

**THE
LAW REPORTS
OF
TANZANIA**

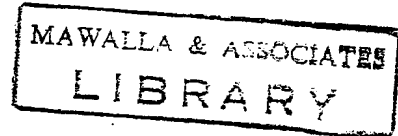
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**1977
PART I & II
III & IV**

**FACULTY OF LAW
UNIVERSITY OF DAR ES SALAAM
P.O. BOX 35093
DAR ES SALAAM
TANZANIA**

THE
LAW REPORTS
OF
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Faculty of Law,
University of Dar es Salaam,
P.O. Box 35093,
DAR ES SALAAM.



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Selection of Cases

All decisions of the High Court of Tanzania 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 Law Reports.

Index

The index has two divisions: a) Civil, which includes all non-criminal and non-penal topics; and 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 some instances, a summary of the facts is given in the headnote.

Identification of Cases

The system of identifying cases is as shown in the following example:

JOHN MLAY v. REPUBLIC High Court, (PC) Crim.App. 24-DSM-73, 7/2/72 Saidi J.
(1) (2) (3) (4) (5) (6) (7)

(1) Parties - The full name of each party is given, first name first. Where there are several plaintiffs, defendants or accused persons, only the name of the first one is given.

(2) Court of Decision - This is the court which decided the case, either the Court of Appeal or the High Court.

(3) Court of Origin - This indicates the type of court in which the case was originally heard. "(PC)" stands for "Primary Court", and "(LC)" stands for "Local Court". No abbreviation is used when the case originated in a District Court or the High Court.

(4) Type of Case - The following abbreviations are used:

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

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Other abbreviations are added as the need arises.

(5) Case Number - This is the number assigned to the case in the series indicated by parts (3) and (4) of the citation.

(6) City - This indicates the city in which the case was heard, or to whose registry the case was assigned. "DSM" is Dar es Salaam; "DIM" is Dodoma, "A" is Arusha; "MZ" is Mwanza; "MT" is Mtwara. Where these are not appropriate, the name of the city is given in full.

(7) Year of Filing - This indicates the year in which the case was filed and assigned a case number.

(8) Date of Decision - This is the date appearing on the decision.

(9) Name of Justice - This indicates the judge or judges who decided the case.

Identification of Inspection Notes

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

Headnotes

These contain a summary of legal propositions found in the case, whether part of the ratio decidendi, or mere obiter dicta. Where necessary a summary of the facts is also given.

Editorial Notes

These endeavour to provide elucidation and guidance to the reader on difficult or controversial points of law raised. In certain instances, they are critical of the judgment reported, in the spirit of aiding the development of a progressive and responsive legal system in Tanzania.

Running Heads

The correct form of citation of the case reported is given in the top right hand corner of each page. Where parts of two cases appear on the same page, the citation of the case which begins on that page is given.

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1. MICHAEL M. LEOPOLD v. REPUBLIC
HIGH COURT CRIM. CAUSE 19-DSM-76, 28/4/76
SAMATTA, AG. J.

HELD:

- 1) The proper test to apply in considering an application under S.80(1)(a) C.P.C. is not whether the Magistrate did act in a prejudicial manner but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the Magistrate in question.
- 2) In determining the question of what is a reasonable apprehension on the part of the accused, regard must be had not to abstract standards of reasonableness but to the standard of honesty and impartiality of the accused himself and his degree of education and intelligence.
- 3) When a Resident or District Court makes an order or ruling in a criminal trial, any party aggrieved by the order or ruling does not have an automatic right to have the trial stayed so that the order or ruling may be tested on appeal in the High Court.

Application allowed.

SAMATTA, AG. J. - This is an application under S.80(1)(a) of the Criminal Procedure Code, for the transfer of Dar es Salaam District Court Criminal Case No.1895 of 1973, Republic v. Michael Morongwa s/o Leopold, from Mr. E.E. Kazimoto, the learned Magistrate who has been hearing it, to another magistrate. The Director of Public Prosecutions, who was represented by Miss Sheikh at the hearing of the application, did not appose it.

Before I proceed to deal with the grounds which Mr. Adoko, on behalf of the applicant, has put forward in support of the application, I propose to give the history of the case, as I am inclined to think that it has some bearing on the application. In so doing I shall have, even at the great risk of making this ruling unduly long, to quote extensively from the record of the proceedings. The case has undoubtedly had a tortured career. The accused, now the applicant, was charged before the District

Court on 11th September, 1973, with stealing by servant, contrary to Ss.265 and 271 of the Penal Code. The hearing of the case began on 11th February, 1974, before Mr. R.N. Okonkwo, Senior Resident Magistrate. The accused was then being represented by Mr. Cobb. For reasons which need not be mentioned, up to 21st April, 1975, evidence of one witness only had been recorded. Shortly after that date Mr. Okonkwo left the country for good. It would appear from the record of the case that sometime later Mr. Cobb was disbarred from practising law in this country. Accordingly, he withdrew from the case. The accused, who was in custody under the Preventive Detention Act, was granted bail by the court in so far as the case was concerned. For one reason or another he entertained the belief that the order for his detention had been revoked. He therefore asked the court to inquire from prison authorities as to why he was still being detained when the court had granted him bail. The court (Mr. E.E. Kazimoto) declined to undertake this task, on the ground that it fell outside the province of the court's responsibilities. The accused continued to remain in custody.

When the case came up on 24th October, 1975, before Mr. Kazimoto for continuation of hearing, the accused, who was unrepresented, elected, in exercise of his statutory right, to have the case heard de novo. He did object however, to the case being heard on that day. This is what transpired in the courtroom, as can be gathered from the record of the proceedings:

Accused: I object the case for hearing because of my bail. I have been released from detention. The prosecution did not bring the court order. The prosecution have failed to do. I am not prepared to say anything in this case.

Court: In short you are refusing to have the case heard because the prosecution did not comply with court order as to whether detention order had been lifted or not and the question of bail.

Accused: Yes, I cannot make a fair defence.

Court: Having considered the above application; objection is overruled. Hearing to continue.

Court: Would you sit down and hear the case.

Accused: I am sitting down and I am not prepared to answer the charges.

Shortly after the accused sat down the first prosecution witness started giving his evidence. In all, five witnesses for the prosecution testified on that day. The accused declined to cross-examine them on the ground that he had not been extended a fair opportunity of preparing his defence and that his counsel was going to take control of the defence case. The case was adjourned to 11th November, 1975, for continuation of hearing.

On that date, the accused made a new complaint to the learned trial magistrate. He said:

I have a point I would like to make. This is very absurd. I have prepared my defence case. The papers were taken by officer in charge of Ukonga prison. I feel I have been deprived of my defence. I have also said I have to be represented. My advocate has not come. I request that the case be stood over waiting for my advocate. The other points I have made regarding my release from prison. I am at your mercy for consideration. The confiscation of my papers has tempered with my defence. Even the prosecution would not have a right to take my documents.

The learned Magistrate's ruling on the new complaint was in the following terms:

As regards the question of confiscation of your papers I do not think this is the proper forum to discuss the matter. The circumstances which led to this confiscation are unknown to the court. I am not going to air any views on it.

I break the narrative just to observe that I should have thought that if anybody seizes any documents from an accused person which are vital to his defence a court of law will regard it as its duty to assist the accused to recover them so that justice may triumph. Be that as it may, as the advocate for the accused did not turn up the case was adjourned to 24th November, 1975. Mr. Essack appeared for the accused on that day. He applied for recall of the five prosecution witnesses so that he could cross-examine them. According to the Public Prosecutor, one of the

witnesses was then about to leave the country, presumably for good. The learned Resident Magistrate refused the application. His ruling on it reads as follows:

I have considered the application for recall of witnesses for cross-examination. As would appear from the proceedings with you (sic) the accused refused to cross-examine and to have nothing to do with the case as the court was responsible for his detention. He appeared to have blamed the court for its failure to get him and hence all opportunities were accorded to him. The accused was further informed of his right to getting an advocate who could apply for recall of witnesses but he refused. I must point out that as much as the court tried to assist the accused in every respect he decided to sit on his rights. It would be not just to use the court services in a manner which would please an individual. As accused has been assisted to the utmost and he refused to use the assistance the court (sic) should not be heard now to apply for recall of witnesses for cross-examination. Application for recall of witnesses for cross-examination refused.

After a short adjournment, Mr. Essack applied for and was granted leave to withdraw from the case. I have not been able to discover from the record and I do not stop to speculate as to whether his sudden exit from the case had any thing to do with the learned Magistrate's ruling. Soon after his withdrawal another witness for the prosecution gave evidence. The accused cross-examined him. The case was then adjourned to 8th December, 1975, for further hearing.

On 8th December, 1975, the accused was represented by Mr. Adoko, who is on record as having stated the following:

I am briefed today to represent the accused. He has given me a document which is an appeal to the High Court. There are two grounds. One was that the application for bail is refused and that the trial magistrate should be changed. With your permission I would like to read to the court the grounds of appeal and then I'll submit them to the court.

The learned Resident stayed the proceedings pending the outcome of the intended 'appeal'. When the matter was referred to this court Biron, J., made an order in the following terms:

By consent application for a change in venue marked withdrawn. The prosecution witnesses required by the defence for cross-examination to be recalled if available. The brief allegedly prepared by the accused and in the hands of the prison authorities to be handed over to the defence counsel if available, and the prison authorities are so ordered provided the brief is available. And the bail granted to the accused is extended on the same terms, as originally granted. Needless to add, this last is ineffective as against any detention order, if there be such order in force.

The hearing of the case was resumed on 10th February, 1976. Following the order made by Biron, J., the learned trial magistrate ordered that "the prosecution witnesses should give evidence and those who had testified should be recalled for cross-examination at a later date". Two witnesses gave their evidence, one of whom was a police officer who produced before the court as an exhibit a bank statement of the personal account of the accused person. The document was produced after a strong objection by Mr. Adoko was overruled by the court. After that the hearing was adjourned to 19th February, 1976. On this date the hearing was further adjourned to 8th March, 1976, as Mr. Adoko did not turn up.

On 5th March, 1976, Mr. Adoko wrote a letter addressed to the learned trial magistrate, which was couched in the following words:

Dear Sir,

CRIMINAL CASE NO. 1895/1973
REPUBLIC v. MICHAEL MORANGWA LEOPOLD

As the advocate for the accused in the above case I apply under the provisions of Chapter III Part IV of the Evidence Act, 1967 that the Court order that I inspect and take copies of the entries in the bankers' book whose copies or what purported to be their copies were produced in court in the District Court of Dar es Salaam case No. 1895/73.

As the record of the trial show, the defence counsel has strongly objected to the production as exhibits the alleged copies of the entries in the banker's book. As

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the record would also show the leading questions asked by the Public Prosecutor in the case was to the effect that the said exhibits, were original. P.W.6 who produced the entries for admission as exhibits, affirmed at first that they were originals, subsequently that they were copies and lastly that he did not know since it was handed to him by an officer of the bank.

You will appreciate that since the case is founded on the bank entries the court as the eye of justice cannot afford to be satisfied by casting its searching glances at a mere copy whose genuineness in so much in dispute but must ensure that the original too do not escape its searching glances.

Yours sincerely,

AKENA ADOKO

As fixed before, the case came up for continuation of hearing on 8th March, 1976. Quoting from the record of the proceedings, this is what transpired in the court-room when the case was called up:

P.P.

There was an application by defence counsel requesting 3 witnesses who previously came to give evidence should be recalled for cross-examination. The witnesses are here in court. I have made them available for cross-examination.

Court: Where is your defence counsel?

Accused: My defence counsel has been here since 8.30 a.m. and that he has another case and after 12.00 noon he would have another matter in the High Court. He had an application that we should apply for order to inspect the ledger card of the savings bank. He has asked for apology. Although he had called the witness for cross-examination it was to be based on the document.

Court: As regards the latter applying for court order it appears from the record that counsel intends to conduct cases as if it was a correspondence course. Any application has to be made by word of mouth and in court so that the other party should have an opportunity to comment on it and the court to make a ruling especially in a case where evidence has already been noted. When the case last came on 19/2/76 counsel who agreed for hearing on that date, having been furnished with the proceedings did not appear. Instead he applied that the case should have come for hearing on either 8/3, 9/3 or 10/3. That letter he even did not refer to any exhibit which he might have wanted during cross-examination.

Now three witnesses are present on 5/3/76 he applied by letter again for inspection of banker's book. The letter was received late on 6/3/76 and even if his application were to be entertained the case could not proceed today as certainly he could not have inspected the banker's books. In my considered view cases are not conducted through correspondence. Secondly counsel has been given every opportunity this court could have given him, witnesses have been recalled for cross-examination, counsel is not here. He knows that he has this case to-day and yet he has fixed another case before another magistrate. In my view these tactics amount to delaying tactics. Under circumstances application for inspection refused and must be made according to procedure and the three prosecution witnesses called for cross-examination are allowed to go and that any further application for cross-examination will be and is hereby refused.

P.P. I apply for another date to call my last witness.

Accused: I apply to appeal to High Court against the ruling.

Court: Having regard to the circumstances that I may be leaving and taking into account the state the case has come to and especially that the advocate seems to employ delaying tactics application to appeal

against my ruling is refused at this stage. (The underscoring is supplied)

Order: Hearing on 22/3/76.

E.E. KAZIMOTO, R.M.

On 22nd March, 1976, the hearing of the case was not resumed as Mr. Adoko informed the court that he had lodged an application before this Court for a change in venue of the trial.

Mr. Adoko, on behalf of the applicant, put forward five grounds in support of the application under consideration. The grounds, which unhappily were phrased as though they were grounds of appeal, read as follows:

1. That the learned magistrate erred in law in refusing to abide by the order of the High Court;
2. That the learned magistrate erred in law and in fact in trying to penalise the appellant for faults caused by his own lateness;
3. That the learned magistrate erred in law in displaying unbecoming malice towards the appellant;
4. That the learned magistrate erred in law in excluding material evidence from the record of the proceedings; and
5. That the learned magistrate erred in law and in fact in refusing to order the inspection of the banker's book when the evidence of alleged copies was being challenged on the ground of forgery.

At the hearing of the application, Mr. Adoko abandoned the fourth ground. Putting it on a broad basis, it was the contention of the learned advocate for the applicant that taken as a whole the attitude of the learned trial magistrate toward the defence during the proceedings was such as to give rise to a reasonable apprehension in the mind of the accused person that he was not going to have a fair and unprejudiced trial. Miss Sheikh, counsel for the Republic, submitted that this court would have no option but to grant the application if from the facts it concludes that the applicant is not satisfied with the way the learned magistrate has

been handling the case. With due respect, I am not inclined to think that this is the right approach to the determination of the application. Indeed, none of the authorities she cited later would appear to support her proposition. In my view the proper test applicable to the determination of the application is that which was stated by Wilson, J., in Bhag Singh v. Rex I.T.L.R(R) 133, and adopted by Saidi, J., (as he then was) in Republic v. Hashim (1968) E.A. 656. Bhag Singh's case concerned an application for the transfer from one court to another of a case which had been partly heard. One of the grounds advanced in support of the application was that a fair and impartial trial of the case could not be had in the trial court. The learned Judge said, at p. 133:

(T)he proper test to apply in considering this application is not whether the magistrate is actually prejudiced against the accused, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the magistrate in question; and that in deciding what is a reasonable apprehension on the part of the accused regard must be had not to abstract standards of reasonableness but to the standard of honesty and impartiality of the accused himself and his degree of education and intelligence.

It will be noted from this test that for an application under S. 80(1)(a) of the Criminal Procedure Code to succeed, the apprehension on the part of the applicant has to be a reasonable one, although, admittedly, in determining the reasonableness a subjective test must be applied. If this Court were to apply the test put forward by the learned advocate for the Republic in considering applications made under S. 80(1)(a) of the Criminal Procedure Code most, if not all, of the hearings of such applications would become mere rituals as in such circumstances it would be almost impossible for this court to hold that an applicant was not satisfied that he was not going to have a fair and impartial trial before the magistrate complained against.

Having indicated the test by which, in my judgment, the instant application must be determined, I now proceed to examine the merits of the application. In view of the conclusion I have reached in this matter, I do not propose to examine all the four grounds. On the first ground, Mr. Adoko submitted that this

Court having ordered that the prosecution witnesses who had already testified be recalled for cross-examination purposes, the learned magistrate's order of 8th March, 1976, denying the defence any opportunity of reaping the fruits of this Court's order was such as to raise a reasonable apprehension in the mind of the applicant that he was not going to have a fair and unprejudiced trial before the learned magistrate. I think there is some merit in this contention. No date had been fixed for the cross-examination of the witnesses. In the letter in which Mr. Adoko had proposed that the hearing of the case resume on 8th, 9th or 10th March, there was no suggestion that the cross-examination of the witnesses take place on any of those dates, as the magistrate appears to have assumed. In fairness to the learned magistrate, it must be said that he appears to have been misled by the statement which was made by the Public Prosecutor. Be that as it may, judging from the wording of his ruling the learned magistrate appears to have anticipated that an attempt was going to be made by the defence at a later date to have the witnesses recalled for cross-examination as he ruled in advance against such an application. This was undoubtedly wrong as each application must be considered on its merits as and when it is actually made. The applicant may be forgiven for having entertained the belief, as indeed he seems to have done, that the learned magistrate was not interested in giving effect to the order made by this Court. Even if it was true that the learned advocate for the accused was using delaying tactics the least the learned magistrate ought to have done was to give the accused himself the opportunity of cross-examining the witnesses. It may be that he did not do so because he was convinced that like on the previous occasion the accused was going to decline the 'offer'. Even if the learned magistrate entertained that belief he should still have clearly demonstrated that he was equally interested to know the other side of the coin by at least giving the accused person an opportunity of cross-examining the witnesses himself.

I now turn to the third ground. Referring to the learned magistrate's ruling on the accused's application made on 8th March, 1976, seeking leave to appeal to this Court against the magistrate's previous ruling of the same day, Mr. Adoko contended that the learned magistrate appears to have made up his mind to convict the accused as he said in his ruling that the accused could appeal against the previous ruling after judgment. With due respect to Mr. Adoko and in fairness to the learned magistrate it must be pointed out that nowhere in his ruling did the learned

magistrate use any such words. It is necessary, I think, to quote again the ruling in question. It reads as follows:

Having regard to the circumstances that I may be leaving and taking into account the state of the case has come to and especially that the advocate seems to employ delaying tactics application to appeal against ruling is refused at this stage.

While I am satisfied that the learned magistrate had not made up his mind to convict the accused, I am inclined to hold that the use of the words "at this stage" in the ruling was capable of giving an impression to the applicant, as, indeed, it seems to have done, that he was engaged in a hopeless forensic battle, the learned magistrate having already prejudged the case. What is important here is not what was in the mind of the learned magistrate when he chose to use those three words; rather it is whether the use of the words led to a reasonable apprehension on the part of the accused person that he was not going to have a fair and impartial trial. I cannot resist the temptation to remark that it is most unfortunate that the learned magistrate used words that were capable of being interpreted as demonstrating partiality on his part.

Before parting with the consideration of this ground I would like to make one observation of general character. There appears to exist a strong belief among some people (including the present applicant) in the country that whenever, a Resident or District Magistrate makes an order or ruling in a criminal trial a party who is aggrieved by the order or ruling has the right to have the trial stayed for the order or ruling to be tested on appeal in this Court. I must say with all emphasis at my command that the belief is unfounded in law. Neither the provisions of S.312(1) nor those of S.334(1) of the Criminal Procedure Code can reasonably be interpreted as conferring such a right on a party to criminal proceedings. Chaos would reign in subordinate courts if such a right did exist and the law would cease to command the respect it enjoys. I should have thought that the belief was given a mortal blow by the decision in Mabruk s/o Orongai v. Rex (1948) I.T.L.R.(R) 311, and decently buried by the decision of Georges, C.J., (as he then was) in Cletusi s/o Seffu v. R. (1969) H.C.D. n.314.

I now turn to the last ground. It was contended with conspicuous ability by Mr. Adoko that while the whole case

against the accused was based on bank entries, instead of ruling on the application made in his (Mr. Adoko's) letter of 5th March, 1976, the learned magistrate embarked upon attacking him of "trying to change the court into a correspondence school". If I understood him correctly, Mr. Adoko submits that this attitude is evidence of partiality on the part of the learned magistrate. I must confess that I have never heard it said before that an application under S.81 of the Evidence Act, 1967, which was one made by Mr. Adoko, must be made "by word of mouth and in court". Neither the section nor the established practice as I know it after ten years of, I hope, profitable experience at the Bar supports the learned magistrate's statement. The trial magistrate's rebuke of the learned advocate for allegedly having intended "to conduct cases as it was a correspondence course" was therefore ill-founded and uncalled for. I am not disposed to think, however, that by itself this fact could legitimately be made a basis for allowing the application.

Applying the test stated by Wilson, J., in Bagh Singh's case, the question I ask myself is this: Has the applicant made out a case to warrant this court to invoke its powers under S.80(1)(a) of the Criminal Procedure Code? I think he has. On a careful and dispassionate consideration of the three grounds I have endeavoured to discuss, I am satisfied that the applicant, who is described in the charge as an Accountant with the Cargo Handling Services Ltd., has a reasonable apprehension that he is not going to have a fair and unprejudiced trial before the learned magistrate, Mr. E.E. Kazimoto. Although the well known saying of Lord Hewart in Rex v. Sussex Justices, Ex parte McCarthy (1924) 1 K.B. 256, 259: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done", is more than half a century old, the principle it embraces is, if I may respectfully say so, as valid in 1976 as it was when the statement was made.

I would allow the application and order that the case be transferred from the District Court to the Resident Magistrate's Court, Dar es Salaam, where it should be heard de novo by another magistrate of competent jurisdiction.

2. NYANZA DISTRIBUTORS CO. LTD. v. GEITA GEN. STORES AND 5 OTHERS
HIGH COURT CIV. CASE 15-MZ-71, 18/1/75
MAGANGA, AG. J.

HELD:

- 1) Where an attachment order is issued by a court, any person with an existing interest at the time of the attachment, may file an objection against such attachment.
- 2) The production of a copy of a cash sale receipt made out one day before the attachment was levied was insufficient to prove that the objector owned the timber as claimed.
- 3) Where a person purchases an unidentified quantity of timber and takes delivery of a part thereof, he cannot be said to own any specific quantity of timber which is not delivered; but is subsequently attached by court.

Objections disallowed.

MAGANGA, AG. J., - The decree holder in this case attached properties which were found lying within the judgment debtor's premises. The judgment debtor then filed an application to raise attachment and six other people filed objections to the attachment of some of the items attached claiming that they have special interest on the items. At the hearing of this application the objection filed by the sixth objector Shindika Shija was allowed as the decree holder's counsel consented to this. This ruling therefore concerns only the judgment debtor's application and the objections filed by John Kisomba Magnus Haule, Boaz Charles Andrea, International Agencies & Construction Equipment and the Diocese of Mwanza (R.C.).

The application by the judgment debtor was made under section 95 of the Civil Procedure Code and in his affidavit in support thereof he averred that he should be allowed to pay the decretal amount by instalments as sale of the attached property would ruin his business. Section 95 of the Civil Procedure Code only pronounces the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. At the hearing of this application counsel for the applicant submitted that the judgment debtor has

all along applied to be allowed to liquidate the decretal amount by instalment but this has been refused. He also stated in support of the application that the judgment debtor has several other debts to pay and as such he should be allowed to operate his business.

The attachment order was properly made and so far the judgment debtor has made no attempt to liquidate the debt he owes the decree holder. His application has no merit at all and it cannot be entertained. It is therefore rejected.

The objector, Magnus Haule, stated that he delivered 28 pieces of timber to the judgment debtor to make windows for him and these are among the items attached. This was on 6th August, 1973 and he was issued with a cash sale of that date. A copy of the said cash sale is attached to the affidavit he filed. Mr. Tukunjoba for the decree holder objected to this application on the ground that the cash sale was issued only a day before the attachment was made. He also submitted that the objector had to adduce independent evidence showing where he bought the timber and who transported the same to the judgment debtor's premises. O.21 r. 58 of the Civil Procedure Code is very clear. It states that a claimant or objector has to adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. As submitted by the learned counsel for the decree holder the copy of the cash sale receipt was issued only a day before the attachment was levied. This in itself creates some doubts as to its genuineness and it was incumbent on the objector to adduce further evidence to show that the timber belonged to him. Thus he has failed to satisfy this court that the timber under attachment belongs to him. His objection cannot therefore be sustained and it is accordingly dismissed with costs.

Similarly the objection of Messrs. International Agencies and Construction Equipment cannot be allowed. Mr. Maduhu who appeared for the objector has made a statement that 47 logs lying at the judgment debtor's premises were sent there by him. Though he avers in the affidavit that an L.P.O. was issued to the judgment debtor by Comworks to supply timber this is not evidence that the logs belong to him. He did not even produce a copy of the said L.P.O. He thus totally failed to adduce evidence to prove his ownership of the attached logs. The delivery note he produced is not sufficient evidence of his ownership and there

are several alterations on it that makes it look suspicious. This objection cannot be allowed and it is accordingly dismissed.

The next objector is the Diocese of Mwanza which has been represented in this application by Brother Andrea. He stated that on 27/7/73 he paid Shs. 4,954/= to the judgment debtor for pieces of timber and was issued with a receipt which he produced. He took delivery of timber worth Shs. 1,485/= on 30/7/73. When he went back for the remaining pieces he was told by the judgment debtors that they had some problems and no timber was given to him. This objection also cannot be allowed for the simple reason that the objector himself says that when he paid the money he was not shown the timber he was buying. Even when he took delivery of the first lot he was told by the judgment debtor that the rest of the timber would be supplied to him when the judgment debtor got the same. It cannot therefore be said that the timber seized belonged to the objector as it had not been shown or handed over to him. Had there been evidence that the timber was handed to the objector but he was just late to take delivery the objection would have succeeded. In the absence of such evidence this objection must also be dismissed. The objector can file a civil suit for non fulfilment of the sale agreement to recover his money.

The only other objection is that of Boaz Charles Andrea who stated that the lorry registration No. MZV 129 which is attached belongs to him. He stated that the lorry was lying outside the judgment debtors premises when the court broker seized it. The vehicle was however later released. At the hearing of this application the objection was dismissed and the objector was advised to sue for damages as that was the right course for him. In the whole therefore, apart from those items which have been found to have been wrongly attached the rest can be sold on application.

3. FATU M. MASUDI v. ALLY R. MASUDI
HIGH COURT CIV. APP. 1-MT-75, 17/7/75
KISANGA, J.

HELD: 1) The relationship of being members of the same clan or of being cousins does not fall within the prohibited relationships under S.14, Law of Marriage Act.

- 2) Parents may arrange a marriage for their children provided that the children themselves, being of age, subsequently approve and enter into such a marriage willingly.
- 3) The proper construction of S.107(2)(a) of the Law of Marriage Act is that proof of one act of adultery by the respondent may, though not always, lead to a finding that a marriage has broken down irreparably. Such a finding will depend upon the circumstances of the case.
- 4) Where an Islamic marriage is terminated by talak before the coming into force of the Law of Marriage Act, and a suit for maintenance is filed after the Act has come into force, the court may order maintenance for a period of iddat as from the date the talak was effective.
- 5) Where an Islamic Marriage is dissolved under the Law of Marriage Act, the rule providing for the granting of maintenance for the period of iddat following such dissolution is inapplicable. In such cases any maintenance awarded for any period following the date on which the dissolution takes effect will be granted only on the general principle that the court has found special reasons for awarding the same.

