind is affected by disease if such disease does not in fact produce upon his mind one or other of the effects specified in the section. I directed the assessors that the insanity must relate to the act complained of. It was not enough to show that the accused and a history of mental disease. It must be shown that that mental

disease affected his act in the way specified in the section. Insanity is a matter for the defence but I explained to the assessors the burden of proof cast on the defence to establish insanity and contrasted that burden with the burden cast on the prosecution. All the defence need do was to show it was more probably or likely that the accused was of unsound mind when he killed the deceased to succeed in his defence. I directed the assessors that the issue of insanity was a question of fact and in deciding that issue they had to take into consideration the following factors: - (i) The accused's family history. (ii) His own personal history. (iii) The circumstances surrounding the act itself. (iv) Opinions of medical experts.

I pointed out to them however that while they could give the greatest respect to the opinion of a medical expert they were not bound by it. I then explained to the assessors how

the factors listed above were relevant in determining the main issue:- the state of mind of the accused at the time he did the act. Here again the assessors by their opinions indicated that they believed the accused was of sound mind when he killed the deceased.

I will now consider the issue of insanity. I believe the evidence of the accused's mother (D.W. 7- ZULA binti FERUZI) which was amply corroborated by D.W.2 and D.W.5. that the accused had two major mental breakdowns in 1958. Dr. Pendaeli, the specialist psychiatrist, who examined the accused in the Isanga Mental Institution from July to September 1972 stated that from the accounts given by D.W.7, D.W.2 & D.W.5 the accused suffered a recognised mental disease CATATONIC SCHIZOPHRENLA. This mental disease has two forms – catatonic excitement which is characterised by violence, aggressiveness, restlessness, delusions and hallucinations. The evidence of the accused's first major breakdown in 1958 fitted into this description. The other form of catatonic schizophrenia is catatonic excitement. When a person suffers from this condition

he just dumps himself in a place – moping and gazing for days, not moving, not talking and not eating. The account of the accused's second major breakdown in the latter part of 1958 or thereabout fitted into the latter description. Schizophrenia is a diseased of the mind because it causes a dissociation of thought and behaviour. In catatonic excitement the faculty of perception and thinking is disturbed and distorted and the same goes for behaviour.

There was some dispute whether the accused had completely recovered so that the chances of recurrence of his malady were remote. Dr. Pendaeli gave it as his opinion that from the accounts given him by D.W.7, D.W.2 and D.W. 5 amongst others the accused had fully recovered and the chances of a relapse were remote and unlikely. This opinion was based on the fact that since 1958 the accused had not shown any symptoms of his former malady …… Nothing daunted, D.W. 7 in her evidence in court stated that the accused did show some signs about 1961 the accused complained of 'seeing double' and giddiness. She stated that they gave him the type of traditional medicine given by the traditional doctors who treated him in 1958 and he recovered. Again in 1970, the accused complained of giddiness. She frankly admitted that she forgot to mention these two incidents to the specialist Psychiatrist….. it appears to me that D.W.7 whom I regarded as a very truthful witness might have not mentioned the incidents to the psychiatrist because the incidents did not amount to a serious breakdown compare able to the 1958 incidents. I told the assessors that one could never be sure that once a person had had a mental disease it might not recur however normal he might have appeared to be. I told them not to rule out the possibility of a relapse in the accused's condition and to hold that relapse was likely. The position, then was that the accused had had two major mental breakdowns in 1958 and the chances of a relapse were likely. The main question however was whether the accused was insane at the time he killed Dr. Klerruu. Dr. Pendaeli was of the view that he was not. I am

myself of the same view. The circumstances before ant after the event and the lucid account given by the accused of the events showed clearly that he had a full understanding of what he did and that it was wrong. Dr. Pendaeli stated that a person who was insane at the time of the act usually had amnesia of the events afterwards. The account given by the accused of the events was very vivid and showed the working of a sound mind. In Exhibit P. 27 which was the extra-judicial statement made by the accused on the 26th December he explained what happened and why he did what he did I have gone into this matter at length in my summing up to the assessors. I will reproduce Exhibit P.27: - “I am staying in Ismani area, Mkungugu village, from 1954 up to now I have been living in Mkungugu village I established my shamba there about 160 acres. According to the new plans reached us, the said shamba was taken away and made as ujamaa village. The said ujamaa village was not adjoining my shamba but my shamba was allocated to other people personally to cultivate and myself was given a piece at the same area at another side. We have not started to cultivate the shamba except one person only. Near to my house there is a small shamba near the plot. Had I cultivated it, it could be about 3 acres. So, only yesterday I started to cultivate it. At about 4 o’clock in the afternoon the Regional Commissioner came there. He parked his car “close to my house and I was in the shamba cultivating by a tractor. He asked, ‘What are you doing?’ ‘Sir’ I told him that, ‘I am cultivating this place which has been given to me by my fellow villager!’ I do not know what annoyed him, he started to abuse me. Then I got out of the tractor and asked him, ‘Sir, why and what did I do?’ he replied me, ‘Be quiet, shut your mouth, what hii, hii, hii?’ And he was also abusing in English. He held a stick in his hand with which he was pushing me and I was moving further away so that he could not hurt me with the stick. I thought to snatch the stick from his, but I thought that he might have a pistol. Therefore I was so enraged; I was going towards my house. When I reached in my house I collected a gun and got out. I looked at him he was beside the house and I was beside the house. I aimed at and shot him. He fell down. When he fell down a thought came to my mind and asked myself what to do. I went to his car to look for switches but I did

not see them. I returned and searched his pockets and I found them I drive the car to the place where e fell down. Then I called one boy to help me to put him in the car. Then I started to leave with him. When I arrived here I thought to inform my son at Mlandege about the matter. I drove to Mlandege but I did not find him. I therefore went direct to Police station. I stopped the car and collected the gun and the switches and entered into the Police Station. I told the constables that I had something to inform them. A constable told me to wait, to finish what they were doing. I told them that I had most important matter that I have killed by the gun I handed over the gun with one round of ammunition and the switches of the car to them. So the constables were busy calling senior Police Officer. The police took me to the scene. I went to show them. When we returned they sent me to hospital and from hospital they kept me in the lock-up. That is all." This could not be an illusory account by a mad man! He stated in that statement that the deceased came to his shamba. The deceased in fact

went there. He stated that the deceased used abusive words to him. D.W.6 in fact over-heard some of these words. He stated the deceased used his walking stick on him. D.W.6 saw the deceased poking the accused with it. He stated that he called a boy to help him put the dead body in the car and D.W. 6, his son, testified that he was the one he called upon. I am satisfied the accused was of sound mind when he killed the deceased and his disease of mind did not affect his understanding of the nature and quality of his act or his knowledge that he ought not to do it. I dismiss the defence of insanity.

I now turn to consider the defence of provocation. It was on this issue that the assessors disagreed sharply. The first assessor referred to the testimony of the 3 witnesses from the Hehe tribe as to how an ordinary Mhehe would be infuriated if an abuse was used against him and his reactions to it. He believed that the state of the accused from the time he was abused, went to his house, collected his gun and shot the deceased was such that he acted in anger and by

inference there was o time for his temper to cool. It was his view that this mood of anger persisted when he put the deceased's dead body in the car as was shown by the peremptory manner he addressed his son 'You come here and help me!' and up to the time he was taken to the district Magistrate (P.W. 23) to make his statement(Exhibit P. 27). It was at this stage that he came to himself and was sorry for what he did as can be demonstrated by that portion of the statement where he said "I killed my companion". He was of the view that the accused killed because he was provoked. One has the impression that the assessor was saying that he killing was not referable to enmity or wicked malice in the moral sense but o anger which was roused at the shamba. The second assessor took what seems to be an opposite view. He disputed the bald assertions by the 3 witnesses from the Hehe tribe that the abusive words used by the deceased at the shamba were enough to provoke an ordinary Mhehe and induce him to kill another person. He said there are two types of abusive language that can be used against a Mhehe and produce different reactions. Giving an example he said that if one tells a Mhehe that he had sexual intercourse with his mother or daughter this type of allegation may cause an ordinary Mhehe to kill and after that he may kill himself. From this point of view the deceased had done 'nothing wrong' at the shamba to induce the accused to kill. In his view the accused killed deliberately. The 3rd assessor agreed with the 2nd assessor. In his view he did not see anything serious that took place at the shamba to induce the accused to kill the deceased. Continuing, he said if at all the accused was provoked at the shamba the distance from the to his house was enough for the accused "to change what he intended to do." In the view of this assessor the killing was deliberate. I have to mention that these three assessors rejected what has compendiously been called the 'grave-yard incident.' The significance of this rejection will become clearer later in this judgment. The 4th assessor was of the view that he killing was due to provocation and although she said that the 'grave-yard incident' might or

Might not be true it was obvious she based her opinion on what happened at the shamba. To he 'an insult is an insult' and from her personal experience of the Wahehe the distance from the shamba to the accused's house was not enough to make an ordinary Mhehe cool his temper. In her view the killing was not deliberate but was due to provocation. Bearing these divergent views in mind and the reasons therefore I will now proceed to deal with the defence of provocation.

Leaving aside the statements by the accused to P.W. 18 (who was also D.W. 4) Khan LODHI, the Regional C.I.D. Officer for Iringa Region and to D.W. 10, Abubakar Hassan, the Regional Police Commander, the accused made an extra-judicial statement (Exhibit P. 27) to the District Magistrate Iringa (P.W. 23) on the 26th December 1971, a day after the incident. At the trial he gave evidence on oath and gave an account of what transpired between him and the deceased which provoked him into killing him. In my summing-up to the assessors I called them (Exhibit P.27 and his oral testimony in Court) two versions of a story because as I said, though they had a lot in common, the orientation was different. I will deal first with the version of the story as told by accused to this Court. Briefly stated, the accused testified that in the afternoon of the 25th December, 1971 he was ploughing with his tractor a piece of shamba that had been allocated to him by the fellow members of the Ujamaa village. P.W. 7 and P.W.9 and his son D.W. 6 were also working with him at he shamba. While he was working at the shamba the deceased came to the shamba. The deceased told him to stop ploughing and asked him why he was cultivating the there. The accused replied that he was cultivating he shamba that had been allocated to him by his fellow villagers. The deceased then said SHUKA (Get down) and the accused climbed down from the tractor. The deceased then said 'UWONGO SHENZI' (you are lying you uncivilized men). The accused then asked him 'KWA NINI BWANA UNANITUKANA, NIMEFANYA NINI' (Why, Sir, are you abusing me, what have I done?) The deceased retorted 'FUNGA MDOMO WAKO' (Shut up your mouth.). The deceased further stated 'NG'E – NG'E or HI HI HI NINI' (What is this babbling). The deceased continued and said "TAZAMA

NINAWAAMBIA LAKINI HAMSIKII" (look, I tell you but you would not listen). The accused retorted "UMENAMBEA NINI" (What did you tell me?) The deceased then started abusing him in English but he was only able to catch the word "Bloody fool." At this stage the deceased who had all along a walking stick in his hand poked it into this stomach but he accused stepped back but he stick touched his thighs. The deceased poked him with his stick three times and at the 4th time the accused turned. He was asked why he turned and he said he decided to leave because he thought it better to avoid what was 'confronting' him by moving away. I may mention that there were other things sad at the shamba but they are no material at this stage in view of the orientation of the story told in court. The accused proceeded towards his house taking the foot-path near the grave-yard. The deceased followed him behind. When he was near the grave-yard. The deceased followed him behind. When he was near the grave-yard (about 6 peaces towards it) the deceased who was following him behind at a distance of about 25 paces said:' 'TAZAMA UNAENDELEA

KUJENGA NYUMBA ZA KUDUMU' (Looking you are continuing to build permanent houses). The accused then turned to him and replied "HII SIO NYUMBA NI MAHALA NINAPOZIKA NDUGU ZANGU" (This is not a house. It is a grave-yard in which I bury my relatives). I may mention at this stage that the accused said that he grave-yard contained the graves of his father, his son, his aunt, his niece, his grandson and the son of one of his neighbours. Continuing, the accused said that when he told the deceased that it was not a house but the grave-yard where he buried his relations the deceased retorted 'NI MAHALI UNAPOZIKIA MIRIJA WENZIO MBWA WEE' (It is the place you bury your fellow exploiters, you dog). At this utterance the accused was stung beyond endurance and lost his temper completely. He went straight to his house which was about 170 feet away, fetched his double-barrel gun (Exhibit P.3), loaded the two barrels on his way out and when he saw the deceased he leveled the gun at him and

pulled the two triggers at once with his middle and 3rd fingers (his index finger was deformed). The shots fired in quick succession and the deceased fell down and died on the sp about 8 feet from the accused's house. In my summing-up to the assessors the incidents at the shamba were collectively called the shamba incident and the incidents at the grave-yard were called the grave-yard incident. Although the accused stated that he was angered by the shamba incident it was the grave-yard incident that had infuriated him most and made him lose his temper completely. He stated that he had always regarded the insult at the grave-yard as more offensive and deadly than that at the shamba. The substance of his evidence in court was to the effect that but for the grave-yard incident this tragedy would not have happened because when he left the shamba he intended to avoid further provocation or harassment from the deceased and his intention was to go to his house and stay there, but that this sudden and deadly insult to the dead at the grave-yard in his presence was the limit and, as he put it, his head was 'spoilt'.

Evidence was led on the customs and habits of the Wahehe, the community to which the accused belonged. P.W. 18 (also D.W. 4) Khani LODHI, the Regional C.I.D. Officer Iringa, testified that he had been in the police force for many years and in the course of his duties he had been concerned in the investigation of cases involving personal violence. He stated that he had served in different places and among different communities. He had served in Moshi, the land of the Wachaga; in Arusha, the land of the Waarusha; in Tanga, the land of the Wabondei and Wadigo and in Iringa, the land of the Wahehe. He gave it as his opinion borne out of experience acquired in working in these communities that an ordinary Mhehe is more excitable than his counterpart in the other communities and is more sensitive to personal insult than his counterpart in the other communities. He also said that he was aware that the Wahehe had great reverence for their deceased relatives and that they would be provoked very much indeed if their dead relatives were insulted in their presence. D.W. 10, the then Regional Police Commander for Iringa Abubakar Hassan, who had been in the police force for 22 years and who had served among various communities in

Tanzania confirmed Khan Lodhi's assessment of the ordinary Mhehe. The defence also called 3 witnesses from the

Hehe community ……[The court reviewed the evidence of these witnesses and then continued]. The purpose of this exercise by the defence was to enable the Court to have an understanding of the mentality of an ordinary Mhehe person by considering their customs and habits. Section 201 of the Penal Code provides that 'when a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as herein after defined and before there is time for his passion to cool, he is guilty of manslaughter only!' Section 202 of the Penal Code defines provocation to mean 'any wrongful act or insult of such a nature as to be likely, when done to an ordinary person … to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered'. The section defines 'an ordinary person' to mean an ordinary person of the community to which the accused belongs. As I told the assessors you have all manner of communities – Tanzanian African community, Asian community, European community etc. Within the general context of an African community one can talk of tribal communities. There may be certain customs, habits and traditions that go to shape ones outlook on life and mould his mentality. Call it tribal or national trait but one may have to consider it if there is any credible evidence of it if he ever hopes to reach the proverbial 'ordinary person.' Duffus P. in delivering the judgment of the Court of Appeal for East Africa in YOVAN v. UGANDA (1970) E.A. 405 at Page 406 after referring the definition of 'an ordinary person' in Section 203 of the Tanganyika Penal code stated as follows:-"The definition applies with equal force to Uganda where there is no statutory definition of an 'ordinary person'. Thus what might be a deadly insult to a member of another

community. In this respect the opinion of the assessors with their local knowledge of the customs of the people of the community can be of he greatest assistance to the trial Judge although, of course, evidence can, and should (if necessary) be led as to the nature and meaning of a particular ac or insult and as to any relevant customs."

What then does one make out of the evidence of the Wahehe witnesses ….In contrast to other communities I think an ordinary Mhehe is more sensitive to personal insult and is more excitable. A personal insult may annoy him more than a physical assault. The explanation for this was offered by D.W. 8 (SAMBILI-NGUNGA MGATA). "If you strike, me, we fight and exchanged blows. It is a trial of strength. But if you abuse a person the reaction is different. If you call a person 'PUMBAVU' (useless man) and he knows he is not useless he can only conclude that you are treating him with contempt and can react violently to such personal abuse." Having found that an ordinary Mhehe is very sensitive to personal insult and can become very excited the question whether a particular word is to be regarded as a personal abuse and his reaction to it will of course depend on the circumstances of each individual case. All one can say is that what one may dismiss as a mere vulgar abuse – or 'jocular quib' may to an ordinary Mhehe be taken as a

Personal insult especially if it tends to demean his person or tends to suggest he is being treated with contempt. I do not accept however that any word that smacks of a personal insult will drive an Mhehe to violence, much less to extreme violence. I share and accept the opinion of the second assessor who, unlike the 1st assessor, was not prepared to accept the extreme position taken by the 3 Wahehe witnesses. This assessor stated that among the Wahehe there are types of abusive language which will produce different reactions from an ordinary Mhehe. He gave an instance of what may drive an Mhehe to extreme violence – an imputation of incest. One thing is clear however from the evidence. I am

satisfied on the evidence before me that the Wahehe hold their dead in great reverence and hold their grave-yard as holy ground and that an insult or offensive remark against their dead in their presence would be taken as a deadly insult. What struck me when I visited the locus in quo was the marked contrast between the condition of the accused's family grave-yard and the condition of the accused's family grave-yard and the condition of his dwelling house. The walls of his dwelling house were of mud and the roof of reddish tin sheets. The grave-yard measured 50 feet by 39 feet and was enclosed by short walls made of cement blocks. It contained various graves of earth mound but his central grave was specially constructed and plastered with cement. I noted in my inspection notes that the grave-yard was swept and well kept. The condition of the accused's dwelling house was indifferent in marked contrast to the condition of the grave-yard. If then the story as told by the accused in court was believed I was quite prepared to hold on the evidence before me that the shamba incident coupled with the grave-yard incident took place in fact. Did the deceased utter these words 'it is where you bury your fellow exploiters you dog' or words to that effect ? I directed the assessors especially on the burden of proof in respect of the grave-yard incident. I told then that if they were satisfied beyond reasonable doubt that the grave-yard incident did not take place, that is to say, that the deceased did not utter these words attributed to him or words to that effect, then they should reject that part of the accused's story – the grave –yard incident. I told them it was not for the accused to establish the truth of the story of the grave-yard incident beyond reasonable doubt to succeed because even if they might not be entirely satisfied that the grave-yard incident took place but entertained some reasonable doubt whether it happened or not then they must give the accused that benefit of their doubt and must accept the story of the grave-yard incident as true. 3 of the assessors stated that they did not accept the story of the grave-yard incident. The 4th assessor stated that it might or might not have taken place. On the evidence I am satisfied beyond reasonable doubt that the grave-yard incident did not take place. I reviewed the evidence in depth in my summing-up to the assessors and marshaled the arguments in support of and

against the acceptance of the story of the grave-yard incident. I can only give a summary here. The accused had opportunity on three different occasions with three different persons to tell his story and on each occasion he gave some account of what transpired between him and the deceased and what the deceased

said to him. The accused was interviewed briefly by the Regional C.I.D Officer, Khan Ladhi whom he called as his witness (D.W. 4). This interview took place on the very night of the fateful Christmas day, the 25th December, 1971. I warned the assessors to bear in mind that according to this witness the purpose of this interview was to enable the witness to get an idea of what happened before he setout on hid investigation and that the witness stated that the accused was not under the impression that he was called upon to make a full statement. The accused however mentioned some words of abuse the deceased uttered. He mentioned such words of abuse the deceased uttered. He mentioned such words of abuse as MPUMBAVU (stupid), SHENZI (uncivilized) 'FUNGA MDOMO WAKO' (Shut up your mouth) NG'E – NG'E – NG'E NINI' (What is all this babbling). He did not however mention this stinging and deadly insult at the grave-yard which according to his story in Court infuriated him beyond endurance and made him lose his temper completely. The accused was interviewed by the Regional Police Commander, Abubakar Hassan, whom he again called as his witness (D.W. 10). He interviewed the accused twice on that same fatefully day. The first interview was before the witness visited the accused's premises where the incident took place. The second interview was after the visit. Here again I warned the assessors to bear in mind that according to this witness the purpose of these interviews was for the witness to find out what actually had taken place in Mkungugu village with a view to finding out whether the accused was alone in this matter or whether there were others involved in it. The accused told him his story. The accused told him how the deceased came to him in his shamba where

he was ploughing there and that he told him that the shamba had been allocated to him by his fellow villagers; that he deceased told him to stop ploughing as the place belonged to ujamaa village and to get down from the tractor; that he was slow in getting down from the tractor as the ignition key was out of order; that the deceased abused him – using such words as SHENZI, NG'E, NG'E NG'E; that the deceased poked him with the walking stick he was carrying and that he got angry and left there and proceeded to his house and took his gun and shot him. At the second interview the accused mentioned more words which he said the deceased used: - words such as 'it is useless; it will be taken over. It will be included in the village farm'; that he accused then asked him thus "Are you going to include this area which has been given to us by yourself" and that the deceased retorted 'LAZIMA' (of course). Accused then asked the deceased HAYA SASA MAMBO GANI NDUGU YANGU (what is all this my brother). The accused however did not mention that grave-yard insult that rankles and stung him most. In the night of the 26th December, 1971 the accused was taken to the District Magistrate, Mr. Ngitami, (P.W. 23) to make a statement. Mr. Ngitami stated that, recalling his experience the previous night when the accused was brought to him to make a statement and he declined to make one, he spent some time discussing with the accused to re-assure himself that he accused rally wished to make a statement. It was only when he was so satisfied that he recorded his statement which was tendered as Exhibit. P. 27. This statement was in substance what the accused told D.W. 10. In Exhibit p. 27 the accused omitted that telling and stinging deadly insult at the grave- yard. It has been suggested that the accused did not really.

wish to make a statement but was urged to do so by the police. That may be so. But the point was that when the accused told his story to the District Magistrate he omitted that most vital bit about the grave-yard. After giving careful consideration to this matter I am satisfied beyond reasonable doubt and agree

with the three assessors that he grave-yard incident did not take place and that the deceased did not utter the words attributed to him or words to that effect. I therefore reject this aspect of the accused's story.

This however is not the end of the matter. The shamba incident has to be considered. Although the accused stated in Court that after the deceased poked him the 4th time with his walking stick, he turned and left and proceeded towards his house with the intention of staying indoors to avoid the deceased and that, but for the grave-yard incident, this tragedy would not have happened yet Exhibit P. 27 told a different story and indicated that it was the shamba incident that provoked the accused. I asked the assessors to go into the shamba incident in depth and to give it as serious a consideration as if they had never been told of the grave yard incident.

The prosecution has raised the question of the credibility of the accused's story of the shamba incident and has urged the court to reject his story and to hold that the deceased did not insult or assault the accused as alleged or at all; that if It happened there was time for the accused's temper to cool. I went into this matter in detail in my summing up to the assessors and I will only deal with the matter briefly here.