Appeal partly allowed. Case remitted to lower court for further action.

KISANCA, J. - The appellant petitioned for divorce in the Primary Court of Mingoyo. That court found that the marriage in question was between person who were within the prohibited degree of relationship in terms of section 14(1) of the Law of Marriage Act in that the parties were a man and his niece, and also that the appellant wife had not consented to such marriage. The marriage was accordingly declared a nullity. Then the court went on to grant orders for ancillary reliefs relating to the division of the matrimonial assets, custody of the children of the marriage and maintenance for both the wife and the said children. Dissatisfied with the orders for maintenance and for the division of the matrimonial assets the wife now appeals to this court where one Athumani Masudi argued the appeal on her behalf.

Although the appeal is not against the principal decree, it seems necessary to consider the correctness of that decree. The trial court held that the marriage was a nullity first, because the appellant was a niece of the respondent. This, however, is not supported by the evidence. The evidence of Mshamu Masudi (the appellant's father) and that of Athumani Masudi clearly shows that the appellant's father i.e., Mshamu Masudi and the respondent's father, one Rashidi Masudi, have a common surname. So that the farthest one can go is to say that the parties belong to the same clan or that they are cousins, but certainly not a man and his niece. But the relationship of belonging to the same clan or of being cousins does not fall within those prohibited relationships under section 14 of the Law of Marriage Act.

The trial court further misdirected itself in finding that the marriage was a nullity for want of consent on the part of the appellant wife. Because the appellant wife herself has not suggested anywhere that she did not consent to the marriage. The marriage was celebrated in 1966 and the parties lived with each other as husband and wife until in 1973 when the incident leading to this suit happened. From 1966 is a considerable period and if the appellant wife did not consent to the marriage, it is most unlikely that she would continue to put up with it all that time. Furthermore during the trial the appellant wife stated that she did not seek to break up her marriage but that it was the respondent who did so by giving her "talak". To my mind this goes to show that the appellant wife was agreeable to her marriage and was prepared to continue it. It is true that according to the evidence of Athumani Masudi and Mshamu Masudi it would appear that the marriage between the parties was planned or arranged by parents, but there is nothing whatsoever to suggest that the parties were not agreeable to or were coerced into such marriage. For, it seems to me that there is nothing wrong with parents planning or arranging a marriage for their children provided that the children themselves being of age subsequently approve of or adopt such a planned marriage and enter into it of their own free will. I am therefore satisfied that the marriage in question could not be impugned either on the ground that the parties to it were within prohibited degree of relationship or that the appellant wife did not consent to it.

The question now is whether the marriage might be impugned on any other ground. It was fully established by evidence that the appellant wife committed adultery once and this is, in fact,

that led to the disagreement and the present proceedings. But the trial magistrate held that a single act of adultery would not warrant a dissolution of a marriage. With great respect I think that this was a misdirection. Section 107(2)(a) of the Law of Marriage Act provides:

(2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree

(a) Adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest.

It is at once apparent that the section applies when it is alleged that the respondent committed adultery. But in the present case the respondent husband was not alleged to have committed adultery. All that was alleged about him was that he told the appellant to go away by giving her "talak" after she committed adultery and he refused to accept her back as his wife.

The provisions of that subsection therefore were both misunderstood and misapplied. The record shows that following the act of adultery in December, 1973 the parties separated and continued to live apart until these proceedings were instituted about 9 months later. And even at the hearing of the suit the respondent husband was not prepared to take the appellant back as his wife. In those circumstances I could find no ground for thinking that the marriage had not broken down completely.

Even if the respondent husband was alleged to have committed adultery, I think that it was still a misdirection for the court to hold that no decree of divorce could be granted when the alleged adultery consisted of only one act. This is not the meaning of paragraph (a) of subsection (2) of section 107 as set out above. I think that on a true construction of that paragraph, what it means is that one act of adultery by the respondent may, though not always, lead to a finding that a marriage has broken down completely and that such a finding may be arrived at more readily where more than one act of adultery have been committed or where adulterous association has continued despite protest. Of course the question whether or not a single act of adultery suffices to found the conclusion that the marriage

has broken down completely will necessarily depend on the facts of each particular case because in arriving at that conclusion the court must have regard to all the circumstances of the case, but what is stressed here is that a single act of adultery by the respondent may, in a fit case, suffice to found the conclusion that the marriage of the parties has broken down irreparably.

Thus I am satisfied that had the trial magistrate properly directed himself on the facts and law in this case, he would have found that the marriage of the parties had broken down irreparably and he would have accordingly granted the decree of divorce as was petitioned for. I would therefore set aside the purported decree of nullity and substitute therefor the decree of divorce.

Having done that I shall now turn to consider the orders for ancillary reliefs as granted by the trial court. On the issue of the division of the matrimonial assets the appellant wife merely claimed that there was a house which she built jointly with the respondent, but she adduced no evidence at all to support such allegation. Indeed the respondent admitted that he owns a five roomed house but when the trial magistrate was summing up the case to the assessors he said that the respondent husband had claimed that this house was built by his parents and that he himself had contributed very little towards it, and at the hearing of this appeal the respondent reiterates his claim that the house was built by his parents. In this connection the respondent agreed to pay shs.200/- to the appellant as compensation for her contribution to the said house. The appellant accepted such an offer before the trial court and the order was made accordingly. I am unable to say that the order was wrongly made or that there is any evidence to warrant enhancement of that award.

However, the appeal against the order for maintenance appears to have merit. The appellant said that the respondent did not maintain her and their two children for the whole period between the time she left the respondent's home and the time of hearing this suit. In the memorandum of appeal it is further alleged that it was costing shs.11/10 per day to maintain the appellant and the two children during this period. Under the provisions of sections 63(a) and 129(1) of the Law of Marriage Act the respondent husband had a duty to maintain wife and children and under sections 115 and 130 of the Act the appropriate maintenance orders ought to have been made accordingly. Indeed, as indicated earlier, the appellant was granted an order for

maintenance which, however, covered only the period of "iddat" following the "talak" under Islamic law and the said order did not extend to the two children of the marriage. I think this was wrong. Section 115(1)(f) of the Law of Marriage Act provides that:

The court may order a man to pay maintenance to his wife or former wife where the parties were married in Islamic form, for the customary period of "iddat" following the date on which the divorce takes, or is deemed to have taken, effect.

I think the meaning of this paragraph is this. Where an Islamic marriage is terminated after the coming into force of the Law of Marriage Act maintenance may be ordered for the period of "iddat" as from the date the decree of divorce was granted by the court. This is so because under the Act the marriage is terminated effectively only through the courts. But where the marriage was terminated by "talak" before the Act came into force, such termination could be deemed to be effective under the Act and if the wife to such a marriage applied for an order for maintenance the court might grant the same for the period of "iddat" as from the date the "talak" was given because that is the date on which the dissolution of the marriage would be deemed to have taken effect.

Now in the instant case where the marriage was in Islamic from the respondent gave the appellant a "talak" on 25.12.73. It is clear that the dissolution of their marriage cannot be deemed to have been effected by such a "talak" because after the Law of Marriage Act came into force in 1971 a dissolution of marriage can only be effected through the courts, and therefore an order for maintenance covering the period of "iddat" could not properly be made to start from the date of such "talak" which is what the trial court did. But what is even more important is this. The proviso to section 115 of the Law of Marriage Act says:

Provided that where the marriage has been dissolved, the wife shall not, unless the court for special reason so directs, be entitled to maintenance for herself for any period following the date when the dissolution takes effect.

In the light of this proviso I think that the provisions of paragraph (f) which are set out above apply only where the

marriage of the parties was dissolved under Islamic law. For, if a marriage is dissolved by the court under the Law of Marriage Act, then the period of "iddat" cannot, in my opinion, be said to be a special reason within the meaning of that proviso on which the court might grant maintenance after dissolving such a marriage. I am therefore of the view that upon the dissolution of a marriage under the Law of Marriage Act the granting of maintenance for the period of "iddat" following such dissolution is inapplicable, and that in such cases any maintenance awarded for any period following the date on which the dissolution takes effect will be granted only on the general principle that the court has found special reason for awarding the same.

As I have stated above, the respondent husband had a duty to provide maintenance for his wife for as long as she remained legally married to him. Thus it is ordered that he shall pay compensation in respect of maintenance to the appellant wife as from the date the wife left his home to the date the decree of divorce was granted. But in accordance with the proviso to section 115, as set out above, I am of the view that she is not entitled to any maintenance thereafter because she has not advanced any grounds, and on the evidence I have not seen anything, which could amount to special reason for awarding any maintenance to her for any period after the marriage was dissolved by the court on 28.8.74.

As regards maintenance for the children of the marriage it is further ordered that the respondent husband shall also pay compensation in respect of maintenance of the two children for the period between the time they went away with their mother until the date the decree of divorce was granted on 28.8.74. The case is therefore remitted to the Primary Court at Mingoyo with a direction to that court to assess the amount of compensation payable in respect of maintenance to the appellant wife and the two children for the period between the time when these three left the respondent's home till the date of the decree of divorce i.e., 28.8.74. It is further directed that for the purpose of such assessment the court may hear evidence from the parties and their witnesses, if any, on the matter.

It is noted that the Primary Court awarded custody of one child to the husband and one to the wife with an order that the husband shall continue to maintain the child who was placed in the wife's custody. I think that order was proper and it shall stand.

In the result the appeal is partly allowed and each party shall bear his or her own costs.

MUSSA SEIFU AND ANOTHER v. REPUBLIC
HIGH COURT CRIM. APPS. 225 & 236-DSM-74, 9/4/75
BIRON, J.

- Held:
- 1) For the purposes of the Minimum Sentences Act 1972, for an offence of stealing to constitute a scheduled offence because the property stolen is that of a specified authority, there must be absolute ownership in such authority and not merely special ownership.
 - 2) The East African Cargo and Handling Services Ltd., does not constitute a special authority under the Minimum Sentences Act.

Appeal allowed.

BIRON, J. - The two appellants were convicted of stealing goods in transit and they were each sentenced to imprisonment for four years. Although in their petitions of appeal both appellants appealed against their convictions and sentences, at the hearing of their appeals which were consolidated, Mr. Raithatha who appeared for one of the appellants - who was the second accused at the trial, formally withdrew his appeal from the conviction and confined himself to appealing from the sentence only. The other appellant, who was the first accused in the lower court, followed suit and likewise withdrew his appeal from the conviction and confined himself to appealing from the sentence only. In this judgment, for the sake of convenience, I am retaining the descriptions of the two appellants as they were described in the lower court.

The facts of the case were briefly as follow:-

On the night of the 25th of June last year a watchman at the Ubungu Customs Sheds depot saw the two accused persons standing near the fence surrounding the depot. He saw the first accused throw a bundle over the fence, but it got caught in the fence and remained hanging on the outside of the fence. When the two accused saw that

they had been discovered by the watchman they both ran towards the gate of the depot shouting and raising the alarm. The police and a supervisor standing at the gate thought that the two accused were chasing a thief and accordingly let them pass. It was not until the watchman reached the gate that they discovered that the two accused, in fact, were the thieves. Both accused worked as casual labourers at the depot. One turned up for work the next day whilst the other did not turn up until a couple of days later. They were arrested and charged and duly convicted after a trial and sentenced as stated above. The bundle, also described as a carton, which the accused had tried to throw over the fence was recovered and found to contain thirty-three pairs of new trousers which, as it was established in evidence, were in transit in Dar es Salaam and addressed to a consignee in Lusaka, Zambia. It is apparent from the consignment note produced in evidence that the goods originated from Hong Kong.

In arguing this appeal Mr. Rathatha submitted that the sentence was excessive bearing in mind that his client was a first offender and a youth; his age as given in the charge sheet is nineteen years. The first accused likewise submitted that the sentence imposed on him was excessive. He, too, is a first offender and his age as given in the charge sheet is twenty-two years.

In mitigation, before being sentenced, the first accused is recorded as saying:-

My father is dead, has left eight children who depend on me. I am married with a child. My mother is very old.

And the second accused is recorded as saying:-

My father and mother are very old. There is a son of my brother who depend on me. My brother has four children who depend on me.

In sentencing the two accused the magistrate stated:-

Sentence:

Accused are all two first offenders, but they have stolen goods which value very high. Value of the stolen property is very high some shs. 3,300/-. Furthermore, in Customs Department offences of this

kind are committed almost every day. The offence is prevalent in the customs area.

Accused have advanced having dependants as their special reasons for a lesser sentence. I do not consider the fact that the accused having dependants is by itself a special reason amounting to a lesser sentence. If every accused would be given a lesser sentence merely because he has dependants there is a likelihood that every convicted African accused would escape the rigours of sentence because as it is understood no one within the African context is free of dependants. The fact that the value is shs. 3,300/- and the offence is prevalently committed in the customs I sentence each accused to four years imprisonment.

Right of appeal explained fully. Bundle of clothes to be taken to Cargo.

In the charge sheet the thirty-three pairs of trousers contained in the carton the accused were charged with and convicted of stealing goods in transit, the goods are described as the property of the East African Cargo & Handling Services Limited, Dar es Salaam - hereinafter referred to as the Company. When I asked Mr. Raithatha whether the Company was a specified authority within the meaning of the Minimum Sentences Act 1972, so that the offence of stealing its goods would constitute a scheduled offence under the Act, whereunder the offence would attract the minimum sentence of imprisonment for three years, Mr. Raithatha submitted that even conceding that the Company was a specified authority within the meaning of the Act, the goods stolen were not the property of the Company.

Item three of the first schedule to the Minimum Sentences Act 1972 reads:-

Theft contrary to section 265 of the Penal Code where the thing stolen is the property of a specified authority.

Learned counsel submitted that the goods were the property of the consignee in Lusaka, Zambia and not that of the Company; the Company only having a special property in the goods, the subject matter of the offence. Mr. Raithatha who contended that the terms special owner and special property were but legal fictions,

called in aid the definition of special property in Jowitt's Dictionary of English Law wherein special property is defined as:-

Special property has two meanings - first....

The first meaning is not relevant to this case; what is relevant is the second meaning which reads; at page 1426:-

Secondly, a person may have a special property in a thing in the sense that he can only put it to a particular use. Thus, in the case of a bailment (q.v.), the bailee has a special property in the thing bailed, for he is only entitled to deal with it in accordance with the contract of bailment; but he can maintain an action in respect of it against a wrongdoer. So possession is said to confer a special property, by which is meant that the possessor of a thing is deemed to be owner of it as against everyone who cannot show a better title.

Mr. Omar, who appeared for the Republic, agreed with Mr. Raithatha that the goods, the subject matter of the offence, were not the property of the company for the purposes of the Minimum Sentences Act 1972; but of the consignee in Lusaka, Zambia.

By Section 258(1) of the Penal Code:-

A person who fraudulently and without 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.

Thus, the Company although having only a special property - being only a special owner of the goods, the theft of such goods would still constitute theft from the Company under Section 265 of the Penal Code whereunder the accused were in fact charged and convicted, as well as under Section 269 - the goods being in transit. But does it necessarily follow that these goods were the property of the Company for the purpose of the Minimum Sentences Act 1972?

It is a well established canon of interpretation that a Penal statute must be construed very strictly. The Minimum Sentences Act 1972 is certainly very much a Penal statute. In

fact, it even deprives the court of its discretion in imposing sentences for offences scheduled under the Act; except that a court can impose a sentence higher than the prescribed minimum. And it is a well established principle that courts are jealous of their jurisdiction and the power to exercise their discretion, and will not lightly surrender either unless constrained by law to do so.

I therefore uphold Mr. Raithatha's submission, supported as it is by Mr. Omar for the Republic, that for the purpose of the Minimum Sentences Act 1972, for an offence to constitute a scheduled offence because the property concerned is that of a specified authority there must be absolute ownership in such authority and not merely special ownership.

Further, there is nothing in the proceedings to indicate that the Company is a special authority within the meaning of the Minimum Sentences Act 1972, and it is apparent that the case proceeded and was dealt with as one not coming under the Minimum Sentences Act 1972.

The convicting court, therefore, had, as has this Court, full discretion in the determination of the proper sentence to award.

I have set out the mitigating factors advanced by the appellants in the lower court and Mr. Raithatha's submissions in this Court. And learned State Attorney further agrees with Mr. Raithatha that the sentences imposed are excessive, adding and I quote:-

A long incarceration would not help them.

To that may be added that a long term of imprisonment may do more harm than good, in that apart from the fact that the appellants would be so much longer in the company of hardened criminals, if they considered the sentences unjust they would be soured, and the prospects of their reformation and rehabilitation, which is the main object of a sentence of imprisonment in a case of this nature, would be considerably impaired.

Further, and this has been overlooked both by the convicting court and learned counsel, that although the taking of the carton of clothes constitutes theft in law, as there was asportation, in reality there was no real theft of the goods

in that, as noted the carton was left hanging on the fence and was subsequently recovered. Therefore in actual reality it was not a case of theft but rather of attempted stealing. The fact that this first venture by the appellants into crime proved so abortive, I think, it will be generally conceded, taking into consideration the other mitigating factors advanced, a sentence of imprisonment for two years would meet the justice of the case.

The appeals are accordingly allowed, and the sentence of each appellant as imposed is set aside, and there is substituted therefore a sentence of imprisonment for two years on each appellant.

5. GEORGE WALTER AND 3 OTHERS v. REPUBLIC
HIGH COURT CRIM. APP. 47-DSM-75, 26/6/75
BIRON, J.

- HELD:
- 1) Under section 22, P.C. an offence is committed not only by the act or omission of an offender but also by person who aids, abets, counsels or procures the commission of the offence.
 - 2) For a document to constitute forgery as defined under sections 333 and 335, P.C. it must purport to be what in fact it is not.
 - 3) The making of a voucher containing a false statement that the lobsters weighed twenty-five kilogrammes when in fact they weighed only eighteen and half kilogrammes does not constitute forgery within the meaning of sections 333 and 335 of the Penal Code.

Convictions of the 1st and 2nd accused quashed and that of the 3rd accused sustained but sentence reduced.

BIRON, J. - The three appellants were convicted; two of them of forgery and they were each sentenced to imprisonment for eighteen months, and the third was convicted of attempting to obtain money by false pretences, and he was sentenced to imprisonment for twelve months. They are now appealing and

their appeals are consolidated. In this judgment I am retaining the descriptions of the three appellants as they were described in the lower court.

The first and second accused were both employed by the Oyster Bay Hotel, the former as a store-keeper and the latter as a cook. The third accused was a fishmonger who used to supply the hotel with fish.

Evidence was given by Henry Herbert Luckhurst (P.W.2), who described himself as the General Manager of the Hotel, to the effect that on the 18th December of last year, whilst he was looking out of a window of his room in the hotel, he noticed that the accused were taking a long time in weighing a basket of lobsters brought by the third accused. The weighing was taking place outside the store, which was visible from his point of observation. He went to the spot to investigate and found that the weight of the lobsters shown on the scales was eighteen-and-a-half kilos, whereas a receipt voucher, so termed by the witness, written out and signed by the first accused and countersigned by the second accused gave the weight of the lobsters as twenty-five kilos at fifteen-shillings a kilo. The lobsters were weighed again in his presence and that of his wife, and it was confirmed that they weighed only eighteen-and-a-half kilos; one kilo being allowed for the basket as it was wet. By the time the lobsters were weighed again, the third accused had already taken the receipt voucher to the cashier and was told to come for payment on the next day. The police were summoned and all three accused were arrested.

The only other witness for the prosecution apart from the police officer who arrested the accused, is another employee of the hotel who stated that he saw the chit showing twenty-five kilos of lobsters and when the lobsters were weighed again they were found to weigh only eighteen-and-a-half kilos.

All three accused elected to give evidence on oath and called witnesses.

The first accused agreed that he wrote out the receipt voucher, but asserted that the weight of lobsters brought by the third accused was, in fact, twenty-five kilos, and he contended that after the lobsters, which as noted were in a basket, had been taken into the kitchen, the quantity was reduced by Mrs. Luckhurst, the wife of the General Manager, before they were weighed the second time.

The second accused who, as noted was a cook, in his evidence stated that he only signed the voucher as confirmation that the lobsters were fit for consumption and he was not concerned with the weight.

The third accused in his evidence, insisted that the real weight of the lobsters he had brought was twenty-five kilos, and he, like the first accused, asserted that the quantity had been reduced from the basket by Mrs. Luckhurst before they were weighed the second time.

All three accused called witnesses, but none of them advanced the case either way, with the exception of Mrs. Luckhurst, who was apparently called by the court at the request of the first accused for questioning.

Mrs. Luckhurst testified that she was in an upstairs room of the hotel when she saw the three accused weighing the lobsters. As she had previously detected shortages and was suspicious, particularly of the first accused, she stated - to quote her verbatim:- "I thought something fishy was going on", the pun was doubtless unintentional, she went to the scene and ordered the lobsters to be weighed again, and it was discovered that the figure of twenty-five kilos given, was false. Although she was called by the court at the request of the first accused, neither he nor the third accused, whose defence was that the quantity of the lobsters brought by the third accused had been reduced by Mrs. Luckhurst when they were taken into the kitchen, put this to her when she was in the witness box, though it is apparent from her answer when cross-examined by the first accused, that it was suggested that some lobsters may have crawled away, as she is recorded as saying: "Nothing crawled away".

The magistrate's judgment commences with:-

In this case accused are three and all have been charged jointly with two counts as hereunder:-

- (1) Forgery c/ss 333 and 337 of the Penal Code.
- (2) Attempting to obtain money by false pretences c/ss 301 and 302 of the Penal Code.

And after reviewing and considering the evidence, inter alia, misdirecting himself in stating that the third accused had

said that he did not know how to read, as the third accused had not said anything of the sort but it was his assistant whom he called as a witness, who said that he, the witness, could not read, contradicted himself in saying that:

In this case first and second accused could not get the money without conspiring with the third accused who was to collect the money,

and then after directing himself on the law in respect of the offence of forgery wrongly as it will be demonstrated, he concluded his judgment as follows:-

Prosecution has proved the case beyond all reasonable doubt. Therefore I convict first accused and second accused of the first count and acquit them of the second count accordingly. Also I convict third accused of the second count and acquit him of the first count forthwith.

If the magistrate found that all the three accused were deliberately trying to defraud the hotel, he should have convicted them all, according to his view of the law in respect of forgery on both counts as charged. And the magistrate is advised to acquaint himself thoroughly with the provisions of Section 22 of the Penal Code which reads:-

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence.

In the last mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with the act or making the omission.

However, as remarked by learned State Attorney, the conviction of the second accused on the first count, that of forgery, cannot be sustained, for, as the magistrate will note on perusal of the charge sheet, neither he nor the third accused were charged on this first count, but only the first accused alone was charged of such count, though all three were together charged on the second count, on which incidentally, as remarked, they should all have been convicted. But as the Republic is not appealing from the acquittals of the first and second accused on the second count, there is nothing this Court can do about it.

To revert to the first count, as submitted by Mr. Chirwa, who appeared for all the three accused at the hearing of these appeals, the making or signing of this false voucher does not constitute forgery in law. Mr. Chirwa based his submission on the judgment of Blackburn, J. in Ex Parte Windsor (1865) 10 Cor's Criminal Cases 118 at p.123, the particular passage reading:-

Now the charge that is made out against this person is that he, being a clerk in a bank, did steal a large sum of money, and in order to conceal it did make an entry in a book, which entry, as I make it out, was an entry stating on his behalf that a certain quantity of specie had been deposited in the vaults, whereas in point of fact, the statement was wilfully and fraudulently false, with the intention to conceal and embezzle. But though he was guilty of that crime, it did not amount to

forgery. Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced into writing.

This definition of forgery by Blackburn, J. would have been binding on this Court under Section 4 of the Penal Code before it was amended and it read:-

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

This section was amended by the Administration of Justice (Miscellaneous Amendments) Act, 1971, to read:-

4. Subject to the provisions of the Interpretation and General Clauses Ordinance the court shall, in construing the provisions of this Code, be guided by the principles of natural justice.

English decisions on the interpretation of the Penal Code are therefore no longer binding on this Court. Even so, the definition of forgery by Blackburn, J. has, in fact, been codified in our Penal Code, and I can do no better than quote from my judgment in the case of Raymond Chilemba v. The Republic (High Court Criminal Appeal No. 228 of 1972 unreported):-

With regard to the two payment vouchers made for night allowances for the appellant, he admitted that he did not in fact spend those nights away from the station, but even so asserted that he was entitled to such allowances. However, as established in evidence, he was not entitled to such allowances and his claims to such were false. Even so, the making of these two false payment vouchers does not constitute forgery, for forgery is defined in Section 333 and 335(a) of the Penal Code as follow:-

333. Forgery is the making of a false document with intent to defraud or to deceive.

335. Any person makes a false document who -

(a) makes a document purporting to be what in fact it is not.

The other definitions of forgery in the section have no application to this case. Although the appellant's claim for

night allowances were false, the payment vouchers for such allowances although containing false statements, do not purport to be anything other than they were. And for a document to constitute forgery as defined in the section, it must, what is commonly termed, tell a lie about itself, such requirement incidentally, in more technical parlance, being termed automendacity. These two vouchers although containing false statements, do not therefore constitute forgery, within the meaning of Section 335 of the Penal Code.

I ought to add that this definition of forgery is, to my mind, unsatisfactory, and I have recommended that it be amended. It is not irrelevant to quote from my letter to the Attorney General with his concurrence, making such recommendation. The relevant extract from the letter reads:-

Section 335: The section commences with Any person makes a false document who -

(a) makes a document purporting to be what in fact it is not; and the section then goes on to define other cases of a false document, but it is this first definition at sub-paragraph (a), which is the most important and usually the one which is applied in most cases of forgery.

In England this requirement of automendacity has of recent years been queried, and in the Criminal Law Review 1971, page 565, the writer, a Mr. Anthony Beck, has headed his article 'The end of Automendacity?' The writer assumes that the requirement of automendacity, which in ordinary parlance simply means a document which tells a lie about itself, that in England this doctrine is now dead. If it was dead when the writer wrote the article, it has certainly been resurrected in the case R. v. Dodge, Regina v. Harris, (1971) 3 W.L.R. 366 wherein it was expressly reasserted that a false document will not constitute forgery unless it tells a lie about itself. Whatever may be the position in English law, in view of the wording of paragraph (a) in our definition, automendacity is definitely not obsolete. I must confess I fail to see why it should be so. Why not add an additional sub-paragraph to read:-

() makes or signs a document containing a statement which is false in a material particular.

This requirement of automendacity has created a great deal of confusion and generated a legion of casuistic technical exercises, for which I am afraid, I can see no reason. If you agree with me, I would suggest that the section be amended accordingly.

For the reasons set out, in this instant case, the voucher although containing a false statement, that the lobsters weighed twenty-five kilos when in fact they weighed only eighteen-and-a-half kilos the making of the voucher does not constitute forgery. The conviction of the first accused on the charge of forgery cannot, therefore, be sustained.

To turn to the third accused, who was convicted of attempting to obtain money by false pretences, it has, I think, been sufficiently demonstrated that the conviction is fully supported and justified by the evidence, on my evaluation of such evidence.

With regard the sentence on the third accused, considered in isolation, it would not appear to be excessive, but bearing in mind that the first and second accused were far more culpable in that, as stated by the magistrate, they were attempting to rob their employer, and possibly instigated the offence, it would be less than fair to let the third accused bear such sentence, whilst the two other accused get off scot free, due to a technicality in law, and the inexperience of the magistrate in acquitting them on the count of attempting to obtain money by false pretences. Accordingly, I consider that the justice of the case would be met if the sentence imposed on the third accused, were reduced to imprisonment for six months.

In the result, the convictions of the first and second accused are quashed, and the sentences imposed thereon are set aside. If they are not otherwise lawfully held in custody, they are to be released forthwith. The conviction of the third accused is sustained, but the sentence imposed on him is set aside and there is substituted therefore, a sentence of imprisonment for six months.

6. REPUBLIC v. JOSEPH NGAIKWAMO
HIGH COURT CRIM. CASE 144-IRINGA-74, 29/1/75
MAPIGANO AG. J.

Held: 1) It is a rule of practice that a dying declaration require corroboration before it can be acted upon.

- 2) The mere fact that the deceased made precise and substantially identical statements on three occasions is not evidence that such statement is accurate but only that the deceased was consistent in her belief that the accused had stabbed her.

Accused acquitted.

MAPICANO, AG. J. - The accused Joseph Ngaikwamo is on a charge of murder, contrary to section 196 of the Penal Code, namely that on or about December 11, 1973 at Ipugasi, Mufindi, he, with malice aforethought, caused the death of his wife, one Lungumudachi d/o Sekasige. The accused denies this charge.

Briefly, what happened and what is not in dispute is that Lungumudachi Sekasige, hereinafter referred to as the deceased, was attacked at night at her house at Ipugasi, Mufindi, on December 11, 1973. She sustained a stab wound in the region of the left ribs. She, alone, went to the house of her young sister P.W.1 Sagina Sekasige to whom she related what had befallen her, and thence to the house of one Pangwano where she met her ten cell leader P.W.2 Batulungi s/o Ngimba to whom she again related what had happened to her. She was sent to Kipengu hospital on the following day, where she was attended by an Assistant Medical Officer, P.W.3 Arthur Mtunya, to whom, yet again, she related how she had been wounded. P.W.3 Arthur referred her to Iringa Government hospital where she died on December 17, 1973.

P.W.7 Dr. Robert Bosma who examined her dead body found that the stab-wound penetrated into the abdomen, thereby cutting the large intestine and the left kidney into two parts. He was of the opinion that the wound had been inflicted by a narrow, long and sharp weapon, and with great force. And that death was due to the after effects of the wound. He replied that the deceased had sustained other minor wounds which he considered unimportant and which therefore he did not record on his report (P.2.) By and large, his observation and opinions are not in dispute, and on the evidence, I would, with respect, agree with his testimony.

The prosecution case as indicated, shows that the deceased made a series of declarations after she had been stabbed. She appears to have been consistent throughout. The substance of

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her allegations is that on that fateful night the accused had arrived at the house at about 8.00 p.m. He had then accused her of unchastity, that she was carrying on with one Pangawano, and that the said Pangawano was tempting her into playing the jilt towards him. She, the deceased, had however kept quiet, upon which the accused took a spear and a knife and stabbed her on the left ribs and on the right arm near the wrist. The accused had then fled from the house.

One thing I am sure of, and what the defence only half heartedly and almost in whisper endeavoured to contest, is that these narrations were in fact made by the deceased. Whether the allegation therein in so far as it implicates the accused is true or not is another and more serious question and I will come to it later.

The accused has, in his unsworn evidence, disputed that he was the one who assaulted the deceased on that occasion. He alleged that he left his house at Ipugasi and went to a place called Mgama where he had another house and a second wife. Mgama appears to be quite far from Ipugasi as according to P.W.2 Batulungi, it is about nine hours' walk from Ipugasi to Mgama. But both P.W.2 and P.W.1 Sagina allege that they saw the accused in the neighbourhood of Ipugasi at mid-day on December 11. That however may not be irreconcilable, as the accused may have left the village later on the same day. The accused went on to say that on the 9th day of his stay at Mgama, a ten cell leader of that area approached him and put to him that he had killed his wife. The ten cell leader arrested him and caused him to be delivered to the police before whom and in the face of beatings he denied having killed the deceased. In due course, he produced a knife (P.1) to Constable Zebedayo, which fact on the evidence available before me, does not advance the prosecution case one jot.

I will say at this juncture that on the evidence there is no material cause why the accused should have set upon his wife. There is an allegation in the deceased's dying declaration that he thought she was having an affair with Pangawano. The prosecution contention seems to be that this is what actuated the attack. But it appears to me that there is no substance in that allegation. At least P.W.2 Batalungi, the ten cell leader, had not received any complaint from the accused to that effect, and he had not even heard any rumour in that respect. And even if the accused could substantiate that allegation which, needless to say, he did not seek to, that would not justify or mitigate the act of

killing his wife in the circumstances. And considering the nature and manner of the assault, the element of intention to kill or to do grievous harm must have attended the commission of the assault, which factor would make the offence a murder as defined under the law.

The only point of contention in this case is whether it is true that it was the accused who stabbed and took his wife's life. As indicated above, this boils down to whether the dying declarations are true beyond reasonable doubt. For the dying declarations are vital to the prosecution case, they are virtually the prosecution case.

The rule of practice and prudence to which both learned counsel have referred to and to which I would lively and carefully address my mind, is that by its own nature, evidence of a dying declaration falls into the category of evidence of which material corroboration is called for, before it can be accepted and acted upon, unless the circumstances show that the deceased was honest and correct: R. v. Elgin s/o Odel and Anor. (1943) 10 E.A.C.A. 90. And as shown, the mere fact that the deceased in this case made precise and substantially identical statements on three occasions, to the effect that the accused was the one who stabbed her, is not evidence of its accuracy but, at the highest, only of consistency of her belief in that regard: R. v. Muyovya Msuma (1939) 6 E.A.C.A. 128.

Without going into detail of the argument advanced by the learned counsel for the Republic, I would, and with respect, say that there is scant independent evidence, if at all, to support the dying declarations as concerns the identity of the attacker. To be sure, the accused was tracked at Mgama nine days after the attack, and according to him, he was by then not aware that his wife, the deceased, had been perniciously assaulted. However, it appears to me, this does not amount to material corroboration, even bearing in mind as I do that circumstantial evidence can amount to corroborative evidence. The medical evidence, of course, can be and is only corroboration as to the nature and manner of the stab-wound.

Sadly therefore, and that without prejudice, there is her dying declarations alone which seriously purport to link the accused in this killing. It is a hotly disputed point whether these declarations, standing alone as they are, can be relied upon and found a conviction. For the Republic it is argued and with some force that the deceased could not have mistaken the

identity of his assailant, notwithstanding the fact that the event took place during night, and perhaps (we were not told) in the dark. Because, it is argued, the assailant talked to the deceased and that she could not have mistaken the figure and voice of another man for that of the accused, her husband, with whom she had lived and begotten three children.

On the other hand, it is argued on behalf of the accused, that it would be unsafe to rule out the possibility that she might have, genuinely or maliciously, made a mistake in her identifying the culprit. And secondly, that it is doubtful if her mind was still clear and recollective of what had happened and of who had attacked her. The pains from the wound, it is submitted, could have dimmed her memory by the time she told the story.

I have followed and considered these arguments. I think with respect to learned defence counsel, that there is no evidence or indication in the evidence, that there was any hostility between the deceased and the accused, to the extent that she could have maliciously and falsely inculpated him in this ghastly incident. If there was any mistake on her part, I would say that mistake was honest, either as a result of the attack having taken place in the dark or as a result of her memory having been confused. But the evidence seems to argue, and I agree, that she was not so physically helpless and mentally powerless as to be unable to recollect what had happened. She walked to her sister's house and she explained about the attack and from there she accompanied her sister to Pangawamo's house where although she fell down on arrival she still repeated her story. It was until the following day that she became so helpless that she had to be carried to the hospital.

The vital question therefore is whether she could have possibly mistaken the identity of the culprit on account of darkness. The assessors are of the view that there was no such a possibility. I respect their view and I feel very reluctant to differ with them. But the gravity of the charge, I feel that there is a reasonable doubt as to the accuracy of the identification. I would therefore, reluctantly, differ with the assessors, I would give the accused the benefit of doubt.

He is consequently found not guilty and acquitted. He is set at liberty provided he is not detained on other lawful ground.

7. MARIBA WANYANGI v. ROMARA ROMARA
HIGH COURT (PC) CIV. APP. 86-MZ-74, 21/6/75
MAGANGA, AG. J.

HELD: A father is not vicariously liable for the tortious acts of his child who is not a minor.

Appeal dismissed.

MAGANGA, AG. J. - This appeal lacks any merit and it must be dismissed. The appellant sued the respondent's son for damages for adultery. He succeeded and was awarded five heads of cattle. He then filed an application for the attachment of the respondent's cattle on the ground that the original defendant/judgment-debtor against whom the decree was being executed was the respondent's son. The respondent was in prison when his cattle were being attached. On being released he filed this suit objecting to the attachment and the court held that the cattle were properly attached since his son had no cattle of his own. He appealed to the district court and the court reversed the primary court decision. The appellant is now appealing against that district court decision.

It was not disputed that the respondent was not a party to the proceedings for adultery. His son who was sued and against whom the decree was passed was an adult living independently. The appellant attached the respondent's cattle knowing fully well that they did not belong to the judgment-debtor. In his memorandum of appeal the appellant says that a father is liable for any misconduct, including tort, by his son according to Kurya customary law and that is why the district court was wrong in reversing the primary court decision.

I think if there was such a customary law as claimed by the appellant it is already obsolete. A grown up son is answerable for all his deeds and a father of such son cannot be held liable for torts committed by the son. It would be repugnant to reason and natural justice to hold a father responsible for the torts or criminal acts committed by his grown up son. The district court was therefore perfectly right to hold that the decree had to be executed against the judgment-debtor and nobody else. Since the application was for the attachment of the cattle belonging to the judgment-debtor's father, and as the father was not the judgment-debtor, the court should have refused to issue process for attachment of the cattle. The appellant is advised to proceed

execute the decree against his judgment-debtor. The district court judgment is upheld and the appeal is accordingly dismissed as it lacks merit.

AJILI MANGOSONGO v. CRISPINA MACHENJE
HIGH COURT (PC) CIV. APP. 11-MT-74, 25/3/75
KISANGA, J.

- Held:
- 1) A person is entitled to compensation for improvements effected on the land, if at the time of carrying out such improvement, he had apparent justification for doing so.
 - 2) Where a person is given the right to use land but he deliberately uses it in contravention of an express condition of user, cannot use his own wrong to defeat the interests of the rightful owner unless such owner acquiesces in such wrong.

Appeal dismissed.

KISANGA, J. - The respondent brought a claim to recover a piece of land worth shs.500/-. The Primary Court at Kipatimu allowed the claim but ordered the respondent to pay shs.1,100/- compensation to the appellant for the improvements which he had effected on the land. Dissatisfied with the compensation order the respondent appealed to the District Court of Kilwa which reduced the award to shs.550/-. The appellant is now appealing to this Court claiming that the disputed land belongs to him.

The appellant's claim that the land belongs to him is entirely without merit. There was abundant evidence to show that the land belonged to the respondent. Indeed in the Primary Court the appellant stated that he was prepared to vacate the land if he was paid compensation for the improvements which he carried out on the land and to confirm that the land did not belong to him he did not in fact appeal to the District Court against the decision of the Primary Court which decided that the land belonged to the respondent; it is only the respondent who appealed against the compensation order.

On examining the judgment of the District Court, it is not apparent on what ground the compensation order was made. The learned District Magistrate found that the appellant planted

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permanent crops on the land knowing fully well that the land was not his. Indeed it is very clear from the evidence that when the appellant was permitted to till the land he was expressly told not to grow permanent crops there. In those circumstances the learned District Magistrate held that in his view the appellant should not be entitled to any compensation and, with great respect, I think that view is correct. But then the magistrate went on to award compensation of shs.550/- being a half of the value of the permanent crops which the appellant grew on the land on the ground that it would be unjust to deprive the appellant of the fruits of his sweat. With even greater respect to the learned District Magistrate I think that this was wrong. To my mind a person should be entitled to compensation for improvements effected on the land only if at the time of carrying out such improvements he had apparent justification for doing so, for example, where he bought and developed the land in good faith but it later transpires that the seller in fact had no title to such land which he could have passed to him. Where a person is given the right to use land but he deliberately uses it in contravention of an express condition of user, he is clearly in the wrong and in my view he should not be allowed to use his own wrong to defeat the interests of the rightful owner unless the rightful owner acquiesced in such wrong. In the present case there was no apparent justification whatsoever for the appellant carrying out the said improvements by growing permanent crops when he knew that the land belonged to someone else and he was expressly told not to grow permanent crops. Moreover the respondent did not acquiesce in the appellant's wrong because she brought the suit so soon after becoming aware of the said wrong. Thus accepting that the appellant was in the wrong, I am of the view that it would be unjust to allow him to build on that wrong to defeat the interests of the respondent when the respondent herself has not acquiesced in such a wrong.

I would accordingly vary the judgment of the District Court and hold that the appellant is not entitled to any compensation in respect of the permanent crops which he grew on the land, and if the respondent has already paid all or any part of the compensation money, the same should be refunded to her. The appeal therefore fails.

9. FULGENCE MPEKILWA v. DOMITINA KIHAMA
HIGH COURT (PC) CIV. APP. 110-MZ-72, 20/6/75
MAGANGA, AG. J.

Held: Rule 19 of the Customary Law (Declaration) Order, does not make it mandatory that a will must be witnessed by not less than two members of the testator's clan where the testator is illiterate.

Appeal allowed.

MAGANGA, AG. J. - In Nyakato Primary Court the respondent Domitina sued for a declaration that her brother's will inheriting the appellant Fulgence was void as it was not witnessed by clan members. The court found for the appellant and dismissed the suit holding that the will was properly attested and was for that reason valid. Domitina being dissatisfied appealed to the district court and her appeal was allowed. The district court reversed the primary court judgment, holding that the will was not attested by clan members and as such it was void. Fulgence was aggrieved by this decision and he has appealed to this Court.

It was not disputed that respondent was a sister of the deceased while Fulgence is not a member of the deceased's clan. In the disputed will the deceased stated that he was inheriting Fulgence because he was the one who looked after him while sick when none of his clansmen cared for him. He however made provision in the will that his wife and the respondent should remain in the shamba during their lifetime but the title was to revert to the appellant on their death.

The will was witnessed by several people including one Petro Ruheshwa who belonged to the same clan as the deceased. Several members of the deceased's clan admitted in the trial court that this Petro is also a member of their clan and they stated that when the will was read at the funeral it was this Petro to whom it was handed after being read. On this evidence the primary court held that the will was valid and dismissed the application for a declaration that it was void.

On appeal, the district court held that the will was void because it was not attested in compliance with the provisions of Rule 19 of the Law of Wills as published vide Government Notice No.436 of 1963. The court was in fact making reference to Rule 19 of the 3rd Schedule to the Local Customary Law (Declaration) (No.4) Order, 1963

published vide Government Notice No.436 of 1963 which provides that where the testator is illiterate a will should be attested by at least four witnesses, two of whom have to be members of the same clan as the testator.

I do not think that Rule 19 makes it mandatory that for a will to be valid it must be witnessed by not less than two members of the testator's clan where the testator is illiterate. The provision must have been intended to be a safeguard against forgeries of wills. Thus where there is no allegation of the genuineness of a will and such will has been witnessed by a member of the testator's clan it would be unreasonable to declare such will void simply because of the absence of a second witness to the will who is a member of the testator's clan. The only mandatory provision in Rule 19 is that a will must be witnessed by not less than two witnesses. In the instant case it was proved that after the testator had written the will it was kept by the only member of his clan who was a witness to it. It was that same witness who read it at the funeral and was appointed to keep it. The will was witnessed by six witnesses, none of whom was said to be related to Fulgence, the appellant. As its genuineness was not challenged and since it was witnessed by a literate member of the testator's clan the primary court was quite right in holding that it was valid. Since the district court decision was based on the assumption that it is mandatory for a will by an illiterate to be witnessed by at least two members of the testator's clan, and I am of the view that this was a wrong interpretation of the rule, and since the primary court decision was both sound in law and logical, I would allow this appeal. The decision of the district court is accordingly set aside and the decision of the primary court is restored.

10. LUCAS MATAFU v. HON. M.M. SONGAMHELE
HIGH COURT CIV. CAUSE 3-MZ-74, 17/7/75
MEALILA, J.

HELD: An action against a Regional Commissioner is a suit against the Government. It must therefore be brought under the Government Suits Ordinance Cap.5 and the procedure set therein must be complied with.

Application dismissed.

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MFALILA, J. - This is an application for the issue of a temporary injunction against the respondent, the Regional Commissioner for Shinyanga Region. For reasons which are not clear the advocate for the applicant cited the Regional Commissioner personally, they did not stop to think what would have become of their application if this particular person holding the office of the Shinyanga Regional Commissioner was either transferred or removed from office in the meantime.

The application supposedly made under the provisions of O. 37 r.2 of the Civil Procedure Code asked for the grant of a temporary injunction "requiring the respondent to re-open the plaintiff's Bar and releasing rentals to the plaintiff on the grounds contained in the plaintiff's affidavit". In paragraph 2 of what is called the plaintiff's affidavit, it was stated that on 8/2/74 the respondent, Songambebe, the Regional Tanu Secretary for Shinyanga Region closed the applicant's bar business which he was operating in the name and style of Shinyanga Mwafrika Bar and also his tenantable premises on Plot No. 23, Block 'K' Shinyanga Township. Now, an injunction means simply a judicial order to restrain. With this in mind it is clear that an injunction is necessarily a negative order, it is never positive in other words in an application for an injunction, there can be no question of a positive order i.e., requiring an individual to do something, there can only be a negative order i.e., requiring an individual not to do what he proposes to do. If something has already been done the cure is not an injunction order, unless of course it is sought either to prevent further breach or continuance of a nuisance. In the present case the applicant is asking this Court to issue a temporary injunction requiring the respondent to re-open his Bar and what he called tenantable premises. I do not know how such an injunction order could possibly be framed.

There is a second difficulty surrounding this application, although this is merely procedural. Applications for temporary injunctions under O. 37 should not be filed as separate suits. They should be filed in the same file containing the main suit, so that in this case, this application should have been filed in the file for Civil Case No. 7 of 1974. This in fact is desirable from a practical point of view for it would enable the court to have in mind the case as a whole when considering whether or not to issue an injunction order.

The third difficulty relates to the competency of this application. I take it that for the purpose of the Government Suits Ordinance Cap.5 this application is a suit. It is alleged in the affidavit that the respondent Songambe closed the applicant's Bar and tenantable premises. I cannot imagine how the respondent could have done this in his personal capacity. He must have used his authority as a Government Officer to effect whatever he did so that the final responsibility lay with the Government. For instance if indeed the respondent closed these two premises, and he were either transferred or removed from office tomorrow, he would not as Songambe have the authority to re-open them even if he wanted or was ordered to. These premises were therefore closed by orders of the Government and if any redress is needed it must be sought against the Government. The procedure for getting civil remedies against the Government is provided in the Government Suits Ordinance, and this must be complied with before this Court can assume jurisdiction. Since this was not done, this Court has no power to make any order against the Government.

For these reasons this application is dismissed. As the respondent did not appear there will be no order for costs in his favour.

11. REPUBLIC v. MARIA NYAGAWA
HIGH COURT CRIM. REV. 13-DDM-73, 26/12/74
MWESIUMO, AG.J.

- HELD:
- 1) Section 176, C.P.C. confers discretionary powers to the court to make compensation orders in addition to any other lawful punishment. But an order for compensation alone does not constitute a sentence.
 - 2) Section 134, C.P.C. empowers a court before conviction to stay criminal proceedings and give a chance to the parties to reconcile in cases of common assault or any other offence of personal or private nature.

Accused discharged.

MWESIUMO, AG.J. - After being convicted of causing grievous harm contrary to section 225 of the Penal Code, on her own plea of guilty, the accused one Maria d/o Nyagawa was just ordered by the District Magistrate, Mr. A.B. Lugendo to pay a compensation of shs.300/-.

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This case has been called up by this court in exercise of its revisionary powers to resolve the legal question of whether an order for compensation alone after conviction constitutes a sentence or not.

In my view the answer is in the negative. In other words an order for compensation alone after a conviction cannot be construed to be a sentence and therefore cannot be pronounced just by itself as a substitute of a sentence.

As the learned State Attorney Mr. Alimwike rightly, pointed out before this court a sentence is that which is passed in line with the wording and meaning of section 176 of the Criminal Procedure Code which inter alia states:

176 - (1) When an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person, whether or not he is a prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is in the opinion of the court, recoverable by that person by civil suit such court may, in its discretion and in addition to any other lawful punishment order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable.

From the wording of the above quoted extract of section 176 of the Criminal Procedure Code it is clear that the Legislature gave discretionary powers to the courts of law to make compensation orders where desirable but such orders must be "in addition to any other lawful punishment" and not as a substitute thereof.

Therefore the district magistrate erred in law when he made the compensation order purporting it to be a substitute of a punishment or sentence after having duly convicted the accused person.

In doing so he wrongly relied on section 134 of the Penal Code which, with due respect to him, he misunderstood hence, the misinterpretation and the misapplication to the instant case.

Section 134 of the Criminal Procedure Code empowers a court of law to stay criminal proceedings and give chance to the parties to reconcile in an amicable way, if the case is of common assault or any other of personal or private nature and in my view the stay of proceedings must be done before conviction.

In the instant case it is doubtful whether one could say it is a type of offence stipulated in section 134 of the Criminal Procedure Code because grievous harm is a felony and therefore graver than a common assault. Secondly, even if one maintained that it was meant to be embodied in that section then the District Magistrate should have stayed the proceedings but what he did was to proceed with the proceedings up to conviction and thereafter awarded a compensation order which apparently seems to have been taken as a substitute of sentence or punishment.

Had the District Magistrate wanted to be lenient towards the accused person, as is clear from his comments proceeding the order, on the grounds of relationship of affinity between the complainant and the accused as they were sisters-in-law then he should have resorted to the provisions of section 38 of the Penal Code as amended by Act No.5 of 1961 and not section 134 of the Criminal Procedure Code.

That section empowers the court to make orders for conditional or absolute discharge, if in its opinion, the convicts' case warrants such a measure of leniency and such a conditional or absolute discharge after conviction is in law a proper sentence.

For the above reasons I now hold that the accused person has not yet been sentenced but has only been ordered to pay compensation of shs.300/- which she has complied with and which ought to have been paid in addition to any other lawful punishment.

However that case was completed before the District Court on the 13th January 1973, two years have passed since then. A notice of enhancement was served on her and on 6th May 1974 she recorded her reasons before a District Magistrate Mr. Y.S. Mperella sternly pleading why this court should refrain, on merciful grounds, from enhancing sentence. In fact, it should not be a question of enhancing sentence as it has been ruled above there was none imposed on her but should be a question of sentencing her.

I have been thinking whether it would be good commonsense and in the interest of justice to sentence the accused after a

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passage of almost two years from the date of her conviction and especially so when the parties seem to have reconcilled and forgotten bitter feelings between them. After deep consideration I feel inclined to have an opinion that it would not be in the interest of any of the parties or the public at large to remind them of that sorrowful event by inflicting any severe sentence against the accused person at this eleventh hour.

In consequence thereof and pursuant to section 38 of the Penal Code as amended by Act No.5 of 1961 I do hereby order that the accused be discharged absolutely.

12. REPUBLIC v. MKAMA NDARO
HIGH COURT CRIM. REV. 18-MZ-75, 20/6/75
KATITI, AG. J.

- HELD:
- 1) Section 63(2)(a) of the Traffic Act 1973 empowers the court to impose a fine or a term of imprisonment less than the minimum upon proof of the existence of special reasons.
 - 2) What amounts to special reasons may be special facts which constitute the offence and/or facts that are personal to the offender.

Case remitted to lower court for action.

KATITI, AG. J. - This record comes for revision consequent upon discovery that the offence and conviction falling under section 40(1) and 62(a) of the Traffic Act No.30/1973 as it does, no disqualification was ordered in the absence of special reasons to be recorded.

Indeed the accused was tried and convicted for causing bodily injury through dangerous driving on the public road c/o 40(1) and 63(a) of Traffic Act No.30 of 1973. Mrs. Matovu State Attorney submitted that not only was there no disqualification but also the sentence was illegal.

I start with the disqualification - section 27(1)(a) states:

Any court before which a person is convicted of -

- (a) a first offence under section 40, 41, 42, or 44 or paragraph (c) of section 52 shall cancel such person's driving licence for a period of not less than three years and shall declare that the person to be disqualified from obtaining or driving licence of any type during such period; ...

unless the court for special reasons thinks fit to order a shorter period of cancellation or suspension of that persons driving licence and to order him to be disqualified from obtaining or driving licence for a shorter period or not to order him to be disqualified.

In my view, the disqualification is mandatory unless the court for special reasons to be recorded and, I am sure to be adduced by the accused, the court either orders disqualification - for a period less than three years or no disqualification at all. It is the court's duty, I think to address the accused to this benefit and ask him to adduce special reasons if any, showing cause why he should not be disqualified from holding or obtaining a driving licence. What constitutes special reasons is abundantly taken care of by case law now and without prejudice, the addition of "the causing of bodily injury" by driving a motor vehicle or trailer dangerously does not in my view escape from the authorities on what constitutes "special reasons;" for the purposes of disqualification or otherwise. I say this because I think the authorities on the repealed and replaced statute apply to the new statute particularly where sections in the repealed and replaced statute have been re-enacted in the same or similar terms.

Now I come to the substantive sentence. The State Attorney did point out that the sentence was illegal. I do not think so. The relevant penalty Section is 63(2)(a) which provides:-

63(2) any person who is convicted of:-

- (a) an offence under section 40 shall be liable to a term of imprisonment of not less than two years but not exceeding five years and the court may in addition thereto impose a fine not exceeding one hundred thousand shillings; ...

unless the court for special reasons thinks fit to impose a fine or a term of imprisonment less than the minimum fine or the minimum terms of imprisonment specified under this section.

The learned State Attorney sought this court to interfere with the sentence if this court agreed with her assumption that the sentence was illegal. As was held by the Court of Appeal for East Africa in William Frank Haining and Others v. (1972) H.C.D. n.53 "the imposition of 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 sentence the trial Judge has acted on some wrong principle or has imposed a sentence which is manifestly excessive or inadequate". I would add that the appellate court would interfere with the sentence if the sentence is illegal and more so in the case of High Court exercising its revisional jurisdiction under the provisions of Section 327 of the Criminal Procedure Code.