What was the background of or the setting to the shamba incident. The accused was ploughing the shamba allocated to him for his individual farming by this fellow villagers. As far as the accused was concerned he had no doubt he was keeping to ujamaa rules by cultivating there. Although this shamba was part of his original holding he was ploughing it now, not by virtue of his original holding, but rather as the area allowed him by his fellow villagers to cultivate as his individual shamba. The deceased, unfortunately, may not have been aware of the local arrangements made for the 1971/72 farming season – by the villagers themselves in regard to what appeared to be a communal shamba. It was equally unfortunate that he deceased did not give any notice that he would visit Mkungugu ujamaa village on the 25th December, 1971 and did not come to any arrangement as he did with the Ndolela ujamaa villagers about working on the communal shamba on the Christmas day. The result was that neither the

Chairman no the Vice-Chairman (P.W. 1 & P.W.2) who could have explained the position to the deceased was around when the deceased drove into the accused's premises. The police were not informed as D.W.10, Abubakar Hassan, the then Regional Police Commander, testified that the deceased would go on safari on Christmas day. The result was that he deceased drove into the accused's premises unannounced and without police escort. The deceased approached the accused on the basis that he was breaking the ujamaa rules by cultivating that shamba. It have also dealt in some detail in my summing –up to the assessors on the relevant part of the

Account of what transpired between the accused and the deceased as told to D.W.10 by the accused. Briefly, it was that the deceased when he came upon the accused at that shamba told him to stop ploughing and to dismount from his tractor and remove his things from there as it was communal shamba. The accused in giving his account to D.W. 10 of what took place told him that he did not dismount promptly but took some time to dismount. When D.W.10 asked him why he was so slow in getting down from the tractor the accused told him that he had some trouble stopping the tractor because the ignition key was out of order. The deceased might have thought otherwise and might have though the delay was deliberate and again this might have account for his alleged abusive language. Given these two factors as outlined above there was some plausibility In the account of the shamba incident as told by the accused. The accused had been consistent in his story about what took place at the shamba. His story in this court up to the time the deceased poked him with his walking stick and he left the shamba was substantially the same as in Exhibit P. 27 and substantially the same as the account he gave to D.W.10. The story started with the deceased meeting the accused at his shamba, and ended with the deceased poking him with his walking stick. He made various statements as to what the deceased said as he remembered them on the various occasions. I am prepared to put the most

favourable construction on the accused's evidence and the story at the shamba may be reproduced in this manner. The deceased met the accused at his shamba and addressed him 'SIMAMA' (Stop). 'Why are you cultivating here'. The accused replied that he was ploughing the shamba that had been allotted him by his fellow villagers as his individual shamba. The deceased retorted 'It is a lie, Shenzi. Stop ploughing; this land belongs to Ujamaa village. Step down. Remove your tractor and don't cultivate here again. 'The accused felt reluctant to step down from his tractor but finally stepped down. The accused asked you going to include this are which has been given to us by yourself' the deceased retorted 'LAZIMA' (of course). The accused asked "What is all this my brother." The deceased retorted 'Shut up your mouth; NG'E – NG'E – NG'E NINI (What is all this babbling). – 'FUNGA MDOMO WAKO' (Shut up your mouth) 'I have told you and you would not listen.' The accused retorted 'what did you tell me.' Then the deceased used some words of abuse in English. The accused caught only the words 'Bloody fool.' The deceased might have used MPUMBAVU and then the deceased poked the accused with his walking stick. It might not have hurt the accused in the sense of causing him any physical pain but it was all part of the insulting behaviour. What then did the accused do? This question will be considered shortly.

I have now to consider the issue of provocation in the light of what was said and done at the shamba as a whole. I will use the term shamba incident to embrace all that was said and done as outlined above. In directing the assessors as to whether the shamba incident was likely to amount to legal provocation as defined in Section 202 of the Penal Code –

I did not single out any particular act or any set of words but asked them to consider the effect the shamba incident as a whole would have on the ordinary Mhehe. I also avoided putting to them, in terms, the famous formula of whether the mode of resentment bore a reasonable proportion to the provocation. That

formula may be more appropriate to a legal system that conceives provocation in terms of acts – physical acts – and which does not recognize that words unaccompanied by acts can amount to provocation terms of acts – physical acts – and which does not recognize that words unaccompanied by acts can amount to provocation. I note also that with the passing of the Homicide Act 1957 in England, which requires under Section 3 thereof that he jury should take into account 'things done or things said or both' the hallowed formula that 'the mode of resentment must bear a reasonable relationship to the provocation' has been brought down from the high pinnacle of a rule f law to the level of a mere guide which may or not commend itself to the jury. Per Lord Diplock in PHLLIPS v. THE QUEEN (1959) 2 A.C. 130 at Page 138. I have no doubt that without specifically referring to this formula assessor as reasonable persons would take the provocation and resentment into consideration in arriving at their opinions. Following the approach suggested in Reg. v. BROWN (1972) 3W.L. R. 11 – a decision which not being a decision of the Court of Appeal for East Africa is strictly not binding on me but which is entitled to great respect because of the inherent common sense in the approach it suggested – I have asked the assessors to consider whether the shamba incident in fact provoked the accused to act as he did and secondly whether it was likely to provoke an ordinary Mhehe to do what the accused did.

In considering the question whether the accused was in fact provoked to kill the deceased if there is evidence of his first reaction to the incident which constitutes the alleged provocation, or if there is evidence as to the state of mind of the accused or of the reason for his subsequent retaliatory act then it is the duty of the Court to consider it. I think there is such evidence in this case. To start with, I watched the accused's demeanour in the witness box in the examination-in-chief and under cross-examination and I shared the view which the specialist Psychiatrist expressed in his report, Exhibit X, that the accused was normally quite 'well composed looking person, who talked only when asked questions.' When on studied Exhibit P. 27 and followed the account of the shamba incident one had the impression that he deceased was more excited

than the accused himself. The accused admitted making the extra-judicial statement Exhibit P. 27 the correctness of which, as far as it went, had never been challenged in this Court. The poking the accused with a walking stick was the deceased's first reaction or impulse. I will reproduce the relevant portion of the Statement (Exhibit P 27). "I do not know what annoyed him, he started to abuse. Then I got out of the tractor and asked him, 'Sir why and what did I do.' He replied me 'Be quite, shut your mouth, what HII, HII, HII! And he was also abusing me in English. He held a stick in his hand with which

he was pushing me and I was moving further away so that he could not hurt me with the stick. I thought to snatch the stick from him, but I thought that he might have a pistol. Therefore I was enraged, and stared moving towards my house. When I reached in my house I took my gun and got out. I looked at him, he was beside the house and I was beside the house. I aimed at and shot him. He fell down. When he fell down a thought came to my mind and I asked myself what to do. I went to his car to look for switches but I did not see them. I returned and searched his pockets and I found them I drove the car where he fell down. I called one boy to help me to put him in the car. Then I started to leave with him….."

It will be noted that he accused's first reaction was to snatch the walking stick from the deceased. He desisted from that course of action Why? He thought the deceased was armed. There was no evidence whatsoever nor has it ever been suggested that the deceased was armed or had anything on him other than his walking stick. Did the accused go for his gun because of what he thought the deceased would probably do to him if he snatched that walking stick from him. Was the accused worked up into a homicidal frenzy because of what the deceased said or did to him or because he thought he was powerless to deal with the deceased be because he might be armed with a revolver? He may have acted in the heat of passion but it is my view that the heat of passion was not

caused by sudden provocation as envisaged by Section 201 of the Penal Code. it is my view that when the accused shot the deceased he was not reacting to a sudden provocation offered him by the deceased. He felt he was then in a position to avenge the insult at the shamba. This, in my view, was an act of revenge. Can it be said that he accused was not master of himself when he did the act? I think not. Furthermore I think he had enough time to reflect on his action in the circumstances. For these reasons I find that the accused's conduct cannot be brought within Section 201 of the Penal Code to extenuate the murder to manslaughter.

In view of my findings it is not necessary to consider what effect the shamba incident would have on an ordinary Mhehe. I have of course noted that an ordinary Mhehe is excitable and very sensitive to personal insult. This must be regarded as a human weakness in an ordinary Mhehe. It is not a mark of valour or a human virtue. The law of course sympathises with human weakness but it does not, I think, indulge or pander to human ferocity. I am inclined to accept the opinions of the tow assessors who were of the view that the shamba incident was not enough to induce an ordinary Mhehe to behave as the accused did.

In the final result I find that the accused killed the deceased by shooting him with his double-barrel gun, was of sound mind when he did the act and killed without legal provocation. I have no alternative but to hold that the charge has been proved beyond reasonable doubt. I accordingly charge has been proved beyond reasonable doubt. I accordingly find the accused guilty of the murder of Wilbert Klerruu.

213. Hamza s/o Athumani v. R., Crim. App. 174-A-72; 1/9/72.

BRAMBLE, J. – The appellant was convicted of the offence of store-breaking and stealing contrary to sections 296(1) and 265 of the Penal Code. He was charged jointly with two other persons who pleaded guilty, were sentenced and later gave evidence for the prosecution.

The facts which are not in dispute are that on the 6th March, 1972 a store belonging to the Suwa Ujamaa Village was broken into and three bags of beans stolen. On being questioned two accused in the case confessed to having committed the offence and named the appellant as a third party to it …. [The court discussed the evidence and then continued]. The main point in this appeal, however, is that there has been no corroboration of the evidence of the accomplices. These accomplices cannot corroborate one another. The prosecution had an opportunity to get some such evidence since P.W. 3 said that the appellant had sent his brother to call him. This brother was not called as a witness. Mr Kinabo for the Republic submitted that section 142 of the Evidence Act can be applied. It states that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. In the case of R. v. Asumani Logoni s/o Muza (1943) 10 E.A.C.A. 92 it was held that there must be exceptional circumstances to justify a departure from the general rule that a conviction on the uncorroborated testimony of an accomplice ought not to be upheld. This was a case from Uganda where there is a section in the Uganda Evidence Act corresponding to Section 142 of the Tanzania Evidence Act. What are exceptional circumstances must be determined on the merits of each case. In the case of Kinchingeri and others v. R., (1909-10) 3 EALR 1 it was held that because the witness made no attempt to shield themselves and in fact believed that they were full justified in acting as they did, because their act had the sanction of tribal custom, the circumstances were exceptional and justified a conviction on that evidence without corroboration it is not possible to lay down a general rule as to what should be considered special circumstances.

The learned magistrate did not direct himself on the necessity for corroboration as a rule of practice. I can find no exceptional circumstances in this case and I allow the appeal, quash the conviction and sentence and order that the appellant be immediately released.

214. Lucas Mbanda v. R., Crim. App. 552-M-71; 16/9/72.

JONATHAN, AG. J. – The appellant was convicted of housebreaking and stealing contrary to sections 294(1) and 265 of the Penal Code and sentenced to concurrent terms of imprisonment of 3 years and 6 months, respectively, being ordered also to receive 24 strokes.

The facts of the case were simple. It is undisputed that on the morning of the 20th March, 1971 the house of the complainant was broken into while he was at work and bed sheets and clothes stolen there from to the value of approximately Shs. 2,000/=. It is undisputed also that on the 27th July, 1971

The complainant saw the appellant wearing what appeared as some of his stolen clothes. He followed him stealthily and thereby came to know where he was staying in the township. A couple of days later he took P.W.3 a police officer to such place. That transpired to be the house of P.W.2 with whom the appellant was staying. In that house they found one bed-sheet, 2 trousers, 3 shirts, a neck tie and a jacket all of which the complainant recognised as forming part of his stolen things. However, the appellant contended the things were his and he duly produced receipts. But these did not satisfy the police officer as they related to completely different items [The court reviewed the evidence as to ownership of the goods and continued]. On the evidence before it, the trial court was entitled to reject (appellant's) claim and to fid that the clothes belonged to the complainant and formed part of the property stolen following the housebreaking incident.

According to P.W. 2, and it is not disputed, the appellant had those things when he moved to stay with him on the 30th March, 1971, what is ten days after the offences were committed. In view of this and having regard to the fact that the things comprised most of the complainant's stolen property, I am satisfied the doctrine of recent possession was properly applied so as to find the appellant the perpetrator of the offence charged. Accordingly, the appeal against the convictions has no merit. [Sentence upheld}.

215. R. v. Stanslaus s/o Barnaba, Crim. Rev. 3-M-72; 16/8/72.

JONATHAN, AG. J. – The accused was convicted on his own plea of being in unlawful possession of Government strokes contrary to section 312 A (2) (as it then was) of the Penal Code and given an absolute discharge under section 38(1) of the Code. The charge alleged that he was found in possession of various items of clothing marked “National Service” which were Government stores and which were reasonably suspected of having been stolen or unlawfully obtained. To this the accused told the court that he was found in possession of the items, but that he had got them form his brother who was employed by the National Service. This was then recorded as a plea of guilt the facts as then outlined by the prosecution and admitted by the accused were that the items were property of the National Service, for use by members of that institution only.

Taking the charge as it stood, it is quite clear that the plea of accused was not unequivocally one of guilty. He admitted possession but gave an account of how he had come b the things. It was, therefore, a triable issue whether the possession was unlawful and the magistrate should have recorded the plea as one of not guilty.

The charge was itself bad, for the particulars were at variance with the statement of offence. Although the particulars stated that the items were Government stores, they could not, in law, be so regarded for the same particulars made it clear that the items were marked “National Service”.

National Service property is property of that institution and cannot at the same time be said to be Government stores, for property of the National Service, public though it is, is not also property of Government.

At the hearing of this matter the learned Senior State Attorney drew my attention to the provisions of section 22 of the National Service Act and suggested that the accused should have been charged there under. With this I respectfully agree. [The court then quoted this section and continued]. These

provisions are the same as those of section 312 A (2) of the Penal Code in so far as the giving of a satisfactory account is concerned. In the case under consideration, the accused said he got the items found in his possession from he brother who was a member of the service. It follows, therefore, that, even if the accused had been charged under the Act, as he should have been, his plea should still have been recorded as on of not guilty.

For the foregoing reasons, I would hold the plea was wrongly recorded and the conviction bad. I accordingly quash the conviction and set aside the order of absolute discharge. In the circumstances of the case I would consider it appropriate to order plea to be taken afresh.

216. Clemence Mziray v. R., E.A.C.A. Crim. App. 85-DSM-72, 24/10/72.

Held: (1) While it is not open to the Court of Appeal for East Africa to consider, on second appeal, the severity or sentence, it must consider the lawfulness of a sentence and will interfere with sentences resulting directly from misdirection's of law.

(2) Sentence of 18 months' imprisonment for causing death by dangerous driving c/s 44A (1) and 70. Traffic Ordinance, Cap. 168 cannot be supported in law where the accused struck down and killed a person walking by the side of the road, while driving at 40M.P.H. on the correct side.

LUTTA, J. A. – This is an appeal from a revisional order under section 327 of the Criminal Procedure Code and also from a decision of the High Court refusing leave to appeal out of time. The appellant was, on the 13th August, 1971, convicted of the offence of causing death by dangerous driving, contrary to sections 44A (1) and 70 of the Traffic Ordinance (Cap. 168) and was sentenced to a fine of Shs. 2,000 or ten months' imprisonment in default. He paid the fine. The High Court caused a notice of enhancement of sentence to be served on

him as it considered the sentence to be inadequate. The matter came before the High Court on the 8th July, 1972; it set aside the sentence of a fine of Shs. 2,000 and substituted therefore a sentence of 18 months' imprisonment. The appellant applied to the High Court for leave to file an appeal out of time against the decision of the Resident Magistrate and on 1st August, 1972, his application was dismissed. He has now appealed against the enhancement of sentence and refusal of the High Court to grant leave to appeal out of time. [The court outlined the submissions of counsel and continued].

Under section 8(6) (a) of the Appellate Jurisdiction Act (cap. 451) this Court has power to hear an appeal by either party to proceedings under Part X of the Criminal Procedure code: "on a matter of law (not including severity of sentence) but not on a matter of fact." This is an appeal against enhancement of sentence and the principles on which this Court will act in such an appeal were set out in the case of Desai v. R. (1971) E.A. 416; at p. 419 this Court said: "On consideration we think that while it is not open to us to consider, on second appeal, whether a sentence is unduly severe or unduly lenient, it must be open to us to consider whether a sentence is lawful, and to interfere if it is not. By necessary extension, we think we have jurisdiction to entertain a submission that a trial court, in considering the sentence to be passed, has misdirected itself in law and, if we uphold such a submission and consider that the sentence passed resulted directly form the misdirection, to interfere with that sentence, so as to substitute for it the sentence which the trial court would have imposed had it directed itself correctly."

In this case the learned judge, when enhancing the sentence said: "In the present case the accused knocked down an old man who was walking on the edge of the road and in the same direction. Accused's explanation that he was dazzled by the full lights of an oncoming car was disproved by evidence and rejected by the trial magistrate and with good reasons. Windscreen of the

accused's car was broken but he did not stop after the accident, but was chased by another man in a bus. I have carefully considered all the aspects of the case and bearing in mind the circumstances surrounding the incident in question, I feel a sentence of a fine of Shs. 2,000 or ten months' imprisonment is far too lenient and not compatible with the gravity of the offence." The evidence which the trial magistrate accepted, was that the appellant was traveling at a speed of 40 m.p.h. on the Nairobi/Arusha road, well on his left side, with dim lights on and that he did not know whether he had knocked down a human being – that when his windscreen broke he thought he had been hit by a stone. However, the trial magistrate said that a speed of 40 m.p.h. on a tarmac road is "high enough and is enough to cause a death of a person." That was not the question. A much lower speed may cause death. The question which the trial magistrate had to consider was whether the speed at which the appellant was driving was in the circumstances dangerous. Both the trial magistrate and the learned judge seem to have lost sight of the act that in the particulars of the charge it was alleged that the appellant was driving at a speed which was dangerous to the public, not that he was driving in a manner dangerous to the public, which is the alternative under the section a speed. A speed of 40 m.p.h. on a main road is not in itself dangerous unless there are circumstances that make it so, and no evidence was called to establish those circumstances. We are not concerned with the question whether the appellant was rightly convicted, because he did not choose to appeal against conviction, what does concern us is tat the learned judge has enhanced the sentence because of the gravity of the offence and yet he does not seem to have related the evidence to the charge. The only reasons he gives are, first, that the trial magistrate disbelieved the appellant and, secondly, that the appellant did not stop immediately after the accident. Neither of these factors was relevant to the question before him. We think the learned judge gravely misdirected himself and that if he had not done so, he would not have enhanced the sentence. In these circumstances this Court not only has jurisdiction in this matter but is also entitled to interfere with the sentence. We accordingly allow the appeal, set aside

the sentence of 18(eighteen) months' imprisonment and restore the sentence originally imposed by the trial magistrate.

217. R. v. Sebastiano s/o Mkwe, E.A.C.A. Crim. App. 84-DSM-72, 24/10/72.

Held: (1) Where an accused acts as a go-between to induce a magistrate to accept a bribe from another party who delivers the bribe shortly afterwards, the accused is himself guilty of a corrupt transaction c/s 3(2), Prevention of Corruption Act, 1971.

(2) Where the accused chooses to testify, the court may take his evidence into consideration in coming to the conclusion that his guilt has been proved beyond reasonable doubt, and need not confine itself to the evidence of prosecution witnesses.

SPRY, AG. P. – The respondent was charged under section 3 of the Prevention of Corruption Act, 1971, with on Innyasi s/o Lehona, with the offence of corruptly giving a bribe to a resident magistrate named Edgar Diones Maokola Majogo,k so as to influence his decision in a case before him. Both accused were convicted. On appeal to the High Court, the conviction of Inyasi was sustained but that of the respondent was quashed. The Republic now appeals against the quashing of the respondent's conviction.

The relevant facts, as established by the prosecution, were as follows. The respondent, who keeps a bar, approached Majogo in his chambers and said that he wished to discuss something with him but would prefer to do so at his bar. Majogo agreed, but said that he would take with him a fellow magistrate, Harold Elais Sisya. On his way home Majogo met Inyasi who referred to the fact that respondent and Majogo were to meet and said that he, Inyasi, after going to his bank, would see Majogo on the following day. The two magistrates later went to the respondent's bar. The respondent wanted to speak to Majogo alone but the latter wisely refused. Eventually, a conversation took place in Sisya's car

between the respondent and Majogo, with Sisya present. The gist of the conversation was that the respondent had a friend who was prepared to pay Shs. 1,000 for help in connection with a certain case.

Majogo and Sisya consulted the police and a trap was laid. The outcome was that on the following day, Inyasi went to Majogo's house and handed over Shs. 800 to him for his help in connection with the case. This was in the sight and hearing of two police officers, who were in an adjoining room.

The learned judge, who allowed the respondent's appeal, based his decision on two considerations. First, there were discrepancies in the evidence and, secondly, he thought that as the respondent took no part in the handing over of the money on the second day, the case against him had not been proved reasonable doubt.

The discrepancy on which the learned judge mainly relied, and which he regarded as very serious, concerned what was said in Sisya's car. Majogo said that the respondent had said he had the Shs. 1,000 'in his pocket in that very car." Sisya, on the other hand, said "I cannot recollect whether it was I or Mr. Majogo but one of us asked where the money was and 2nd accused said the money could be produced shortly thereafter." With respect, we cannot see that this discrepancy is of any real significance. Indeed, it is not by any means certain that there is any contradiction, especially as Sisy's account continues "I told the 2nd accused to give back the money to that man." Substantial, the evidence of these witnesses is consistent and the trial magistrate found them to be witnesses of truth. It may be that on this particular detail, the memory of one of hem was a little confused. Neither was asked in cross-examination any question on this particular matter and was are not persuaded that it is any ground for doubting their evidence

As regards the second point, the learned judge said that because of this contradiction it was doubtful if the respondent mentioned money at all. He went

on:" All he said that there was someone who had a case about a Kihamba before Mr. Majogo and that Majogo should try to help that man and no more. No name was mentioned, nor was the case number or whether it was a civil or criminal case nor was any money mentioned. What took place next day was strictly between P.W. 1 (that is, Majogo) and first appellant and 2nd appellant did not give any money to PW.1 to seek his favour in criminal case No. 430/71, and as an inducement. For all its worth PW.1 need not have seen 1st appellant if he so desired the following day and that would have been the end of everything ……."

With respect, that is a serious misdirection. If the evidence of the two magistrates was truthful, and there is no reason to doubt it, it is clear that the various events which occurred in less than thirty-six hours all formed part of a single transaction first, there was the respondent's approach to Majogo. Then, soon afterwards, the chance conversation between Inyasi and Majogo, when the former referred to the respondent by name and said he would see Majogo after he had been to his bank. Then there was the conversation in the car. Finally, the next morning, Inyasi paid over the Shs. 800 for help in his case. It is immaterial that the respondent was not present when the money was handed over. It is quite clear that he was a principal offender, acting as a go-between on behalf of Inyasi, who preferred to make his corrupt approach to Majogo indirectly. We think his guilt was amply proved and that this appeal must succeed.

There is also another serious misdirection in the judgment appealed from. The learned judge criticized the trial magistrate, saying that he "should look only to evidence of prosecution witnesses to see that the case is proved beyond all reasonable doubts and not try to fish for something from defence."