The question now is whether the sentence was illegal as submitted by the learned State Attorney. Upon my reading of Section 63 and particularly 63(2)(a) I am of the view that although it provides liability to imprisonment of not less than two years but not exceeding five years, this provision is watered down by a further provision that the court could still impose a fine or term of imprisonment less than the minimum upon existence of special reasons, so that a trial magistrate exercising his discretion judicially and finding special reasons, would be entitled to impose a sentence less than the minimum prescribed. What constitutes special reasons for purposes of imposition of sentence less than the minimum prescribed could definitely be special to the facts which constitute the offence as well as those that relate to the offender. For if the reasons special to the facts which constitute the offence go to induce the court not to disqualify or to order shorter period of disqualification, these same reasons could still excite leniency in the minds of the court and have the sentence reduced. Similarly these same reasons could be special to the offender for if ages had it that in imposing fine, it should be such fine as within acceptable confines of his capability to pay, why shouldn't his ability to pay be a special reason for departing from the minimum sentence considering the circumstances of the case also. After all how many would escape jail if the minimum fine were to be imposed without regard to the provision cited above?

In the case in point, the magistrate imposed a sentence less than the minimum prescribed. In his preamble to the sentence he makes no reference to "special reasons" as such but to my mind his inquiry of accused means as is shown by the record shows he had the provisions in mind and a fine of 200/- in addition to the

compensation of 200/- for a person earning 340/- is by no means small. In my view the earning capacity of the offender could constitute special reason for the court's departure from the frowning and punitive section. I am therefore not inclined to disturb the punishment imposed.

It is hereby ordered that the case be remitted to the trial court. The trial magistrate is directed to issue the necessary legal process for the compliance of Section 27 of Traffic Act No.30/1973.

13. GATI MARWA v. KISIRI KUBYO
HIGH COURT (PC) CIV. APP. 236-MZ-73, 5/2/75
MPALITA, J.

HELD:

- 1) Where a tort is committed against a minor, he may either sue by his next friend or wait till he reaches age of majority.
- 2) Where the minor chooses to wait till he reaches the age of majority, the limitation period begins to run against him on attaining the age of majority.
- 3) Where there is no evidence as to the Customary law rules governing the age of majority, the court should apply the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules 1964.
- 4) A Primary Court has no jurisdiction to entertain tortious actions unless based on Customary law.

Appeal dismissed.

MPALITA, J. - The appellant, a boy aged 10 years, sued the respondent, in the Primary Court at Nyamwaga claiming compensation amounting to Shs.600/- for injuries he received when he was assaulted by the respondent. He told the Primary Court that the respondent assaulted him without any reason and caused him injuries to his private parts which necessitated his being admitted in hospital and received treatment for about one week. He said that for this assault the respondent was charged with a criminal offence and was convicted and sentenced to 2 months imprisonment. The respondent did not dispute these allegations and on the evidence the Primary Court found the claim established

successfully appealed to the District Court which allowed the appeal on the basis that the appellant's appeal was time barred and that it should have been dismissed on that basis by the trial court. From this decision the boy Gati appealed to this Court, saying that his claim was not time barred because all this time the respondent was in jail and therefore he was unable to bring these proceedings.

I think that the District Court was wrong in dismissing the appellant's claim on the basis that it was time barred. The record shows that the appellant was 10 years old when he instituted these proceedings in 1973 and since the cause of action arose in 1969 when the appellant was assaulted by the respondent, it means that he was 6 years old when the cause of action arose. He was therefore at the time a minor and as such had no capacity to sue. I was surprised by the statement in the judgment of the District Court that in the appellant's area a minor has capacity to sue. I think this statement is meaningless in the sense that it is contradictory. A minor anywhere can never have capacity to sue. What is likely to be the position is that the age of majority differs in different communities so that if in the appellant's community a person can sue at the age of 10, it follows that at that age people are no longer regarded as minors for the purpose of bringing civil suits, but no evidence was led to support this view that in the appellant's community people achieve the age of majority at the age of 10 and since it is not only unreasonable but highly unlikely, and in the absence of any evidence supporting this view I will proceed on the basis that the age of majority which should have been taken in this case is 18 years which is the national one. Therefore if at the time the cause of action arose the appellant was a minor, the time against him could only start to run on his attaining the age of majority i.e., 18 years. See Rule 3(1) of the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules 1964. Therefore when the appellant brought the action in 1973 he was still within his time, in fact he is still within his time until he reaches the age of 18 years when time will start to run against him.

But the appellant's action could not succeed for other reasons. First this being a claim in tort and measured in monetary terms the Primary Court had no jurisdiction to entertain the suit. The civil jurisdiction of Primary Courts is conferred by section 14 of the Magistrates' Courts Act and claims in tort are not included unless they are based on Customary law which the present claim is not. Secondly, the appellant had no capacity to

sue by a next friend, i.e., an adult relative could have represented him or he could have waited until he reached the age of majority before bringing the suit in his own name. As the appellant's claim was incompetent for the above two reasons, the present appellant's appeal must be dismissed although for different reasons from that given by the District Court.

As neither party appeared there will be no order for costs.

14. ABDALLAH NYAMIZA v. REPUBLIC
HIGH COURT CRIM. APP. 337-MZ-74, 13/6/75
MAGANGA, AG. J.

- HELD:
- 1) In identification cases, minor discrepancies in the evidence of the witness are not fatal if they are not material to the identification of the accused.
 - 2) A specified authority falling within Ss.4 and 5 of the Minimum Sentences Act must be proved, mere allegation is insufficient.

Sentence reduced.

MAGANGA, AG. J. - The appellant was convicted of stealing a motor vehicle c/s 265 of the Penal Code and he was sentenced to 5½ years imprisonment. The appeal is against conviction and sentence.

The facts found established were that on 24th December 1972 a Landrover belonging to Fort Ikoma Lodge was stolen from the car park at the lodge. The theft was reported to Mugumu Police Station and the report was sent to all police stations in Mwanza and Mara Regions. On 27th January 1973 a report was received at Musoma that the vehicle had been seen at Bariadi in Shinyanga region. A team of police officers including P.W.3 Corporal Gideon left for Bariadi. On reaching a place called Ngassamo they got further information that the vehicle was within that area. They were led by a special constable (P.W.4) to a place where they found the same vehicle being repaired by four people. P.W.2 identified the vehicle as the one which had been stolen and as the group neared the vehicle Corporal Gideon ordered the four people to surrender without resistance. Three of the people obeyed but the fourth one ran away and managed to escape to a maize shamba. That person disappeared but the other three were

rested and charged with the theft. They were subsequently convicted. The prosecution case was that the appellant was the person who escaped. The question before the court was therefore whether the appellant was properly identified to be the person who escaped.

In a well reasoned judgment the learned resident magistrate considered the issue of appellant's identification at length and came to a conclusion that it was conclusively proved that the appellant was the person who ran away from the team of policemen and escaped. He then resorted to the doctrine of recent possession and found the appellant guilty of theft of the motor vehicle. He accordingly convicted him as charged.

In his defence at his trial and in his memorandum of appeal the appellant denied to have ever been in the group which was found possessing the stolen vehicle. He is also now challenging the finding of the magistrate on his identification.

The evidence relied on by the magistrate on the issue of identification of the appellant was given by four prosecution witnesses. Corporal Gideon (P.W.3) deposed that he knew the appellant well before the incident and on the day in question he saw him run away as he ordered the group to surrender. He stated that he did not hold an identification parade because he knew the appellant and saw him on the day running away. According to him, the appellant was wearing a dirty white shirt with greasy patches and was at the time holding the bonnet of the vehicle. P.W.4, Michael Cheyo deposed that he had seen the appellant in the company of the other three the previous night at the home of Maria (P.W.6) and he was the one who reported them to the police as they looked suspicious. He stated that while in the company of the police he saw the appellant run away from where the car was found when they were ordered to surrender. According to him the appellant was wearing a yellow shirt. P.W.5, Augustino Manzale, who was also with the policemen, deposed that he lives in the same house as Maria and he saw the appellant together with the other three people at Maria's house where they slept. He also saw the appellant run away from the vehicle when they were ordered to surrender. The appellant was at the time wearing a yellow shirt. Finally, Maria (P.W.6) deposed that on the day before the police arrested the people who had the vehicle the appellant together with the three other people went to her home around 9 p.m., and asked for a place to sleep as they said their vehicle had mechanical defects. She offered them a place to sleep and the

appellant was one of the four people who slept at her house. In the morning the appellant and his friend started repairing the vehicle but they were interrupted by the police. She saw the appellant run away and he was not arrested then. The appellant had a yellow shirt with a lot of grease on it.

The appellant is challenging his identification saying that there was contradiction in the evidence of the prosecution witnesses as to the shirt the person who ran away was wearing. This contradiction would have been material only if his identification was solely based on the cloth the person who ran away was said to have been wearing. This however was not the case. He was identified by no less than three witnesses who had seen him before the police arrived. P.W.3 knew him well before and Maria could not have made a mistake in identifying him because he had slept in her house. His identification as the person who ran away was therefore beyond doubt.

As the learned Resident Magistrate properly found the appellant and his three friends were found in possession of the stolen vehicle just about a month after it had been stolen. The registration numbers of the vehicle had by then already been changed and a white plate was fixed on the vehicle. Since a motor-vehicle is not something which can change hands so easily, I am of the view that the learned Resident Magistrate properly directed himself on the applicability of the doctrine of recent possession. His finding that the appellant was one of the people who stole the motor vehicle was therefore the only logical conclusion in view of the evidence before the court. The appeal against conviction is therefore dismissed.

In sentencing the appellant, the learned Resident Magistrate stated that since the vehicle belonged to Fort Ikoma Lodge the offence fell under Sections 4 and 5 of the Minimum Sentences Act, 1972. No evidence was however led to show that Fort Ikoma Lodge Ltd., is a 'specified authority' or a 'subsidiary company' as defined in section 3 of the Minimum Sentences Act, 1972. There was a base statement by the Public Prosecutor, after the conviction was entered, that Fort Ikoma Lodge is a specified authority. This statement alone was not enough to bring the offence within the ambit of the Act. It had to be proved by evidence that the statement was in fact correct. This was not a situation where the court could take judicial notice of the alleged fact and I am not aware of a case in which it has been proved that Fort Ikoma Lodge Ltd., is a 'specified authority'.

or a subsidiary company as defined in section 3 of the Act. The appellant should not under the circumstances have been sentenced under the Act. This being the case, it means that the learned Resident Magistrate exceeded his jurisdiction when he sentenced the appellant to 5½ years imprisonment since the maximum sentence he could lawfully impose is 5 years imprisonment as provided by section 7 subsection (1)(a) of the Criminal Procedure Code. The appellant however deserved a deterrent sentence and I would reduce the sentence imposed on him to 5 years imprisonment.

15. REPUBLIC v. SAIDI SALEHE
HIGH COURT CRIM. REV. 9-DSM-74, 15/5/74
BIRON, J.

HELD: The failure to write a judgment and record a conviction is fatal to the proceedings and is not curable under s.346 of the Criminal Procedure Code.

Conviction quashed and sentence set aside.

BIRON, J. - The accused was charged with being a rogue and vagabond contrary to section 177(4) of the Penal Code. The particulars of the charge as laid being that:

The accused person is charged on the 11th day of January, 1974 at 00.30 at Kinondoni Playground within the City of Dar es Salaam Coast Region was found asleep in the Banana Trees at such time and under such circumstances as to lead to the conclusion that, the said accused person was there for an illegal or disorderly purpose.

And he was sentenced to imprisonment for six months.

Evidence was given by a Police Officer to the effect that whilst on night patrol duty he was alerted by a member of the Peoples' Militia who had seen someone behaving suspiciously at the Kinondoni Playground. On the witnesses going to the spot they found the accused lying asleep amongst some banana trees in the playground after having shed his clothes, which he had hung on the banana trees.

In his defence the accused stated that he had come down from Kondoia to visit his aunt who works as a nurse in Dar es Salaam. He had been unable to find her and not having the means

to go to any hotel or knowing anyone in town, he went to the playground where he went to sleep. After this explanation the court noted as follows:-/

Mitigation: Nil.

Sentence: Six months imprisonment.

By section 210 of the Criminal Procedure Code:

The Court having heard both the complainant and the accused person and their witnesses and evidence shall convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him, or shall dismiss the charge under section 38 of the Penal Code.

And by section 170(1) and (2) of the Code and section 171(1) of the same Code:

170(1) The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates if any.

Provided that where the judgment is in writing at the time of pronouncement the judge or magistrate may, unless objection to such a course is taken by either the prosecution or the defence, explain the substance of such judgment in open court in lieu of reading such judgment in full.

(2) The accused person shall, if in custody, be brought up, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.

171(1) Every judgment under the provisions of section 170 shall, except as otherwise expressly provided by this Code, be written by, or reduced to writing under the personal direction and superintendence of, the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date of which it is pronounced in open court.

The failure to write a judgment and record a conviction is obviously fatal to the proceedings and is certainly not curable under section 346 of the Criminal Procedure Code.

The sentence not being founded on any conviction, cannot be sustained and it is accordingly set aside.

This court could order a retrial, but as it is the practice not to order a retrial unless a conviction is likely to result, and in this case it is impossible to envisage a conviction resulting after a fair trial, as the accused who stated that this was his very first visit to Dar es Salaam having come from Kondoa, is obviously a very unsophisticated person. It cannot therefore by any means be said that in going to sleep in the playground having nowhere else to go, he was there for an illegal or disorderly purpose, which said purpose is an essential ingredient of the offence.

In the result, the sentence imposed is set aside and unless lawfully held in detention in some other connection, the accused is to be immediately released. And I would recommend that unless he has someone to go and stay with, he be repatriated to Kondoa.

16. MANAGER NYAMWEZI CREAMERIES TABORA v. KILUGALA MALOMO
HIGH COURT MISC. CIV. APP. 3-TABORA-74, 29/4/75
MWAKASENDO, J.

Held: The employer's liability under the Ordinance can only arise if the employee is engaged in his employment.

Appeal allowed.

MWAKASENDO, J. - This appeal by the Manager, Nyamwezi Creameries Tabora is from the judgment and decree of the District Court Tabora in Misc. Compensation Civil Case No.5 of 1973.

The facts giving rise to the suit are quite brief and straightforward. They are these. The respondent, original plaintiff, one Kilugala Malomo was until the 29th July, 1972 an employee of the Nyamwezi Creameries, a NAFCO, project at Tabora. His duties with the appellant firm were those of an electrician and as an electrician he had to carry out repairs and keep in good mechanical order all the machinery of the factory, as well as the company's motor vehicle. On 29th July, 1972 at about 8.30 a.m. Malomo was riding on a company's bicycle borrowed the previous

evening from another company's employee (P.W.2) when he collided with a tractor Registration No.GTD 854 along the Boma Road, a public road within Tabora Township. Malomo suffered quite a number of injuries in the accident and had to be admitted in hospital for treatment. The driver of the government tractor was subsequently brought before the District Court to answer a charge of driving a motor vehicle on the public road without due care and attention. He was convicted of the offence and sentenced to pay a fine of Shs.200/- or four months' imprisonment in default. He was also ordered to compensate Malomo for the injuries suffered in the accident in the sum of Shs.1,000/-.

On 31st July, 1972 the Manager of Nyanwezi Creameries completed a report under section 3(1) of the Accidents and Occupational Diseases (Notification) Ordinance, and forwarded the report to the Labour Office, Tabora and 23rd November, 1972 the Labour Officer Tabora, acting on behalf of the respondent Malomo, put in a claim of Shs.10,260/- under the Workmen's Compensation Ordinance Cap.263 of the Laws. The claim being hotly contested by Malomo's employers the matter had to be referred to the District Court for decision.

The District Court which found the facts to be as outlined above for some reason not quite comprehensible from the record, found that the appellant firm were liable to compensate the employee Malomo in terms of the provisions of the Workmen's Compensation Ordinance - vide Section 5 of the Ordinance.

Mr. El-Maamry, learned Counsel for the appellant firm, has quite properly in my opinion, complained against the decision of the District Court which shows clearly that the learned Resident Magistrate grossly misdirected himself on the law applicable to the subject - matter of dispute. As both Counsel have readily conceded, the only issue in this case is whether or not on the facts the employee Malomo could properly be said to have met his accident in the course of his employment. The learned Resident Magistrate in dealing with this point in his judgment said the following, I quote:-

The defendant contended that even though he was going to his place of work but as the accident did not occur when the workman was engaged in the actual duties of his employer then he was not acting within the course of his employment at the time. The Counsel quoted the case of VIRANI v. DHARAMSI (1967) E.A. 132 where it was decided that a workman is regarded to be within the course of his employment when "an accident arises from an act which an

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employee is employed to do even if he adopts the wrong method of doing it. The court sees nothing in this case which states that an employee who is on his way to do the duties of his employer and in the course of this he meets an accident then he is not covered within the Workmen's Compensation Ordinance. The Court is satisfied that going to a place of work every day and coming back home after the working hours is an act done by a workman in connection with his employer's trade or business in terms of Section 5(2) of the Workmen's Compensation Ordinance which requires that the act must be done for "the purpose of and in connection with his employer's trade or business". It could be any act for example fighting if it is in defence of the employer's property. So the court finds that the workman Christopher Malomo, was in the course of his employment when the accident occurred.

With all respect to the learned trial Magistrate. I am unable to agree that the facts found established in this case brings the respondent employee within the ambit of the provisions of Section 5 of the Workmen's Compensation Ordinance at all. For ease of reference sub-sections (1) and (2) of Section 5 are set out in full hereunder viz:-

5.-(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions of this Ordinance:-

Provided that:-

- (a) the employer shall not be liable under this Ordinance in respect of any injury other than an injury resulting in permanent partial incapacity which does not incapacitate the workman for a period of at least three consecutive days from earning full wages at the work at which he was employed; and
- (b) if it is proved that the injury to a Workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed:-

Provided that where the injury results in death or serious and permanent incapacity,

the court on a consideration of all the circumstances may award the compensation provided for by this Ordinance or such part thereof as it shall think fit.

(2) For the purposes of this Ordinance an accident shall be deemed to arise out of and in the cause of a workman's employment:-

- (a) where death or serious and permanent incapacity of the workman results from such accident, notwithstanding that the workman was, at the time when the accident happened, acting in contravention of any statutory or other regulation applicable to his employment or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer if such act was done by the workman for the purposes of and in connection with his employer's trade or business; or
- (b) where the accident happened in or about any premises at which the workman was for the time being employed for the purposes of his employer's trade or business, if it happened while the workman was taking stops, in an actual or supposed emergency in or about these premises, to rescue, succour or protect persons who were, or were thought to be or likely to be, injured or imperilled, or to avert or minimise damage to any property owned by the employer or for which the employer was answerable to the owner.

In view of this clear and unambiguous provisions of Section 5 particularly the provisions of sub-section (2) thereof, I cannot see how it can be said, as presumably the Magistrate says in his judgment, that the accident to Malomo the subject-matter of these proceedings, occurred in the course of Malomo's employment with the appellant firm. It seems to me a completely unarguable point that when the employee Malomo met with an accident along Boma Road, a public road, was no more engaged in his employer's business than say a workman who gets injured near his house on his way to his place of work. Be that as it may, on consideration and serious deliberation over this matter, I have come to the conclusion that the employer's liability under the Ordinance can only arise if and only if, on the facts of the case it can be

properly said that the employee was engaged in his employment, that is, while at his place of employment and while entering and leaving it. The employer's duty could thus extend to matters arising while the workman is on the employer's premises on his way to his place of work or while he is leaving the premises on his way home but not otherwise.

At pages 323 and 324 of the Law of Master and Servant by Francis Raleigh Batt, 5th Ed. there is this most instructive passage:-

It is clear beyond doubt that a master is not liable for his servant's wrong merely because the wrong was occasioned by the servant using his master's property. The workman must have been using the property in discharge of his duties of service.

A reference may also be made to the case of HIGBID v. R.C. HAMNETT LTD., (1932) 49 T.L.R. 104 where an employee who used his employer's bicycle for his own purposes in dinner hour was held not entitled to be compensated by his employer under the English Workmen's Compensation Acts.

Now, the principle that arises from all the cases I have had an opportunity to consult seems to be clearly this that an employee or workman who is off the premises of his employer, for instance on the public road on his way to his place of employment, and gets injured while so engaged, he cannot successfully sue his employer under the Workmen's Compensation statute because, as the courts have time and again held, he was not at the time acting in the course of his employment. One may well sympathise with an employee - who finds himself in the position in which the present respondent is, but in my judgment, sympathy would not be a sufficient ground in law to warrant this court to depart from a clear accepted principle of law. Accordingly for the foregoing reasons, I am satisfied and it is my considered view that the complaints raised against the judgment and decree of the District Court in this case are wholly justified. In the result, this appeal is allowed, the judgment and decree of the District Court of Tabora in Tabora Misc. Employment Civil Case No. 3 of 1973 are quashed and set aside and there is substituted therefore an order dismissing Mr. Kilungala Malomo's plaint with costs. The appellant firm is also awarded the costs of prosecuting this appeal.

17. LYDIA SEME v. OBASIT KIPANGE
HIGH COURT CIV. APP. 14-DDM-74, 4/4/75
MWESIUMO, AG. J.

- HELD:
- 1) Where a dispute is heard and determined by the Land Tribunal and an appeal therefrom heard by the Minister for Lands, no court may deal with the issue of costs arising from any or both proceedings.
 - 2) The issue of costs in such proceedings is within the competence of the Land Tribunal and the Minister for Lands.

Appeal dismissed.

MWESIUMO, AG. J. - This is an appeal from a decision of Tukuyu District Court Civil Case No.20 of 1973.

I have with particular attention read the proceedings of the lower court in the light of the memorandum of appeal and appellant's submissions before this court. I concur with the learned Resident Magistrate who determined that case.

Like him, I respectfully hold the view that the District court is not the venue for awarding costs for a case heard and determined by the Land Tribunal and appealed therefrom to the Minister for Lands. The law on that subject is crystal clear that the Minister's decision on such subjects shall be final and shall not be reviewed by any court of law.

Admittedly what the appellant wanted from the District Court is not to review the Tribunal's or Minister's decisions but costs. But the costs arose from the decision of the Minister. In my view for the court to start that matter again even though only touching the aspect of costs would result in intruding on the Minister's decision. I cannot see how a court of law could judiciously determine the issue of costs without going into the analysis of the Minister's decision.

There is no provision in the relevant law that bars the appellant from seeking the award of costs either from the Land Tribunal or the Minister.

We are told by the Commissioner for Lands vide his letter Ref. No. CLT/AP/TK/380/15/SDM dated 19/11/73 that the matter of compensation for cassava in the disputed land was purely a court case. Well, that may be so, and I think the learned Resident Magistrate has commendably dealt with that aspect of the case separately, as will be seen here at a later stage.

However, deliberately or perhaps inadvertently, the Commissioner did not go further to offer any advice or decision on the issue of costs which resulted from the hearing of the land dispute before the Tribunal and the appeal thereon before the Minister.

By simple logic the issue of costs arising from those two hearings are part and parcel of these main hearings and I could not for one moment think of any sensible piece of legislation that would empower the Tribunal and the Minister to determine the substantive issues of a case and prohibit them to determine the subsidiary issues, such as costs, that naturally flow from their decisions on the substantive issues.

To pass such a law would be driving towards the apex of absurdity for it would degenerate and accommodate a terrible wave of chaos in the administration of justice with resultant injustice to the litigants involved.

For these reasons, I am impelled in law, to sustain the learned Resident Magistrate's advice that the appellant should go back either to the Land Tribunal or the Minister to seek this redress.

By strict operation of the law on the subject this matter is not within the province of the courts of law at any level, High Court, inclusive.

I now have to turn to the question, earlier deliberately left, of compensation for cassava assertedly having been the property of the appellant and allegedly having been without authorization uprooted and utilized by the respondent. Here again I am in entire agreement with the learned Resident Magistrate in his ruling thereon. In other words, on the weight of evidence on the factual issues before that Court, the appellant has failed to establish her claim.

This court at this stage cannot claim a better opportunity of assessing the credibility of the witnesses whom it has no chance to observe while the Court below had ample time to see and observe them. Thus its conclusions on those factual issues which were

properly and procedurally approached must be allowed to stand undisturbed.

In the event therefore, this appeal fails and is accordingly dismissed with costs to the respondent.

18. MELISHO SINDIKO v. JULIUS KAAYA
E.A.C.A. CIV. APP. 4-A-76, 23/3/76
LAW, V.-P., WAMBUZI, P. & MUSOKE, J.A.

- HELD:
- 1) The pecuniary jurisdiction of Primary Court in civil matters does not exceed Shs.1,000/-.
 - 2) Such pecuniary limitation cannot be evaded by bringing a series of suits, each within the court's jurisdiction, to recover a single debt which is outside that jurisdiction.

Appeal allowed.

LAW, V.-P. - This is a most unfortunate case. It brings the law into disrepute, and reflects adversely on the courts and advocates who have had to deal with it, with the exception of the High Court which made a valiant but, I am afraid, unavailing attempt to ensure that justice was done. I fear that this Court is equally helpless.

The background to this sad story is as follows. The respondent was the plaintiff in a suit filed by him in the Primary Court in the West Meru District. I shall refer to him henceforth as the plaintiff. He sued the appellant, hereinafter called the defendant, for shs.2,000/- allegedly lent by him to the defendant. The case was admirably tried in the Primary Court, and in agreement with the assessors the magistrate found in favour of the plaintiff, and gave him judgment for the sum claimed, with costs. Unfortunately the Primary Court magistrate was not aware of the fact that the suit was outside the pecuniary jurisdiction of his court. This is not surprising, as the normal civil jurisdiction of a Primary Court, which is shs.2,000/-, was limited to shs.1,000/- in the case of suits for the recovery of civil debts, by an amendment to section 14(1) of the Magistrates' Courts Act (Cap.537) which is tucked away in the Schedule to the Written Laws (Miscellaneous Amendments) Act, 1968, together with other amendments to ten other Acts. Had the Primary Court magistrate been aware of this amendment, he would

have rejected the plaint and referred the plaintiff to the West Meru District Court, which was vested with the requisite jurisdiction to entertain the suit. As it is, the defendant, assisted this time by an advocate, appealed to the District Court. The grounds of appeal were confined to the merits of the case, no challenge as to the jurisdiction of the Primary Court being raised. The District Court magistrate allowed the appeal, and entered judgment for the defendant, with costs. The plaintiff then appealed to the High Court, this time engaging the services of an advocate. At this stage, for the first time, the defendant's advocate raised the question of jurisdiction. The learned judge (Jonathan, J.) had no doubts about the appeal on the merits. He held that the District Magistrate was not justified in setting aside the judgment of the Primary Court. There has been no appeal against this decision, which in my respectful opinion was clearly right. The learned Judge dealt with the jurisdiction point in this way - he restored the judgment of the Primary Court in favour of the plaintiff to the extent of shs.1,000/-; and gave him leave to bring fresh proceedings in the District Court for the balance of his claim. Against this part of the decision of the High Court the defendant, with leave, now appeals.