Once an accused person has been called on to make his defence, any evidence he gives or calls is evidence in the trial and it is the duty of the court to consider the evidence as a whole. [The court discussed the application of the Minimum Sentences Act, 1971 and continued]. Accordingly, we allow the appeal set aside the judgment of the High Court and restore the conviction and sentence passed on the respondent by the trial magistrate.

218. Frank Kachile v. R., E.A.C.A. Crim. App. 97-DSM-72, 24/10/72.

Held: (1) Leave of the court is always required for the recall of a witness.

(2) The court may, in special circumstances allow the recall of a prosecution witness even after the close of the prosecution case, likewise with defence witnesses.

SPRY, AG. P. – [The court dismissed the appeal from convictions on two counts of theft by public servant, reducing them, however, to counts of theft c/s 265, Penal Code. in the course of its judgment, the court made the

Following remarks on an opinion expressed by the judge in the High Court]. The learned judge expressed the opinion that, until the prosecution has closed its case, it is entitled, as of right, to recall a witness on a point which the prosecution considers material to its case. With respect, we do not agree. We think that the leave of the court must always be obtained for the recall of a witness, and this is a judicial discretion, although it will normally be allowed up to the time when the prosecution (or the defence) closes its case and may, in special circumstances, be allowed even after that to meet questions that could not reasonably have been anticipated.

219. Tanzania Sand and Stone Quarries v. Omoni Ebi, H.C. Civ. App. 10-DSM-72, 16/8/72.

Held: (1) The omission by the trial court to frame an issue is not fatal unless it results in a failure to decide properly the point in question amounting to a failure of justice.

(2) Where a person has been deprived of a liquidated amount or specific goods by the wrongful act of another, he is entitled to interest from the date of filling the suit. Where, however, damages have to be assessed by the court, interest is given only from the date of judgment.

MWAKASENDO, AG. J. – The court dismissed the substantive appeal from a decision of the Resident Magistrate's Court, Dar es Salaam awarding damages to the plaintiff/respondent for losses suffered in a motor accident caused by the negligence of defendant/appellant holding on the facts that the negligence of defendant/appellant holding on the facts that the negligence was proved. The following holdings of law concern subsidiary grounds of appeal] I now turn to ground 2 of appeal. Mr. Kapinga in an able and lucid argument, vigorously submitted that the Magistrate's failure to frame issues in the case was not merely a procedural error but was one which went to the root of the Magistrates decision, - vitiating it. In support of his contention Mr. Kapinga cited authorities ranging from D.F. Mulla on the Indian code of Civil Procedure to some observations= in East African cases. Although the provisions of the Civil Procedure Code 1966 make it clear that it is the prime responsibility of the court to see that issues are framed in every action, it is clear too, that advocates appearing in the action have an equally important duty to see that the requirements of the code are complied with by the Court. In this case, both counsel who have appeared on appeal appeared when the action was tried in the District court and for my part I do not think they should now be allowed to adopt a holier – than – thou attitude and cast all blame for the failure on the Court. That would not be fair and the blame must be shared equally between them and the Court. Now, what is the consequence of the omission in this case, to frame issues? D.F. Mulla in the Indian Code of Civil Procedure, the source of the provisions of our own Code, gives what is in my view, a good answer to the question at page 695 of his work: "Where a material fact stated in the plaint is denied or is not admitted in the written statement, the Court must frame and issue on the fact. What is the consequence of

an omission to frame an issue of fact? The answer depends on the following considerations. If, though no issue is framed on the fact, the parties adduce

evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside in appeal on the ground merely that no issue was framed. The reason is that mere omission to frame an issue is not fatal to the trial of a suit. But if the point denied in the written statement is not tried at all, or if tried, is tried imperfectly so as to cause failure of justice, the case will in appeal be remanded for a retrial after framing the necessary issue. In other words, omission to frame an issue is an irregularity which may or may not affect the disposal of a suit on the merits." In the present case, as it may be noted from the plaint, the written statement of defence and the memorandum of appeal and as agreed to by both Counsel for the appellant and Counsel for the respondent, the only important issue for the determination of the Court was whether the plaintiff or the defendant or both of them were negligent. This was the fundamental issue in the case and I think it cannot be said in this case that the omission to frame the issue occasioned any failure of justice. On examination of the entire record in this case, I am satisfied that the parties and the Magistrate were fully aware of what the important issue was in the case. The parties adduced evidence on the issue and this issue was the whole subject. – Matter of the Magistrate's judgment. I can therefore find no reason to disturb the District Court's decision on this ground. Ground 2 of appeal similarly fails.

Next ground to be considered is ground 6. I think the law on the point raised in ground 6 of the appeal is well settled and it is that as laid down by the Court of Appeal in Prem Lata v. Mbiyu (1965) E.A. 592, a case concerning damages for personal injuries. This case has been followed by the Court of Appeal in a more recent case, that is, Mukisa Ltd. v. West End (1970) E.A. 469. In the latter case the Hon. The Vice President of the court, Spry V.P., succinctly discussed the principle that must be followed in this type of case and he said at p. 475 of his judgment: "I think it is clear that the judge had power to make that award, but with respect I do not think he should have done so. The principle appears clearly, I think in the judgment of this Court in Prem Lata v. Mbiyu (1965) E.A. 592. That was a case concerning damages for personal injuries. The

principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

In this case the learned Magistrate awarded interest from 10.10.69 to the date of judgment at 9% and from date of judgment to payment of decretal amount at 7%. I do not think the award of interest prior to the filing of the suit can be supported on the principle discussed by Spry V. P. in the Mukisa Ltd. v. West End case and I am completely unable to see that here is any authority for such an unusual award of interest in the code. I am in any event satisfied that the award of interest prior to the filing of the suit was wrong there being no ground at all to justify it. Appellant's appeal on this ground therefore must succeed to this limited extent

That in interest shall be 9% from the date of filing the suit to the date of judgment and thereafter until payment of decretal amount at 7% [The court then briefly considered a final ground of appeal and dismissed it]. In the result, save for the limited extent indicated in the judgment where appellant has succeeded, this appeal fails and it is dismissed with costs.

220. East African Railways Corp. v. Anthony Sefu, H.C. Civ. App. 19-DSM-71, 15/9/72.

Held: (1) In the absence of clear and unambiguous language no statute shall be construed as to oust or restrict the jurisdiction of a Superior Court.

(2) Superior Courts have an inherent jurisdiction to supervise the working of inferior courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law.

(3) The jurisdiction of a Superior Court to correct errors made by an inferior tribunal acting within its jurisdiction may be ousted by the clear provisions of a statute.

(4) Section 16 of the Public service Commission Act, 1962, laws of E.A.C.S.O. clearly ousts the jurisdiction of Superior Court to inquire into the validity of decisions taken by the East African Railways and Harbours Service Commission within its jurisdiction.

MWAKASENDO, AG. J. – The respondent in this case, ANTHONY SEFU, was first employed by the appellant Corporation (originally the East African Railway and Harbours Corporation as a foreman on 28th June, 1950. in 1965 after attending several in training courses, he was promoted to the post of several in-training courses, he was promoted to the post of locomotive driver Grade NB. VA. At a salary of £303 per annum. In August or September 1967 he was suspended from duty by his authorized officer on account of being found drunk on duty and on failing to give a satisfactory explanation of his conduct to his superiors, he was eventually dismissed from service by the Corporation. Although according to the regulations the respondent had a right to appeal against the dismissal, and he was clearly so informed of his right respondent, for reasons best known to himself, never availed himself of this opportunity and as far as can be gathered from the records, no appeal had been lodged against the Corporation's decision to dismiss him at the time when he decided to challenge his dismissal by civil suit for wrongful dismissal.

One of the grounds of defence averred by the General Manager of the East African Railways Corporation was that the District Court was not seized up of jurisdiction to inquire into the dismissal from service of the respondent/plaintiff b the Railways and Harbours Service Commission. This averment was contained in paragraph 8 of the defendant's Written Statement of Defence and it reads: "8. This written statement of Defence is filed without prejudice to the right of he defendant to contend which he will in fact contend that he Honourable Court is

not seized up of jurisdiction to inquire into the question of determination of service of the Plaintiff as ordered by the said Commission.

True to his promise, the defendant, as soon as the hearing of the suit started, raised an objection founded upon absence of jurisdiction of the court to hear the case. In support of his submissions on this point, Mr. Bishota, learned counsel for the defendant, cited the provisions of Section 16 of the Public Service Commission Act, 1962, Act No. 6 of 1962 of the Laws of the East African Common Services Organisation Acts and Subsidiary Legislation for 1962. Section 16 of the Public Service Commission Act, 1962 provides: “16. The question whether – (a) any Commission has validly performed any function vested in it by this Act; (b) any member of a commission or any other person or authority has validly performed any function of the Commission delegated to such member or other person or authority under this Act; or (c) any member of a commission or any other person or authority has validly performed any other function in relation to the work of the commission or in relation to any such function as is referred to in the preceding sub-paragraph, shall not be inquired into in any court.” The Railways and Harbours Service Commission was constituted under section 5 of the Public Service Act, 1962 thus: “5. The Commission established by Article 40 of the Constitution for the Railways and Harbours Administration shall be known as the Railways and Harbours Service Commission.” And its functions are set out in Section 13 of the same Act, which provides: “13(1) Subject to the provisions of this Act, power to appoint persons to hold or act in offices in that part of the public service consisting of the East African Railway and Harbours Administration (including power to make appointments on promotion and transfer and to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove from office persons so appointed is hereby vested in the Railways and Harbours Service Commission. (2) The power to appoint a person to hold or act

in the office of General Manager (including an appointment on promotion or transfer) is hereby vested in the Authority acting after consultation with the Railways and Harbours Service Commission and the Secretary General."

I have endeavored to set out in full all these provisions of the Public Service Commission Act 1962, because it is on the construction of these provisions that defendant's main objection to jurisdiction really rests. It was contended on plaintiff's behalf and the same arguments have been repeated here, that on the proper construction of the provisions of Section 16 of the Public Service Act, 1962, the jurisdiction of the court was not wholly ousted but in the words of the learned Resident Magistrate, "it was just limited". And it was further contended by the plaintiff, with reference to the provisions of Section 16 of the Public Service Act, 1962, that the duty to decide whether any function vested in the Railways and Harbours Service Commission is validly performed was not that of the Commission but of the Courts. None too convincing a reason has been suggested for this contention but be that as it may, plaintiff's contentions on this point apparently found favour with the learned Resident Magistrate and received unreserved approval in his ruling.

I must at once confess my inability to comprehend fully the reasoning behind the learned Resident Magistrate ruling's ruling. While he does make an attempt to refer to the operative words in Section 16 of the Public Service Act, 1962 – "the question of whether any commission has validly performed any function vested in it, shall

Not inquired into in any Court" – no attempt whatsoever is made to construe these words and to relate them to the objection by the defendant that the Court had no jurisdiction to inquire into the question of dismissal of the plaintiff. The Resident Magistrate's ruling on the point is fairly comprehensive and may conveniently be set out in full:

"Ruling: Counsel for the defendant, Mr. Bishota, has raised a preliminary point that this Court is not seized up of jurisdiction to inquire into the question of determination of the Plaintiff as ordered by the Railway Service Commission. He submitted that under Section 16 the Public Service Commission Act, Act 6 of 1962 the question of whether any commission has validly performed any function vested in it, shall not be inquired into in any Court." He contended that, that expression ousts the jurisdiction of this Court.

"Mr. Dave for the plaintiff argued that this Court has jurisdiction to inquire whether the Commission has 'validly performed' its functions. He said that the Commission cannot be its own judge to see if its functions are 'valid' at all he contended that if that were to be the effect of the legislation then there is a clear denial of natural justice, which this court is here to uphold. He further submitted that this Court is empowered in its inherent jurisdiction to adjudicate upon the matter where there has been a denial of natural justice to an individual.

"In reply Mr. Bishota pointed out that the question of denial of justice does not arise where the legislation in clear terms ousts the jurisdiction of the Court.

"It is a cannon rule of construction that any provision of law which imposes burdens on the private individual and restricts his rights of carrying on his lawful avocations must be strictly interpreted and complied with before his right can be restricted. Thus the question whether a statute precludes the jurisdiction of the Courts depends upon the words used and upon the clear construction to be placed upon those words: In Maxwell on the Interpretation of Statutes 10th Edn. 1 we have the following comment: 'A statute is the will of a legislature and the fundamental rule of interpretation is that a statute is to be expounded according to the intent of hem that made it. If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such cases best declaring the intention to the legislature. If there is one rule of construction for statutes, it is that you must not imply anything in them which is inconsistent with the words expressly used'.

"On the principle enunciated above, the argument by Mr. Dave that this Court has jurisdiction to inquire whether the Commission 'validly' performed its functions is merited.

"It has been recognised for a long time past, that Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. In De Souza v. Tanga Town Council (1961) E.A. 386 the E.A.C.A. categorically stated that the Court may declare a tribunal's

Decision a nullity if: (1) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have not been committed, the Court cannot substitute its judgment for that of an authority which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as it is to decide it rightly.

"Thus the Court's jurisdiction is just limited but not completely ousted. I will hear both sides so that I can have the records and the explanation as to the manner or procedures adopted in dismissing the plaintiff. That will be record on the basis of which I shall decide if the tribunal went outside its 'functions' or violated the principles of natural justice etc. Then the purported decision of dismissal is no decision at all. It is a nullity.

'To the extent I have described above, I hold that this Court has inherent jurisdiction to entertain the suit." The defendant has appealed against this ruling to this Court.

The only issue to be decided in this appeal is whether or not the Resident Magistrate's Court was right in assuming jurisdiction, for the reasons set out in the ruling, to inquire into the validity of plaintiff's dismissal from service by the East African Railways and Harbours Service Commission. In the course of this

appeal the Court has had full opportunity to hear both Counsels speak in support of their respective submissions. I must thank them for the ability and clarity of their arguments and I would be less than fair if I were not to put on record the Court's debt their industry and the many authorities that they have properly placed before the Court.

It is, I think, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. Many modern statutes contain provisions which attempt to remove decisions of tribunals or Ministers from review by the courts by making these decisions "final" or "conclusive". The use of such words was fully discussed in the case of R. v. Medical Appeal Tribunal ex. P. Gilmore (1957) I QB 574 at 583. Denning L. J. (as he then was) said: "The remedy by certiorari is never to be taken away by statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean without recourse to certiorari. It makes the decision final on the facts, but not final on the law. Notwithstanding that he decision is by statute made 'final 'certiorari can still issue for excess of jurisdiction or for error of law on the face of the records". And so have the Courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior course or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the superior Courts to supervise inferior Courts or tribunals is necessarily delimited. As Lord Summer said of the superior Court's supervisory jurisdiction in Rex. V. Nat Bell Liquors Ltd. (1922) 2 A.C.128 at a page 156: "Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the

Area of the inferior jurisdiction and the qualifications and condition of its exercise; the other is the observance of the law in the course of its exercise".

A statute setting up a tribunal may of course, in clear and precise words, debar any inquiry that may be necessary to decide whether the tribunal has acted within its authority or jurisdiction. Such a provision would operate to debar contentions that the tribunal while acting within its jurisdiction has come to wrong or erroneous conclusions. There would however, even in such a case, be no difficulty in pursuing and in adducing evidence in support of an allegation, for instance, that the members of the tribunal had never been appointed to act as such members or that those who had been appointed had by some irregular conduct disqualified themselves from membership of the tribunal. Further, it seems, there would be no difficulty in raising any matter that goes to the right or power of the tribunal to exercise the function or power vested upon it. What an ouster clause, such as it is claimed is contained in Section 16 of the Public Service Commission Act, 1962, does is to forbid any questioning of the correctness or validity of a decision or determination which it was within the area of jurisdiction of the tribunal to make. At this point it would, I think, be appropriate to quote from the speech of Lord Morris of Borth-y-Gest in the case of Anisminic v. Foreign Compensation Commission (1969) 2 WLR 163 at page 180. He said:

"If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. It a particular issue is left to a tribunal to decide, the even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law." Again at

page 181 the same learned noble lord observed in a similar vein: “If, therefore, a tribunal whole within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record then the superior Court could correct that error unless it was forbidden to do so. It would be so forbidden if the determination was ‘not to be called in question in any court of law’. If so forbidden it could not then even hear argument which suggested that error of law has been made. It could however still consider whether the determination was within ‘the area of the inferior jurisdiction.’

Although the judgment of Lord Morris of Borth-y-Gest in the Anisminic case was one of the minority, there can be no doubt that his observations on the effect of “ouster jurisdiction clauses” are sound and correct and in my judgment, the same principles ought to apply in considering the present appeal

It will be noted in the instant case, that no suggestion of irregularity either of conduct or procedure on the part of the Railways and Harbours Service Commission were precisely alleged by the plaintiff in his plaint. He merely contented himself by making generalised allegations of wrongful dismissal, without more. He does not state how his dismissal was wrongful. He does not suggest that the Commission acted in contravention of any law or that it went against any of the procedure prescribed in the Second Schedule to the Act which the Commission is required to observe in the conduct of its business.

Examination of the record abundantly shows that the plaintiff would have had no ground to complain in this respect. In accordance with the regulations the plaintiff was informed soon after his suspension the reasons thereof. He was required, again in accordance with the regulations, to give a satisfactory explanation of his conduct to his superiors within a given time. This he did but unfortunately his explanation was found inadequate and he was so informed. Thereafter the matter was referred to his superior officer at the Corporation’s

Headquarters in Nairobi who instituted an inquiry of their own and who, on being satisfied that plaintiff's conduct was of a very serious nature, to merit dismissal from the service, forwarded the results of their inquiries to the Commission together with their comments. The Commission on considering this report reached the decision to dismiss the plaintiff from the service with loss of all benefits. The decision of the Commission was communicated to him and plaintiff has not denied this. Even at this stage it was open to him to appeal against the decision but the plaintiff never chose to avail himself of this opportunity even though as late as November 19th, 1968 he was advised through NUTA to appeal against the decision to the appropriate higher authority.

It would however appear that plaintiff's main grievance against his dismissal is that it was done or communicated to him by the District Mechanical Engineer and the letter of 6th December, 1967 addressed to him by the District Mechanical Engineer, Dar es Salaam, would clearly give this impression. However, any misapprehension created by this letter were or should have been removed by letter dated 23rd January, 1968 whereby the plaintiff was informed through NUTA: "I regret to have to advise you that it has not been possible for me to deal with your allegations on the case for, all the facts of Mr. Seffu's case were referred to the Railways and Harbours Service Commission who considered the case and ordered the dismissal".

By 23rd January, 168, therefore, the plaintiff should have had no doubts as to who had ordered his dismissal from the service and it was then open to him to lodge an appeal in the normal way. Even assuming that the decision to dismiss him from the service was that of his authorized officer, a decision later confirmed by the Commission, there was noting to stop him on the 23rd January, 1968 to ask the Commission to review his case in accordance with Regulation 59 of the East African Community Service Commission Regulations (which are in every respect similar to the East African Common Services Organisation Commissions Regulations.). Regulation 59 provides:

"59(1) Where any matter relating to disciplinary proceedings in respect of any officer has been referred to the Commission and the Commission has for the

first time made a decision or order therein, the authorized officer or the officer in respect of whom the decision or order has been made may request the Commission to review its decision or order in such matter:

"Provided that the Commission shall not review such decision or order unless it receives new material facts which the Commission is satisfied might have affected its former decision or order and if adequate reasons for the non-disclosure of such facts at the earlier date are given.

"(2) Any application or request for the review by an officer in respect of whom a decision or order has been made by the Commission shall be submitted through the authorized officer together with such new material facts within six weeks of the date upon which the decision or order of the Commission is addressed to the officer. Only one such review shall be allowed."

In May 1969 the General Secretary of NUTA wrote to the Director General of the Railways Corporation asking him to review Mr. Sefu's case under the provisions of Regulation 59. However nothing came of this request as the General Secretary of NUTA had not complied with the procedure laid down in Regulation 59. It was also the view of the Director General that no new facts had come to light since the decision to dismiss Mr. Sefu had been taken in 1967 and therefore the question of review did not arise.

This is the short summary of the leading to Mr. Sefu filing a plaint against the General Manager of the East African Railways Corporation.

The question therefore, arises whether the Courts of law can entertain such a suit, the purport of which is to question the validity of the decision taken by the East African Railways and Harbours Service Commission? On the principles aptly stated by Lord Morris of Borth-y-Gest in the Anisminic v. Foreign Land Compensation Commission case, it would seem to me that the Courts of this country are debarred from inquiring into the validity or otherwise or the decision to dismiss Mr. Sefu.

The clause in the statute Section 16) ousting the jurisdiction of the Courts is precise and couched in the most clear and unambiguous language possible- it says “the question whether any member of a Commission or any other person or authority has validly performed any function of the Commission delegate to such member or other person or authority under this Act, shall not be inquired into in any Court.” By the provisions of Section 13 and regulations 50 to 52 of the Public Service Commission Act, 1962 (the Section and regulations of the Community Service Commission are in similar terms), it is abundantly clear that the power of disciplining and removing from office officers in receipt of a salary of less than £400 per annum has been delegated by the Commission to the Heads of Departments of the officer concerned. There can therefore be no doubt that when the District Mechanical Engineer instituted the investigation into Mr. Sefu’s Conduct in this case he was acting properly within his jurisdiction.

I have already indicated how this investigation was conducted and how eventually, it was decided that the respondent, Mr. Sefu, should be dismissed from his service. There is nothing throughout the course of the disciplinary proceedings to suggest that the authorized officer acted without or in excess of jurisdiction. That being so, his decision is one which the provisions of section 16 of the Act say this Court or any Court shall not inquire into. Parliament for reasons best known to itself has stated categorically

and in a language which is both clear and unambiguous that where a Commission or an authorized officer has performed a duty or function which it is within his jurisdiction to perform or do in terms of the provisions of the Act, such a performance shall not be the subject of inquire in any Courts of law. That is what Parliament has decreed and it is not open to the Courts to even hear arguments, as the learned Resident Magistrate did in this case, which suggest that the Commission or authorized officer might have been mistaken in its or his decision.

Even if It were alleged, as it might on occasion be, that the Commission or authorized officer misconstrued the provision of the law or regulation, that would still not have entitled the Court to question the decision reached by the tribunal. Lord Reid in Reg. v. Governor of Brixton Prison Ex p. Armah (1968) A.C.192, 234 stated the matter thus: "If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue and there is irregularity in the procedure, he does not destroy his jurisdiction reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction." To the same effect we find the following passage in paragraph 119 in Volume 11 of Halsbury's Laws of England, 3rd Edn. (1955) page 62: "Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of certiorari on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a stature, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, r convicts without evidence) be deemed to exceed or abuse its jurisdiction." It would therefore appear plainly clear that the learned Resident Magistrate in this case was mistaken in purporting to question the validity of the decision reached by the Conclusion to dismiss the respondent from his employment. The legislative enactment in question which ousted his jurisdiction did so in clear and unambiguous terms and the least he could have done was to comply. In not so complying he grossly erred and his decision cannot be sustained. It must accordingly be quashed and set aside.

It follows therefore that this appeal has to be allowed. And an order to the effect that the decision of the East African Railways and Harbours Commission to dismiss the respondent/plaintiff with loss of all benefits, is a matter in which the Courts have no jurisdiction to inquire, shall issue accordingly.

221. Namdekeda v. Akili, H.C. (P.C.) Matrim.. Civ. App. 12-DSM-72, 31/8/72

Held: (1) Direct appeals to the High Court from Primary Court in matrimonial proceedings are provided for in S. 80 (1), marriage Act, 1971. [But see editorial note at end of case].

(2) An action under Muslim law taken by a husband against his father-in-law for detaining his wife after the revocation of two talaks is not a matrimonial proceeding within the meaning of Section 2, Marriage Act, 1971.

(1972) H.C.D.

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MFALILA, AG. J. – The appellant filed an action against his father-in-law, Mshamu Akili, in the Papura Primary Court in Mtwara Distinct alleging that the latter was unjustifiably detaining his daughter, who is the appellant's wife and preventing her from cohabiting with him. The respondent denied these allegations and stated that he was prepared to hand over his daughter to the appellant but only before a Sheikh. The Primary Court for reason which are not clear proceeded to decide an issue which was not at all before it. It declared that the marriage was no longer subsisting and that the appellant's wife could collect her talak from the court any time she wished. Apart from the fact that this order was irrelevant, it was also illegal because the Primary Court purported to pronounce the marriage dissolved without following the provisions laid down in the Marriage Act for the dissolution of all marriages.

Lastly, the Primary Court advised the parties to appeal directly to this court. No doubt the Primary Court was under the impression that this matter fell within the class of cases under the Marriage Act in which appeals lie direct to this court However, Section 80(1) of the Marriage Act 1971 only provides for direct appeals to this Court in Matrimonial Proceedings. Matrimonial proceedings are defined in the Act [Section 2] as those proceedings instituted under Parts 11 and V1 of the Act. The proceedings in the present case being as it is an action under Muslim Law against the father in law for allegedly unjustifiably detaining his daughter after the revocation of two talaks pronounced earlier is neither a

Matrimonial Proceeding under Parts 11 and V1, nor a Miscellaneous Proceeding under V of the Act. This is therefore an ordinary civil action in which a Primary Court has jurisdiction under sec. 14(1) (a) (i) of the Magistrates' Courts Act. It was therefore an action outside the Marriage Act, for which appeals to this court lie via the District Court.

The record should therefore be returned to the District Court for the hearing of the appeal against the judgment and finding of the Primary Court.

Ed . Note: In Kalengo v. Bula Mangi, (1972) H.C.D. n. 11, Kwikima Ag. J. held that the procedure laid out for appeals by the Magistrates' Court Act, 1963, was in no way altered by s. 80(1) of the Law of Marriage Act, 1971. About six months later in Anna Samson v. Richard Odera Abuda (1972) H.C.D. n. 13, Mfalila Ag. J. came to a different conclusion and held that under s.80 (1) of the Act appeals from Primary Courts in Matrimonial Causes go straight to the High Court. The provisions of Section 93 of the Law of Marriage Act, 1971, seem to shed some light on this legal controversy. This section states: "Notwithstanding the provisions of this Act, and subject to an rules made hereunder, where any matrimonial proceeding is instituted in a primary court it may be instituted, tried and disposed of in the same manner as any civil proceeding instituted in a primary court and the provisions of the Magistrate's Court Act, 1963, and of any rules made there under regulating the institution, hearing and disposal of a proceeding of a civil nature in primary courts, shall apply, mutatis mutandis, to every such matrimonial proceeding."

222. R. v. Omari Halfani, H.C. Crim. Rev. 33-DDM-72, 14/8/72.

The accused was charged with conduct conductive tot a breach of the peace c/s 5, Public Order Ordinance, Cap. 304. The definition of this offence reads: "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a

breach or the peace or whereby breach of the peace is likely to be occasioned, shall be guilty of an offence."

Held: The uttering of foolish and unpatriotic words relating to the demise of a national leader does not constitute the offence charged where the listeners were merely "displeased".

KWIKIMA, AG. J. – On 29th December, 1971 the accused was relaxing in Nyang'oro Bar. There were other customers besides him, among these customers were Samson Sitapakure, Mbamboleo Mbugi and John Mpunge. These three the accused then started talking about the death of the late Dr. Kleruu who had just been killed. In the course of their conviction the accused uttered words which displeased the others. He was then reported to the Police who arrested him and charged him. He was convicted and fined Shs. 800/=

According to the three people who testified against the accused three different versions of the words uttered by the accused are given. Samson reports the accused as saying; "Kwa nini mnasikitika mauaji haya …… Ni bure tu mnasikitika yule ameuawa kwa haki, sawa kama karani mmoja wa Cooperative aliuwawa na makuli wake alipowaambia wachukue mizigo wakampiga sindano mbili akafa kwa hiyo kifo chake ni haki."

If that is what the accused said, he was telling the others not to feel sorry for the untimely demise of Dr. Klerru whom the accused felt to have been killed with justification like some clerk of a Cooperative he knew who was stabbed with a needle by the porters whom he had been ordering. That is one version. Another one is given by Mamboleo and it goes thus: "Hii maneno mnasemasema kila saa mambo namna hii yalitokea Nairobi yuko baniani mmoja tajiri aloindoka kwenda safari na mtoto wa banian akaamrisha makuli kufanya kazi hawa makuli walikasirika na wakampiga na sindano mtoto wa baniani akafa."

This version differs substantially from the first one. In the first place, Mamboleo does not report the accused to have said that the death was justified. What is more, the person stabbed with a needle is this time the son of an Indian

employer and not the clerk of a Cooperative. Yet Mamboleo and Samson were both there and claim to have heard the accused simultaneously.

The third eye-witness, John, came with yet another version. It went thus: “Hicho mnachozungumza kuhusu kifo cha Dr. Kleruu ni sawa tu amekufa kwa haki. Kulikuweko makuli Fulani ambao walikuwa wakisukumwa na Kiongozi wao na wakampiga sindano akafa.”

This time the person who was pierced with a needle is not a cooperative clerk but the reason for his being pierced is the same however. It is that he was driving the porters hard, or “pushing them around”. The learned trial Magistrate was aware

of the patent contradictions in the versions of the eye-witnesses. He did not however, bother to resolve the contradiction. He only chose to believe the prosecution witness.

It should be pointed out to the learned Magistrate that the issue was not whether the prosecution witnesses were to be believed or not. The issue was whether the words reported to have been uttered by the accused were “abusive or insulting” as is laid down in section 5, Cap. 304. it was certainly unpatriotic and naïve on the part of the accused not to sympathise with his compatriots on the demise of a national leader. But his is not saying that in uttering his drunken words the accused did utter. The charge came out with a fourth version which included some reference to Ujamaa villages. Unfortunately none of the witnesses heard the accused referring to Ujamaa villages. Had the learned trial magistrate given the contradiction the attention it deserved, it is doubtful whether he would have concluded that the accused uttered any on the four versions. And looking at the reported words, it cannot be said that all four versions or any of them could be taken as abusive or insulting. Indeed, even the witnesses were only displeased. They were not annoyed in such a way as to want to teach the accused a lesson. Certainly even this court is displeased at the accused’s folly,

but the law has not yet got to punishing the foolish or the unpatriotic. The trial court appears to have acted vindictively especially if it is recalled that he accused, a first offender was fined Shs. 800/=. There is nothing to exclude the possibility that this conviction was also arrived at vindictively and against natural justice. Accordingly it is hereby quashed and the sentence thereof set aside. The Shs. 800/= should be refunded to the accused who is here by acquitted.

223. Silfano @ Ochanda s/o Okech v. R., H.C. Crim. App. 271-M-72, 3/10/72.

Held: (1) On a charge of obtaining goods by false pretences it is necessary to prove an intent to defraud.

(2) To defraud is to deprive by deceit. Whereas to deceive is by falsehood to induce a state of mind, to defraud is by deceit to induce a course of action.

(3) When an accused obtained goods on credit by falsely pretending that he was the agent of another, an intent to defraud may be inferred even though it is unclear whether or not he intended to pay for them later.

(4) It is improper for a court to take into account rum ours or personal knowledge about the bad conduct of court clerks in general in sentencing a particular court clerk.

(5) It is improper for a court to take into account in sentencing the fact that the accused did not show his remorse by pleading guilty.

EL-KINDY, J. – The appellant, SILIPANO @ OCHANDA s/o OKECH, was charged with and convicted of obtaining goods by false pretences contrary to section 302 of the Penal Code, Cap. 16, and he was sentenced to imprisonment for twelve months. He was also ordered to pay Shs. 12/= to Amir Thawer (P.W. 3). He appealed against conviction, sentence and order.

On appeal, before me, the appellant was represented by the learned counsel, Mr. Matemba, and the respondent Republic was represented by the learned State Attorney, Mr. Massawe.

The appellant was employed by the Judiciary as a messenger and he was working at the District/Resident Magistrate's Court, Tarime. He was then working under Mr. Karosso, who was the Resident Magistrate in charge of the station. On the 17th of March, 1972, at about 10 a.m. or 11 a.m., the appellant approached Mr. Korosso (P.W.1), in his office, and asked him if he could give him a written authority to enable him to collect some electric cells, referred to as "batteries" in these proceedings, from the shop of one Amir Thawer (P.W. 3), but the said magistrate refused to do so. It was understood that he appellant was seeking to make use of the credit facilities granted to Mr. Korosso by the said shop-keeper, Amir Thawer, but he person to pay for them would be the appellant although the name of the debtor would be that of Mr. Thawer, that sometimes Mr. Korosso obtained goods on credit without a written authority, and he mentioned previous instances when some cigarettes were delivered to Mr. Korosso through the agent he sent to collect them.

In this case, when the appellant was denied the written authority, the appellant proceeded to the shop of Mr. Thawer (P.W.3) at about 2.45 p.m. The appellant said that after Mr. Korosso had refused him the alleged authority he advised him that he could, on his own, go to the shop and negotiate his credit as he required, but I see no comment from the evidence of Mr. Korosso on this matter. His evidence merely indicated that after he had refused to give the note, the appellant left his chambers. When the appellant arrived at the said shop, he approached Mr. Thawer who gave him the twelve cells. According to Mr. Thawer, the appellant told him that he had been sent by Mr. Korosso to collect twelve electric cells. He said that he asked if he had brought a written authority, but he appellant told him that he had not as the said Mr. Korosso was too busy to write the required authority. He said that he believed what the appellant told him, and further believed that he had been sent by Mr. Korosso to collect the said

goods. Mr. Thawer said that he had known the appellant or three years, and he knew him as a court messenger. He said that he handed over the

twelve electric cells, which were worth Shs. 12/= and wrote an invoice (Exhn. D) In the name of Mr. Korosso, and he asked the appellant to sign thereon as the recipient and the appellant did so. The manner of making of the invoice showed clearly that credit was being given to Mr. Korosso and not to the appellant, and that the appellant signed thereon, as per Mr. Thawer, as a receiver of the cells on behalf of the debtor. To complete the prosecution case, on the 19th of March, 1972, Mr. Korosso met Mr. Thawer and the latter asked him if he had received the electric cells, he had asked for, from the appellant, and the former replied that he would take legal action against the appellant as he had not sent him for anything of that sort. Mr. Korosso went further and alleged that on the 20th of March, 1972, the appellant went to his house and apologized to him for taking cells in his name and asked to be forgive for what he had done, but he magistrate, under standby, refused to accept his apology and to forgive him. The appellant told the said magistrate that his father would sell a cow and that the money from such sale he would use to pay the price of the cells.

On the other hand, the appellant denied that he collected the said electric cells in the name of or on account of Mr. Korosso. He said that he requested Mr. Thawer to give him the material electric cells on credit and that he would pay for hem on some other occasion when the returned from safari, and that Mr. Thawer agreed to his request. He said that he signed the invoice as the debtor and not as a receiver on behalf of Mr. Korosso. He said that at the time he signed the invoice he did not see that it was in fact made in the name of Mr. Korosso. [The court gave further details of the defence case and continued].

The learned trial magistrate carefully considered the evidence before him. He held that the appellant made the representation to Thawer as Thawer alleged. For this conclusion he relied on the evidence of Thawer, Mr. Korosso and the

invoice. He rejected the defence case as being untruthful. He found the appellant guilty as charged.

Mr. Matemba attacked the conviction on two grounds. Firstly, he said that the evidence of Mr. Thawer was doubtful as it was likely that Mr. Thawer entered the name of his customer Mr. Korosso in order to ensure that he received payment for the said electric cells without the knowledge of the appellant and that it was most unlikely that the appellant, after he had been refused authority from Mr. Korosso, would still go to the shop of Mr. Thawer and claim that he had been sent to collect the said electric cells. In other words, Mr. Matemba, was saying that Mr. Thawer was a tricky character and therefore his evidence should not have been accepted as easily as it was saying that Mr. Thawer was sticky character and therefore his evidence should not have been accepted as easily at it was accepted.] The court outlined counsels' submissions on this point and continued]. With due respect to the learned counsel for the appellant, I find no valid reason for holding that the evidence of Mr. Thawer and Mr. Korosso should have been rejected.

The second line of the attack contended that the ingredients of the charge of obtaining goods by false pretences were no proved. He submitted that the prosecution should have proved

not only the false pretence but also intent to defraud. He submitted that the learned magistrate did not go further to consider whether what he held to be a trick was done with intent to defraud. Mr. Thawer. He said that here was no evidence that the appellant did not intend to pay for the twelve cells. He quoted the judgment in the case of RAJANI v. R. (1958) E.A. 646 at p. 649. Therefore he said the conviction was bad as all the ingredients of the offence were not proved beyond reasonable doubt.

On the other hand, the learned State Attorney, if I followed him and I understood him correctly, said that fraud was in this case proved, as fraud

constitutes an act which induced a course of action, and that the appellant, by his representation had induced a course of action on the part of Mr. Thawer. For this proposition he quoted the case of AUGUSTINO BROWN CHANAFI v. R., Cr. App. No. 183/67 of Dar es Salaam High Court Registry and appearing in the (1968) H.C.D. n. 73 where Biron, J. held that to deceive meant to induce a state of mind and that to defraud meant to induce a course of action impliedly, the learned State Attorney did not think that tit was necessary for the prosecution to prove that he appellant did not intend to pay for the electric cells, and that the act of inducing Mr. Thawer to part with his goods amounted to fraud.

The charge was brought under the provisions of Section 302 of the Penal Code, Cap. 16. That section reads: “303. Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induced any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour, and is liable to imprisonment for seven years.”

One of the ingredients of the charge is intent to defraud. I will, therefore not be enough just to prove that the goods were obtained by a false pretence or inducement. It has to be proved that it was done with intent to defraud. And the question, in this appeal, was whether the prosecution proved beyond reasonable doubt that the appellant did the act with intent to defraud unfortunately the learned Resident Magistrate did not clearly, if at all, direct his mind to this issue. In the last paragraph of his judgment, the learned trial magistrate held: “The only question which remains to be answered is: Did accused (appellant perpetrate any trick in obtaining the twelve battery cells from Amir?”

As it can be seen the question posed left the impression that the learned magistrate would convict once he was satisfied that the appellant “perpetrated” the trick. It is not clear whether the framing of this issue was also meant to include the issue of whether the “trick” was “perpetrated” with intent to defraud. Mr. Matemba argued that the way the learned trial magistrate directed himself amounted to a serious misdirection as the learned magistrate did not appear to be aware that he strict alone was not enough and that the trick should be

accompanied by intent to defraud. The learned trial magistrate continued to hold as follows: “Amir (P.W.3) told the court that the accused (appellant) told him that he was sent by Mr. Korosso but he had no letter of authority from him as Mr. Korosso was too busy to write. Amir believed the accused (appellant) to have been sent by Mr. Korosso and that the accused (appellant) was taking the battery cells to Mr. Korosso. He therefore prepared an invoice receipt (Exh. “D”) in the name of Mr. Korosso and accused

(appellant) signed on it as a receiver and not as a debtor. As the receipt (Exh. “D”) bears the name of Mr. Korosso as the person liable to pay and accused (appellant) sign on it is self explanatory that accused (appellant) had no genuine belief that the was himself incurring a debt which he made himself liable to pay. Since the receipt was prepared in his presence, it confirms the testimony of Amir that he accused (appellant) claimed to have been sent by Mr. Korosso and that he was taking the goods to him. Since accused (appellant) was not sent by Mr. Korosso and he never delivered the battery cells to him but obtained for himself without Amir intending to pass them to him. I am satisfied that he obtained by false pretences. The charge against him is prove beyond reasonable doubt. Accordingly I find accused (appellant) guilty and convict him as charged.”

The passage left no reasonable doubt that the learned magistrate concentrated him attention on the question of whether or not (a) the appellant made the representation as charged and (b) whether the false representation led to his obtaining the twelve electric cells, but at no time did he address his mind to the issue of whether the appellant (c) did so with intent to defraud the owner of his property. With respect, I do agree, therefore, the learned trial magistrate failed t direct his mind to the important ingredient of the offence – whether the appellant had the necessary intent to defraud. And the question is whether this non-direction was fatal. Mr. Matemba, as I have already stated above, alleged that it was necessary to prove that the appellant had no intent to pay for the

battery, and that the evidence did not show that he had no intent to pay. I would now refer to the case of the High Court of Uganda in Criminal Appeal No. 241 of 1955, RAJANI v. R. (1958) E.A. 647. In that case, the appellant ordered some spare parts from a company by using the forms of another company." The learned judge, Sir Audley McKisak, Chief Justice as he was then, held at page 649: "It has been further argued that the mere intention not to pay does not amount to obtaining credit by fraud. That proposition, however, does not appear consistent with authorities. While I agree with Mr. Wilkinson that he instant case is distinguishable from R. v. Jones (1898) I Q.B. 119 (in which the prisoner ordered a meal in a restaurant having no money to pay for it), there is still remains the concise but unambiguous statement in R. v. Thompoon, 5 Criminal Appeal R. 9, that: "The cases establish thus – that if a man never had any intention to pay, that is fraud other than false pretends." This means, of course, and intention which is not revealed when credit is obtained. Such conduct is clearly dishonest. When the appellant accepted the credit terms offered by the Kampala Company for the goods when he ordered them having no intention of paying for them and, f course, concealing that intention since credit would not otherwise have been given, the appellant's conduct, to my mind, did amount to obtaining credit by fraud."

The facts of that case resemble the facts in this case. In both cases, appellants obtained credit through the name of another party. In both cases the intent of the applicant was concealed, but, on the evidence, the appellant Rajani, through his conduct, was found to have had no intention to pay for the spare parts and

therefore intent to defraud was found to exist. In his appeal, was there any evidence that the appellant had no intention to pay? Can this be deduced from the conduct of the appellant and the circumstances of this case? In the ease of

AUGUSTINE BROWN CHANAFI (1968) H.C.D. n. 73 Biron, J. seemed to have accepted the wide interpretation of deceit and fraud at page 4 of the said judgment the learned judge said this: “The question that poses itself is, does such conduct constitute an intent to defraud? The terms “fraudulent” and “intent to defraud” have been very unduly construed by the courts and held to cover numerous and diverse acts and omissions…….” He quoted with approval and adopted the words of Buckley, J. in RE LONDON AND GLOBE FINANCE CORPORATION (1903) I Ch. D. p. 728 at p. 732 where the said learned judge hold: “To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit. It is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind, to defraud is by deceit to induce a course of action.” He also quoted other cases, including the case of GEORGE WOODGATE v. R. E.A. p. 525, wherein a wider meaning was given to the term intent to defraud. The appellant Chanafi had obtained money through a false insurance corporation note and this conduct was held as disclosing intent to defraud.

However, having carefully given though to the evidence and the circumstances of this case, it is not clear whether the appellant intended to pay for the electric cells or not at the time when he obtained them. What the explained later to Mr. Korosso cannot be taken to apply to the state of his mind when he was obtaining the alleged goods. But it is clear that his conduct was fraudulent as well. The appellant realized that if he had told Mr. Thawer that he wanted the cells himself he would not have got them as it was most unlikely that credit would have been given to him. Therefore, he saw fit to devise a system was, to all intents and purposes, fraudulent, apart from it having a false representation. His conduct left not reasonable doubt that the appellant intended to defraud Mr. Thawer whether or not he intended to pay for it later. I find, therefore, that although evidence showing that he appellant had no intent to pay would have is closed a much clearer intent to defraud, the omission to do so did not mean that intent to defraud did not exist. As I have demonstrated, fraud was

proved by the appellant's own conduct. Therefore, although the learned trial magistrate did not directly direct himself on the issue of fraud, this error is not fatal to the conviction, as the evidence on record left no reasonable doubt that he appellant obtained the alleged electric cells not only by false representation but also with intent to defraud . In the result, I see no reason to disturb the conviction of the appellant.

Mr. Matemba argued that for a first offender with a clean record, as the appellant was, the imposition of a term of imprisonment of one year was too severe. The learned magistrate took into account the fact that the sentence for such offences has been by legislation, increased to seven years. He thought that he offence committed b the appellant was grave although the value of the goods obtained was small. He took into account what he considered to be "ill-effects" of such offences, and the fact that the whole method of obtaining goods disclosed dishonesty by a member of the Judiciary the "Temple of Justice" as he called it. He said that such conduct would have a bad effect on the Judiciary as members of such department are expected to be of high integrity. With respect I do not think that it was fair for the learned trial magistrate to

take into account matters which he may have heard unofficially about conduct of court clerks. If he wanted to take such matters into account, at least, some evidence should be led against the appellant and the appellant should be given opportunity to refute such allegations. If this is done, then the danger of using "rumours" to aggravate sentences would be avoided. Whatever the learned magistrate might have heard in private about the bad conduct of members of the judiciary in his jurisdiction, there is no reason to believe that the appellant was necessarily one of them. The single incident of dishonesty is only too remotely connected to justify his inclusion in the group. In my view, the learned trial magistrate, who is otherwise an able magistrate, erred in taking into account matters which were within his personal knowledge through other sources without

giving the appellant the opportunity of commenting on them. It is impossible to say that the learned trial magistrate was not overwhelmed with this matter when he considered sentence to be passed on the appellant. Similarly, I do not think that it was open for the learned trial magistrate to take into account the act that the appellant did not feel sorry for what he had done and plead guilty. As it was said by the Court of Appeal in the case of MATTAKA AND OTHERS v. REPUBLIC (1971) E.A. 495, if the appellant did so, it would have interfered with his right of appeal. But, with respect, it cannot be said that he appellant did not show his remorse. He did tell Mr. Korosso that he was sorry that he did as charged when he visited Mr. Korosso at his house. And this indicated that he appellant felt sorry for what he had done. It was only natural for him to put up a fight when he realized that he would be charged for a criminal offence and he cannot be blamed for this. Nevertheless, I fid that he sentence imposed was excessive, and I accordingly reduce it to imprisonment for six months. Except as indicated above, this appeal is accordingly dismissed.