Unfortunately it is clear, in my opinion, that this appeal must succeed. The Primary Court had no jurisdiction to entertain the plaintiff's suit, and the proceedings in that court were a nullity. The Primary Court would only have had jurisdiction if the plaintiff had limited his claim to shs.1,000/-, and waived his right to claim the balance, which he did not do. Pecuniary limitations to a court's jurisdiction cannot be evaded by bringing a series of suits, each within the court's jurisdiction, to recover a single debt which is outside that jurisdiction. The learned Judge's order to this effect cannot be supported, and in my view this appeal must be allowed and the judgment obtained by the plaintiff set aside as a nullity.

There remains the question of costs. Mr. D'Souza for the defendant has asked for the costs of this appeal in this Court, and in the High Court, and in the District Court, and in the Primary Court. The plaintiff, who appeared in person in this Court, is clearly bewildered by what has happened. Not only has he had to sell all his cattle to brief an advocate in the High Court, but he has lost the benefit of a perfectly good judgment for shs.2,000/- as well, on a technicality. Unfortunately for him a valid objection relating to jurisdiction is a technicality to which we have to give effect. The fact that an objection to

jurisdiction should have been raised earlier is something we can take into consideration in our order as to costs. If the objection had been raised in the District Court, as it should have been, the matter would have ended there, and the expenses incurred in the High Court and in this Court would have been avoided. Mr. D'Souza submitted that the plaintiff is to blame for all this. He initiated the proceedings, and should have chosen for them a court having jurisdiction, and Mr. D'Souza submitted that in this respect the plaintiff must be presumed to have known the law. To this I would reply that if the plaintiff, a poor peasant, is presumed to know the law as to jurisdiction, how much stronger must that presumption be in the case of magistrates and advocates.

I would order that the parties bear their own costs in this Court and in all the courts below. If the plaintiff has paid the defendant's costs in the District Court, as ordered in that court, they must be repaid to him. If he is still so minded, after his unfortunate experiences, the plaintiff can bring his suit again in a court having jurisdiction, presumably the West Meru District Court, if the suit is not now barred by limitation.

WAMBUZI, P. - I have had the benefit of reading in draft the judgment prepared by the learned Vice-President. I agree that the appeal must be allowed as quite clearly the Primary Court had no jurisdiction to try the case in which the amount claimed exceeded its pecuniary jurisdiction. I wish only to add that I share the concern expressed by the learned Vice-President on the way this case was handled. It is an unfortunate coincidence that the matter as to jurisdiction was first raised on a second appeal in the High Court when both parties were represented by Counsel and not in the District Court where only the defendant was so represented. I cannot over emphasize the duty of advocates to bring to the notice of the courts all the relevant facts and the law applicable in a particular case. In this case the appeals to the High Court and to this Court would not have been necessary had the relevant law been brought to the notice of the District Court and of the High Court. In saying this I am not in any way absolving the courts of any responsibility as they are presumed to know the law and may only be reminded of it.

I think this is a proper case in which the successful party ought to be deprived of his costs which would normally follow the event. As Musoke, J.A. also agrees there shall be an order in the terms proposed by the learned Vice-President.

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REPUBLIC v. CLEOPHACE KATETHI
HIGH COURT CRIM. REV. 19-MZ-75, 2/7/75
IUGAKINGIRA, AG. J.

- HELD:
- 1) Section 198 C.P.C. applies to cases where the complainant, duly served, fails to appear on the date of the hearing and not to cases where the complainant is present, but unable to offer evidence against the accused.
 - 2) Unless withdrawn by the prosecution a court has no power to dismiss a case for want of prosecution. This is true irrespective of the numerous opportunities that may be given to the prosecution to adduce evidence against the accused.

Order of trial court set aside.

IUGAKINGIRA, AG. J. - The accused was charged with stealing a person employed in the public service contrary to sections 70 and 265 of the Penal Code. The charge-sheet alleged that between November, 1972 and February, 1973 while employed by the Republic in North Mara District as a revenue collector, he stole cash Shs. 1,569/70 which came into his possession by virtue of his employment.

The record of proceedings testifies to a deplorable state of affairs. The position is well summarised by the trial magistrate:-

On careful perusal of the record, a table of which is given hereunder, it is more than clear that an inordinate delay to complete this case has caused accused hardship. There have been more than 25 different dates fixed for hearing of this case but none has been fruitful. Accused was first charged here on 13.2.73, almost 2 years now, and was in remand for over 7 months before he was released on bail. It seems to me as if this inordinate delay has been the result of sheer negligence on the part of the Police. The table below confirms this conclusion. There have been furious complaints in the Parliament condemning unnecessary delays of trials in courts. Although the amount involved is slightly high and the property of Government but the accused has been sufficiently punished having been put into peril for two years now, hence the expression 'Justice delayed is justice denied'.

He then went on to tabulate the dates on which the case was mentioned and adjourned and continued:-

As already remarked, any reasonable person would be right to conclude that these adjournments and the reasons thereof are proof of the possibility that the prosecution has no evidence at all against the accused who is unnecessarily being put into peril.

For all what I have attempted to explain above, I will be jeopardising justice to allow a further adjournment of this case.

ORDER: Further adjournment is hereby refused and as prosecution offers no more evidence, I dismiss the charge, under S.198 of the Criminal Procedure Code and acquit the accused.

Right of appeal explained.

The Republic did not appeal. I believe it was felt, as this Court feels, that the learned District Magistrate did the most reasonable thing in the circumstances. However, the case was admitted to revision to consider whether the magistrate was entitled to rely on section 198 in acting so reasonably. The section provides as follows:-

If, in any case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall dismiss the charge and acquit the accused person, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either admit the accused person to bail or remand him to prison, or take such security for his appearance as the court shall think fit.

As is readily discernible from the section, it applies where the complainant, duly served, fails to turn up on the day appointed for the hearing. The section does not apply where the complainant

is present but for various reasons is unable to offer evidence against an accused person. It has been held by this Court on various occasions that "complainant" should be construed to mean the prosecutor. It is conceded though that on many occasions, and almost every other day, the victim of the crime has also been referred to as the complainant. Referring to the indiscriminate use of the term, El-Kindy, Ag. J. (as he then was) said in D.P.P. v. Philipo, (1971) H.C.D. n.295, that "For the sake of convention the victim of crime has often been referred to as the complainant in practice... but in fact the complainant is the Republic which, as it were, complains to the court of law when it files charges". He went on to say that the victim "was a more witness in the case". In the instant case, the Republic was in fact represented by a police officer. The officer told the court that he had no witnesses - a story which had been repeated nearly thirty times before - and asked for an adjournment. The accused then complained and the court went on to order as above. There can be no question that section 198 did not authorise the measure taken by the learned Magistrate because the complainant was present.

A situation similar to the present one arose in R. v. Murinda and Others, (1971) H.C.D. n.445. In that case the first respondent was charged with representing himself as having powers of witchcraft and the rest with employing or soliciting the use of witchcraft. There followed numerous adjournments on account of the prosecution's failure to adduce evidence. Eventually the trial court fixed a final date for hearing but again the prosecution were not ready. The magistrate then dismissed the charge and acquitted the accused under section 198. On revision it was held that a case cannot be dismissed for want of prosecution. The order was set aside and the case referred back to the trial court.

I have no doubt in my mind that the above case was properly decided. It is definitely lamentable that an accused person may be put to great moral and physical stress and strain due to the prosecution's inaction or perfunctory performance. That, however, would not authorise the court, on its own motion, to release the accused from the charges. It does not in fact appear to me that there is any provision in the Criminal Procedure Code which gives such power or discretion, apart from a successful submission of no case to answer. In the situation of this case, the prosecution can only be advised to withdraw from the charges under section 86 or 200. It can only be hoped that this matter would attract the attention of the authorities concerned so as to confer upon the

courts some kind of power to terminate on their own motion proceedings which are vexatiously and unusefully protracted.

Meanwhile, I set aside the order of the learned District Magistrate, reasonable as it was, and refer the case to the trial court to be dealt with according to law.

20. REPUBLIC v. JOSEPH ANSELEM
HIGH COURT CRIM. REV. 5-MT-75, 7/6/75
KISANGA, J.

HELD:

- 1) The basic rule of practice is that it is the duty of the presiding magistrate to ensure that witnesses do not sit in court until they have been called to give evidence.
- 2) Subject to the rule of practice above, the fact that a witness has been present during the testimony of the other witness(es) does not make his or her evidence inadmissible. It is a matter of ascertaining the materiality of the evidence and the weight to be attached to it.
- 3) Where an accused person is convicted of an offence involving damage of property, such damages must be specifically proved before the court makes a compensation order against the accused.

Conviction upheld, sentence confirmed and compensation order set aside.

KISANGA, J. - The accused was convicted on two counts of doing grievous harm and malicious damage to property contrary to sections 225 and 326(1) of the Penal Code. He was sentenced to 2 years' imprisonment on the first count and 9 months' imprisonment on the second count; the sentences to run concurrently. He was further ordered to pay Shs.200/- compensation in respect of the offence of grievous harm and Shs.1,300/- in respect of the offence of malicious damage to property.

The complainant is employed by the Tobacco Authority of Tanzania as a driver. On the material day he was driving his employer's lorry from Mtwara to Songea and on the way he came to Nangoo village in Masasi where he parked the motor vehicle and went into an hotel there for a meal. It was night time but the hotel room was lit.

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After he was served and as he was eating, the accused and two others came in and went to the complainant, snatched his food and began to eat it. The complainant asked them why they did so but they replied rudely, whereupon he decided to leave the hotel. But before he reached his motor vehicle the accused followed him and hit him with a stick on the ribs causing a fracture of one rib. Complainant quickly ran into the driver's cabin of his vehicle, but the prisoner stoned and smashed the windscreen of that vehicle after which he and his companions ran away.

The complainant was the first prosecution witness to be called and while he was giving evidence the other prosecution witnesses sat in court throughout, and at the end of his (complainant's) testimony the prisoner pointed this out and applied to the court to have these witnesses disqualified from giving evidence after the complainant; the application was duly granted. Thus some five prosecution witnesses were barred from giving evidence and after a long adjournment the prosecution managed to bring a second witness whose evidence supported that of the complainant only up to the point when the complainant walked out of the hotel room following the prisoner's interference, but the witness could not say what happened after that because he himself went away at that same point.

In his defence the accused put up an alibi which was discredited by his own witness and the trial magistrate accordingly rejected it.

I admitted this matter to hearing in order to consider, *inter alia*, the correctness of the procedure which the magistrate adopted in disqualifying the prosecution witnesses who were present during the testimony of another prosecution witness. The basic rule of practice is that the presiding magistrate has a duty to see that when a case is called on the witnesses in the particular case do not sit in court until after they themselves have been called and have finished giving their evidence. The rationale of this rule seems clear; it is that the witness should give an account of matter which are within his own personal experience, and not matter which he has merely heard someone else talking about. But where for one reason or another a prosecution witness is in court when another or other prosecution witnesses were giving evidence, I think that this alone is not sufficient to disqualify such a witness from giving evidence in the case. I could not find direct authority on this point, but there are a number of decisions of this court which appear to be of some guide. For example, in the case of Adam Shabani v. R. (1967) H.C.D. n.193 in which the accused was charged with robbery with violence the court refused to admit the evidence of a defence witness on the ground that she (the witness) sat in the courtroom

throughout the trial. On appeal to this Court Platt, J. held that:-

The fact that the witness for the defence may have been present during the testimony of other witnesses does not make his or her evidence inadmissible. It is a matter of ascertaining the materiality of the evidence and the weight to be attached to it.

The same principle was applied by Mustafa, J. (as he then was) in the later case of Peter Mutabuzi v. R. (1968) H.C.D. n.149. But the two cases and the others which I have managed to find concerned refusal to admit the evidence of defence witnesses, while the present case concerns refusal to admit the evidence of prosecution witnesses, and that is why I said that the decisions are not directly on the point. However, it would seem to me that the same principle should apply also where prosecution witnesses are present in court during the testimony of other witnesses, and I see no logical reason for adopting a different approach in such cases. Because as I said earlier, the reasoning behind the basic rule as stated above is that a witness should base his evidence on personal experience and not on what he merely hears other people say. Thus if a witness (whether he be a defence or a prosecution witness) is wrongly in court during the proceedings, I think he should still be called, but in the course of his evidence attempts should be made to ascertain whether he is testifying from personal experience or whether he is relying for his knowledge on what he heard the other witness saying. If the court is satisfied that the witness is relying for his knowledge on what he heard other witnesses saying in court then it should attach no weight on the evidence of such a witness. But the witness may very well say something or things which cause the court to come to the conclusion that the witness's account is based on his own personal experience of the matters he is testifying to. Should the court come to that conclusion then there would be every justification for accepting and acting on his evidence, and the mere fact that he was present when other witnesses were giving evidence would appear not to affect the position materially. I am therefore of the view that the learned trial Magistrate in the instant case acted wrongly in disqualifying the prosecution witnesses, and that he should have adopted the procedure as outlined above.

I am also satisfied that such evidence as was adduced was sufficient on which the court could have convicted the prisoner as it did and that the alibi of the prisoner cannot have raised any reasonable doubt in the mind of the court. I would therefore uphold the conviction. The sentences imposed were not manifestly excessive and that of 2 years' imprisonment imposed in respect of the first count and which required confirmation is accordingly confirmed.

But the order for compensation in respect of the damage caused to the lorry appears unsupportable. The charge alleges that the windscreen which the prisoner smashed is valued at Shs.1,300/-, but no evidence was adduced at the trial in support of the allegation. The only other mention of the matter was made by the public prosecutor when, after the judgment was delivered, he was addressing the court on matters of sentence and said that the complainant's employer paid about Shs.1,300/- in respect of the damage caused to the vehicle. But quite clearly this was not enough because it was no more than a bare allegation. It was necessary to prove it for example by calling upon the complainant's employer to give oral or documentary evidence showing that such costs were incurred to repair the damage. In the absence of any such proof then, I think that the order was wrongly made and it is accordingly set aside. However, the compensation order for Shs.200/- in respect of personal injuries sustained by the complainant shall stand.

21. IN THE MATTER OF AN APPLICATION FOR BAIL; REPUBLIC v. PAULO KILUWA AND ANOTHER
HIGH COURT MISC. CRIM. CAUSES 18 & 13-MZ-75, 30/4/75
MFALILA, J.

- HELD:
- 1) The question of bail is one for the court to determine after taking into account all the surrounding factors and judiciously addressing its mind to the whole question paying particular attention to the possibility of the accused absconding from or tempering with the process of law.
 - 2) Where the prosecution alleges some likely misconduct on the part of the accused as a reason for opposing bail application, such allegations must be supported by affidavit or otherwise substantiated.

Applications allowed and bail granted.

MFALILA, J. - The two applicants Paul Kiluwa and Wilberd Mpanda are two of the seven accused persons charged before the Mwanza District Court with the offence of causing loss to their employer - a parastatal body namely NATEX contrary to Section 284 A of the Penal Code. Both of them applied for bail in the District Court under Section 123(1) of the Criminal Procedure Code. Both applications were refused, from this decision refusing them bail, they made further applications to this Court under Section 123(3) of the same

Code. Each of these applications was supported by an affidavit. As the applications in the District Court were dealt with together in the same ruling, for convenience I have consolidated them although they were separately filed by different counsels that is to say Miscellaneous Criminal Cause No.13 of 1975 in respect of the applicant Wilberd K. Mpanda filed by Mr. Matemba and Miscellaneous Criminal Cause No.18/75 for the applicant Paul Kiluwa filed by Mr. Rugarabamu. Mr. Mwanyika appeared for the Republic.

For the purposes of these two applications I will only concern myself with the last order of the District Court dated 10 April, 1975 refusing to grant bail to the applicants. The record of the District Court shows that on that date, all the accused persons applied to be admitted to bail and complained that as they had been in custody for a long time, they felt that the police had more than enough time to complete their investigations and that therefore at that stage they should be granted bail. In objecting to these applications, the prosecutor is recorded to have told the Court that investigations were still in progress, that property involved was not recovered, that the offence was a serious one involving the loss of property valued at Shs.198,722/10 the property of the Republic and that if the accused were released on bail he feared that they would try to temper with prosecution investigations and thus cause obstruction to the course of justice.

After hearing these submissions from the accused persons and the prosecution, the learned District Magistrate made the following ruling and I will quote it in full:-

As I have remarked in another case similar to this one which involves also 1, 5, 4 (in this case) the offence facing these men is also a serious one involving property valued at Shs.198,722/10 property of NATEX a company of the Government. I am told that the property has not been recovered either in full or in part. I take into account the reasons advanced by the prosecutor for objection, and would agree that the offence as it stands to-day is one which a bail application can justly be granted without considering the surrounding circumstances of the case and public's interest. There is no doubt that the case has attracted public and Government's attention as to how it will be dealt with, the case is of such great concern entertaining bail application is a matter to be exercised with greater precaution. Therefore I do not think bail can or should be granted at this juncture, I accordingly

accept prosecution's objections and deny accused's right of bail.

mittedly there are passages in this ruling whose meaning cannot easily grasped, for instance it is not clear what the learned magistrate meant by saying "the offence as it stands to-day is one in which a bail application can just be granted without considering the surrounding of the case and public's interest". However, I think it is possible to say from the general trend of the reasoning that the Magistrate refused to grant bail to the accused persons for the following reasons:-

- (a) that the accused persons were facing a serious charge involving public property worth, to use a popular term, a colossal sum of money i.e., 198,722/10.
- (b) that the whole of this property or its value had not been recovered.
- (c) that investigations into this offence had not been completed.
- (d) that the case had attracted the interest of both the Government and the public as to how it will be dealt with.

During the hearing of these applications both learned Counsels for the applicants attacked the District Court ruling as set out above. In particular Mr. Rugarabamu stated that none of the reasons advanced by the prosecution in the lower Court is a valid basis for refusing bail. He agreed that the property involved was worth a large sum of money but he said that this should not be a ground for refusing bail because considering the time that has elapsed, the prosecution should have completed their investigations. As to the allegation that if the accused persons are released on bail they are likely to temper with investigations, Mr. Rugarabamu stated that these were mere allegations unsupported by any evidence and that consequently they cannot be used to refuse bail and to this he drew the attention of the Court to an old decision of this same Court - BHAGWANJI KAKUBHAI (Applicant) v. Rex (1921-1952) 1 L.R. 143. Lastly he said that the learned presiding Magistrate on 10/4/75 while refusing bail, failed to consider fully the principles governing the granting of bail to an accused person and that he entertained extraneous matters in his ruling thereby unjustifiably refusing bail to the applicant.

For the applicant Wilberd K. Mpanda, Mr. Matemba in sum adopted what had been said on behalf of the other applicant adding that one month was more than enough in which to complete any investigations even taking into account the heavy commitments of the Frauds Section.

Mr. Mwanyika the learned State Attorney who appeared for the Republic opposed these applications. While conceding that bail was a right and not a privilege, as indeed it is, he said that in the circumstances of this case granting bail to the applicants would be a denial of justice on the part of the Republic. The reasons being that if the applicants are admitted to bail, and considering their respective positions, they will temper with investigations thus making it impossible to marshal evidence against them. He added in support of this view that the state of the Lower Court record is proof of the assertion that investigations are still going on. The record shows that almost every time the record comes up, either a new charge or a new accused is added and that this process is still going on. Lastly he repeated the submissions of the prosecutor in the District Court that the offence charged is a serious one involving public property worth a large sum of money and that this offence amounted to economic sabotage which in fact is "murder" of the parastatal and cited the remarks of this Court in R. v. Kassam, (1971) H.C.D. n.315 by my brother Mwakasendo Ag. J., (as he then was.)

It is not difficult to see that these are strong submissions from both sides involving on the one hand the principle that aside of murder and treason, in all other cases accused persons are entitled to bail as of right unless clear circumstances are shown that to afford this right to the accused public interest would be injured and on the other the principle that the public is entitled to have all offenders prosecuted and where appropriate punished and that efforts to that end should not be unduly jeopardised by having investigations tempered with or the absconding of accused persons.

The traditional overriding consideration in deciding whether or not a particular accused should be remanded on bail or in custody is the consideration whether the accused will appear to stand his trial. If from all the surrounding circumstances including the availability of substantial sureties the Court is satisfied that the accused will appear to stand his trial on the day appointed, the granting of bail should be a matter of course. However although this is an overriding consideration, it is by no means the only one. For instance if it is known for certain that by virtue of his position and the facilities still at his disposal the accused, if free is capable of destroying some vital piece of evidence and that this piece of evidence has not at that stage been secured and kept in a safe place, this would be a

very valid reason for refusing the accused bail. But I do not think this should apply to prosecution witnesses, because unless it is intended to keep the accused in custody until the prosecution closed their case at his trial, the accused can interfere with prosecution witnesses even after the completion of investigations by influencing them through bribery or threats so that at the trial they give evidence which is opposed to what they stated at the investigation stage. I do not think that either now or in the future our faith in our investigators and prosecutors is so wanting that they really need such extensive protection.

In the case cited by Mr. Rugarabamu, this Court held that where the opposition to an application for bail is based on allegations of some likely misconduct on the part of the applicant, the facts on which this opposition to bail is based should be proved by affidavit or in some such manner unless this requirement would cause unreasonable delay in the hearing of the application. I am satisfied that this is a prudent requirement for no man should be deprived of his freedom on mere allegations. Those making the allegations must be in a position to demonstrate that they exist. This principle is of general application, and with respect, I do not think it should be limited to the facts of that case as the learned Judge stated in the case cited by Mr. Mwanyika i.e., R. v. Kassam (1971) H.C.D. n.315. Referring to the case of Bhagwaji (supra) and other two similar cases which had been referred to him the learned Judge in Kassam's case stated:-

The offences on which each of the applicants had been held though serious, were in no sense as serious as the offence for which the present applicant stands charged... it is clear from an intelligent reading of the judgments that each decision rested on its own peculiar facts.

And when the Judge turned his attention to the prosecution allegations that the applicant will temper with investigations if granted bail he said:-

There are some cases and I believe the instant may be one in which an intelligent guess can be made that the applicant having regard to the nature of the case is likely to hamper the speedy conclusion of police investigations.

For my part I am fearful of relying on guess work even if it be intelligent guess work, for two reasons, first that in the absence of relevant material it is difficult to make a guess let alone an intelligent one as to what the applicant is likely to do when granted

bail, secondly if one chooses to make allegations against another, surely one must be in a position to substantiate them, and efforts to this end should not be spared. Only in this way can a court arrive at a decision which is just although not necessarily popular. In these two applications before me, there is no allegation that if the applicants are granted bail they will abscond thus evade the process of this court, but this consideration is so fundamental that I will consider it nonetheless. The learned Judge in the Kassam case had the following to say after citing an English case R. v. Porter (1910) 1 K.B. 369:-

It is no less true here than it is in England that a person in the position of the applicant faced with such a serious charge of allegedly stealing Shs.91,638/10 which may even grow larger as investigations progress will be greatly tempted to abscond and therefore evade justice. I do not believe that the fact that a person does not possess any valid travel papers or documents will be much of a hindrance or obstacle to a person who is determined to flee the country.

The learned Judge then went on to make a remark about economic sabotage on which Mr. Mwanyika relied. The learned Judge said that economic sabotage of parastatal organisations was as much a "murder" of these institutions as the intentional killing of another human being. I am not in a position, without sufficient material, to say whether we have elevated the worth of property to the level of human life and whether in fact this is desirable, but for the purpose of these applications, I can only say that these remarks were obiter as they were in no way necessary to the decision in that application. The decision in the Porter Case would also not support the above proposition because that case was not in any way concerned with the question whether the accused would abscond and evade justice if granted bail. As I understood that case the question there was whether the agreement entered into by the appellant (Porter) and one Brindley of the one part with Clark of the other part whereby Clark (the accused in another case) should indemnify Porter and Brindley against their liability on their recognisance which they had entered into as sureties for the appearance of Clark in case of Clark's failure to make appearance in court, was an agreement to do something which tended to produce a public mischief and therefore illegal giving rise to an indictment for conspiracy. The Court of Criminal Appeal answered this question in the affirmative. Lord Alverstone C.J. who delivered the judgment of the court stated at page 373:-

It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice.

I am therefore satisfied that the decision of this court in the Kassam case dismissing an application for bail was based on the particular facts of that case namely that the period (one week) which had elapsed from the time of the applicant's arrest was not long enough so that the prosecution could not have been expected to complete investigations within that time. To this effect the learned Judge said:-

The applicant was arrested only over a week ago and it could in my opinion be demanding the impossible to expect the police to have completed their investigations within a week.

With respect I agree with these observations, and say that where as in the case of the applications before me a public institution has lost property worth large sums of money allegedly at the hands of the accused(s), then subject to what I have stated, applications for bail should not be lightly allowed during the initial stages. But this does not mean that this should be turned into an indefinite period. Police should be afforded reasonable time within which to complete the main aspects of the investigation. What is reasonable will depend on the peculiar facts of each case. In the present case it is not known when the applicants were arrested but they were taken to court on 27/3/75. That is to say they have been held in custody for over a month to-date. During the whole of this time the prosecution have consistently told the District Court that the applicants should not be released on bail because investigations are not yet ready and that if released the applicants would temper with these investigations. I find it difficult to take these submissions seriously, for what they mean is this, that although the applicants were arrested and charged over a month ago, the investigations of the charges against them are still at such an early stage and still so delicate that they will crumple the moment the applicants are granted bail. If this is so, that one month after the arrest of the applicants the case against them is still so weak that what has been achieved must be protected by the continued detention of the applicants, one may legitimately ask why were arrested in the first place. I would have thought that

one month after the arrests, the prosecution, even after making allowance for "pressure of work", should have built up a sufficiently strong case as to be almost in the final stages of compiling the evidence for action by the Director of Public Prosecutions under Section 28A(4) of the Penal Code. For these reasons I am satisfied that in the particular circumstances of this case, the contention that the applicants should not be admitted to bail because investigations are not complete cannot be accepted. To go on accepting this contention indefinitely would be a denial of justice to the applicants, for a situation may be reached whereby even when bail is clearly deserved, it will nevertheless be refused for no other reason than that the prosecution is opposed to bail. Whether or not in a particular case bail should be granted is a matter for the court to determine after taking into account all the surrounding factors and judiciously addressing its mind to the whole question. For as Wilson Ag. C.J., put it in the Bhangwaji Case - "It is certainly no part of our system of criminal justice to keep a man in gaol because to put it colloquially, the police do not like the look of his face." This is in conformity with the basis of our criminal law that all are deemed innocent until the contrary is proved in a Court of law. The soundness of this principle is easily grasped the moment one is personally involved in its application, let us readily apply it to others.

As remarked, the allegation that if released on bail the applicants would temper with investigations was not supported by any evidence. I think the learned Magistrate may have been right in stating that the case has attracted the interest of both the public and the Government, but he was most certainly wrong in going on to say that the public and the Government were interested in this case as to how it is going to be dealt with. This is because the Executive branch of Government has never as far as I am aware told the Judicial branch of Government how to deal with cases. These were therefore extraneous matters which the learned Magistrate should not have considered in determining the applications before him.