224. Ali Kassam v. R., E.A.C.A. Crim. App. 92-DSM-72, 24/10/72.

Held: (1) An act done to sway an agent from the impartial discharge of his duties or from loyalty to his employer is done “corruptly” within the meaning of S. 3(2), Prevention of Corruption Act, 1971.

(2) In the absence of a motive proven to be neither evil nor dishonest, to make a payment to an agent to do something in relation to his principal’s affairs which the agent is in any event bound to do is to act “corruptly” within the meaning of s.3(2) of the Act. Makubi v. R., (1968) E.A. 667; (1968) H.C.D. n. 363 doubted; Mandia v. R., (1966) E.A. 315 distinguished.

LAW, AG. V-P. – The appellant was charged in the court of the resident magistrate at Mtwara with an offence contrary to section 3(2) of the Prevention of Corruption Act, 1971, the particulars whereof read as follows:-

"That A.M.P. Kassam is charged on 16th day of December, 1971, at about 09.40 hours at Government Quarters House at Ligula Area within the Township and District of Mtwara,

Mtwara Region did corruptly give Shs. 200/- ….. to Mr. G.L Mbawala a person employed in the public service as a Regional C.I.D. Officer, Mtwara, to do something in relation to his principal's affairs, namely to get him a letter certifying to officer-in-charge identification Bureau Dar es Salaam that he has no bad record so that he could get a clearance pass to go to America."

On the charge being read over to him, the appellant pleaded thereto in the following words: - "It is true." The prosecutor then stated the facts at length, after which the appellant said: - "What has been stated by the prosecution is correct." These facts included the following: - the appellant asked Assistant Superintendent of Police, Mbawala, to do him a favour by obtaining for him a certificate of good character from the Identification Bureau in Dar es Salaam in order to enable the appellant to get a clearance pass to travel to America. He produced a list of eleven other persons who wanted similar certificates, and offered to pay Shs.100/- in respect of each certificate. Mr. Mbawala said he would consider the matter, and told the appellant to come later. Mr. Mbawala then enlisted the help of other police officers, and concealed them in his house next morning. The appellant arrived at about 9.40 a.m. and repeated his request, adding that he had brought Shs. 200/- which he offered to Mr. Mbawala, who took the money and gave a pre-arranged signal, whereupon the hidden police officers emerged from their hiding places and arrested the appellant. At the request of Mr. Lilani addressed him in mitigation Mr. Lilani pointed out that the appellant could have obtained the certificates of good character without payment, that he was not trying to obtain benefit or favour illegally, and that he had acted through ignorance and fear of the police. The magistrate sentenced the appellant

to the minimum sentence prescribed by the Minimum Sentenced Act, 1963, which was then in force. The appellant appealed to the High Court claiming that he should not have been convicted as the facts did not disclose that the act complained of was done corruptly. Mr. Lakha submitted in the High court, as he did before us, that he appellant's plea and acknowledgment of the truth of the facts should not be construed as an admission that the money was paid corruptly. The appellant was unrepresented at that stage of the proceedings and this ingredient of the offence was not specifically put to him. An unrepresented accused should have all the ingredients of a charge put to him. In particular he should not be convicted on his own plea on a charge of corruption unless he clearly admits that he acted with a corrupt intention. However, the appellant is not illiterate, and Mr. Lakha does not suggest that the manner in which his plea was taken has resulted in the proceedings being a nullity. He preferred to rely on a submission that the conviction should be set aside as he facts did not constitute and offence in law. Mr. Lakha in the court below, and before us, relied on Mandia v. R., (1966) E.A. 315 and Makubi v. R. (1968) E.A. 667. He stated (and this was accepted by r. King for the Republic) that certificates good character are issued by the police on request, after reference to the Dar es Salaam Identification Bureau, without charge. He submitted that in offering police officer money to do what he was in duty bound to do, the appellant was not actuated by any improper

motive, or evil or dishonest intention. The learned judge, after directing himself most carefully an correctly on the law came to the conclusion that on the facts the appellant "intended to buy the officer's loyalty and get him to act in the way he wanted him to act irrespective of whatever might have been the officer's obligations to his employer. The money was not meant to be a fee. It was the price he was prepared to pay to get the officer to do his bidding …….", and he concluded that, in these circumstances, the appellant's motive was "anything but honest" and his intention corrupt. After anxious consideration of the arguments

raised before us, we have come to the conclusion that Onyiuke, J. was right. What possible motive could the appellant have had for offering money to the police officer in this case, other than an improper one? Even if it was only to ensure preferential or expeditious processing of the certificates, this was a payment designed to induce the officer to do something in relation to his principal's affairs. Relying on Makubi's case (supra) Mr. Lakha submitted that to make a payment to an agent to do something in relation to his principal's affair's which the agent is bound in any event to do, does not constitute corruption. We do not agree. In so far as Makubi's case supports Mr. Lakha's submission, we think It was wrongly decided. Mandia's case (supra) was very different from the one now under consideration. In that case the payment was proved to have been made for a motive which was not evil or dishonest; in this case no proper motive has been suggested at all. We cannot accept the proposition that the offering of money to a public officer, to do what in any event he would have done, is lawful or proper. For one thin such a practice tends to corrupt, and to lad such officers to expect extra payment for doing their duty or to refuse of delay the doing of their duty unless extra payment is forthcoming. It follows that in our judgment a payment in the nature of that made by the appellant is made corruptly, within the meaning of section 3 (2) of the Prevention of Corruption Act, 1971, and we accordingly find that the appellant was properly convicted and we dismiss the appeal.

The sentence imposed was the minimum prescribed by law. Had it not been so, we might have found that there were mitigating circumstances and reduced it, but this can only be considered in another place. The sentence of corporal punishment will of course not be carried out, in consequence of the enactment of the Minimum Sentences Act, 1972 (No. 1 of 1972).

Ed. Note: This judgment upholds the judgment of Onyiuke, J. in the High Court of Tanzania, (1972) H.C.D. n. 186, which the reader is referred to. It should be noted that neither judgment explicitly overrules the holding of Hamlyn J. in Makubi v. R., (1968) E.A. 667; (1968) H.C.D. n. 363. That case might possibly be distinguished from the present one on the grounds that in Makubi, the money

was offered so that the agent might not perform an illegal act which arguably reveals a motive, neither evil nor dishonest. In the present case, there was no threatened illegal act.

225. Juma Lebenge v. R., H.C. Crim. App. 160-DSM-72, 16/8/72.

Held: (1) It is not necessary for a trial court to mention every witness by name in his judgment provided it is clear that the substance of the evidence has been considered.

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(2) "Grievous harm" as defined in Section 5 of the Penal Code does not include all bodily hurts which are permanent, but requires that the harm be such as seriously to interfere with health or comfort.

(3) The knocking out of tooth with a first does not by itself constitute "grievous harm".

ONYIUKE, J. – The appellant was convicted by the Resident Magistrate, Mr. P. K. Shayo, in the District Court of Dar es Salaam, of causing grievous harm c/s 225 of the Penal Code. The particulars of offence were that he unlawfully hit one Jones Sombanile on the mouth and knocked out one of his teeth. He was sentenced to 18 months' imprisonment and was ordered to pay Shs. 150/= as compensation to the complainant for the injuries he sustained. The appellant has appealed to this Court against his conviction and sentence.

The main point in this appeal against conviction was the complaint of non-direction and the effect it had on the conviction. The facts were that the appellant who had fathered a child for one Chiku Nyanga (P.W.2) saw her walking along Azikiwe Street in company of the complainant (P.W.1) in the afternoon of the 2nd February, 1972. P.W.1 and P.W.2 were co-workers in the National Insurance Corporation and P.W.1 had taken her out to lunch that day. Besides, they were already engaged to be married. When the appellant saw P.W.2 in P. W. 1's company he stopped to talk to her P.W.1 left them talking while appellant called

the complainant and he went back to where he was standing with P.W.1. According to the evidence of P.W.1 the appellant asked him why he “was running with his wife”. P.W.1 replied that he did not know he was her husband. The appellant descended on him and started to beat him. P.W.1 fell down and got up again. He apparently wanted to avoid creating a scene and walked away. The appellant followed him and started bearing him up again. In the process he knocked out a tooth from his mouth. They were separated by the people around. The complainant went and lodged a complaint with the police and proceeded to hospital for treatment. P.W.2 corroborated the evidence of P.W.1 and stated that she had a child for the appellant who promised to marry her. She broke off the engagement when the appellant married somebody else and it became obvious to her that the appellant was merely “cheating” her. She then got engaged to the complainant.

The appellant in his defence stated that on that day he saw P.W.2 with a man who was “unknown” to him. When P.W.2 saw him she stopped and he talked to her. According to him, P.W.1 “ran away” when he was talking to P.W.2. He asked P.W.2 who P.W.1 was but she gave him no reply. He then called P.W.1 who was a bit far away. P.W.1 came and I reproduce the appellant’s evidence as to what transpired. “I called the complainant. He came there, we were now 3. I asked him why he was walking with my fiancée.” He said he did not know me. I talked very politely. I came near him. He did not answer me. He started answering rudely. He said it was not his duty to find out who I was. I told him I did not want to quarrel I only wanted

to know. He lost his temper. He struck me on the face-bone. The girl caught me by my waist. Complainant took advantage. He tried to throw me down. I was struggling. Complainant held my shoulder. He tried to beat me with his head. I managed to avoid his head. He knocked his head on the floor. I pushed him. He fell down.” According to the appellant the complainant lost a tooth when he

accidentally knocked his head on the ground. He called a witness on Hassan Saudi who testified that he saw P.W.2 holding the appellant by the waist and a man came and held the appellant, and threw him down. People came in to separate them and he (witness) held the accused. Under cross-examination he stated that both appellant and P.W.1 struggled and threw themselves down. He said he did not see P.W.1 bleeding and he did not bother to see if he was bleeding.

The learned Magistrate reviewed the evidence and held that it was the appellant that started the fight and that he knocked out a tooth from the complainant's mouth. He accepted P.W.1' s account that it was the appellant who attacked him on two grounds, namely, the inherent probability of the case and the corroboration of this evidence by P.W.2 whom he considered a truthful and impartial witness. As to the first ground the learned Magistrate stated the appellant was unable under cross-examination to say how P.W. 1 was rude to him and what constituted the rudeness. Furthermore if the complainant was rude the person likely to be provoked by the rudeness was the appellant and not the complainant who was offering the provocation. The learned Magistrate held that the appellant's assertion that the complainant was rude was merely a pretext for his attack on him.

Mr. Lakha, learned Counsel for the appellant, has attacked the learned Magistrate's judgment on the ground that he failed completely to take into account the evidence of the only witness for the defence in making his findings of fact based on the credibility of the witnesses. The evidence of the defence witness supported the appellant's story and had the learned Magistrate considered it there was the possibility that it could, at last, raise reasonable doubts in his mind as to the appellant's guilt. It was therefore a serious case of non-direction. The learned State Attorney who appeared for the Republic conceded that no where in the judgment was the appellant's witness mentioned or his evidence considered but he submitted that this was not fatal to conviction considering the whole circumstances of the case.

In my view it is not necessary that a trial court should mention every witness by name in his judgment provided it is clear on the record that the substance of the evidence of the witnesses which supports the prosecution or the defence was considered by the court before arriving at its findings of fact. In this case there was only one witness for the defence and it did appear at first-sight as if the learned Magistrate took no account of his evidence before arriving at his conclusions of facts. He did however say that he had given the case most serious and careful consideration. It would have been much better if he had made some reference to the fact that the appellant's story was supported in part by the evidence of another witness and to have stated whether he believed it or not. I accept the submission that the failure by the learned Magistrate to refer to the evidence

of the appellant's witness was a non-direction. I accept, however, the submission by the learned State Attorney that the non-direction was not fatal to the conviction in the circumstances of this case. Even if the evidence of the defence witness was accepted it did not affect the Magistrate's finding that the appellant was the first to attack the complainant. [The Court elaborated on this point and then continued].

I entertain grave doubts however whether the loss of one tooth in the circumstances of this case amounted to grievous harm within the meaning of that term as defined in Section 5 of the Penal Code. Section 5 defines "GRIEVOUS HARM" to mean "any harm which amounts to a main or dangerous harm or seriously or permanently injures health or is likely so 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." 'Maim' is defined in Section 5 as 'the destruction or permanent disabling of any external or internal organ, member of sense.' 'Dangerous harm' is defined in Section 5 as 'harm endangering life.' 'Harm' is defined as 'any bodily hurt, disease or disorder whether permanent or

temporary.' A bodily hurt which is permanent may therefore not necessarily amount to grievous harm. It is my view therefore that the term 'grievous harm' as defined in the Penal Code necessarily involves a consideration whether the harm is such as seriously to interfere with health or comfort and the answer to the question may depend on the nature of the injury and the surrounding circumstances of the case. The knocking out of a tooth with a first is not by itself, in my view a main or dangerous harm or harm which causes permanent or serious injury to health nor does it amount to permanent disfigurement. I am fortified in this view by the medical report, which, although it is not binding on me is nevertheless relevant, described the injury as 'harm'. I will therefore alter the finding to assault causing actual bodily harm c/s 241 of the Penal Code. (See: R. v. MIPAA, (1968) H.C.D. n. 265). Subject to this, I will dismiss the appeal against conviction.

I will now turn to the consideration of sentence. The appellant was sentenced to 18 months' imprisonment on the basis of a convict for causing grievous harm which carries a maximum sentence of 7 years. Now that the finding has been altered to that of assault causing actual bodily harm which is a less serious offence and a mis-demeanour, I should think that the sentence should be reviewed. The appellant was a first offender, a young man of about 25 years who acted from the excessiveness of personal emotion and jealousy. This cannot however excuse his conduct especially in this case where he had no reason to be jealous in view of his selfishness and utter disregard of the feelings of P.W. 2, who considered him a "cheat". He fathered a child for P.W.2 and instead of marrying her took another woman as a wife. He has now lost his head because he saw P.W in another man's company. He had misbehaved himself in public. I think, however, that the fact of a criminal prosecution and conviction and consequent public disgrace have served to make him realize his folly. I do not think a prison sentence will serve any useful purpose in this case. I will alter the sentence to Shs. 200/= or 2 months' imprisonment in default. ORDER: Finding altered to that of assault causing actual bodily harm c/ss 241 of the Penal Code. Subject to this the appeal against conviction is hereby dismissed. Sentence is

hereby altered to a fine of Shs. 200/= or 2 months' imprisonment in default. The order for compensation stands.

(1972) H.C.D.

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226. R. v. Aleni Mwamengo, H.C. Crim. Rev/136-DSM-71, 15/9/72.

Held: Imprisonment, even in a suspended form, is inappropriate for the offence of defilement of a girl under twelve years, where the accused is a youthful first offender now pursuing his studied in secondary school.

MWAKASENDO, AG. J. – The accused in this case, Aleni Mwamengo, was charged with defilement of a girl under the age of 12 years. He pleaded guilty to the charge and was accordingly convicted and sentenced to twelve months' imprisonment suspended under the provisions of section 294A of the Criminal Procedure Code for a period of 12 months. The accused was subsequently called upon by this Court to show cause why the sentence imposed should not take immediate effect and he has done so. Accused who at the time of the commission o the offence was Standard Seven pupil in Mbozi District is now in Form I at the Rungwe Alliance Secondary School. His letter to this Court shows that he is contrite and promises to be of good behaviour in future. As the boy is now pursuing a course of academic instruction I would be loath to interfere with his education, the effect which an order for his immediate imprisonment would have Learned State Attorney fully concurs in this view. Furthermore, it would appear from the record that this was at least a case where the trial Court could have imposed a sentence of corporal punishment rather than one of imprisonment even though the sentence was admittedly suspended. The learned trial Magistrate correctly thought sending the youth to prison would be ruinous, but imposing a suspended term of imprisonment, has, in my view, that same ruinous effects on the boy's future. For this reason I am satisfied that the sentence imposed by the trial court is manifest in its severity and it should not be left to stand. The sentence is accordingly quashed and set aside and there is substituted therefore a sentence of ten strokes of corporal punishment. In order

to disturb the boy's education as little as possible, it is directed that the boy be called before the Resident Magistrate's Court, Tukuyu and there have this order read over to him. The sentence imposed herein will then be administered in accordance with the Corporal Punishment Ordinance, Cap. 17 of the Laws.

Ed. Note: It is to be queried whether a sentence of corporal punishment, the imposition of which has recently been curtailed by the legislature, should be viewed as a "less severe" sentence than a suspended prison term which would not normally be carried out.

227. Jacob Stephen v. Coast Commercial Co., H.C. Misc. Civ. App. 14-DSM-71, 25/5/72.

Held: (1) The transferee of a business is liable for all the debts and obligations of the transferor in respect of that business at the time of transfer unless notice of the intended transfer has been published in the Gazette or a prescribed newspaper, In accordance with Section 2, Transfer of Business (Protection of Creditors) Ordinance, Cap. 398.

(2) However it is not open to a creditor who has obtained judgment against a debtor to execute his decree by resort to attachment of property owned by the transferee of the debtor's business, without first obtaining judgment against the transferee himself.

(3) The High Court has the inherent power to review orders of lower courts, whether appeal able or not, which are perverse or contain grievous errors of fact or law.

MWAKASENDO, AG. J. – The appellant in this case, one Jacob Stephen Haule appeals from an order of the District Court of Dar es Salaam made under rule 57, 0.21 of the Civil Procedure Code. Before coming to the issues raised by this appeal, I will first give a brief outline of the background facts of the case. One

Frederick Alexis Mwalinde Mutafurwa, is a businessman trading as the Coastal Commercial Company. During the year 1968, Mutafurwa, trading as Coastal Commercial Company (hereinafter called “the plaintiff Co.”) sold and delivered goods on credit of the value of Shs. 1,654/70 to the defendant, one E.C. Haule, a tradesman doing business at shop No. 27, National Housing Corporation Estate, Keko. Payment for this sum was demanded by the plaintiff Co. but the defendant neglected or refused to pay. Consequently the Plaintiff Co. sued the defendant for the recovery of the aforesaid sum. On 31st August, 1970 the Plaintiff Co. obtained an exparte judgment and on 15th day of October 1970 applied for the execution of the decree. The District Court issued the attachment order five days later, that is, the 20th of October 1970. The attachment order commanded the Court Broker to attach the movable property of the judgment debtor which were set forth in the Schedule to the order as furniture, shop goods at shop No. 27, N.H.C. Keko, ad all motor vehicles of the judgment debtor. The property of the judgment debtor was duly attached in execution of the decree and the Court Broker made a report accordingly to the Court on 7th November, 1970.

On 21st November, 1970, the appellant Jacob Stephen Haule filed in Court an objection to the attachment of the attached property. The objection was made under Rule 57, 0.21 of the Civil Procedure Code. The objection filed by the appellant was fully investigation by the Court but at the end of the investigation the court ruled against the objector on what is stated in the ruling t be a point of law. The ruling is a short one and may conveniently be set out in full:-

“The applicant applied that the order of attachment of goods per inventory dated 7/11/1970 annexed to the chamber application be lifted as the said property belongs to him and not to the judgment debtor in civil case 2579/68. I wish to dispose of this application on a point of law which the respondent has raised. Under Cap. 398, Transfer of Business (Protection of Creditors) Ordinance, Section 2 (b) states that transferees of business shall be liable for all debts and obligations for which the transferor thereof is liable in respect of that business at the date of the transfer unless notice of the intended transfer has been published in the Gazette. The learned Counsel for the applicant raised a

very appreciable point that an ordinary man is not expected to know the formalities involved in business transfer. I should first point out to the learned Counsel for the applicant that Cap. 398 is “intended” to protect creditors on the transfer of a business. So that in my

Opinion Section 2(b) of Cap. 398 which section deals with the liability of transferees in respect of the debt of their transferors of businesses unless of course the transferees had published a notice in the Gazette. The rationale of imposing absolute liability on the transferees is to make them take heed of fraudulent transferors who would sell their business in order to defeat their creditors’ demands. So that in the absence of such notice being published in the Gazette or a national newspaper, the judgment debtor still held himself out to be the owner of the business since his creditors were ignorant on the fact that he had already sold the business to the applicant. So that under Section 398 (2) (b) and on the principle of holding out, I reject the application.”

The appellant takes great exception this ruling …… [The court reproduced the grounds of appeal and then continued].

Perhaps at this stage I should deal briefly with the evidence adduced by the objector/appellant in support of the application. The objector stated that he objected to the attachment of the goods in shop No. 27, N. H.C. Keko on the ground that the goods in the shop belonged to him, as licensee of the shop and owner of the goods therein, and not to the judgment debtor. He disclosed to the Court that he became owner of the shop on 6th June, 1970 as a result of the goodwill of the business and the goods of the shop being sold to him by E.C Haule, who as we know was the defendant/judgment debtor in Dar es Salaam District Court Civil Case No. 2579 of 1968. The objectors produced receipt and other documents as evidence of the transaction of sale.

The question whether the plaintiff Co. Creditor could validly attach the trade goods in shop No. 27, N.H.C. Keko at the time when he did. Counsel for

the Plaintiff Co. has justifiably argued that although the goods in the shop were at the time of the attachment owned by the objector, the objector as transferee of the goodwill and business formerly owned by the judgment debtor, was by virtue of the provisions of Section 2 (b) of the Transfer of Business (Protection Creditors) Ordinance, liable to the Plaintiff Co. for the judgment debtor's debts or obligations at the date of the transfer of his business to the objector. Section 2 of the Transfer of Business (Protection of Creditors) Ordinance, Cap. 398, reads: - "…… every person who after the date of the coming into operation of this Ordinance acquires: - (a) the goodwill; or (b) the whole or substantially the whole of the property of any trading or manufacturing business or any business or any business of a like nature shall, notwithstanding any agreement to the contrary, be liable for all the debts and obligations for which the transferor is liable in respect of that business at the date of the transfer unless notice of the intended transfer has been published in accordance with the provisions of section 3 not less than two months or more than six months before the date when the transfer is to take effect."

It is not disputed in this case that on or about the 6th of June, 1970 the appellant acquired the goodwill and the whole of the trading business of the judgment debtor, E.C. Haule, by way of sale. It is further not in dispute that as on that date the judgment debtor, E.C. Haule was indebted to the Plaintiff Co. in the sum of Shs. 1,654/70. In fact this sum remained unpaid to the date of the attachment. It is also in evidence and not disputed by the parties

that when the sale of the judgment debtor's trading business took place no notice of the transfer had been published either in the Gazette or in any prescribed newspaper. However, the question is, was the objector as transferee of the judgment debtor's business, liable, for the debt or obligation of paying the sum of Shs. 1,654/70 owed by the judgment debtor to the Plaintiff Co. at the date of the transfer? In Mpanda General Agency v. Kassamali Kanji and Others (1964) E.A.

639, a case which involved the construction of the provisions of Section 2 of the Transfer of Business (Protection of Creditors) Ordinance, Mr. Justice Law (Law, j. as he then was) said in construing the word “liable” in the context of section 2 of the Ordinance, “I can see no justification for interpreting the word ‘liable’ in the restricted sense of ‘liable to be sued’ It is immaterial, so far as the defendant is concerned, whether Amor’s indebtedness rendered him liable to be sued on the date of the transfer, or whether his liability to be sued had been deferred by agreement, or by giving of a promissory note. The essential point is that ton October 10, 1960. Amor was under an obligation to pay a debt to the plaintiff. As I have already found that he defendant acquired the goodwill and substantially the whole of Amor’s property in his trading business if follows that ….. Amor was liable to the plaintiff for his debt or obligation existing at the date of the transfer of his business to the defendant, and the defendant is liable to the plaintiff in respect thereof.”

I have no doubt that Mr. Justice Law’ interpretation of the word “liable” in Section 2 of the Ordinance is a correct one and I have no hesitation in applying it to the present case. Hence the answer to the question I have already posed would be that as the judgment debtor was liable to the Plaintiff Co. for his debt or obligation existing at the date of the transfer of his business to the objector, i.e. on the 6th of June, 1970, the objector/appellant was as of that date liable to the Plaintiff Co. in respect thereof. I have however grave doubts as to the correctness of the Procedure adopted by the Plaintiff Co. in enforcing their rights against the transferee of the judgment debtor’s trading business. I do not think it is open to a creditor who has obtained judgment against a debtor to execute his decree by resort to attachment of the property owned by that debtor’s transferee of his business, without first going to Court and obtaining judgment against the transferee. What the plaintiff Co. purported to do in this case was to short-circuit the long process involved in obtaining judgment against the objector/appellant .This procedure, I must say, is novel but I can find no legal authority for it n the circumstances. Although the learned Resident Magistrate was perfectly entitled to deal with the legal issue raised by the Counsel for the Plaintiff co., she was

wrong to rule against the objector on the basis of it. Indeed, I cannot see how the provision of Section 2 of the Transfer of Business (Protection of creditors) Ordinance could have been invoked in support of a wrongful attachment of property belonging to the objector, against whom there was no decree at the time.

Before disposing of this appeal there is only one final point that I have to consider. Learned Counsel for the Plaintiff Co./respondent raised an important point of procedure. His argument is to put it briefly, that this appeal is incompetent on the ground that it being an appeal from an order from which no appeal lies to the High Court under the provisions of the Civil Procedure Code, vide section 74 as read together with Rule 57, 0.21 and rules 1 and 2, 0.40. As I have already found that the learned Resident Magistrate

Erred in ruling against the appellant/objector on the mistaken assumption that the provisions of Section 2 of the Transfer of Business (Protection of Creditors) Ordinance, which were in fact irrelevant, applied, I do no think the point raised by the Counsel for the respondent/Plaintiff Co. can be seriously entertained. While I concede that if the order from which this appeal originates was legally sustainable no appeal would lie there from, I am unable to agree that the same consequences flow from a perverse or irregular order. Suffice only to add that in the view of this Court, the High Court has power, inherent as well as under the civil Procedure Code, to review orders of the lower Courts, whether orders are appealable or not, which in the view of the Court, are perverse or contain a grievous error of fact or law. Were the Courts not possessed of this power, many a party would be denied justice, which those of us who sit here, are enjoined to administer without fear or favour to all who seek it.

Accordingly, I hold that the appellant/objector who undoubtedly was aggrieved by the order of the learned Resident Magistrate was entitled to have

that order reviewed by this Court by way of an appeal, notwithstanding that no appeal lies from such an order under section 74 of the Civil Procedure Code. Consequently the legal objection raised by the Counsel for the Plaintiff Co. /respondent fails. In the result, appellant's ground of appeal succeeds in toto and this appeal is therefore allowed with costs.

228. Kubach & Saybook Ltd. v. Hasham Kassam & Sons Ltd., H.C. Civ. Case 3-A-72, 23/10/72.

Held: A court will not act upon an affidavit which does not distinguish between matters stated on information and belief, and matters deposed to from the deponent's own knowledge, or as regards the former which does not set out the deponent's means of knowledge or his grounds of belief.

BRAMBLE, J. – This is an application for leave to defend a suit under the Summary Procedure Rules. Order XXXV. Rule 3 (1) provides that: "the Court shall, upon application by the defendant, give leave to appear and defend the suit, upon affidavits which: a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note; or b) disclose such facts as the court may deem sufficient to support the application." Order X1X, Rule 3 (1) reads as follows: - "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted. Provided that the grounds of belief are stated."

The substance of the affidavit in support of this application is contained in paragraphs 3 and 4 which are:-

"3. That the plaint in the above case does not disclose cause of action in that: - a) it does not state that the said Bill of Exchange was duly presented for payment: b) notice of dishonour of the said Bill of Exchange was given to the defendant;

c) the said Bill of Exchange has not been duly protested for non-payment; d) the Notary Public's slip attached to the said Bill of Exchange is not proper and valid. 4. That the goods supplied by the plaintiff to the defendant when received by that defendant were not according to the goods agreed to be sold and the plaintiff is not entitled to get the suit amount as there is failure to consideration of the said Bill of Exchange Ex. "A"." The last paragraph reads: - "That what is stated above is true to the best of my knowledge and belief."

According to the relevant rule a deposition must be made of facts within the deponent's knowledge and facts such as he believed provided he set out the grounds of his belief. It has been submitted on the respondent's behalf that the affidavit does not comply with the rule and that the court cannot act on it. In support reference was made to the leading case of Standard Goods Corporation Ltd. v. Harakchand Nather & Co. (1950) E.A.C.A 99, where it was held that: "It is well settled that where an affidavit is made on information it should not be acted upon by court unless the sources of information are specified." It was found that the deponent in an affidavit stated facts but did no say which were from hi sown observation and which were from information. In Assahand & Sons v. E.A Records (1959) E.A. 360 E.A. 360 the court commented on an affidavit and said, "The affidavit of Mr. Campbell was deficient in three respects. First, it did not set out the deponent's means of knowledge or his grounds or belief regarding g the matters stated on information and belief, and, secondly it did not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge." It cited the Standard Goods Corporation case with approval and said that the court should not have acted upon an affidavit so drawn. These decisions follow the ruling of the Court of Appeal in England where in In re J. L. Young Manufacturing Co. (1900) 2 Ch. 753, it was laid down that an affidavit of information and belief not stating the source of information and belief is irregular.

In these types of cases affidavits are often too loosely drawn and an opposing party has the right to object. Here, there is nothing to show what the

grounds of his belief were. It is not such an affidavit on which I could act and the application for leave to appear and defend the suit is dismissed with costs.

229. Mpapayu v. Tusiliwa, H.C. (P.C.) Civ. App. 71-DDM-72, 15/11/72.

The appellant sued the respondent in order to recover Shs. 460/= as compensation for the pregnancy of his daughter Delphina. The respondent is the step-father of Christian who was responsible for the pregnancy. With consent of the respondent, the court awarded the amount claimed. The District court however in exercise of its revisional jurisdiction ordered the refund of the money by the appellant. On appeal to the High Court.

Held: (1) A man who had sexual relations with a woman prior to her pregnancy and whom she names as the father of her child is held to be the father under customary law even if the time period between the sexual relations and the birth is too short for the man to be the real father.

(2) The father of a girl made pregnant may recover compensation only from the man responsible, and not from his father or step-father.

KWIKIMA, AG. J. – The appellant has a daughter, Delphina, who had an affair with the respondent's step-son, Christian. The latter is a soldier in the Tanzania Peoples Defence Forces. He is currently stationed at Tabora. The appellant sued the respondent in order to recover compensation when Delphina was made pregnant by Christian who, when he was on leave, took her award from her father's home and went to live with her. The parties to this case are not hostile to each other. Indeed, as the trial magistrate observed, the parties were in complete understanding; so much so that Delphina was allowed to go and stay with the respondent with the full blessings of the appellant. The Shs. 460/= was awarded to the appellant with the consent of the respondent. It was surprising therefore that the Njombe District Court should go out of its way to revise this award and order the appellant to refund the money.

The Njombe District Magistrate was influenced in his decision by the letter from Christian denying that he made Delphina pregnant. Christian did not dispute having sexual relations with Delphina. His argument was that he could not be the father of Delphina's child because the child was born five months after their meeting. The learned District Magistrate believed Christian, and proceeded to free him of any responsibility for Delphina's pregnancy. The learned gentleman overlooked the well-established rule of customary law that the person named in such cases must prove that he had had no sexual relations with the woman who named him. In this case Delphina named Christian's denial was based on his belief that according to him, the interval between their meeting and the birth of the child was too short to make him the father of the child. It should be pointed out that under customary law, Christian had to prove that he had had no sexual relation with Delphina. It was not sufficient to deny paternity for the reason which he gave. The appeal court ought to have held him liable when he failed to deny having sexual relations with Delphina. By admitting that he had had relations with Delphina Christian was more of less admitting paternity under customary law.

The letter from Christian ought not to have been taken as evidence in rebuttal of the appellant's allegation. If there was any merit in the letter, then Christian ought to have been called to give evidence so that the appellant could controvert him. The court could also have opportunity to assess his credibility. The District Court did not act legitimately when it interfered with what was a consent settlement. On these considerations the appeal would seem to be justified.

The Declaration of Customary Law allows fathers [to obtain] compensation from those who make their daughters pregnant. There is no provision under which the father of a girl made pregnant may recover compensation from the father of the man responsible for the pregnancy. The person to be sued for any compensation is the man responsible, not his father or step-father as the case may be. In this case the appellant was clearly wrong when he sued Christian. I would for this reason dismiss the appeal with an order that now that Christian's

whereabouts are known, he should be summoned before the Arbitration Board to work out a compromise. Before the said

Board the parents may decide what to do with their children Delphina and Christian. The money Shs. 460/= paid to appellant should not be refunded until solution to the problem is reached. I am optimistic about this case because the parents seem to be on very good terms……

230. Gulamali Walji Hirji v. Mrs. Sherbanu Walji and Others, H.C. Civ. Case 97-DSM-71; 3/11/72.

Held: (1) The law gives each and every partner of a partnership firm the right to have a true and full account of the partnership.

(2) A governmental act nationalizing all of the properties of a partnership formed to operate three distinct businesses brings about the dissolution of the partnership.

(3) The period of limitation for a suit for an account of a dissolved partnership begins to run on the date of the final transaction connected with the account of the dissolve company, s. 6(a), Law of Limitation Act, 1971.

(4) "Transaction" as used in the Act means any act, doing, negotiation, dealing or business.

MWAKASENDO, AG. J. – This ruling relates to two matters both raised by Mr. Raithatha learned Counsel for the Defendants. The first of such matters concerns the question whether or not, as Counsel for the defendant put it, the plaint discloses a cause of action with regard to plaintiff's claim to have the accounts of the Partnership firm "Walji Hirji & Co." re-opened. And the second point is whether or not the suit is barred by limitation.

To begin with the first point, Counsel for the defendants argued not quite persuasively I am afraid, that the plaint filed by the plaintiff did not disclose any

cause of action with regard to plaintiff's claim to have the accounts of the Partnership firm re-opened. In support, he cited number of authorities ranging from the rules of Civil Procedure to cases decided in England. I have carefully considered these authorities but I cannot see how they support defendant's contention. All the cases cited by the counsel for the defendants are cases dealing with settled accounts which the plaintiff in this case does not allege the instant case to be. And although the language used in the particulars of the plaint is in many places inelegant and imprecise, it is quite clear from the 'Prayer' that the relief sought by the plaintiff is to have a true and full account oft the partnership firm throughout the period of its existence. There would appear to be no question but that the law gives each and every partner of a partnership firm the right to have a true and full account of the partnership firm – vide section 192 of the Law of Contract Ordinance, Chapter 433 of the laws. On this point therefore, I have to find against the defendant and I accordingly reject the first preliminary point.

The second point is more intricate. In answering the question raised by defendant's Counsel in his second preliminary point, it is essential first that I should deal with the issue of dissolution of the Partnership firm. The defendants contend that the Partnership firm was dissolved by the act of confiscation of the Partnership firm was dissolved by the act of confiscation of the Partnership business in Zanzibar, on 2nd April 1965. The Plaintiff, on the other hand, contends that the dissolution of the firm did not take place until the death of the Senior Partner, Walji Hirji, in 1969. The Law of Contract Ordinance describes in what circumstances a partnership is to be regarded as dissolved \. The provision which I think fits our present case is paragraph (b) of sub-section (1) of Section 212 of the Ordinance, which reads: - "212 – (1) Subject to any agreement, between the partners, a partnership is dissolved ……. (b) If entered into for a single adventure or undertaking by the termination of that venture of

undertaking." In this case the 'Walji Hirji & Co.' was formed to operate three distinct businesses, i.e. the Diamond Coir factory, piece goods and produce business and the Shamshir factory. The act of confiscation of all the firm's properties by the Zanzibar Revolutionary Government brought to an end all the firm's trading activities in Zanzibar. It would seem to me therefore, that the question of when the partnership firm was dissolved is answered and it is, as I find it, the second day of April, 1965.

However, on the dissolution of the Partnership as foretasted, the rights and obligations of the partners continued in all things necessary for winding up the business of the partnership and to complete transactions begun but unfinished at the time of the dissolution. On the evidence given by Hassanali Walji Hirji, the second defendant, his father continued, after the dissolution of the partnership, to receive moneys on behalf of the dissolved partnership and to pay out moneys so received to the plaintiff by his father at the end of 1966. on these facts it is contended on behalf of the defendant that as the dissolution of the Partnership took place on 2nd April, 1965 and the suit was instituted on 15th day of July, 1971, the suit is barred by limitation, vide section 3 and Part 1 item 12 of the Law of Limitation Act, 1971. Mr. Lakha, learned counsel for the Plaintiff, has countered this contention by citing the provisions of Section 6(a) of the law of Limitation Act, 1971, which reads: - "6. For the purpose of this Act – (a) in the case of a suit for an account, the right of action shall be deemed to have accrued on the date on which the last transaction relating to the matter in respect of which the account is claimed took place." The word "transaction" as here used, has not any extraordinary or technical meaning but is used in its ordinary sense of "act, doing, negotiation or dealing business: that which is done, and affair", as defined in the common English dictionaries. In the instant case, what was the last transaction relating to the accounts of the dissolved partnership? The second defendant Hassanali Walji Hirji, told the Court that right up to the end of 1966 his father was receiving and paying out moneys connected with the affairs of the dissolved firm. He himself in April that year had entered into an agreement with Ludolph Struto & Co. G.M.B.H. The agreement related to a claim which the

foreign company had against the dissolved partnership and the second defendant was, on his own admission, acting on behalf of all the partners of the dissolved firm. It would appear to me, therefore, that although the partnership firm was dissolved in 1965, dealings or transactions partnership firm was dissolved in 1965, dealings or transactions relating to the partnership asset and liabilities continued to be carried out

until the end of 1966. All these transactions, no doubt, are matters which must be taken into account in the making of true and full accounts of the partnership, before the partnership is finally wound up.

On consideration of the matter, I have come to the conclusion that as the final transaction connected with the account of the company took place at the end of 1966, time for the purpose of limitation began to run then. It follows, therefore, that as the suit was filed on 15th day of July, 1971, it was not barred by the Law of Limitation Act, 1971. Accordingly, defendant's objections based on this ground also fail.

231. R. v. Selemani s/o Yasini, H.C. Crim. Rev. 50-DSM-72, 11/9/72

Held: (1) Where goods are stolen from a special owner who was in lawful possession of the goods with the approval of the owner himself, a compensation order made in favour of the special owner rather than the actual owner is not improper, as the latter is not deprived of any claim he may have against the special owner.

(2) Where a purchaser of stolen goods is in bad faith, he is not entitled to compensation for any loss suffered.

MNZAVAS, J. – In this case the accused was charged with and convicted of sealing by servant c/ss 271 and 265 of the Penal Code. There was abundant evidence in support of the conviction. The case was only brought up for argument regarding the order of compensation ….. The following were the facts

of this case: On 23/11/71 one, Bisher Humwel (PW 3), sent his driver, the accused, to Mikumi where he was to collect 500 bags of cement and send them to the Railways Administration in Mbeya. The accused drove his lorry to Mikumi and loaded 500 bags of cement as ordered by his employer (PW.3) but instead of delivering them to the Mbeya Railways Administrations instructed by his employer, he sold them to one Noor Mohamed (PW.2) for Shs. 7,500/= and pocketed the money. He then drove back to Iringa, left the lorry at his employer's premises and absconded. Next morning the complainant (PW.3) found his lorry safely parked outside his house but he could not trace his driver. He was suspicious and reported the matter to the police. Investigations were instituted and the accused was arrested on 26/11/71 in a bar at Igawa Village in Mbeya. Further investigations led the police to the house of Noor Mohamed (PW.2) who admitted buying 500 bags of cement fro the accused for Shs. 7,500/=. At this time Mohamed had already sold 300 bags. The remainder, 200 bags were seized by the police. As I have already mentioned there can be no doubt that the conviction is in harmony with the evidence. After conviction the learned resident magistrate sentenced the accused to 2 years' imprisonment and ordered him to pay Shs. 7,500/= to his employer as compensation.

In his admission note my learned brother judge minuted: (1)"Sentence does not warrant interference. (2) Compensation order doubtful. Cement was the property of E.A.R. Cop …… Complainant was mere carrier. Loss was occasioned to E.A.R. Corporation and Noor, the person who bought the contraband. Question 1: Who should the accused compensate? Question 2: Should the compensation be in terms of cement or in cash? The price of a bag varies with time and place."

The learned State Attorney argued that the learned trial magistrate was right in ordering compensation in favour of the complainant (PW.3). The Republic further argued that the evidence showed that the price of cement at the material

time was Shs. 15/= per bag and that he order of Shs. 7,500/= compensation to the complainant for the loss of 500 bags was proper.

There can be no doubt at all that on the facts of this case the complainant was more entitled to compensation that the Railways Administration or Mr. Noor Mohamed who bought the cement from the accused. He was sub-contractor of the railways and his duty was to carry the Railways Administration's cement from Mikumi to Mbeya. The cement was in the possession of the complainant when his driver stole it. I with respect agree with the learned judge that ownership of the cement was with the Railways when it was stolen, but with even greater respect to the learned judge I do not think that this fact makes the order of compensation to the complainant "doubtful". Though the Railways was the general owner of the cement at the time it was stolen, the complainant was also a special owner of the cement at the time it was stolen. In coming to this conclusion I am fortified by the clear language of section 258(e) of the Penal Code which says inter alia: "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." The compensation order in favour of the complainant was there – fore proper as he was a special owner of the cement at the time. The fact that he compensation order was made in favour of the complainant does not rob the Railways Administration its rights to claim for the cement from the sub-contractor (complainant). The Administration can if necessary file a suit against the complainant claiming 500 bags of cement.

As for Noor Mohamed (PW.2), the person who bought the cement from the accused; the circumstances under which he bought the cement tare extremely suspect. I would say that he was very lucky not to be charged with receiving stolen property.

One more point before I conclude; it is not clear from the judgment as well as the order of the learned resident magistrate how the 200 bags found with Noor were disposed of. If they were handed to the complainant, then the order of Shs. 7,500/= should be reduced by 200 bags whose value at the time was Shs. 3,000/= i.e. Shs. 15/= per bag. For the above reasons I tend to agree with the

Republic that the magistrate's compensation order was proper. The sentence of 2 years' imprisonment needs confirmation by this Court and is hereby confirmed.

Ed. Note: Unfortunately it is not clear, as is noted in the judgment, how the trial court disposed of the 200 bags of cement found with Noor (PW.2). In principle, where goods have been stolen and the thief convicted, the goods, if recovered, should in all cases be restored to the original owner (or his representative) and the court must make a restitution order to this effect (Sale of Goods Ordinance, Cap. 214, s. 26(1); Criminal Procedure Code, s. 180). So the 200 bags of cement should have been restored to the complainant, or to the Railways Administration. In such a case, what are the rights of Noor (PW.2)? In situations where an innocent purchaser is deprived of stolen goods by a restitution order, the court may 9 and normally should) order the thief to compensate him for his loss (Criminal Procedure Code, s. 176(1) and (2)). Therefore the trial court should have made a finding as to whether or not Noor (PW.2) was an innocent buyer. If he were found to be in good faith, he would be entitled to compensation as regards the 200 bags of cement, of which he would be deprived by the restitution order.

232. Kabiga s/o Iringa v. R., E.A.C.A. Crim. App. 91-DSM-72, 24/10/72.

Appellant was charged with murder and was originally arraigned before Onyiuke, J. on 27th July, 1970. The case was adjourned and accused was ordered to be detained at Isanga for observation after the defence had raised the issue of insanity. About fifteen months later appellant was arraigned afresh before Jonathan, Ag, J. and was found guilty of murder.

Held: (1) It is irregular to have one High Court judge continue a case begun by another, but his irregularity did not in the present case lead to a failure of justice.

(2) A court has the power, under s. 168A, Criminal Procedure Code, to adjourn proceedings and order he accused detained in a mental hospital for examination at any time after the plea has been taken, even if there is not as yet in evidence any material raising the issue of insanity.

LAW, AG. P. – The appellant was convicted of murder by the High Court of Tanzania sitting at Mwanza (Jonathan, Ag. J.) and was duly sentenced to death. He has appealed against his conviction and sentence.

The appellant was originally arraigned before Onyiuke, J. on 27th July, 1970. At the outset Mr. Rugarabamu, who appeared for the appellant, informed the court that he had reason to think the appellant was insane, and he asked that the appellant be sent to Isanga Institution for observation and trial adjourned. Mr. Samata, for the Republic,

Objected that the application was premature as section 168A of the Criminal Procedure Code only applied "during" a trial and as there was as yet no material on which the issue of insanity could be raised. We agree that an application for an adjournment should not be made until the trial starts, that is to say, when the plea has been take, but we do not agree that no such application can be made until there is material raising the issue of insanity. Indeed this is clear from the wording of subsection (1) of section 168A which gives a court power to adjourn the proceedings and order the accused to be detained in a mental hospital for examination "notwithstanding that no evidence has been adduced or given of such insanity." However, the learned judge accepted Mr. Samat's submission. Three witnesses gave evidence before Mr. Rugarabamu renewed his application, whereupon the judge adjourned the case to a date to be fixed and ordered that the accused be detained at Isanga for observation. For the removal of any doubts which may exist we would observe that the discretionary powers vested in a judge under section 168A can be exercised at any time after arraignment, even if no evidence has been called. For instance, the judge may decide to act on his

own observation of the accused, or on information supplied by prosecution or defence advocates. Be that as it may, the next step in this case was more than 1 year and 3 months later, when the appellant was arraigned afresh before Jonathan. Ag. J., on 18th November, 1971. He pleaded not guilty, assessors were selected and the trial began ab initio. There was thus the extraordinary situation that the appellant was the accused in a part-heard criminal case before Onyiuke, J., charged with the murder of Dalali, and while that case was still pending, he was being tried on the same charge by a different judge. There is no provision in the Criminal Procedure Code for one judge to continue a case begun by another, although such a procedure is provided for in subordinate courts by section 196 of the criminal Procedure Code. Quite clearly, if Onyiuke, J. proceedings should have been terminated by nolle prosequi entered under section 81(1) of the Criminal Procedure Code, before starting a trial de novo before another judge on the same information. This irregular procedure has not however led to a failure of justice in the case and is in our view curable under section 346 of the Penal Code. [The court then reviewed the evidence and rejected the appeal]

233. Solomon s/o Ulaya v. R., E.A.C.A. Crim. App. 10-DSM-72, 19/10/72.

Held: (1) The views of assessors in High Court trials may not be taken on the matter of sentence, which is for the judge alone to decide.