For all these reasons, I am satisfied that at this stage of the proceedings in the District Court, there are no valid grounds to go on refusing granting bail to the applicants. I have dealt with all the objections that were raised, and finally as indicated it was not suggested that the applicants would abscond if granted bail. In the result, these applications are allowed, the order of the District Court refusing to grant bail to the applicants is set aside and substituted therefore an order admitting to bail both the applicants namely Wilberd Mpande and Paul Kilua upon their executing bonds in

the sum of Shs.50,000/- each, with two sureties for each applicant in the like sum. Each of the sureties should satisfy the Senior Resident Magistrate Mwanza that on the event of forfeiture, he has the means to raise Shs.50,000/-.

22. REPUBLIC v. ABRAHAM HASSAN
HIGH COURT CRIM. REV. 9-DDM-74, 30/12/74
MWESIUMU, AG. J.

HELD:

- 1) The offence of corruption with agents contrary to Section 3(2) of Cap.400, as amended by Act No.16 of 1972, falls within the scope of Ss.4(a) and 6(3) of the Minimum Sentences Act 1972 which when read together make it mandatory for the court to impose a sentence not less than three years imprisonment notwithstanding the existence of special reasons.
- 2) The general procedure in the enhancement of sentences is that the accused must be served with an enhancement notice to enable him to appear in court to defend himself.
- 3) The above procedure is applicable in the following circumstances:-
 - (a) Where the offences charged do not fall within the Minimum Sentences Act, 1972.
 - (b) Where the offences charged do fall within the Minimum Sentences Act, but the sentence is subject to the discretion of the Magistrate to award a sentence less than the minimum.
- 4) Where a superior court finds that the sentence awarded by the trial court is less than the minimum prescribed and sets to rectify the error, it is futile to require the accused person to advance reasons against the enhancement of such sentence.

MWESIUMU, AG. J. - This case has been called up for revisionary purpose to consider the sentence of 12 months' imprisonment for an offence of corruption with agents contrary to Section 3(2) Chapter 400 as amended by Act No.16 of 1972 of which one Abraham s/o Hassan was convicted by Njombe District Court.

minimum but what it does is just an exercise of sentencing the accused to what he should have been sentenced by the Lower Court whatever might be his special reasons or special circumstances of the case. Therefore, in my opinion, when dealing with notices of enhancement to an accused person one must differentiate three categories of conviction firstly, of offences falling out of the Minimum Sentences Act, secondly those within the Act but still the courts are empowered to exercise some discretion to award sentences less than the minimum if there are special reasons and circumstances, and lastly there are those convictions on offences for which the legislature has given no discretion to award a sentence less than the minimum.

It is for the last category of offences where I strongly hold the view that it is futile and indeed unnecessary exercise to insist that the accused be heard before his sentence is corrected from the illegal sentence of the Lower Court to the minimum mandatory sentence.

The instant case falls within the third of the three categories I have endeavoured to analyse above. Therefore it was not necessary to insist on giving the accused the right to be heard before substituting the illegal sentence with the mandatory minimum sentence.

Had I intended to impose against him a sentence higher than the mandatory minimum then the matter would be different. In such a case then a need would arise for the accused to be heard before awarding him such a higher sentence.

In the present case I have preferred giving him the mandatory minimum sentence and therefore the question of his first being heard in my view, has been properly dispensed with.

23. THOBIAS ZENDA v. HERMAN ZENDA
HIGH COURT CIV. APP. 7-MT-73, 26/1/74
KISANGA, J.

Held:

- 1) Where services have been rendered for the benefit of another, the person rendering such services is entitled to compensation even if there was no such agreement at the beginning.
- 2) Where a claim for compensation relates to service rendered in the past, and the labour charge estimates

have been done on basis of current costs, the court can adjust the estimated labour charges taking into consideration subsequent changes in the labour market.

- 3) In accordance with the provisions of O.XVII r.10(1) C.P.C. where a judge or magistrate by reason of death, transfer or any other causes is prevented from concluding a trial of a suit, his successor is entitled to take over and continue the trial of the same case.
- 4) Where an issue to be decided is largely on the credibility of witnesses, it would be proper and desirable for the succeeding magistrate to let the trial be finalised by his predecessor where possible.
- 5) Order XVII r.14 of the C.P.C. empowers the magistrate to call at his own initiative an additional witness at any stage in the proceedings if he thinks it is absolutely necessary to do so.

Appeal dismissed.

KISANGA, J. - The appellant sued the respondent to recover Shs.12,827/30 being the amount owing on a building contract. The claim was partly allowed only to the extent of Shs.4,500/-, and dissatisfied with such an award the appellant now appeals. The case was heard by two magistrates. The first one recorded the evidence of the appellant and all his witnesses and also the evidence of the respondent and his three witnesses. It would appear that this magistrate went on transfer and his successor continued the proceedings and recorded the evidence of the remaining six defence witnesses after which he accordingly determined the matter.

Most of the facts were not in dispute and may be briefly summarized as follows. The appellant and the respondent are brothers. The respondent decided to build two houses in Mtwara town and for this purpose he sent for the appellant who was in Songea to come and assist. The appellant is a carpenter by trade and so he became in charge of all the carpentry work including roofing of the houses and making the frames, windows and the doors. The work was carried out purely as a family enterprise and there was no agreement whatsoever for payment to the appellant for his services.

The learned trial Magistrate found that the appellant was entitled to be paid for the services rendered to the respondent even though there was no agreement for such payment. I think that this view was correct. The appellant has expended his effort and energy towards building the houses on a scheme which was at first a family enterprise between brothers. But if it now turns out that the brothers have disagreed and the respondent claims exclusive ownership of the houses then I think that it is only fair and equitable that the appellant be compensated for his labours. On the other hand to hold otherwise would amount to unjust enrichment on the part of the respondent which the courts cannot sanction.

Having found for the appellant the learned Resident Magistrate then sought to determine the actual amount to be awarded but he found that the evidence before him was not sufficient for the purposes. Whereupon he, on his own initiative, called as a court witness an Inspector of buildings with Comworks who estimated the labour charges for carpentry work in respect of both houses. For the first houses the witness estimated the total charges at Shs. 6,365/50. The evidence as recorded does not show that the witness gave the estimated total charges in respect of the second houses. However, he did estimate the charges of each job individually which, as far as can be ascertained from the record, add up to Shs. 2,760/-. Thus estimated total charges for carpentry work on both houses comes to Shs. 9,125/30. These would have been the charges in 1975. But the two houses were completed in 1966 and 1971 respectively, so that the learned trial Magistrate taking into account the price increases which have occurred to date, adjusted that figure and accordingly reduced it to Shs. 4,500/- which he duly awarded to the appellant.

At the hearing of this appeal the appellant contended that the trial Magistrate was wrong in awarding him an amount less than that as estimated by the building Inspector. The building inspector said in evidence that the estimated labour charges which were based on the year 1973 would have been less if they were based on the year 1966 because there have been increases in the wages. On that account I am of the view that the trial Magistrate was justified in adjusting the estimated labour charges for 1973 to take into account the changes in the wage structure which had occurred hitherto.

The appellant also has contended that the trial Magistrate was wrong in taking over and continuing the case which was partly heard by his predecessor because he was not in a position to assess

the demeanour of those witnesses who gave evidence before his predecessor. There is no merit whatsoever in this argument. Order 18 Rule 10(1) of the Civil Procedure Code provides:-

Where a judge or magistrate is prevented by death, transfer or other causes from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

It is apparent from the record that the first magistrate ceased to exercise jurisdiction in the area and was succeeded by the second magistrate who concluded the trial. Acting under the provisions of the sub-rule quoted above the succeeding magistrate was perfectly entitled to take over and continue the trial and the appellant could not, as of right, demand that the case be finalized by the magistrate who was seized of it in the first instance. I do concede however that there might be cases where the issue to be decided depends wholly or almost wholly on the credibility of witnesses in which case the question of seeing the witnesses and watching their demeanour becomes of crucial importance. In such circumstances the succeeding magistrate might very well come to the conclusion that in order to do justice to the case it is desirable that the trial be finalized by the magistrate who commenced hearing it, and in my opinion, it would be both desirable and proper in those circumstances for the succeeding magistrate to have the trial finalized by his predecessor. But such was not the case here. As indicated earlier most of the facts were not in dispute and therefore the question of credibility of witnesses did not arise. Indeed the succeeding magistrate did allow the appellant's claim acting on the evidence which was recorded almost wholly by his predecessor, and therefore it is impossible to see the basis for the appellant's complaint. It is true that after allowing the claim the succeeding magistrate did reduce the claim and awarded a lesser sum than that stated in the plaint, but in doing so he was acting solely on the evidence which he recorded himself. As I said before there is no merit in this appeal and it is accordingly dismissed. The remaining grounds of appeal do not raise any points of substance warranting consideration.

That was sufficient to dispose of this appeal but it is necessary to deal with one point which was raised by the trial magistrate. As pointed out earlier the trial Magistrate allowed the claim but in the course of writing the judgment in which he allowed that claim he felt that there was need to record additional

evidence in order to ascertain the actual amount to be awarded. However he added that he was not certain as to the legality of this procedure, particularly as it was already so late in the proceedings, although he would act as he did on grounds of equity. Order 16 Rule 14 of the Civil Procedure Code provides that:-

Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit the court may, of its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

This rule clearly empowers the magistrate to call at his own initiative, an additional witness at any stage in the proceedings if he thinks it necessary to do so. However I should hasten to add that this power should be exercised only rarely, the broad rule being that it is for the party to present his own case to the court and not for the court to make a case for the litigant. The instances in which the provisions of this rule may be invoked will depend on the facts of each case. In the instant case the additional evidence was necessary not to make or boost the appellant's case but only to ascertain the quantum of the actual award which award was made in principle on the evidence as was adduced by the appellant himself. In my view this was a deserving case in which to invoke the provisions of Rule 14 above and to call additional evidence after judgment in order to ascertain the actual amount to be awarded to the successful party.

In the result the appeal is dismissed with costs against the appellant.

24. RIOBA MARWA v. WAISIKO CHACHA
HIGH COURT CIV. APP. 129-MZ-74, 23/4/75
MPALLILA, J.

Held:

Failure by the primary court magistrate to take individual opinions of the assessors and register their votes is an irregularity which an appellate court cannot allow to stand.

Appeal allowed. Order for retrial.

MPALILA, J. - The appellant Rioba s/o Marwa is appealing against the order of the Primary Court of North Mara District at Mtana dissolving his marriage to the respondent Wandiko d/o Chacha. The Primary Court accepted the respondent's petition and dissolved the marriage on the allegation of cruelty perpetuated on her by the appellant. On the other hand the appellant denied these allegations and protested his strong love for the respondent and that in the circumstances he had no wish to be separated from her.

I think on the whole the respondent had sufficiently proved cruelty on the part of her husband the appellant. Her mother testified to this and the certificate of the Conciliatory Board reinforces this view, in particular the allegation that at one time he chased her from the house while in labour and she had to deliver the child alone in the bush. Luckily a passer-by rescued her. In these circumstances I do not think the appellant deserves any woman for a wife. He is a brute who should be living alone.

However, I note with regret that the Primary Court Magistrate failed to take the individual opinions of the assessors and register their votes. His so called "unanimous decision of the court" was accordingly irregular and cannot be allowed to stand.

For these reasons, I allow this appeal by setting aside the judgment and orders of the Primary Court. The record should be remitted to the Primary Court with a direction that the same magistrate and assessors should sit and determine the petition according to law on the evidence recorded. I will make no orders for costs.

25. MISWAHILI MULUGALA v. REPUBLIC
HIGH COURT CRIM. APP. 627-MZ-73, 5/10/74
LUGAKINGIRA, AG. J.

- HELD:
- 1) In a case where facts are based solely on circumstantial evidence corroborating each other a conviction is possible if the circumstantial evidence lead irresistibly to an inference of guilt and should be incapable of any other reasonable explanation.
 - 2) It is undesirable to convict on the circumstantial evidence of a complainant unless the trial court has fully warned itself of the danger and is convinced about the complainant's veracity.

- 3) The offence of common assault is a cognate offence to robbery, therefore a conviction for common assault can be substituted for robbery.

Accused found guilty of common assault.

LUGAKINGIRA, AG. J. - The appellant and another were convicted of robbery c/s 286 of the Penal Code and sentenced to the statutory minimum term of seven years' imprisonment. They appealed to the District Court but the appellant's appeal was unsuccessful. He has now preferred this further appeal.

The complainant told the trial court that on 2/9/72 he set out with Shs.290/- in his pocket to purchase a radio at Chikobe shopping centre in Geita District. For unknown reasons, he did not pursue that mission and instead found himself drinking pombe at the home of the appellant. At about 7.00 p.m., he called it a day and left to go home. A short distance away he was confronted by three people, including the appellant, who assaulted him and allegedly robbed him of Shs.290/-. He raised an alarm. His attackers ran away but the appellant was found at the scene by P.W.2 and P.W.3. When they enquired as to the cause of the assault the appellant said the complainant was a thief. The complainant, however, never mentioned to these people that he had been robbed of any money. It seems that the money affair was first mentioned in court.

On the evidence available the trial court was justified in finding that the complainant was assaulted. When P.W.2 and 3 arrived at the scene they found the complainant fallen down unable to rise. He then complained that he had been attacked by the appellant and two others. The appellant was then standing a few paces away. He did not deny the accusation. He merely retorted that the complainant was a thief and left the scene. That kind of reaction, particularly the appellant's failure to deny the accusation as and when it was made, cannot be consistent with innocence.

The question of robbery, that is, the act of stealing in the above state of affairs, presents some difficulty. As already observed the complainant never mentioned to his rescuers that he had been robbed. The appellant was also not found with money. The evidence that was available to corroborate the complainant's word was wholly circumstantial. It is undesirable to act on the bare word of the complainant in the absence of corroborative evidence unless the trial court has fully warned itself of the

danger and is convinced about the complainant's veracity. But as has been repeatedly laid down, circumstantial evidence must lead irresistibly to an inference of guilt and be incapable of any other reasonable explanation.

That view was expressed by the Court of Appeal in Simoni Musoke v. R. (1958) E.A. 716 at page 718. The Court went on to cite a passage from the judgment of the Privy Council in Teper v. R. (2), (1952) A.C. 480 at page 489 which I will quote here in view of its relevance to the instant case:-

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.

In this case the trial Magistrate took as corroborative circumstantial evidence the fact that the complainant had been drinking in company with his assailants and had taken out money in their full view to pay for pombe. He also felt bound to believe the complainant because he thought there was no other ground upon which the assault could be explained. In my view he was entitled to take these factors into account. But what transpires is that in doing so he failed to look for other co-existing circumstances which could weaken or destroy the inference of guilt. First of all, when the appellant was confronted by P.W.2 and 3 he said the complainant was a thief. The learned Magistrate never gave consideration to this allegation in his summing up to the assessors or in his judgment. The fact that the appellant never repeated the allegation in court was immaterial. He could even choose to remain silent. The trial court was bound to evaluate all the evidence including that of the prosecution. There could be some truth in the appellant's allegation because the record indicates that the attack made on the complainant was not the sole work of the appellant and two others but a mob which may have amounted to ten. Indeed, even the complainant himself stated "walinipiga wakisaidiana na watu wengine kama watano ambao sikuwafahamu." And the first accused who was acquitted by the District Court spoke of the complainant having been chased until he went to hide in an underground excavation. It does not readily suggest itself to me that this mob was beating and chasing the complainant because of his Shs.290/-. A more plausible explanation could be that the complainant had stolen a plate, as alleged by the appellant, and the mob reacted by administering instant justice.

Secondly, it was in evidence that the complainant was fairly drunk at the time of the incident. When P.W.2 and 3 arrived at the scene they found the complainant fallen and apparently not fully conscious. It was not until they had poured water over his body and until he had vomited profusely that he was able to say anything. Then they led him to his home. It was not unlikely in this state of affairs that the complainant may have been relieved of his money by his rescuers. Thirdly and finally, the complainant had set out with Shs.290/-. Out of this amount he bought some pombe. It was then impossible that he still had Shs.290/- to be robbed from him. He could not eat his cake and have it. These co-existing circumstances do weaken if not actually destroy the inference of guilt on the appellant. I am certain that had the trial Magistrate given them consideration he might have acquitted the appellant as charged. On my part I find it unsafe to sustain the conviction. I therefore quash the same and set aside the sentence imposed.

The final point to be considered is whether a conviction for common assault can be substituted. I have found decided cases conflicting on this point. In R. v. Milambo, (1971) H.C.D. n.361, the accused was charged with robbery with violence but convicted of indecent assault. On revision, Jonathan, Ag. J. (as he then was), held, and I think rightly too, that indecent assault was not a cognate offence to robbery. But the learned Judge went on to state, obiter, that "It seems also that there could not have been substituted a conviction either under Section 240 or 241 because common assault and causing bodily harm are not to my mind cognate offences to robbery." But in Paul Jumarne Mzee v. R., (1971) H.C.D. n.148, the appellant had been convicted of robbery with violence in the lower court. On appeal conviction was quashed and a conviction for common assault substituted. Delivering his judgment Kwikima, Ag. J., stated "An assault is minor to a robbery for the use of force or the threat of it more often than not involves assault.... I cannot therefore see how any robber could complete his intention without assaulting his victim." And in Sayale Seliani v. R., (1968) H.C.D. n.243, the appellant had been charged and convicted of robbery. On appeal a conviction for causing actual bodily harm was substituted. I think reference to the statute would be of assistance at this juncture. Section 181(2) states:-

When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Although the subsection is seemingly general I think it has to be strictly construed. The test in my view should be whether the minor offence is accommodated in or cognate to the major offence before conviction can be entered for such minor offence. The word "cognate" is defined in the 1966 Impression of Chambers' Twentieth Century Dictionary to mean "of the same family, kind or nature: related or allied." And according to P.G. Osborn's Concise Law Dictionary, 1962 Impression, in Roman Law the word "cognate" meant "persons connected with each other by blood." On this understanding, then, if a person is charged with but acquitted of attempted murder and evidence reveals that he used an unlicensed firearm, he cannot be convicted of unlawful possession of a firearm under the Arms and Ammunition Ordinance. The two offences are not cognate as they are products of different ancestors.

Indeed, in Elmi bin Yusuf v. Rex, 1 T.L.R. (R) 269 this court held that it would always be hazardous where an accused was charged with an offence under the Penal Code to convict for a minor offence which is not to be found in the Penal Code. In order for two offences to be cognate therefore the minor offence must be of the same root with the major offence so that the former is arrived at by the subtraction of the facts constituting the latter. As is said in Mitra's commentary on the Indian Criminal Procedure Code (3rd ed. page 559), "the grave charge (must give) notice to the accused of all circumstances going to constitute the minor offence." This would exclude the possibility of the accused being prejudiced in his defence.

Turning to the instant case and to robbery generally there can be no doubt that assault is an essential ingredient of the offence. When an accused person is charged with robbery and evidence is led as to how he effected it, it is essentially evidence of assault on the victim's person. I am therefore inclined to agree and do agree with the decision in Paul Jumanne Mzee's case. For these reasons I hold that common assault is cognate to robbery. Having found in agreement with the trial court that the appellant did assault the complainant, I accordingly convict him of common assault c/s 240 of the Penal Code.

This offence carries a maximum sentence of twelve months' imprisonment. I note that the appellant has been in prison since 29/9/72 which is a complete two years. In the result he should be immediately set free unless held on some other lawful cause.

26. HUSSEIN BHANJEE v. THE NATIONAL INSURANCE CORPORATION (T) LTD.

E.A.C.A., CIV. APP. 31-DSM-75, 4/12/75

LAW, AG. P. MUSTAFA, AG. V.-P. & KIMICHA, J.

HELD:

- 1) An application for amendment of a plaint should rarely be allowed at the appellate stage unless the matter had been overlooked by inadvertence or the amendment is necessary for the proper determination of the matters in issue.
- 2) The appellant was not entitled to damages for loss of profits since that was consequential loss for which the respondent was expressly absolved by reason of the terms of the contract.

Appeal and cross-appeal dismissed.

LAW, AG. P. - The appellant was the owner of a lorry, insured by the respondent, which was involved in an accident. The respondent appointed a firm known as Tanganyika Garage and Spray Painters (hereinafter referred to as "the Garage") to repair the lorry. In due course the Garage submitted to the respondent a certificate, signed by the appellant, to the effect that the repairs had been completed at a cost of Shs.8,550/-. The learned trial Judge found that the repairs had not in fact been done, and that the appellant's signature to the certificate had been obtained by a trick. The respondent, believing the certificate to be genuine, paid the bill. So far as they were concerned, the matter was at an end.

The lorry was being bought by the appellant, under a hire-purchase agreement, from Riddoch Motors Ltd. Being deprived of the use of his lorry, the appellant was unable to make the monthly payments under the agreement. Riddoch Motors accordingly seized the unrepaid lorry. By a coincidence, their agents who did the actual seizure were the Garage. For some reason, neither Riddoch Motors Ltd., nor the Garage saw fit to inform the appellant that his vehicle had been seized.

The appellant then sued the respondent, claiming either the return of his lorry, duly repaired, or the cost of the repairs, which he estimated at Shs.10,149/90. He also claimed damages for loss of profits consequent upon being deprived of the use of the lorry, at the rate of Shs.3,000/- a month.

In the course of the hearing in the High Court, the appellant learnt for the first time of the seizure of his lorry, which by then had been taken to pieces for use as spare parts.

The learned Judge gave judgment for the appellant for the Shs.10,149/90 claimed by him as being the cost of repairs, but dismissed the claim for damages for loss of profits, holding that this loss had not been proved.

On appeal, Mr. M.A. Lakha for the appellant contended that the judge should have given judgment for the value of the lorry and not merely for the cost of repairs, and that he should also have awarded damages for loss of profits. Mr. Kinariwalla for the respondent cross-appealed against the award of the cost of the repairs, submitting that the amount claimed had not been proved, and against the finding that the certificate submitted by the Garage was a forgery. He also filed a notice of grounds for affirming the decision in so far as it rejected the claim for loss of profits, submitting that this was a claim for consequential loss for which the respondent was not liable in terms of an exception clause contained in the policy of insurance.

I will deal first with the appeal. Mr. Lakha's submission on the first ground is that although the appellant had not claimed the value of the lorry in his plaint, because he did not then know of its seizure and destruction, this matter became an issue in the course of the hearing, when the appellant first became aware that the lorry had been seized and taken to pieces. As it transpired that the vehicle had ceased to exist, Mr. Lakha submitted that the judge made the wrong order in awarding the cost of repairs. The lorry was no longer capable of being repaired. The judge should have awarded the full value of the lorry, the seizure being a direct result of the respondent's failure to have it repaired. Mr. Lakha, relying on dicta by the learned authors of Chitale and Mul on Civil Procedure, submitted that where the original relief claimed has become inappropriate, by reason of events happening after filing of the suit, it is incumbent on the court to take notice of these events and to mould the decree accordingly. Mr. Lakha also relied on decisions of this Court such as Odd Jobs v. Mubia (1970) E.A. 47 and Ramji v. Rambai (1970) E.A. 515, to the effect that where an issue arises in the course of a trial, which is adopted by the parties and generally canvassed, that issue should be adjudicated. I do not think that the issue whether the appellant was entitled to be compensated for the loss of his lorry ever became an issue at the trial. Issue had been agreed and framed, and it was never suggested that an additional issue covering this point should be framed. The point

was not generally canvassed. There is no mention of it in Mr. Kinariwalla's long submission at the trial, and only a passing reference to it in Mr. Lakha's address. Indeed, Mr. Lakha is recorded as having said:-

... I concede the vehicle cannot be repaired... in my submission if the defendant did not carry out the repairs he is liable to pay to the plaintiff the equivalent value of such repairs.

Clearly the issue as to whether the appellant was entitled to be paid the full value of the lorry never became an issue in the suit, nor was it left to the judge for decision. For that reason we rejected an application for amendment of the plaint. Such an application is rarely allowed at the appellate stage, and then only when the matter had been overlooked by inadvertence, which was not the position here, see Jupiter Insurance v. Rajabali Hasham, (1960) E.A. 595, or the amendment is necessary for the proper determination of the matters in issue. That also was not the position here, as the appellant seems to have been content to leave the decision of the suit to the court on the basis of the framed issues, which did not include an issue as to whether he was entitled to be paid the value of the lorry. In my view the first ground of appeal fails. The second ground, that the appellant was entitled to an award in respect of loss of profits, must in my opinion also fail, for the reason set out in the respondent's notice of grounds for affirming the decision on a ground other than that relied on by the learned Judge. The respondent's liability to the appellant under the policy of insurance was, under Section 1, to indemnify him against loss of or damage to the lorry. By the exceptions to Section 1, the respondent was expressly stated not to be liable for, inter alia, consequential loss. Loss of profits due to non-availability of the vehicle because it has been lost or damaged is, in my opinion, clearly a consequential loss for which the respondent was expressly absolved from liability in terms of the contract between the parties. In my view this ground of appeal also fails.

I now turn to the cross-appeal. The first ground is that the learned Judge erred in awarding Shs.10,149/90 in respect of repairs, as there was insufficient evidence to support that award. The evidence was admittedly scanty. The appellant deposed that Riddoch Motors Ltd., had given him an estimate of Shs.10,149/90 for repairing the lorry. He did not produce the estimate, but his evidence on this point was not challenged in cross-examination, and

I think it was open to the judge to accept, and act upon, this evidence. The other grounds is directed against the learned Judge's finding that the certificate that the repairs had been completed was a forgery. This finding was based on the judge's acceptance of the appellant's evidence that his signature was appended to a form in respect of another vehicle previously owned by him and repaired by the Garage, and on the rejection by the judge of evidence to the contrary given by the owner of the garage. The finding was thus based on the judge's view of the credibility of the two witnesses. An appellate court will be slow to interfere with a judge's finding of fact based on credibility. In this case there is no reason at all to think that the learned Judge was in error in this respect.

It follows that in my opinion both the appeal and cross-appeal fail. I would order that the appeal be dismissed with costs, and that the cross-appeal be dismissed with costs. I would allow the respondent such costs as are attributable to the filing of the notice of grounds for supporting the decision, which in my view succeeded. As the other members of the Court agree, it is so ordered.

MUSTAFA, AG. V.-P. - On the facts this was a peculiar case. The appellant was the owner of a lorry which was involved in an accident, and it was, on the instructions of his insurance company, the respondent, sent to a garage for repairs. The garage purported to have repaired the lorry and to have obtained a discharge voucher signed by the appellant for such repairs and it duly received payment from the respondent therefore. The respondent naturally thought that the matter was at end. However the appellant contended that the discharge voucher was not genuine and what was more suprising, that the vehicle was not repaired at all but was in fact "cannibalised" at a later stage. The trial Judge found that the appellant's contentions were well founded, and gave judgment in favour of the appellant for Shs.10,149/90 which he assessed as the cost of the repairs, but dismissed the appellant's claim for damages for loss of profits.

The appellant in his appeal submitted that he should have been given judgment for the value of the lorry instead of the cost of the repairs as the lorry was no longer available and for damages for loss of profits. I respectfully agree with the learned Ag. President when he found that the question whether the appellant was entitled to the value of the lorry never became an issue in the pleadings or in the trial itself, nor was it canvassed or left to the judge for decision. A last minute attempt by Mr. Lakha for the appellant for an amendment

to include such an issue was rejected by this court and that ground of appeal fails. I am satisfied that under the insurance policy, Section 1, the respondent was excluded from having to pay consequential loss, and loss of profits as claimed was clearly a consequential loss. There was a cross-appeal concerning the amount awarded for cost of repairs but that submission has no merit.