(2) A case of manslaughter in which no weapon is used and the death could not have been foreseen from the nature of the assault is not one deserving severe punishment.

SPRY, AG. P. – The appellant pleaded guilty to manslaughter. He was under the influence of drink, annoyed at food not being ready and aimed a kick at his wife. In fact he kicked his mother. This caused a ruptured spleen and she died.

While we entirely agree with the learned judge that killings resulting from drinking are far too common, this was a case where no weapon was used and where fatal consequences could not have been foreseen from a single kick. The act of the appellant was unlawful, and he was rightly convicted, but we cannot regard it as a case that merits severe punishment.

As Mr. Jadeja has pointed out, there was an irregularity in the procedure, in that assessors were appointed and their views taken on the matter of sentence. This is contrary to the Criminal Procedure Code, under which sentence is a matter for the judge alone.

The appeal is allowed and the sentence reduced to three (3) years imprisonment.

234. Dharsi Manji & Sons. V. Amri Saidi, H.C. Civ. App. 8-DDM-72, 18/8/72.

Held: (1) The question whether a plaint discloses a cause of action is determined from the plaint alone together with any thing attached and forming part of it, on the assumption that any facts alleged or implied are true.

(2) Unless a plaint by itself clearly discloses a cause of action, it must be followed by supporting particulars enabling the defendant to know the nature of the claim.

(3) In a suit for the price of goods sold and delivered, the plaintiff must show the nature of the goods, the dates on which the goods were sold and delivered, as well as the dates of any payments on account.

MNZAVAS, J. – The appellant sued the respondent for Shs. 1,465/50 due for agree or, alternatively, reasonable price for goods sold and delivered to the respondent. Each party was represented by and advocate in the lower court. The learned trial magistrate after evaluating the whole evidence came to the conclusion that the appellant (original plaintiff) had failed to prove his claim on

the balance of probabilities and dismissed the suit with cost. Against that decision the appellant has appealed to this court. Before this court the appellant was represented. The respondent did not appear.

The learned counsel for the appellant argued that the trial magistrate was wrong in holding that the appellant had failed to prove his claim against the respondent. It was argued that the magistrate had misdirected himself on the burden of proof in civil cases. It was submitted that the respondent having in his defence said that he had paid for the goods delivered to him by the appellant it was incumbent on him to show to the court how he effected payment. The learned counsel also argued that the respondent was not a very reliable witness as he, in his written statement of defence, denied ever buying any goods from the appellant but that he changed his story in his evidence in court where he admitted

receiving goods from the appellant but adding that he had paid for all the goods he received from him. In support of his argument that the learned resident magistrate misdirected himself on the burden of proof the court was referred to page 755 of the Law of Evidence by Woodroffe and Amer Ali – 9th Editions. Page 889 paragraphs 8 – SARKA on Evidence – Eleven Edition, was also quoted to the court.

With respect I tend to agree with the learned defendant counsel that the learned magistrate failed in his judgment, to observe the inconsistencies in the defendant's case. But with even greater respect to the learned counsel I would say that the plaintiff's case is also no immune from irregularities. Dealing first with the defendant's case he, in his written statement of defence dated 11th October 1971, denied owing the appellant the sum claimed. He went on and said that he had never bought any goods from the appellant. The respondent gave a diametrically opposed defence in his evidence in court. There he admitted receipt of goods from the appellant but argued that he had paid the appellant for all the

goods he received from him. This being the nature of the respondent's defence in the lower court this court can only come to the conclusion that the defendant was either deliberately telling lie to the court or he did not know what he was talking about. His written statement of defence and his evidence in court could certainly not be both true.

Coming to the appellant's case I would say that it is very doubtful whether the plaint as presented by the appellant (original plaintiff) disclosed a cause of action. This being a suit for payment for the balance of the price of goods sold and delivered it was incumbent on the appellant to show with sufficient particularity the dates on which the alleged goods were sold and delivered, the nature of the goods as well as the dates on which payments on account were made . The appellant was clearly under a duty to particularize his claim so as to help the respondent (original defendant) to prepare his case. At this juncture I would like to mention that he defendant in par. two of his written statement of defence pleaded that the plaint did not disclose a cause of action. The learned resident magistrate did not deal with this aspect of the defence. He should first have decided this preliminary issue. Had he done so it is possible that he would have rejected the plaint under OR. V11, R.11 [Civil Procedure Code and there would have been no need for a trial. As it was held in AFRICAN OVERSEAS TRADING CO. v. TANSUKH S. ACHARYA (1963) E.A. 468: "The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with any thing attached so as to form part of it, and upon the assumption that any express of implied allegations of facts in it are true."

In the present case the plaint had nothing attached to it in support of the claim. Read alone, the plaint does not disclose a cause of action as it is ambiguous. The learned counsel's argument in par. Two of the memorandum of appeal that – "The learned Resident Magistrate ought to have held that it was not necessary for the appellant to attach a copy of an Invoice or Statement to the plaint as the appellant was not in possession of the original Document" is, with

respect of no consequence. Unless a plain by itself clearly discloses a cause of action,

it must be followed by particulars in support of the claim so as to enable the defendant o know the nature of the claim so that he may be able to prepare his defence. In this case the plaint should have been followed with copies of entries in appellant's shop-book showing the amount and type of goods delivered to the respondent, the amount of part payment and the balance. Copies of invoices should have been attached to the plaint so as to furnish the respondent with particulars of the claim. This the appellant did not do. The omission was, in my view, contrary to the mandatory provisions of or V11 R. 17(1) of the Civil Procedure Code. While still on the plaintiff's case, I also agree with the learned magistrate that he plaintiff (present appellant) was rather vague as to what amount he was actually claiming from the respondent. His claim on his plaint materially differed from his evidence in court.

As I have tried to show this is a case which has been decided on very unsatisfactory evidence. While primarily the blame could be attributed to the appellant in that his plaint did not properly disclose a cause of action, the defendant's counsel was also to blame in that he failed to ask the court to decide the preliminary point first. The defendant's defence opposed, as it was, to his written statement of defence is also to some extent a reflection on his credibility. It is my view that this is one of those cases where the trial court should have either rejected the plaint under OR. V11 R. 11(a) of the Civil Procedure Code or alternatively he could have ordered the plaintiff to furnish sufficient particulars to the plaint so as to enable the defendant o prepare his case. At this stage the best solution would seem to be to quash the proceedings and the judgment of the lower court, this I hereby do. The appellant is allowed to present a fresh plaint, this time in good form; and if he does so, the case is to be heard de-novo. No order as to cost.

235. John s/o Okello v. R., H.C. Crim. App. 167-M-72, 11/8/72.

Held: To suggest sexual intercourse with a woman and, on her refusal, to hold her tightly around the waist and to pull her, struggling, towards a vacant house, taking away her khanga and tearing her dress in the process, amounts to an indecent assault.

EL-KINDY, J. – The appellant, JOHN S/O OKELIO, was charged with an convicted of indecent assault contrary to section 135 (1) of the Penal Code, Cap. 16 and he was sentenced to imprisonment for 18 months subject to confirmation by the High Court. He was also ordered to pay Shs. 15/- to the complainant (P.W.1). He appealed against conviction, sentence and order. Pelina (P.W.1) alleged that on the 6th of February, 1972, at about 4 p.m., she was walking along a road in her village. There were 4 Ruandese people ahead of her. As she walked, she met the appellant. She said that the appellant held her had and told her that he loved her and proposed sexual intercourse, with her, but she refused. She was a married woman. The appellant then produced a currency not of Shs. 5/- and offered it to her, but she still refused. Thereupon, she said, the

appellant held her tightly around her waist and began to pull her towards a vacant house. She wore a dress on which she wore a piece of khanga. In the course of the struggle, she said, the appellant took away her khanga and tore her dress, but her cries of help caused the four Ruandese and Henry s/o Kiiza (P.W.3) to go to her aid. She alleged that the appellant left her and ran into a house, where he locked himself in. The boy Henry (P.W.3), who gave sworn evidence, said that he saw the appellant pulling away the complainant, and that he went to her aid together with the four Ruandese, and then the appellant left the woman alone. Henry's evidence was properly admitted, and therefore, it supplied the required corroboration on the evidence of Pelina. Pelina said that tit was the first time she met the appellant and that she had not seen him before. In

his defence, he said that Pelina, Henry and the husband of Pelina gave false testimony against him, and that they had been told by one Gordon to do so as he had had a previous quarrel with Gordon, who promised to see him committed to prison. The learned trial magistrate considered the allegation and found that he allegation of conspiracy had no basis. He found that it was the first time that Pelina met him and that the appellant had no previous quarrel with Pelina and Henry. He found that they were witnesses of truth, and he accepted their evidence.

Having found the facts as alleged by Paulina and Henry, the learned magistrate quite properly, wet on to consider whether the facts as proved amounted to indecent assault. In this respect, he relied on the judgment of my learned brother Mnzavas, Ag. J., as he then was, in the case of R. v. SHABANI (1971) H.C.D. n. 233. He held that the holding tightly of the complainant around her waist coupled with the suggestion of love and sexual intercourse, amounted to indecent assault in law. And, with respect, I agree with him.

In passing the sentence of 18 months, the learned trial magistrate took into account the fact that it was an indecent assault on “a respectable house-wife”, and that he had threatened to cut the cell leader with a panga, when the cell leader approached him. His conduct, therefore, he said was equally dangerous. He could, as well, have taken into account the fact that he appellant had caused the complainant physical pain when he held her tightly around her waist or stomach. Although the sentences appear to me to be severe, it is not so severe as to warrant this court to interfere with it. It is accordingly confirmed. The appellant was also ordered to pay Shs. 15/- for loss of property. Presumably the learned trial magistrate acted under the provisions of section 176(1) of the Criminal Procedure Code, Cap. 20. There was evidence which showed that when appellant released Pelina, he disappeared with her piece of khanga. It was, therefore, only fair that he should compensate her. The order is upheld. I certify that

This appeal has been lodged without sufficient cause for complainant and I order that it be summarily rejected.

236. Kondo v. Mwajabu d/o Juma H.C. (P.C.) Civ. App. 38-DDm-72, 25/8/72.

A wife sued her husband for maintenance while staying with her parents, alleging that she left him after being assaulted.

Held: (1) A previous acquittal in a criminal case on a charge of assault does not bind the court in a civil suit to find that no assault occurred, because the burden of proof differs in civil and criminal cases.

(2) The wife was entitled to maintenance while with her parents, because the husband was the cause of her leaving and did not attempt to bring her back.

MNZAVAS, J. – The appellant and the respondent are husband and wife. Sometime in 1969 the appellant assaulted the respondent because she refused to go and cultivate his shamba at Bubu village. As a result of the assault the respondent left the matrimonial home and went to live with her parents. On the 6th December, 1971, the respondent filed a suit for maintenance against the appellant. The Kondoa Urban Primary Court entered judgment in her favour and ordered the appellant to pay her two goats as maintenance expenses. Dissatisfied with the decision and order of the primary court the appellant appealed to district court. He was again defeated. This time he was ordered to pay Shs. 300/- as maintenance expenses to the respondent instead of two goats previously ordered by the primary court. Still dissatisfied he has now come to this court.

Before this court the appellant argued that he was in no way responsible for the respondent's maintenance while she was living with her parents because she had for no reason at all left the matrimonial home. As for the alleged assault he denied assaulting the respondent and referred to the court the decision in

Kolo primary court criminal case No. 61/69 in which he was charged with assaulting the respondent but found no guilty of the charge.

As rightly commented by the learned magistrate in his judgment the fact that the appellant was acquitted on the charge of assault does not necessarily mean that he did not assault the respondent. He may have done so but here may have been no sufficient evidence to prove beyond reasonable doubt that he did; and hence his acquittal. The appellant cannot, therefore, rely on the acquittal as a basis of his argument in this civil case because the burden of proof in a criminal case is totally different from that in a civil case.

Evidence that may fail to support a criminal charge may be quite adequate to prove a civil action. In criminal case No. 61/69 there was medical evidence that he respondent sustained injuries on her lip, cheek, chin and loin. Even if this court

Is, for the sake of argument, to accept the appellant's argument that the respondent left the matrimonial home for no reason at all, there is no evidence to indicate that the appellant went to his in-laws and inquired as to any their daughter had deserted him. The respondent was, (as she still is), legally married to the appellant while at her parents' home and from the evidence accept by the lower courts there can be no doubt that the appellant was the caused of her leaving the matrimonial home to go to her parents. She was, therefore, full entitled to maintenance by her husband while at her parents' home. The award of Shs. 300/- is in no way excessive taking into account the fact that it covers a period of nearly to years. The judgment of the district court is in harmony with the evidence. The appeal fails. The respondent is to have her costs in this case and the lower courts.

237. Tenga v. Zinzi, H.C. (P.C.) Civ. App. 17-M-72, 14/7/72.

Held: A husband seeking the refund of bridewealth should first file a petition for divorce and if he obtains a decree, then the court can proceed to consider the issue of a refund of bride-price which is incidental to the main issue of divorce.

KISANGA, J, - The respondent sued the appellant for the refund of 17 cattle being bride price he paid in respect of his wife. The primary court allowed the claim only to the extent of 5 cattle plus Shs. 15/- He appealed to the district court which increased the award to 14 head of cattle. The appellant has now appealed against that decision.

The respondent alleged that his wife left the matrimonial home and went to stay with her brother, the appellant, for the purpose of receiving medical treatment. After some time he approached her and asked her to return home but she refused. The appellant in his defence said that his sister became ill but the respondent, her husband, would not provide the fare to take her to hospital she therefore left the matrimonial home and went to stay with him. The respondent came to fetch her back but she refused on the ground that he refused to provide the fare to take her to hospital. Whereupon the respondent agreed to leave her at the home of the appellant to continue with treatment. Meantime the respondent instituted this claim and this was a surprise to the appellant. The appellant's story was fully supported by that of the respondent's wife who said that she was surprised that the respondent brought the claim because she has no intention of parting with the respondent and that she was ready to go back to him provided that he does not refuse to take her to hospital.

In the case of SUNGWA FUMBUKA v. KASULUCHA, (1968) H.C.D. n.84 it was held that a claim for the refund of bride price cannot be sustained unless there has been a petition for divorce. In the present case the claim was simply one for the return of brideprice but it is quite clear from the evidence that no petition for divorce has ever been brought to dissolved the marriage for which the bride price was paid

At some stage the primary court magistrate appears to have treated the matter as if it was a divorce suit. In his judgment he said, “After negotiations she (the respondent’s wife) has consented to go with her husband but her husband has pressed for dissolution of marriage”. It may well be that the respondent expressed a wish for a divorce but that was a mere wish or desire and the court could not consider it because there was no petition for divorce before. It. The proper procedure is that the respondent should file a petition for divorce and if he obtains a decree, then the court can proceed to consider the issue of a refund of bride price which is incidental to the main issue of divorce.

I am therefore of the view that this suit was brought prematurely and it ought to have been dismissed. Accordingly the appeal is allowed with an order that the appellant recovers his costs in this Court and in the Courts below.

238. M.H. Jan Mohamed v. Registrar of Building, H.C. Civil Case 21-A-72, 26/9/72.

Held: (1) In a suit for a declaration that the plaintiff is tenant of certain premises, the subject matter of the suit is the land. Therefore the value of the subject matter for purposes of determining the appropriate court for trial under s. 35(2) (a), Civil Procedure is the value of the land in Question.

(2) Jurisdiction of a court prima facie is determined by the value the plaintiff puts on his suit, unless the valuation is patently wrong on the face of it. To state the value of the premises is not patently wrong.

BRAMBLE, J. – This is suit for a declaratory order. A preliminary objection has been raised that the suit does not comply with Section 13 of the Civil Procedure Code which reads: ”13. Every suit shall be instituted in the court of the lowest grade competent to try it. For the purposes of this section, a court of a resident magistrate and district court shall be deemed to be courts of the same grade.” The question is whether the suit should have been brought in a district court. There has been no dispute as to the fact that such a court has power to

grant the order sought. Section 35(2)(a) limits its jurisdiction to proceedings in which the value of the subject matter does not exceed twenty thousand shillings.

The order sought is a declaration that the plaintiff is a tenant of certain premises. Mr. Lubuva contends that the subject matter of the suit is the legality of the plaintiff's stay on the premises and monetary value ought to be put on this issue. In suing for possession a person is claiming a legal right and this right is not considered as the basis on which a value should be placed for the purpose of ascertaining in what court the matter should be tried. It is the value of the land: and the land

is considered the subject matter. A declaration order in a case like this is statement of the person's right with respect to property and the property is the subject matter. Moreover it is the value that the plaintiff puts on his suit that prima facie determines jurisdiction in the 9th Edition of Mulla on the Indian Code of Civil Procedure page 893 it is stated that: "If the over-valuation or under-valuation is patent on the face of the plaint, it is the duty of the Court to which the plaint is presented to return it to the plaintiff to be presented to the proper Court". There is no corresponding rule in our Civil Procedure Code but as a matter of practice this can be done.

Here it is not a case of wrong valuation but the method of valuation. I cannot say that the plaintiff's estimate of value as being the annual rental value of the premises is wrong and I hold that the matter is proper before this Court.

239. Andrew s/o Kileo v. R., H.C. Crim App. 385-A-72, 29/9/72.

The appellant was charged with stealing by servant c/s 271 and 265 of the Penal Code and convicted of receiving property suspected of being stolen c/s 311 of the Penal Code. The main evidence against him was a statement he

made to the Police admitting possession of the stolen goods but explaining that they had been given to him by his co-accused as security for a loan.

Held: The admission of an incriminating fact coupled with an exculpatory explanation is not a confession, and if made a Police Officer is admissible in evidence.

BRAMBLE, J. – The appellant was charged with stealing by servant c/s 271 and 265 of the Penal Code and convicted of receiving property suspected to have been stolen c/s 311 and sentenced to 2 years' imprisonment. The main evidence against the appellant was a voluntary statement made to the police. Mr. Kapoor for the appellant submitted that the statement was inadmissible in evidence because of section 28 of the Evidence Act which reads: "No confession made by any person whilst in the custody of a police officer, unless it be made in the immediate presence of a magistrate as defined in the Magistrate's Courts Act, 1963 or a justice of peace under that Act, shall be proved as against such person." Section 27 is more on the point since it says: "No confession made to a police officer shall be proved as against a person accused of an offence."

The tendency has been to confuse confessions to a police officer with statements to a police officer. In R. v. Kufungu s/o Nusurupia and another, (1941) E.A.C.A. 89 a confession was defined as "an unequivocal admission of having committed an act which is law amounts to a crime." In R. v. Mali Kiza s/o Lusota, (1941) 8E.A.C.A. 25 it was held that: "No statement that contains exculpatory matter can amount to a confession if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact is not of itself a confession."

This is illustrated in R. v. Kutuyan s/o Swanditti, (1941) 8 E.A.C.A. 56 where a statement "I have killed my father accidentally when he tried to strike me" was not treated as a confession.

From the sections quoted above it is clear that a voluntary statement made to a police officer is admissible in evidence if it is not a confession and the question to be decided before admitting or rejecting it is whether or not the statement is a confession. In this case the appellant admitted being in possession of goods which had been stolen but he gave an explanation that they were given to him by his co-accused as security for a loan. Here there was an admission of an incriminating fact but there was an exculpatory explanation. It was not a confession and the statement was admissible in evidence.

In his evidence on oath the appellant simply described the circumstances relative to his arrest. He did not refer to the statement in any way. He called two witnesses to rebut the evidence of P.W.3 and P.W.4 that he had left the suit alleged to have been found in his possession at the house of P.W.3. Apart from this there was nothing to suggest that he was denying possession. The learned magistrate did not consider this place of evidence but it did not go to the root of the matter nor could it affect the main issue if the statement was held to be the appellant's. Mr. Kapoor submitted that it was in the nature of an alibi. If this was so it was an alibi for the 30th October, 1971 and not for the date, on which the offence was said to have taken place, the 5th September, 1971.

There was no questioning of the statement to the police. The learned magistrate, however, misdirected himself when he stated that he appellant admitted that he brought a suit for Shs. 60/-. What he said was that it was given to him as security for a loan. This was not proved to be untrue and the prosecution had every opportunity of doing so. The position was that the appellant was found in possession of goods recently stolen and he gave an explanation that might reasonably be true. The trial magistrate did not direct himself on the law and found him guilty of receiving. There was misdirection on the facts and non-direction on the law and in the circumstances of this case they are fatal. With proper directions the case should have been dismissed. I will,

therefore, allow the appeal, quash the conviction and sentence and order the immediate release of the appellant.

240. Ezekia s/o Simbamkali v. R., E.A.C.A. Crim. App. 30DSM-72, 18/7/72.

Held: (1) Notes made by witness may be used to refresh his memory but are not in themselves admissible in evidence.

(2) Where the prosecution seeks to rely on a confession the burden is entirely on the prosecution to prove that it was voluntary.

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(3) At a trial within a trial to determine the admissibility of a confession, the prosecution should call all persons able to give relevant evidence, including the person to whom the statement was made, and the interpreter, if any, and these witnesses may be cross-examined by the defence.

(4) Where, after a trial within a trial, a statement is held to be admissible, the prosecution evidence regarding it is given again in the presence of the assessors, and the witnesses are again cross-examined because, although the issue of admissibility has been decided, the circumstances in which the statement was taken may affect the weight to be attached to it.

(5) The confession of one accused implicating his co-accused can only add the final assurance to an already strong case.

SPRY, V. P. – The two appellants were convicted of murder and sentenced to death. They were alleged jointly to have killed on Zachariya s/o Simbamkali.

The case again the first appellant, Ezekia s/o Simbamkali, a brother of the deceased, depended almost entirely on a confession he is alleged to have made to a Justice of the Peace, Allen Mbuke. No question was raised by the advocate for the appellants, Mr. Patel, when this witness, [Allen Mbuke], began to testify,

indeed, it would seem from the record as a whole that he cannot have received proper instruction. The witness is recorded as saying that Ezekia was taken to his office to made a statement. He went on “I recorded the transaction as per notes I took which I produce” and these were admitted as Exh. P.1. This was gravely irregular for a start. The witness might have been permitted to use the notes to refresh his memory but they were not, in themselves, admissible in evidence.

The learned judge then asked Mr. Patel if he wished to object to the introduction of the statement and received a negative reply. Ezekia himself, however, said that he had made the statement because he was beaten. The learned judge rightly decided to hold a trial within a trial. Ezekia was called to give evidence, although Allen Mbuke had given no evidence as to the circumstances in which the statement was made, the defence had had no opportunity to cross-examine him and the interpreter who had acted in the matter had not been called.

When Ezekia had given evidence-in-chief, the learned judge gave his ruling. So far as the record goes, Ezekia had not been cross-examined and had not been asked if he wished to call any witness. The learned judge remarked that the Justice of the Peace had given evidence that he had been satisfied Ezekia was a free agent and had no recent marks of injury on his body. This, according to the record, is not true; presumably, it is a reference to the “notes”. He concluded that as Ezekia could not name or identify the people he alleged had beaten him “and in view of the unreasonableness of his story”, the confession was to be admitted.

With respect, we think these grounds are unsatisfactory. In an ordinary, humble, citizen is beaten by police or local authority askaris, it is very likely that he would not know the names of the individuals involved and although the

beating of prisoners is most reprehensible, we know that it does happen and therefore that such allegation cannot lightly be dismissed.

What is however, much more serious is, as Mr. Lakha, who appeared for the appellants, submitted, that it is impossible, from a perusal of the record, to avoid the conclusion that the learned judge placed the burden on Ezekia of proving that this statement was not voluntary. It is well established that where the prosecution seeks to rely on a confession, the burden is entirely on the prosecution to prove that it was voluntary. This was a most grave error.

It may be desirable to set out again the procedure to be followed at these trials within trials. Immediately it is known that the admissibility of a statement is to be challenged, the assessors should be asked to retire. This should, whenever possible, happen before any mention of a statement has been made, the usual procedure being for defence counsel to inform the court that a question of law needs to be considered. The prosecution then calls all the witnesses available to prove that the statement was made voluntarily and according to law, including the person to whom the statement was made, the interpreter, if any, and any other persons who can give relevant evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. On this issue, the burden of proof is wholly on the prosecution. The judge gives his ruling in the absence of the assessors, who then return to court. If the statement has been held to be admissible, the prosecution evidence regarding it is given again and the witnesses are again cross-examined, because, although the issue of admissibility has been decided, the circumstances in which the statement was taken may affect the weight to be attached to it and for this reason the assessors are concerned with them.

If this confession is excluded, as we think it must be, very little evidence against Ezekia remains. It appears that, after the body of the deceased had been found, some three months after the murder, Ezekia handed to the police a hammer and a rungu which were in his house and which are alleged to have been used in the killing. Even on this matter, there is some conflict of evidence between two police witnesses. Ezekia was also implicated in a confession made

by his co-accused and ultimately retracted. It is well established that such a confession can only add the final assurance to an already strong case. It could not serve to establish common intent and if Ezekia's confession is excluded, there is no substantial evidence to prove any common intent and the only direct evidence is that Ezekia entered the house of the deceased after the latter had been assaulted by the second appellant and received what may will have been the fatal wound.

Ezekia elected to make an unsworn statement from the dock. In his summing-up to the assessors, the learned judge described this as adoption of his earlier confession. With respect, we cannot agree. We do not; of course know the actual words he used in his own

Language, but as interpreted and recorded we think the substance of his statement was, that as the court had accepted the alleged confession, it was useless for him to say more.

In view of the apparent misdirection on the onus of proof in the trial within a trial, and the lack of evidence that the alleged confession was voluntary, and the paucity of other evidence against Ezekia, it would clearly not be safe to allow his conviction of stand. The case against him raises a very grave suspicion, but that is not enough. His conviction is quashed, and the sentence passed on him is set aside.

There was, however, eye-witness evidence against Iddi, given by the widow of the deceased, Tulanyalika. She said that Iddi entered their house, had some conversation with the deceased and then, for no reason, struck him on the head with a hammer. She ran out, meeting Ezekia, who was entering the house. She ran to the house of Ezekia, and told his wife what has happened.

The learned judge rightly said that the evidence of Tulanyalika needed to be approached with caution. She did not report what has happened to the police, or to the ten-cell leader whom she knew, or to the deceased's brother who was

searching for him. We think her evidence should be regarded on the same lines as that of an accomplice.

Idd elected to make an unsworn statement from the dock. This again is curiously contradictory. He began by saying “It is true that I killed the deceased”. He went on “What I told the area secretary was true”. He then changed his story completely and alleged that he had been drunk and that it was Ezekia and Tulanyalika, who had killed the deceased and hidden his body.

Although there are aspects of the case against Iddi that have caused us some anxiety, we think his statement at his trial, taken with his confession to Allen Mbuke and the evidence of Tulanyalika, taken together, leave no reasonable doubt of his guilty. His appeal is dismissed.

241. B. A. Minga v. Mwanachi Total Service Station, Shinyanga and Total (T) Ltd., H.C. Civ. Case, 18-M-68, 18/8/72.

The plaintiff sued the defendants for damages for their alleged negligence. The plaintiff was the owner of a house at Shinyanga which was occupied by a number of tenants. On the material date, one of the occupants purchased one gallon of what was believed to be pure unadulterated kerosene from the kerosene pump at the petrol station owned by the first defendant. The kerosene was supplied by the second defendant. Later that evening, observing that his light was growing dim, one of the occupants of the house attempted to fill it, while it was still alight, with the kerosene purchased earlier. There was an explosion followed by a fire and the building was almost

completely destroyed. An analysis of the liquid sold from defendant’s kerose pump showed that it consisted of 82.4% kerosene and 17.6% petrol. The court found that this mixture was highly inflammable and combustible and a dangerous substance to sell to consumers for ordinary household use, especially for

lanterns. The court also found that it was this dangerous mixture which caught fire, exploded and caused the house to burn down.

Held: (1) In a suit for negligence, a plaintiff must alleged in the plaint and prove (a) the existence of a duty of care; (b) the breach this duty; and (c) resulting damage.

(2) A plaint, although badly drawn, should not be struck out, if it contains sufficient allegations of fact to show that there are serious issues or difficult questions of law to be decided.

(3) Once the plaintiff had shown that the liquid sold as pure kerosene was in fact a dangerous mixture, the inference was that its presence was due to someone's fault and it was for the defendants to show that the fault was not theirs.

(4) The law imposes a duty to take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure persons so closely and directly affected that one ought reasonably to have them in contemplation.

(5) The nature of that duty varies according to whether or not the act involves a thing dangerous in itself.

(6) Liability does not depend on whether the defendants were manufacturers or distributors or both, but on whether they had put themselves in direct relationship with the consumer.

(7) In this case, the defendants owed a duty of care to the consumer, which consisted of taking precautions so that the substance sold as kerosene is not contaminated or made dangerous, a duty which they did not carry out.

(8) Where pleadings do not particularize special damages, the 'modern approach' is to allow them to be proved although not specifically pleaded, if the pleadings clearly show a claim for special damages.

(9) The opinion of an engineer not specially qualified to assess damages caused is acceptable on the issue in view of the shortage of experts in the country.

EL-KINDY, J. – [The court discussed the issues of fact summarized above and continued].

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The next issue was framed to find out "who made the mixture," and this issue raised the question of burden of proof in such cases. It is clear from decided cases that the plaintiff has not only to allege (a) the existence of a duty of care; (b) the breach of such duty of care; and (c) the resultant damage in his claim. This court already heard a submission of no cause of action raised by the learned defence counsel. However, the defendants were not satisfied with the ruling of my learned brother, Mr. Justice Mnzavas, Ag. J. (as he was then), appealed to the Court of Appeal and the Court of Appeal upheld the ruling of this court in their judgment in Civil Appeal No. 13 of 1971 MWANANCHI SERVICE STATION AND TOTAL TANZANIA LIMITED v. B.A.MINGA (unreported). Although the Court of Appeal agreed with the learned defence counsel that the "plaint was badly drawn," the learned judges did "not think a plaint should be struck out, if it contains sufficient allegations of fact to show that there are serious issues to be decided between the parties and particularly not where there are difficult questions of law to be decided." It is, therefore, not open for me to reopen a decided point, but it is clear that if the plaintiff's counsel wanted, he could have applied for and probably be permitted to present an amended plaint so as to remove the defects mentioned. However, the learned counsel for the plaintiff did not do so. The learned defence counsel complained against this. I can do no more than note that the defects had not been cleared, and the suit stands for decision with all the attendant defects and problems. On the issue now before me, it was for the plaintiff to show that the liquid sold to him was the mixture he alleged it to be and since the mixture came out of the pump of the petrol station of the first defendant with liquid supplied by the second defendant on a hospitality basis from another company, the burden of proof is upon the defendants to rebut the allegation. The mixture could only be there as a result of some one's fault

and having found that the mixture came from the stated kerosene pump the plaintiff discharged the burden of proof placed on him and it was for the defendants to show that the fault was not theirs. (See GRANT v. AUSTRALIAN KNITTING MILIS (1936) A.C. 85 per Lord Wright). Neither the first nor the second defendant led any evidence to show that the liquid from the kerosene pump was kerosene pure. Instead Damji (D.W.1) who spoke on behalf of the first defendant, said that some kerosene was sold to customers on 11-12th August, 1968, 10-11th August, 1968, 8-9th August, 1968, 12-13th August, 1968 as the station daily records (Exhibit D.5) showed and that the last quantity received was 650 gallons from the second defendant which was delivered on the 26th July, 1968. The implied meaning was that if so much kerosene was sold on various dates without any complaint from customers, the irresistible inference was that the kerosene sold could or was not adulterated. With respect, the inference is not necessary, as there could be several explanations why customers who bought the liquid on these dates did not complain. It does not even mean that therefore, there was no complaint or that the kerosene was in saleable state. A petrol attendant was on duty at the said petrol station, but his person, who, probably, would have aided the defence cases, was not called to give evidence as it should have been done if he supplied the saleable kerosene. Nor did the Manager of the petrol station give evidence. It was said that

he had left the country. It is rather odd for him to leave at such a time when he knew that there was pending a civil suit against his firm. Having regard to the evidence led, I find the first defendant did not discharge the burden of proof imposed on it.

For the second defendant, Nasser (D.W.2) described the procedure of supplying kerosene to the first defendant. He said that every product has a different storage tank, and since they are separate, there was “no possibility or likehood of the products mixing,” and that the intake and outtake is done under

the supervisor of the depot manager. He said that every Total Petrol Station, or any such station, maintains a separate tank for each type of petroleum product and that these tanks remain the property of the supplying company. In this case, these tanks remain the property of the second defendant. He said that each separate tank had its own pump, and that petrol cannot come from the pump of kerosene. To that extent, that will be true, but it does not take into account the fact that the kerosene may have been contaminated before it was filled in the correct tank or the correct tank was itself defective. Hence, petrol could come out of a kerosene pump, if that was the substance added to the kerosene. Be that as it may, the said witness continued to say that the product will go to the consumer in the same state as it left the depot pump, so that the first defendant had no opportunity to interfere with the product. As a result, the kerosene supplied could not have been checked by the first defendant to find out if the product supplied was contaminated, the first defendant would not have known of this. I accept this general description of the process of supplying petroleum products to petrol station owners but it is not an adequate defence, in the circumstances of this case as there is no necessary connection between the general description and the depot at Tabora from which the kerosene came. There is no evidence to show that (a) the kerosene tank at Tabora conformed with the general description given, and (b) that the same kerosene tank was not defective of could be inferred to have been free of defect. In my view, the burden of proof has not been free of defect. In my view, the burden of proof has not been discharged by the second defendant either.

It was stated, and this can be seen from the mere perusal of the plaint (Para 5 thereof), that the plaint was defective. It did not state that the mixture was dangerous. This is correct, but this court, unfortunately for it, has to decide this case nevertheless. The evidence disclosed that the mixture was dangerous in itself, and there seems to be placed a higher duty of care in such cases. However, I would like to refer briefly to the general duty of care as stated in the notorious case of M'ALISTER DONOGHUE v. STEVENSON (1932) A.C. 562. I shall quote passages from this judgment to the extent that they are relevant to

this suit. At p. 580 Lord Atkin discussed the concept of a general duty of care when he said: “At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instance. The liability for negligence, whether you style it such or treat as in other systems as a species of “culpa” is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code ensures cannot in a practical world be treated so as to give a right every person injured by them to demand relief. In this way rule law arise which limit the range of complaints and the extent of

remedy. The rule that you are to love you neighbour becomes in law; you must not injure you neighbour, and the lawyers’ question, who is my neighbour? Receives a restricted reply. You must take foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seem to be – persons who are so closely and directly affected by my act that I ought reasonable to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called in question”. The general principle has been applied and sometimes even modified in various decisions in England, but I do not consider it necessary to review them generally having regard to the case in had. Suffice to say that the quotation is a useful guide in this case as in others.

At page 583, the said Lord Atkin gave his opinion in connection with “articles of common household use,” and kerosene, is such a common household article in this country. He said: “I confine myself too articles of common household use, where every one, including the manufacturer, knows the articles will be used by other persons than the actual ultimate purchaser – namely, by members of his family and his servants, and in some cases his quests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon

its members as to deny a legal remedy where there is so obviously a social wrong."

Later on, at page 595, the same learned judge considered the distinction made between dangerous and non-dangerous things. He said: "I do not find It necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical different ion by which to distinguish the existence or non-existence of a legal right".

And he agreed with the opinion of Scrutton L.J. in the case of HODGE &SONS v. ANGLO-AMERICAN OIL CO. (1922) 12 LL. L. Rep. 183. I think the learned judge saw the difficulty involved. In this case, pure kerosene is not dangerous in itself for the reason that the flash point was high, but the mixture of the kerosene with petrol was a dangerous substance as its flash point was low.

This is probably a clear distinction since kerosene's flash point is 44 ^{0} C while that of petrol is 12 ^{0} C, but it would probably cause a serious argument if the range had been one of a few degrees only. However, the distinction is well established. In the case of DOMINION NATURAL GAS CO. LTD. v. COLLINS AND PERKINGS, (1909) A.C. P. 640 at p. 646 Lord Dunedin said: "What that duty is will vary according to the subject matter of the things involved. It has however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things ejusdem generis there is a peculiar duty to take precautions imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precautions, it is no excuse to say that the accident would not have happened unless come other agency than that of the defendant had

Intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it ….. on the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

And liability does not depend on whether the defendants were manufacturers or distributors or both, but on whether they had put themselves in direct relationship with the consumer. I would adopt with approval the words of Stable J. in the case of WATSON v. BUCKLEY & ORS. (1940) 1 All E.R. page 174 wherein the learned judge said: "I do not think that it matters whether the man is a manufacturer or whether he is a distributor. It seems to me to be the same in the case of a person through whose hands there has passed a commodity which ultimately reaches a consumer to his detriment. Where that person has intentionally so excluded interference with, or examination of, the article by the consumer, then he has, of his own accord, brought himself into direct relationship with that consumer so as to be responsible to the consumer for any injury the consumer may sustain as a result of the distributor's negligence. The duty is there."

On the evidence, it is clear that the defendants owed a duty of care to the consumer. That duty consisted of taking precautions so that the substance sold as kerosene is not contaminated and made dangerous by their negligence. The defendants knew, or ought to have known that, this duty of care existed, and that, in this case, the consumers needed kerosene pure and not kerosene with something else for which they had not bargained. It seems to me to be irrelevant whether Nkangawabagwe or Bujibu, or both of them, were tenants, servants, or agents of the plaintiff. They were simply visitors.

This simple fact did not make the substance sold to the occupants any less dangerous than it was. Their duty was towards the consumer, and the defendants ought to have known that by selling such a mixture to visitors of the house of the plaintiff, damage was likely to occur if the substance was used.

They had, therefore, brought themselves into direct relationship with the plaintiff through their own conduct. It is also to be noted, on the evidence, that the substance alleged to be kerosene could not, nor was it expected, to be examined by the purchasers so as to satisfy themselves that the substance was well and truly pure kerosene. The evidence further showed there was no external interference by a third party – e. i. novus actus interveniens which the defendants could rely on. I agree with the learned defence counsel that it was not pleaded that the substance reached the consumer in the state it left the kerosene pump, but, with respect, I cannot agree that there was no evidence to show that it reached the house of the plaintiff in the state it left the kerosene pump. In this respect, there was the evidence of Nkangawabagwa which showed that he took the liquid directly from the said petrol station to the house of the plaintiff. The liquid, admittedly, was not sold in a sealed container. And it was not supposed to be sold while in a sealed container. It

appears that a customer would call at such pump, and buy the liquid as it came out of the pump and put into the container. It was not or the plaintiff to prove that the manner of carrying the liquid to the petrol station was defective. As I have said it was his duty to show that the liquid he bought was not kerosene, as he did, and leave it to the defendants to put in their defence. It would be most unreasonable to expect a consumer to know and to expect him to prove the inside working of the two defendant companies. It was for these two companies to how that the mixing up could not have occurred when the liquid was in their possession. I find, therefore, that both defendants were in breach of a duty of care. They were negligence in selling a dangerous mixture to the occupants of the house of the plaintiff, when they knew that he purchaser was likely to use the liquid for domestic purposes as kerosene. There was nothing to suggest that the liquid was dangerous. And if the defendants did not know the nature of the liquid sold, then they were more than negligent in the matter, as this would indicate that

they did not even take the reasonable care to make sure that the liquid which they sold as kerosene was in fact kerosene. Nkangawabagwe did not know the nature of the liquid. Nor was he expected to know of this. Like any reasonable consumer, who buys kerosene off a kerosene pump at a petrol station, he had no reasonable cause to suspect that the liquid he bought was not pure kerosene. He relied on the distributors and he cannot be blamed for this.

Let me turn now to the question of damages sought. Paragraph 6 of the plaint reads. "On or about the 11th day of August, 1968 at about 10 p. m. the said plaintiff's tenant and/or agent poured some of the said kerosene in his lamp and lit the same whereupon the said kerosene caught fire which spread to the ceiling board of the house and caused extensive damage to the extent of Shs. 33,600/= to the plaintiff's house as shown in the report of the Regional Engineer, Shinyanga which is annexed hereto and marked exhibit 'A' to which the plaintiff will crave leave to refer to as part of the plaint."

And paragraph 8 sub-paragraph (1) prayed that judgment should be entered in favour of the plaintiff for a sum of Shs. 33,600/=. Neither paragraph 6 nor Para 8 stated whether this was sought as general damages or as special damages. It seems that there is an accepted distinction between general and special damages. The learned author of MAYNE AND MC GREGOR ON DAMAGES, 12th Ed. At page 813, discusses this concept in some detail in paragraph 970. He states: "In considering how the Plaintiff must deal with damages in his statement of claim, a basic distinction must be made between general damage and damages. General damage consist in all items of loss which the plaintiff is not required to specify in his pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items of loss which must be specified by him before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary and useful to warm the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial."

The learned author then quoted the words of Bowen L.J. in RATCLIFFE v. EVANS (1892) 2 Q.B.D. 524 at 528 where the learned judge said that special damage "means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial." The distinction is accepted by this court. The distinction is based on a requirement that certain claims needed to be specified. I also accept the test stated and I apply it in this suit. It is clear from paragraph 6 of the plaint that the claim to the damage of the house was in the nature of claim to special damages as the defendants were entitled to know the nature of the claim against them although the paragraph was silent on them. To the extent the pleadings were drafted, they were defective, but I would respectfully follow the modern approach stated in the case of LONDON – GRIFFITHS v. SMITH (1950) 2 All ER. 6622 and allow special damages to be proved although this was not pleaded as I am satisfied that the pleadings clearly showed that it was a claim for special damages. The plaintiff therefore had to prove damages. The learned defence counsel submitted that special damages should be strictly proved. I agree that it is the duty of the plaintiff to prove the amount he claims as special damages. I am not sure whether the use of the words "strict proof" adds anything to the accepted burden of proof in civil cases. The issue then is whether the plaintiff has proved the damages he was claiming. In this respect, he relied on the evidence of himself and of Mr.Choto (P.W.10) together with the report prepared by Mr. Choto (P.W.10). The plaintiff said that when he visited his house on the 12th of August, 1968, he found that the house was destroyed and that he requested Mr. Choto to assess the damage done to his house, and the latter obliged. According to his (P.W.10) evidence and report, the building was I-shaped making two wings – a western wing and an eastern wing. The measurements of the western wing were 64 feet long by 22 feet wide, and 32 feet long by 18$^{1}/_{2}$ feet wide of the eastern wing. These were external

measurements. The walls were $10^{1}/_{2}$ feet high and he floor area was approximately 2000 square feet, and of 28,000 cubic feet. He used the volume as his basic figure and calculated the construction cost of a cubic feet at Shs. 1/50, and this gave him the figure of Shs. 42,000/=. He confirmed that the building was destroyed by fie and that it was built of permanent materials. The foundation was built of concrete although the correct size and depth of the foundation was not given. The whole ceiling was burnt. The windows and doors were damaged by fire. It was found the walls had sustained cracks and weakened in several placed. Some of the cracks were continuous from top to bottom. Mr. Choto said these cracks were caused by fire. In respect of the roof, all the timber was burnt, and the corrugated iron sheets were badly weakened and hey had no support of the trusses. The ceiling was totally burnt, but he could tell that there was a ceiling by the remains of the ceiling on the walls. And finally, he said that the remaining part of the building was weakened. He said that the destruction was approximately 80%. The learned civil engineer was extensively cross-examined on his commissions and omissions when he made the general assessment of the destruction to the building. I do not intend to refer to each of the defects in omissions in this case, but they are all taken into account in assessing his evidence.

However, I would refer to some of the most glaring defects in the evidence. It is clear that Mr. Choto was a civil engineer by profession, and probably most of his omissions arose out of the fact that assessment of the nature he was asked to do was not, strictly speaking, the specialty of his branch of the profession. Probably a quantity surveyor, or architect, or insurance assessor would have been a better person to do the job. But this court has to be realistic about these professional things especially when such evidence is only an aid to the court in its assessment of reasonable damage. One cannot ignore the fact that in a developing country like ours professional of a different specialty are come times

called upon to do the job of other professionals due to the well known fact of shortage of experts. Therefore, this court has no alternative but to rely on the evidence of Mr. Choto to the extent that it aided this court to come to a fair conclusion. In my view, there was evidence which clearly showed that damage was done to the house of the plaintiff as a result of the fire which followed the selling of the dangerous mixture of the occupants of the house of the plaintiff. It is clear that the exact cost of the construction of the building is not known. It was completed in 1965. But this, by itself, should not be an impediment to assessment although it is a factor to be taken into account. The house was destroyed in august, 1968 and, therefore, it has been in existence for slightly over two years. By any means, it was still a new house, and the depreciation in value was negligible although it cannot be said that its value had not depreciated. Therefore having regard to the evidence before me and that of Mr. Choto in particular, I find that special damage has been proved on balance of probability. Although his evidence was wanting in so May ways, I cannot say that his assessment of 80% destruction was in any way very high or very low. Having regard to the evidence, thin as it was, I accept the assessment of 80% at the assessed price. I, therefore, assess special damage at Shs. 33,600/= (thirty-three thousand and six hundred only), which the defendants should pay to the plaintiff jointly and severally.

It is also clear that as a result of the destruction of this house, the plaintiff lost rent due to him every month. For the 8 rooms, the plaintiff was getting Shs. 400/= per month. The plaintiff is entitled to be compensated for this loss. This is also given by way to special damage. The defendants should pay the plaintiff Shs. 400/= per month commencing on 11th August, 1968 till full payment is made. The plaintiff also prayed for interest on the amount due at the rate of 9% from 11th August, 1968 till payment is made. I see no reason to withhold this from him. It is accordingly awarded. The plaintiff is also awarded full cost against both defendants.