I concur in the order proposed by Law, Ag. P.

KIMICHA, J. - I have read and entirely agree with the judgment of the Ag. President. I agree with his reasoning and conclusions and I concur in the order proposed by him.

27. MUGESI NYITONYI v. MANGAZENI NDEGE
HIGH COURT (PC) CIV. APP. 187-MZ-72, 18/11/74
LUGAKINGIRA, AG. J.

- Held:
- 1) No claim for refund of dowry can be heard unless the marriage itself has previously been dissolved.
 - 2) A refund of dowry can only be claimed by the husband.

Appeal dismissed.

LUGAKINGIRA, AG. J. - The appellant, a married woman, sued her "brother" for the refund of dowry to her husband because there is a matrimonial feud, although the marriage still subsists. There is a custom among the Bazanaki of Musoma District whereby when a man dies his wives, children and material properties are inherited by his brothers. In this case the appellant's father Nyitonyi died while she was a young girl. She and her mother were then inherited by Ndege, the respondent's father. That's why, in this judgment, I am referring to the respondent as the appellant's "brother."

When the appellant grew up she was given in marriage by the respondent's father who received the dowry. When the respondent's father died, something dramatic happened. The deceased's brothers were prevented by a local chief from inheriting his wives, children and properties, usually cattle. The chief ruled that the cattle be kept at the deceased's homestead for the maintenance of his family. The respondent, being the eldest son of the deceased's most senior wife, was declared by the chief to be the heir. It is for this reason that the appellant brought these proceedings against him. She was successful in the court of first instance but lost on appeal to the District Court.

I have no doubt that in the circumstances outlined above the right person was sued in this case. This is notwithstanding the fact that the respondent did not expect to be his father's heir but was made one through the "interference" of the chief. It does not even appear to be material that the respondent shared or otherwise in the enjoyment of the dowry. It is sufficient if he is the heir. That to me is the meaning of para 47.11.B in the First Schedule to the Local Customary Law (Declaration) Order, 1963 which states:

If the father-in-law had received the bridewealth when he was still alive, his main heir is responsible for its return, irrespective of the house to which the wife belongs.

That apart, however, this appeal has no chance of success. In the first place, I have already indicated that the marriage still subsists. This court has consistently held that a party will not be heard to claim the refund of dowry unless the marriage itself has previously been dissolved. In this connection, the decisions in Sungwa s/o Fumbuka v. Manyanda Kasalucha, (1968) H.C.D. n.84, Mkiriti v. Mtenyi, (1972) H.C.D. n.7 and Tenza v. Zinzi, (1972) H.C.D. n.237, among others, are relevant. A distinction should also be drawn between these decisions and the decision in Nyamu v. Mahere, (1971) H.C.D. n.173, where it was held that if the wife is the guilty party she cannot obtain a divorce until the bridewealth has been repaid. This decision was based on the provisions of para 58 of the Order already referred to. It provides:-

If the wife is the guilty party she cannot obtain a divorce until her father has repaid the bridewealth or, if he has not the means to pay what the court has ordered at once, the amount remaining becomes a preferential debt.

Although there is no provision prohibiting the repayment of bride-wealth before divorce proceedings are commenced, the paragraph just quoted does not in any way permit the recovery of bridewealth before divorce proceedings are actually commenced. The court will first be presented with a petition for divorce. If the proceedings reveal that the wife is the guilty party it may allow the petition but withhold the divorce certificate until her father has repaid the bride-wealth wholly or in part.

Secondly, this appeal must fail because the proceedings as a whole were incompetent. The appellant has no locus standi. As was held by the District Court, it is only her husband who can sue for

the return of the bridewealth after obtaining a divorce. I do not see how she can usurp her husband's right to sue if this is not to dramatise the uncleanness of her hands in the alleged matrimonial feud. In dealing with these matters the District Magistrate said:-

It would be too much to allow Bi. Mugesu to file proceedings for dowry because I see there is no cause of action between her and her relative brother Mangazeni. It is Ginza (her husband) if anything, to do the claim which would only be allowed where there is divorce. There is no divorce so far proved.

With that I fully agree. The appellant is being misled into futile litigation. The appeal is therefore dismissed with costs.

28. REPUBLIC v. OMARY MOHAMED
HIGH COURT CRIM. REV. 6-DSM-74, 15/5/74
SAIDI, C.J.

- Held:
- 1) Under Secs. 319(1), 329(1) and 346 C.P.C. the Appellate or Revisional Court is impowered to do what the trial court ought to have done; alter the charge and conviction under the appropriate Sections of the repealed Act which was then in force when the offence was committed provided that; (a) the offence was in all respects the same under the old and the new sections and that; (b) no failure of justice would result from such alteration.
 - 2) The penalty and amendment of penalty in the above circumstances, are covered by the provisions of Secs. 14 and 49 of the Interpretation of Laws and General Clauses Act, which provides that in such cases the penalty prescribed must be the one prescribed at the time of the commission of the offence.
 - 3) Section 63(2) of the Road Traffic Act empowers the court to impose a sentence less than minimum once it is satisfied that it is proper to do so.
 - 4) The meaning of the words "special reasons" in S.63 of the Act is an extended one and covers as wide a field as the "special circumstances" in the Minimum Sentences Act.

- 5) The power to impose a penalty of a fine is optional. Where this option is taken, the court must ascertain that the fine can be paid by the convicted person so that failure to pay should not render illusory the option specifically granted by the legislature.

Proceedings held valid, charge and conviction altered, sentence reduced and order to re-open issue of disqualification made.

SAIDI, C.J. - This case raises two important issues for consideration. The first issue relates to the validity of the conviction of the accused of an offence under an Act which was not yet in force. The second issue relates to the court's discretion in passing sentence under the Road Traffic Act No.30/73.

The accused Omari Mohamed was charged before the Principal Resident Magistrate with reckless driving on a public road c/ss 42(1)(c) and 63(2)(b) of the Road Traffic Act No.30/73. The particulars of the offence allege that Omari Mohamed on the 22nd November, 1973, at about 9 a.m. along Jamhuri/Ohio streets, within the city of Dar es Salaam, being a driver in charge of vehicle TDE 823 did drive the said vehicle on the road in a manner which, having regard to all the circumstances of the case, was reckless to the public or to any person, to wit; while driving along Jamhuri/Ohio streets he failed to stop at Jamhuri/Ohio street thereby his vehicle collided with another vehicle, TZ 16995, and damaged it.

On 15th February, 1974, Omari Mohamed appeared before the learned Principal Resident Magistrate of Dar es Salaam. He admitted the facts outline in the particulars of the charge sheet as correct and was found guilty and convicted on his own plea. He was fined Shs.10,000/- or one year's imprisonment. As he could not pay the fine, he was committed into prison. When the case came up for revision on 19th April, 1974, he was granted bail on his own bond of Shs.500/-, pending the determination of the case.

Mr. Mrema who appeared for the Republic, stated that the Republic could not support the conviction of the accused as there was a serious irregularity in the manner the charge against him was brought. As the offence was committed in November, 1973, it should have been brought under the old Traffic Ordinance, Cap. 168, and not under the Road Traffic Act, No.30/73. The question to be determined here is whether the conviction on a charge

brought in the manner Omari Mohamed was charged, would in all cases be a nullity. This question was elaborately dealt with by Sir Ralph Windham, C.J. in Republic v. Indo Parsad Jamietram Dave, (1963) E.A. 65. In that case the Pharmacy and Poisons Ordinance (Cap. 94) had been repealed by the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws). The accused Indo Parsad Jamietram Dave was charged, among other things, with failing to exhibit a certificate of registration as a pharmacist while carrying on the business of pharmacist c/s 19(1) of the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws). The accused pleaded guilty, he was convicted and fined. The Ordinance under which the accused in that case was charged was already enacted but had not yet come into force at the time he committed the offence. Like the present case the accused ought to have been charged under Section 5 of the Pharmacy and Poisons Ordinance (Cap. 94), which was then still in force at the time of the commission of the offence. In that case Sir Ralph Windham, C.J. held:-

(i) the provisions of S.319(1), S.329(1) and S.346 of the Criminal Procedure Code are wide enough to enable the court, acting on appeal or in revision, to do what the court of trial ought to have done, and accordingly the court had power to alter the charge and conviction under the appropriate section in the Pharmacy and Poisons Ordinance (Cap. 94) which was in force when the offence was committed, provided that the offence was in every essential the same under the old and new sections, and provided that no failure of justice would result from the alteration.

(ii) S.19(1) of the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws) was a reproduction of S.5 of the Pharmacy and Poisons Ordinance (Cap. 94) almost verbatim and without any material alteration and no injustice had resulted to the accused from the mis-citation of the charging Ordinance and Section; accordingly the charge and conviction from S.19(1) and (2) should be altered to S.5 and S.36 of Pharmacy and Poisons Ordinance (Cap. 94).

The facts of the Dave's case seem to be somewhat similar to the facts of this case. The accused was charged under the Road Traffic Act No.30/73 when he should have been charged under the old Traffic Ordinance, as the Road Traffic Act had not yet come into operation at the time he committed the offence. It appears that the Criminal Procedure Code empowers the court to do what the trial court ought to have done and alter the charge and conviction under the appropriate

sections in the old Traffic Ordinance which was then in force when the offence was committed, provided that the offence was in all respects the same under the old and the new sections, and provided further that no failure of justice would result from such alteration. The offence in S.42 of the Road Traffic Act seems to be the same as the offence in S.45 of the Traffic Ordinance, now repealed. The offence of reckless driving is covered by both though the language used as well as the penalty provided differ. I do not think that the mis-citation of the charging Ordinance and section could have prejudiced the accused in his defence or resulted in a miscarriage of justice. One could argue about the question of sentence as it is not the same in both sections. This matter is covered by the provisions of S.14 and S.49 of the Interpretation of Laws and General Clauses Act No.30/72 which deal with the effect, repeal and amendment of penalty. Under S.14(c) a repeal shall not "affect any right, privilege, obligation or liability acquired, accrued, or incurred under the provision so repealed" and under S.49:-

Where an act constitutes an offence, and the penalty for such offence is amended between the time of the commission of such offence and the conviction therefor, the offender shall, unless the contrary intention appears, be liable to the penalty prescribed at the time of the commission of such offence.

As the new Act had not come into force at the time the offence was committed the penalty applicable is the one in S.45 of the Traffic Ordinance.

I am therefore satisfied that these proceedings are not a nullity as the irregularity in the charge is curable under S.346 Criminal Procedure Code. I accordingly alter the charge and conviction of the accused from S.42(1)(c) and S.63(2)(b) of the Road Traffic Act to S.45 of the Traffic Ordinance, Cap.168. The sentence of Shs.10,000/- fine or one year's imprisonment is set aside. As the accused has served two months' in jail in default of payment of the fine and he was a first offender, he is an old man and had a good record of driving for 28 years, I feel that 2 months' imprisonment, which he has already served, is sufficient for the offence committed.

The second issue for consideration in this case is the discretion of the court in passing sentence under the Road Traffic Act No.30/73. Mr. Mrema drew my attention to the serious concern

of the learned D.P., on the tendency of the lower courts to impose the minimum penalty provided in S.63 of the Act. He asked this Court to take a serious view of the matter and to lay down general rules for guidance. This is not the first time the question of sentencing under the new traffic law was raised in Court. It was raised recently before Mwakasendo v. in Orest Morris v. R., Dar es Salaam Criminal Appeal 45/74, Omeri Mbaraka v. R., Dar es Salaam Criminal Appeal 59/74, and before Jugasingira A.G. v. in Dar es Salaam Criminal Appeal 54/74 and Rajab Jirani Maneta v. R., Dar es Salaam Criminal Appeal 54/74 and Rajab Jirani Maneta v. R., Dar es Salaam Criminal Appeal 54/74, were the accused were charged with a similar offence under S.42(1)(c) and S.63(2)(b) of the Road Traffic Act. It appears that in all these cases the accused were sentenced to a fine of Shs.10,000/- or one year's imprisonment. They were invariably committed into prison failing to pay the fines. The point for consideration here is whether or not this is what was meant by the legislature in passing the new Road Traffic Act. Section 63(2) of this Act which prescribes the penalties for the offences in Part IV of the Act, fixes both the minimum and maximum penalties for these offences. This however does not mean that the discretion of the court in passing sentences less than the minimum has been frozen by the Road Traffic Act. The matter was dealt with at some length by Mwakasendo v. Omeri Mbaraka v. R., in Dar es Salaam Criminal Appeal 59/74. I am in agreement with the views he has expressed on the question of the discretion of the court in passing sentence. Although the minimum penalty has been laid down by Section 63(2) of the Act it would appear that in very rare cases the minimum penalty should be imposed. Section 63(2) embodies one important qualification which affect the penalty to be imposed in each individual case. This appears at the end of the subsection in the following words:-

Unless the court for special reasons thinks fit to impose a fine or a term of imprisonment less than the minimum fine or the minimum term of imprisonment specified under this subsection.

The concluding part of subsection (2) definitely empowers the court to impose a sentence less than the minimum once it is satisfied that it is proper to do so. It appears that this part of the subsection requires the court to ask the accused to speak in mitigation and state "special reasons". Although the wording of S.63 as a whole is not very clear, it would appear to me that the exercise by the court in finding out whether there exists "special reasons" in each individual case is more or less mandatory. The meaning of "special reasons" here is an extended one and would appear to cover as wide a field as the "special circumstances" in the Minimum

Sentences Act No.29/73. I do not think that this meaning is restricted to the narrow area under S.27 of the Road Traffic Act which deals with disqualification from holding or obtaining a driving licence. As such "special reasons" under S.63(2) would be of various types and would cover a very wide area. Where the offence charged is covered by S.63(2)(a) and (b), further consideration must be given by the court to the provisos appearing under these subsections. These provisos have reduced the minimum sentence still further, but this is not the end of the matter as "special reasons" have to be considered again to reduce the penalty below the minimum in the provisos where it is necessary.

Another matter which requires serious consideration is the question of imposing a fine as a penalty. The Legislature has provided for a fine or imprisonment as a penalty for the offences stated in S.63 of the Road Traffic Act. This is an option given by the Legislature, which therefore means that in imposing a fine the court must ascertain that the fine can be paid rather than impose a fine which cannot be paid, and as a result the accused has to go to jail. In Mohamed Juma v. Rex 1 T.L.R. 257, Wilson, J. held:-

That, though severe sentences may be justifiable for certain offences under the liquor laws, the fines imposed in such cases should bear a reasonable relation to the accused's power to pay, taking all his circumstances into account, and should not be such as to render illusory the option of a fine specifically granted by the Legislature in the case of a first conviction under the liquor laws.

In another case, Nyakulima d/o Chacha v. Rex, 1 T.L.R. 341, Mahon, J. Observed:-

The principle is that a fine should be one which an accused person can reasonably be expected to pay.

Mahon, J. also observed in R. v. Bison s/o Mwanga, 11 T.L.R.

Before imposing a fine the court should make some enquiries of the financial standing of the accused and the result of this should form part of the record.

In the case of Samwel Mwendawano v. R., (1967) H.C.D. n.451 I referred to the same principles for assessing a proper fine to impose in each individual case and I expressed the view that an accused should not be fined more than one-third of his monthly income.

I wish to take this opportunity to call upon magistrates to consider the views expressed very seriously when sentencing persons charged under the new Road Traffic Act. They should always call upon the accused in every case to state "special reasons" when speaking in mitigation and they should also always ascertain the ability of the accused to pay the fine they wish to impose, because a heavy fine, like the one imposed in this case, just means sending the accused person to prison since it is quite obvious that very few persons in Tanzania can pay a fine of Shs. 10,000/-.

Lastly, I wish to say one or two words about the question of disqualification from holding or obtaining a driving licence. The licence of the accused in this case was cancelled and was disqualified from holding a licence for three years. There is nothing recorded showing whether he had been asked to state "special reasons" under S.27(1)(a) of the new Road Traffic Act, for non-disqualification. I have already mentioned that he was a first offender, he is an old man and he had a clean driving record of 28 years. I think the question of his disqualification should be reopened. I direct that the learned Principal Resident Magistrate calls back the accused and gives him the opportunity of stating "special reasons" under S.27(1)(a). Thereafter he should deal with the question of disqualification according to law.

29. REPUBLIC v. SULEMANI SAIDI AND ANOTHER
HIGH COURT CRIM. REV. 18-MT-74, 6/3/75
KISANGA, J.

Held:

- 1) Sec. 136(2) C.P.C. requires that where an accused person is charged with a number of offences, each offence must be set out in a separate count.
- 2) A misjoinder of counts would vitiate a conviction only if the error occasions a failure of justice.
- 3) The proper interpretation of S.6(1) of the Minimum Sentences Act is that the court may exercise its discretion and exclude the application of the Act even though the accused has previous convictions or

he was otherwise liable to be sentenced under S.5(d) and (e) of the Act.

- 4) That discretion in favour of cases falling under S.5 of the Act should be exercised very carefully and in the most deserving cases only, otherwise the various minima prescribed under that section could easily be rendered meaningless.
- 5) Allocutus is an important right of an accused person and magistrates should always ensure that an accused person is given an opportunity to exercise it.

Conviction and sentence altered.

KISANGA, J. - The two accused persons in this case were charged jointly in a single count with stealing goods in transit contrary to sections 269(c) and 265 of the Penal Code. They were both convicted and sentenced to prison terms of 3 years and one year respectively.

Very briefly the facts were as follows:- Both accused were employed as porters at the Lindi Port. On the material day they went to work and as they were leaving at the end of the day they were intercepted and searched at the gate. The first accused was carrying a bag which was found to contain some beans and a cake of Lux toilet soap. The second accused also was carrying a bag which was found to contain some rice and a cake of Bee flower toilet soap. There was no evidence adduced as to the quantity of the beans and rice found on the accused persons but according to the charge-sheet they were half a kilo each. An official from the S.T.C. Lindi testified that one day before the incident he went to the port area to collect a consignment of soap which was sent to S.T.C. However he found that two cartons of Lux and Bee flower soap were broken and some pieces of soap were missing from there. He left those cartons behind and did not take them with him. In their defences, the first accused in effect claimed that the beans and soap were planted in his bag and he was completely unaware of them. The second accused however, admitted that he picked the rice and the piece of soap which he found spilt or dropped in the port area.

The trial magistrate rejected the story of the first accused and found that he knew that he was carrying beans and a piece of soap in his bag; I am of the view that he was entitled to come to such a conclusion. However he took the view that since no evidence

adduced to prove ownership of the beans and rice, the charge in respect of these two items was not proved. But he was satisfied that the two pieces of soap were sufficiently identified to be the property of S.T.C. and accordingly he convicted each accused for stealing a cake of soap in transit.

The charge as laid reads:-

Offence - Section and Law: Stealing Goods in Transit, c/s 269(c) and 265 of Penal Code Cap.16 of the Laws.

Particulars of the offence: The persons are jointly charged on the 25th day of September 1973 at about 14.00 hours, in Port area, within the township and District of Lindi, Lindi Region did steal half kilo of Beans, one piece of Lux soap, half kilo of Rice, and one piece of soap (Bee Flower Brand) all valued at Shs.4.35, being in Transit from S.T.C. Dar es Salaam to S.T.C. Lindi. The property of S.T.C. Lindi.

would seem from the evidence that there may have been more than one act of stealing involved in this case. For, each accused was found separately to be in possession of a piece of soap and it was not shown how each obtained his piece of soap. It is quite possible that each accused obtained his piece of soap quite independently of the other, in which case there would be two separate offences of stealing each of which ought properly to be charged in a separate count as required by Section 136(2) of the Criminal Procedure Code. I am therefore of the view that there was no justification for referring the charge in a single count, and the proper thing to have been would have been to charge each accused in a separate count.

The next question to consider is whether this error of charging two thefts in a single count was fatal to the conviction. It is settled law that not every misjoinder will be fatal. In the case of Aguthu v. R., (1962) E.A. 69 the accused was charged in one count with convicted and on appeal it was held that the proper thing to do was to charge each theft in a separate count, but failure to do so would vitiate the conviction only if the error occasioned a failure of justice. In that case there was such failure of justice by reason of the trial court failing to consider the evidence on each count separately and consequently the conviction was quashed. But in the instant case the trial Magistrate adequately considered the evidence in respect of each accused separately. On that account therefore I am of the view that no failure of justice was occasioned and accordingly the error is curable.

The trial Magistrate found that the two pieces of soap were adequately indentified to be the property of S.T.C. Lindi. The two pieces were common articles in that they did not bear any special mark of S.T.C. There was no evidence that S.T.C. Lindi was the sole dealer receiving consignments of soap from Dar es Salaam. In other words those two pieces of soap could have come from a parcel or parcels consigned to someone other than the S.T.C. Lindi. In such circumstances therefore I am of the view that there was not sufficient evidence to establish ownership of the two pieces of soap in question and consequently the charge of stealing goods in transit cannot be said to have been proved beyond a reasonable doubt. However there can be no doubt that the two pieces of soap belonged to port authorities Lindi in that anything lying in the port area belonged to port authorities in their capacity either as a general owner or a special owner. They would be a general owner if they had unlimited authority to deal with the thing, and they would be a special owner if they had limited authority to deal with the thing, for example, when they were merely handling and keeping custody of the goods pending delivery to the general owner. It therefore follows that the two pieces of soap were stolen from the port authorities and this amounted only to simple theft. Accordingly the conviction for stealing goods in transit is set aside and one for simple theft is substituted.

In passing sentence the learned trial Magistrate proceeded on the basis that the offence was a scheduled one because the property stolen belonged to the S.T.C. As indicated earlier, my view is that it has not been proved sufficiently that the property involved belongs to the S.T.C., nevertheless I think that the offence is still a scheduled one because the property belonged to the Harbours Corporation which is a specified authority within Section 3(c) of the Minimum Sentences Act.

In sentencing the second accused it would seem clear that the learned trial Magistrate was acting under the provisions of Section 6(1) of the Minimum Sentences Act even though he does not say so expressly. Accordingly he sentenced that accused to 12 months' imprisonment and I think this was quite justified. It is less clear, however, under which section of the Act he sentenced the first accused to 3 years' imprisonment. This accused was found to have a previous conviction. But it is clear that the trial magistrate cannot have sentenced him in pursuance of Section 5(a) of the Act which deals with accused person who have previous convictions because if he did this then he would have imposed a minimum of 5 years' imprisonment. Yet, I am unable to say for certain whether

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he acted under the provisions of Section 6(1) of the Act which empowers the magistrate to exercise his discretion in certain cases and impose a sentence less than the minimum as prescribed under the Act. I must here admit at once that the provisions of the said Section 6(1) are not altogether free from difficulty. That subsection as amended by Act No.23 of 1973 provides:-

6.--(1) Notwithstanding the provisions of Section 4 or Section 5 where a person is convicted of a scheduled offence and the court is satisfied that:-

- (a) the person so convicted is a first offender; and
- (b) the value of the property obtained by such person in the course of the commission of such offence or which he attempted to so obtain does not exceed or, in the case of an attempt, would not have exceeded, one hundred shillings; and
- (c) having regard to all the circumstances of the case, it is just and equitable so to do,

the court may, in lieu of sentencing such person to the minimum sentence of imprisonment provided for in Section 4, proceed to deal with such person as if this Act had not been enacted.

It would appear that difficulty arises because of the reference to Section 5. Because under Section 6(1)(a) one of the conditions precedent for exercising the discretion is that the accused person must be a first offender. Yet in the opening sentence this same subsection is saying in effect that even where under Section 5(a) of the Act the accused person has previous convictions and therefore is not a first offender, this fact may be disregarded, and the magistrate may proceed to exercise his discretion. On the face of it, therefore, there appears to be a conflict within the provisions of Section 6(1) of the Act. There is also an inconsistency arising from the last sentence of that sub-section. Because according to that sentence once the three conditions precedent are satisfied, the court may disregard the various minima provided for under Section 4, but nothing is said on what the court may do in relation to the various minima provided for under Section 5 which is referred to in the opening sentence.

On the other hand however it seems clear that under Section 6(1) of the Act as amended by Act No.23 of 1973 reproduced above, the Legislature intended to extend the category of cases in which the courts may exercise discretion and exclude the application of the Act. This appears to be so for the following reason. Before 1973

the discretion of the courts to exclude the application of the Act as limited only to cases falling under Section 4 of the Act. But Act No.23 of 1973 specifically makes reference to Section 5 thus extending that discretion to cases falling under that section also and in this connection it is significant to note that the reference to Section 5 was the only amendment introduced by the amending Act No.23 of 1973. It would seem from this that Parliament must have clearly contemplated extending the discretion of the courts to cover a wider range of cases under the Minimum Sentences Act. To be more precise Parliament intended to extend that discretion to cover the cases falling under Section 5 of the Act except cattle theft and robbery which are expressly excluded from such discretion by Section 6(3) of the Act, and the fact that in the last sentence of sub-section 6(1) there is no corresponding reference to Section 5 which is mentioned in the opening sentence was, in my view, only an oversight.

Against the background, therefore, I think that in the face of the said conflict and inconsistency within sub-section 6(1) of the Act as amended, the provisions of the subsection must be construed in such a way as to give effect to the intention of the Legislature. Accordingly I think that the proper interpretation to be put on that sub-section is that the court may, in a suitable case, exercise discretion and exclude the application of the Act even though the accused has previous convictions, or he was otherwise liable to be sentenced to a minimum term of imprisonment under paragraph (d) or (e) of Section 5. This view appears to be supported by the fact that while the section extended the discretion to cover cases falling under Section 5, there is no indication that discretion is limited to certain cases only falling under the section except as provided under Section 6(3) which, as already noted, says that the discretion is not exercisable in cases of cattle theft and robbery. Thus upon reading the whole of Section 6 the clear impression one gets is that the discretion of the court extends to cover all the cases under Section 5 except cattle theft and robbery. However it seems to me that discretion in favour of cases falling under Section 5 should be exercised very carefully and in the most deserving cases only, otherwise the various minima prescribed under that section could easily be rendered meaningless. In other words if, as in the case for instance, it is sought to exercise discretion in favour of an accused who has previous convictions, there ought to be very good or compelling reasons for doing so. Now, in the instant case the accused, as already noted, had a previous conviction. But the value of the property stolen (a cake of soap) was clearly negligible. The circumstances attending the commission of the offence could be said to be aggravating. The theft was not a cleverly planned one and it would appear that the accused who was working as a porter

cumbed to temptation and picked up the piece of soap which had
pped in the port area and kept it for himself.

The record shows that the accused was given no opportunity of
ing something in mitigation. This was an error. Allocutus is
important right of an accused person and magistrates should
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luence the magistrate to exercise discretion in his favour.

Considering all the circumstances of the case I think that if
; trial Magistrate had properly directed himself on the question
sentence he might well have found that this was a fit case in
ich to exercise discretion and exclude the application of the
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bt to the accused, and in exercise of the revision powers of this
rt I reduce the sentence of 3 years' imprisonment to one which
ll result in the immediate release of the accused from prison.
at is to say the accused is to be released unless he is otherwise
ld on some other lawful ground. The sentence of 12 months'
prisonment imposed on the second accused is not disturbed and
any event the record would appear to indicate that he has
ready finished serving it.

• ROBERT MAKWAIYA v. REPUBLIC
HIGH COURT CRIM. APP. 256-MZ-74, 21/4/75
LUGAKINGIRA, AG. J.

HELD: To found an offence under S.284A of the Penal Code, it
must be proved that an employee has caused his employer
to suffer pecuniary loss by any wilful act or omission,
or by his negligence or misconduct or by reason of his
failure to take reasonable care or to discharge his
duties in a reasonable manner.

Appeal allowed, conviction quashed and sentence set aside.

LUGAKINGIRA, AG. J. - I allowed this appeal at the close of the
hearing and ordered the appellant's release. I reserved my reasons
for doing so which I will now give.

The appellant was charged of stealing by servant cash Shs.13,273/30
the property of Bukoba Development Corporation and in the alternative
of occasioning loss to a parastatal organisation c/s 284A of the
Penal Code to the extent of Shs.13,000/-. After making his own

calculations, the trial Magistrate found that there was only Shs. 1,580/30 which was not accounted for and entered convictions for theft of that sum and in the alternative count. He sentenced the appellant to 3 years' imprisonment.

The facts may be briefly summarised. The appellant was employed by a Corporation, otherwise referred to as BUDECO, as a butcheries' manager. In September 1971 he was given Shs.100,000/- to purchase cattle in Sukumaland for slaughter in Bukoba. In Sukumaland he hired the services of P.W.1, Selemani Rumole, to purchase the cattle for him. Various transactions took place between these two people. At the end about 340 head of cattle were landed at Bukoba. The appellant then presented his financial report to the BUDECO Board of Directors. It transpired that he had advanced Shs.13,000/- to P.W.1 to purchase more cattle and there was a balance of about Shs.1,274/- unaccounted for. Twice the appellant returned to Sukumaland to collect the cattle or the money but got nothing from P.W.1. He was arrested there on the second occasion and charged as above.

The trial Magistrate, after noting that P.W.1 had a fraudulent past and was unreliable, found that he received a total of Shs. 94,440/80 from the appellant. There was then a balance of Shs. 5,555/20. He also found that Shs.3,254/90 was paid to shippers at Mwanza leaving a balance of Shs.2,300/30. Incidentally, I am not concerning myself with the accuracy of the figures but taking them down as they appear in the judgment. The trial Magistrate then found that the appellant paid Shs.300/- to P.W.5 and "supposedly" Shs.720/- to P.W.7, the BUDECO officials who accompanied him, as their allowances. This reduced the balance to Shs.1,580/-. He then convicted the appellant with theft of this sum.

Surprisingly, the balance arrived at by the trial Magistrate was higher than that arrived at by the BUDECO accountant, P.W.6. In fact, the accountant does not seem to have arrived at any balance at all. He said, "I am not exactly sure how much balance the accused should have. The Shs.13,000/- was alleged to have been given to P.W.1 in order to buy cattle for the Corporation. There was a balance of over Shs.1,274/-. The accused never accounted for this money." Be that as it may, the trial Magistrate also found that the appellant used Shs.272/30 for his own lodging and food. But he omitted to deduct this from the balance as he did with the allowances of P.W.5 and 7.

Apart from this, there were other unknown disbursements which the trial Magistrate had in mind which were never known in money terms. He pointed out, for instance, that "no evidence was led by

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the prosecution on this aspect of expenses for hiring the truck or driving cattle other than the evidence of P.W.1. This also includes terms on which P.W.1 was doing this job on behalf of the Corporation and whether the purchase prices did not include agency fees. Having entertained doubt on this issue the benefit must go to the accused." In fact he gave the appellant no such benefit. He went on to deal with cases where there was known payments and completely ignored his above remarks. To this must be added the fact that the appellant had a Corporation car and a driver. It cannot be conceivably said that the car was running without petrol or the driver was going without food. The magistrate found that there was no evidence that the appellant had an imprest besides the Shs.100,000/-.

In taking all these into consideration and considering the small balance of Shs.1,580/- arrived at by the trial Magistrate, I think a better and concerted effort at accounting would have revealed that the appellant had legitimately accounted for the entire sum given to him. It therefore follows that the prosecution did not prove theft of the sum charged or any sum at all. The conviction on the first count was therefore unsound.

The appellant had been alternatively charged with occasioning the loss of Shs.13,000/- to BUDECO. This is the money which the appellant left with P.W.1 to purchase more cattle. There was a payment voucher Exh. G. which showed that P.W.1 received this money. The witness denied receiving the money but the trial Magistrate disbelieved him because of his evasions and uncertainties on so many issues. To found an offence under Section 284A, an employee must cause his employer to suffer pecuniary loss, etc., "by any wilful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner."

It does not appear from the evidence that the BUDECO management were particularly displeased when they were informed of the advance payment of Shs.13,000/-. It is when the cattle were not forthcoming that they became restless and ordered the appellant to return to Shinyanga and bring the cattle or the money. Indeed, P.W.1 subsequently sent a telegram, which was not tendered, advising the appellant, "Njoo ng'ombe wako tayari". The appellant returned there but P.W.1 gave him no cattle saying some had died. That was December, 1971. He returned there again in January 1972 and waited at Shinyanga as P.W.1 was purportedly looking for cattle. He was arrested before the cattle were brought. These efforts on the part of the appellant do not indicate that he acted wilfully when he advanced the money or acted negligently or failed to take reasonable

care. I should on my part observe that it was not a wise thing to advance the money, although P.W.1 and the appellant were long acquaintances and actually friends, but the appellant does not appear to have acted with mala fide. It was upon the prosecution to establish on evidence the existence of such a dirty mind or the appellant's negligence or indifference subsequent to realising that the money was at stake. This the prosecution failed to do and appellant was entitled to an acquittal.

It was for these reasons that I quashed the convictions, set aside the sentence and ordered the appellant's release. The Republic was also disinclined to support the convictions.

31. GODFREY MACHANGE v. REPUBLIC
HIGH COURT CRIM. APP. "I" (-MZ-74, 21/3/75)
KATITI, AG. J.

- Held:
- 1) When the question of credibility depends on the demeanour of the witness in court, the trial court stands at an advantage, but when the views upon argumentative inferences from undisputed facts are to be made, both the trial and appellate courts are in the same position.
 - 2) Under Sec. 151 C.P.C. the court has power at any stage of the trial to summon any person, not already called as a witness, to give evidence if it is essential to the just decision of the case.
 - 3) The use of expert opinion is an exception to the general rule that oral evidence must be direct.

Appeal dismissed.

KATITI, AG. J. - The appellant Godfrey Machange was charged, tried and convicted before the District Court Shinyanga and sentenced to a term of three years imprisonment the sentence falling under the purview of the Minimum Sentences Act 1972. The appellant aggrieved has appealed to this Court against both conviction and sentence.

A recapitulation of the evidence of this case is necessary to have a proper perspective of the case. The facts are that the appellant met P.W.1 for the first time on the eve of 5/4/72 at the place known as the Ushirika Bar in Shinyanga. One Dr. Sangawe of Shinyanga introduced the appellant to P.W.1 Josephat Machar as a Dr. from Bugando Hospital. After this normal conversation in which

the appellant emphasised his professional qualifications which he got from West Germany after seven years study, the natural turn of events were that P.W.1 introduced himself too as a bank official and the two discovered themselves as coming from the same place Moshi.

It is P.W.1's evidence that next day on 6/4/72 the appellant visited the Bank at 10 a.m. in the company of one Libaba an employee of the District Council as then known. On entry into the bank the appellant is said to have gone straight to the table of P.W.1 and exchanged greetings with him subsequent to which P.W.1 took the indulgence of showing the appellant his home which is said not to be far away from there. When they came back, P.W.1 says that the appellant told him that before he went for studies to West Germany he had been working as a Medical Assistant and that he had a current account with the National Bank of Commerce Bukoba and confirming that the account was not drawn and as he needed money he asked P.W.1 to advise him on how he could get money which he indicated he badly needed.

P.W.1 anxious to help, asked the accused if he had his cheque book but when the appellant indicated that he had left his cheque book at Mwanza P.W.1 suggested to the appellant to buy a countercheque. P.W.1 gave the appellant a countercheque No. 256251 and advised him that as this cheque was for Shinyanga the appellant had to cancel "Shinyanga" and substitute "Bukoba" and sign against these alterations. The appellant is said to have signed against the alterations, signed as a drawer, on the face and the back of the cheque and drew 300/- at the counter after the necessary authority from the P.W.1. This cashed cheque was sent to Bukoba N.B.C. branch only to have it back to sender on 22/4/72 with remarks that the appellant had no account at Bukoba. As a result a report which led to his arrest was made to the Police Station. The cashed cheque was tendered in Court as Exh. A by P.W.2 only to be confirmed by P.W.3 P.J. Muguzi the Manager of N.B.C. Bukoba that although his branch received Exh. A in the name G. Machar—they had no account in the name of such a customer and an endorsement "No account" had to be made. This cheque was dispatched back to Shinyanga.

Examined by the appellant, P.W.3 inter alia told the court that if a person is known and trusted he can be allowed to draw money at one branch if he has or it is believed he has the money in another branch. Richard Ikula P.W.4 a bank clerk confirmed cashing the accused's cheque after satisfying himself that it had been authorised for payment by P.W.1. He identified Exhibit A as the cheque and added that he cashed it after requiring the appellant to

sign at the back of the cheque. He added that he examined the cheque and that it had three signatures and it would appear he would not have remembered him but for the introduction P.W.1 made that the holder was a Mr. Machar.

With the above prosecution evidence Section 206 C.P.C. was administered to the appellant who elected to give a sworn defence and call witnesses. It is conceded by the defence that the appellant was in Shinyanga on the eve of 5/4/72. In the evening the appellant visited the Area Commissioner Mr. Kassian with whom he went to Ushirika Bar. Subsequent to his arrival in came Dr. Sangawe after whom came P.W.1 Josephat who greeted them from a distance.

The appellant goes on to state that at about 9.30 p.m. P.W.1 came to him and requested a lift at 20/- remuneration and that as a wrangle ensued as a result of his persistent refusal to grant P.W.1's request the Area Commissioner intervened. It was after this that P.W.1 left threatening and saying "We will see." Next day the appellant went his way to Mwanza and on his way back 8 days later he was arrested at the Petrol Station in Shinyanga. The appellant's witness Pandya--narrating the counter cheque procedure told the Court that a counter cheque is issued when the customer has no sufficient money in the bank and also when the customer has forgotten his cheque book and that this can be cashed after the signatures have been found correct. On the question whether a customer having his account in Bukoba could cash his cheque at Shinyanga, D.W.1 said that this was possible if the customer is introduced by another customer known to the bank.

The above evidence in short was the basis of the conviction. I made a deliberate effort to go to this length in view of the grounds of appeal filed. What is inevitable on the record should be a concession that indeed the appellant did visit Shinyanga and was actually seen by P.W.1 at close quarters and mistaken identity would be inadmissible if lodged. P.W.1 and P.W.4 do testify that the appellant did visit the N.B.C. on the morning of 6/4/72 and the evidence of P.W.1 does show that the appellant did claim to have a current account at Bukoba and that he needed money. Believing the story against the background of the introduction made on previous night P.W.1 did give out a counter cheque which the accused signed before cashing at P.W.4's counter. P.W.4 also points out that the appellant was introduced to him as a Mr. Machar before this cheque was cashed. This means the appellant signed before P.W.1 and P.W.4. If P.W.1 can be claimed to be telling lies against the appellant because of the alleged night incident, what would be the reason why

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P.W.4 should tell lies against the appellant. And that the appellant did sign the cheque appears corroborated by P.W.4. The magistrate having seen the witnesses himself and certainly observed their demeanour was, a better judge as to their credibility. On record his finding that they were believable cannot be easily shaken. As Sir John Coleridge put it in R. v. Bertrand (1867) L.R.I.P.C. 520,533:-

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When the question of credibility depends on the demeanour in the box, the manner in which the witness answered and by how he seems to be affected by the question put and so on, the trial Judge has an advantage. But when the views upon argumentative inferences from facts not disputed the Court of appeal is really in as good a situation as the trial judge.

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As can be observed there are no argumentative inferences from fact upon which this Court can, or may put itself in a position to judge otherwise the credit worthiness of the above witnesses. This means the trial Magistrate having believed P.W.1 and P.W.4 as he appears he was entitled to do it should be taken to mean that he rejected the appellant's defence which again in the circumstances he was entitled to do. Just like the trial Magistrate I just cannot see why P.W.1 should say "we will see" to a person he had just seen and for such a short while and even go to the extent of involving his banking profession. This disposes off ground 8 and 9.

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It is contended that Dr. Sangawe and Area Commissioner Kassian should have been called by the prosecution. It is my view that the prosecution having a duty over its case, it is for the prosecution to know which witness to summon. The Court can summon witnesses indicated to be material to the case and these witnesses are normally shown in the witness application forms filed by the prosecution. This is in compliance with Section 145(1) C.P.C. which states:-

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If it is made to appear that material evidence can be given by or is in his possession of any person, it should be lawful for a Court having cognisance of any criminal matter to issue a summons to such person requiring his attendance before such Court or requiring to bring and produce to such Court for the purposes of evidence all documents and writings in his possession of or power which may be specified or otherwise sufficiently described in the summons.

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As the Court is no investigating machinery it has no means and it is not its duty to know in advance who would give material evidence except where Section 151 C.P.C. is applicable in the interest of justice. I concede however that there is power to summon witnesses under Section 151 Criminal Procedure Code, which provides:-

Any Court may at any stage of a trial or other proceedings under this Code, summon any person as a witness or examine any person in attendance, though not summoned as witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

As the record shows the Area Commissioner Kassian, and Dr. Sangawe came in the appellant's defence and it would appear they were not material to the defence otherwise he would have them summoned. As far as Dr. Sangawe is concerned the appellant is himself recorded as having said the following:-

I am dispensing with the evidence of Dr. Sangawe. It is my view that the evidence of the Bank Manager, one Pandya is enough. I am requesting the Court to write the judgment.

It follows therefore that the trial Court never refused to call any witnesses the appellant might have needed. The case took a year waiting for defence witnesses. In the circumstances it is my humble view that there were no circumstances warranting the courts application of Section 151(1) of the C.P.C. as the evidence of them does not appear essential and particularly in the event of the appellant himself refusing to call them although this would have been immaterial to the Court's decision.

Another ground of appeal is that no handwriting expert was called to compare his specimen signature and the signatures on the cheque in question. If P.W.1 and P.W.4 saw the appellant sign in front of them and they easily point that out I cannot see the force of this ground. The evidence is vehemently categorical that the appellant signed first before P.W.1 and later P.W.4. Both P.W.1 and P.W.4 did see him sign. The very cheque number was noted as 256251 and sent to Bukoba. P.W.3 identifies it to be the very cheque he sent back to Shinyanga with an endorsement "No account". In such circumstances I cannot see the usefulness of the handwriting expert.

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I must point out here and now that the use of expert opinion is an exception to the general rule that oral evidence must be direct evidence. In this case we have oral direct evidence that the signatures shown were made by the appellant and certainly a handwriting expert is not in a better position than the one who has seen with his senses. Section 61 states:-

All facts except the contents of documents may be proved by oral evidence.

Section 62(1) - oral evidence must in all cases whatever be direct that is to say -

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.

P.W.1 and P.W.4 having seen him sign that is the best evidence for even assuming a handwriting expert is admitted his opinion can never be conclusive. The weight to be given to such opinion was rightly described by Lord Birkenhead in Wakefield v. Lincoln (1921) 90 L.T.P.C. 174 when he said:-

Let me say a word about handwriting experts. Let every-one be treated with proper respect, but the evidence of handwriting expert is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting, practised in the tasks of making minute examination of handwriting, directs the attention of others to things he suggests are similarities. That, and no more than that is his legitimate province.

And on this very issue the Court of Criminal Appeal in R. v. Padmore (1930), 46 T.L.R. 365, held inter alia:-

I think the expert witness and possibly the magistrate may have fallen into the error of treating handwriting evidence on the same footing as finger print evidence. There is a presumption that no two persons have identical finger prints but there is no presumption that no two persons have similar handwriting.

Indeed people can easily and at will change their handwritings. It is therefore my view that the trial Magistrate was right in accepting the oral evidence on this aspect. Opinion evidence however excepted cannot take precedence over direct evidence.

Ground No.5 is not material to warrant serious consideration and ground 6 is equally trivial for it is on evidence of P.W.1 that he trusted that the appellant had the money in Bukoba N.B.C. branch and this was not contrary to banking procedure as this was even supported by the appellant's own witness Pandya the Manager, N.B.C. Shinyanga when he said - I quote:-

If a customer who is having his money at another branch say Bukoba and if such customer is introduced by another customer known to the Bank official that customer may be allowed to draw the money despite the fact he is having no number of his account.

This actually confirms the procedure already given by the Bukoba Manager when cross-examined by the appellant. This therefore disposes off ground 8.

From the foregoing it is clear that the trial Magistrate did properly direct himself on the law and evidence to come to the conclusion he did. The appeal against conviction fails and the sentence is upheld.

32. JASTON MASENGULA v. REPUBLIC
HIGH COURT CRIM. APP. 435-MZ-74, 14/3/75
KATITI, AG. J.

- HELD:
- 1) A charge may be amended at any stage of the trial up to, and excluding judgment, provided always the accused is granted an opportunity to make a fresh plea to the amended charge and recall any witnesses.
 - 2) Where a charge of stealing relates to property found with the accused, it must be proved beyond doubt that such property is the same as the one alleged to be stolen.

Appeal allowed.

KATITI, AG. J. - Obvious as will be shown hereunder Section 296(1) of the Penal Code creates one offence since theft or for that matter felony committed within the building after "breaking" and "entry" is not according to the interpretation of the section independent of the "breaking" and "entering." Studios observation must reveal that there should be no confusion between Section 296 and 294 of the Penal Code. For clearly Section 294(1) the burglary and house

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breaking section stipulated that breaking and entering "any building tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony which may be burglary or house breaking depending on whether it is night or day. Thus it is my view that the distinction is so clear that a proposition for an authority in this direction is unnecessary.

The trial Magistrate realised in the course of judgment that actually the two charges preferred against the appellant were misconceived. He therefore at that late hour proceeded to amend the charge and entered a conviction under Section 296(1) of the Penal Code. As pointed out Section 296(1) of the Penal Code creates only one offence - breaking into a building and committing a felony therein i.e., theft in this case. For completeness I quote hereunder - Section 296(1):-

Any person who breaks and enters a school house, shop warehouse store, workshop, garage, office or counting house or a building which is adjacent to a dwelling house and occupied with it but is not part of it or any building used as a place of worship and commits a felony therein... is guilty of a felony and is liable to imprisonment for ten years.

Thus it is very clear that only one offence is created by the compounding of the elements shown therein namely:-

- (1) Breaking and entering any of the
- (2) Four types of building:-
 - (a) School house, shop warehouse, store workshop, garage, office - or
 - (b) Counting house, or
 - (c) Building adjacent to a dwelling house and occupied with it but not part of it - or
 - (d) Any building used as a place of worship
- (3) And commits a felony therein.

Thus although the offence created by the above section is only one the charges preferred in this case were two counts as shown above. However the trial Magistrate having noted this irregularity proceeded to purport to amend the said charges in the judgment and convicted the appellant under Section 296(1) of the Penal Code. The most honoured principle in the administration of justice is that the accused person

must know of the charge he stands prosecuted. This necessary knowledge enables him to prefer his defence to the extent of his ability. It is for this reason that Section 293(1) of the Criminal Procedure provides:-

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.

Of course it may well be that there may be reason for the amendment of the charge in which case Section 209 of the Criminal Procedure Code would come into play. Section 209(1) of the Criminal Procedure Code Cap.20 provides:-

Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just:

Provided that, where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge:

Provided further that, where a charge is altered under this subsection, the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

As is obvious in this section the amendment of a defective charge is permissible at any stage of a trial and it is mandatory that the accused person be given the golden opportunity of pleading to the amended charge and further be allowed opportunity to recall witnesses to give evidence afresh or for further cross-examination. It goes without saying and categorically obvious that since the above referred to opportunities can hardly be given to the accused during the judgment, I would therefore add that for the purposes

this section at any stage of the trial should mean stages from argument up to and excluding judgment. In this I am supported by Biron J's observation in Republic v. Salehe Ruhuma 1973 L.R.T. 5 in which an amendment to the charge having been effected in judgment, the learned Judge had this to say:-

As will be noted, the Section (209(1) of the Criminal Procedure Code) commences with "where at any stage of a trial ..., which means what it says, that any stage of a trial court may, in certain circumstances amend the charge, but not when a trial has been completed, as it was in this case. Further the first proviso expressly states, 'where a charge is altered as aforesaid the court shall thereupon call upon the accused to plead to the altered charge. That is mandatory and a court could hardly call upon the accused to plead to an amended charge after completing the trial, and as there is a further provision, that the accused may demand the recall of any witness who has given evidence which could hardly do after completion of a trial.

It is therefore obvious that the amendment in the judgment was made late and therefore irregular and Section 209 of the Criminal Procedure Code has no application on that stage. However it is my view that such an irregularity would not go to vitiate conviction and is therefore curable under Section 346 of the Criminal Procedure Code as amended by the Written Laws (Miscellaneous Amendments) Act 1970 and the charge is taken as amended to breaking into a building and committing, a felony therein c/s 296(1) of the Criminal Procedure Code.

I have dealt with the above on the assumption that the conviction was on the evidence appropriately entered. As one of the grounds of appeal contends that the prosecution evidence suffered from insufficiency in support of the charge I have a duty to look at the conviction whose propriety has been attacked both in the memorandum of appeal and by appellant's advocate Mr. Tukunjoba at the hearing of the same from several fronts. The first being that there was no evidence to sustain conviction on the charged count and that identification of property left a lot to be desired.

The evidence adduced by the prosecution in the Court below is that upon the detention of one Abdulrasul Jaffer Jammohamed of Kabale, his guest house known as Rose Guest House and all that it contained were confiscated and some other property handed to the Police for custody and the key for the said Guest House handed to O.C.D. ASP Kabale - P.W.1

On 6/5/74 while P.W.1 was on Town patrol he got information that the Guest House had been broken into on the previous night. P.W.1 proceeded to the scene in the company of Sgt. Major John, Detective Ludovick. According to P.W.1 Room 2 was unlocked and one sponge mattress, 2 bedsheets and one blanket missing, Room 3 partly closed but two bedsheets, one stool and a pillow missing Room 4 unlocked with two bedsheets, conical mosquito net missing and Room No.5 sponge mattress missing. However the version of P.W.2 B.697/D/M. John who was also present is different. To him one sponge mattress and one bedsheet were missing in Room No.3 three bedsheets and mosquito net and pillow missing from No.3 and two bedsheets missing from Room No.4. This variation may have been caused by lapse of memory perhaps compounded by imperfect sense of observation. What is therefore certain and established is that the above items were missing from the rooms. However it is not clear whether P.W.1 ever took the inventory of the articles involved at the time he took over the key. This may well be insignificant but further more although we have on evidence the condition of the doors when P.W.1 went to the scene but it is nowhere established that when P.W.1 locked the main door did also lock or close the rooms nor is it clear that there were other entrances and if any, they were closed or locked. I cannot say this is healthy position and the trial Magistrate made no finding on this.

Upon information received the appellant's house was searched in the presence of P.W.4 and the following were seized:-

- (i) 5 bed sheets of different colours,
- (ii) One pillow fitted in its pillow case,
- (iii) Conical mosquito net,
- (iv) Two mattresses - one sponge and the other spring,
- (v) Khaki shirt (New),
- (vi) Seven new glasses.

The bedsheets seized were compared with those obtained from the Guest House as sample and which bear R.G.H. Label. The bedsheets seized from the appellant's house had their corners cut and without R.G.H. Label. But it appears the prosecution's suspicion was that the cut corners were the areas where R.G.H. had been appendaged although the appellant did maintain that he did cut the corners as identification marks as he had previously been a victim of thefts. Of course it is not rare to find people who are extremely scrupulous with their property and in this event although the

prosecution's suspicion may in the circumstances warrant sympathy but suspicion as such is a vocabulary that has no relevance in criminal law jurisprudence.

Still much more important is the established fact that this property is alleged to have been stolen from Rose Guest House. The appellant was never caught stealing and therefore the evidence is circumstantial and identification of property seized from the appellant's house as being the complainant's is very crucial. An attempt at identification was made through P.W.5 Hassan Msekwa, P.W.6 Honorata Makoba both previously in the employment of Abdulrasul Jaffer Jannomohamed. Both said that some bedsheets seized from the appellant's house resembled those stolen from Rose Guest House. But things or articles that resemble under this sun are so many and numerous that human errors in respect of the same are not uncommon at all. Of course Mr. Jaffer himself never gave evidence. On identification of stolen property it is my view that the property must be identified beyond reasonable doubt that they belong to the owner - complainant. In this case as I pointed out above identification of property is admittedly so scanty that pervasion of doubt looms prominently. With this and the insufficiency of evidence on breaking into a building allowing this appeal becomes a matter of urgency. This appeal is therefore allowed, conviction quashed and sentence and any order relevant and pursuant thereto set aside. In this event the question whether or not confiscated property becomes the property of the Government does not arise but of course on record the order for restitution of property to Government was misconceived as the charge sheet show Jaffer was the complainant.

33. TEDDY LUCAS v. REPUBLIC

HIGH COURT CRIM. APP. 549-MZ-74, 6/6/75
KATITI, AG. J.

- Held:
- 1) Where an application to treat a prosecution witness hostile is granted, the court must ensure that such witness is given an opportunity to explain the inconsistency between his statement and the evidence given in court.
 - 2) It is a fatal irregularity for the court to treat the statement of the hostile witness as evidence and rely on it to convict.
 - 3) Normally a hostile witness is not a reliable witness and his evidence is of little, if any, weight.
- Appeal allowed.

KATITI, AG. J. - The appellant was charged with corrupt transaction with agent contrary to S.3(1) of the Prevention of Corruption Act 1971; convicted and sentenced to three years imprisonment. Aggrieved by both sentence and conviction he seeks to appeal to this Court. Before I go to the substance of the appeal, I have a duty to question the form of the charge preferred against the accused. As is shown above, it is corrupt transaction with agent c/s 3(1) of Act No.16 of 1971 but it appears that the appellant being an employee of Mwatex is the one who is alleged to have solicited the bribe in question. If this is the case then the charge should read corrupt transaction by agent c/s 3(1) of Act No. 16 of 1971 for if the position were actually the charge was corrupt transaction with agent meaning some other person is inducing the appellant to corruptly receive consideration, then the charge should be as it is above. In view of what the results of this case are I shall not deal with this problem. As evidence shows, this appeal is bound to succeed, I shall not go into the effects of such irregularity.

Now I come to the particulars of the offence. Again the particulars of the offence appear to have been clumsily set. The draftsman of the charge appears to have used conjunctive and disjunctive expressions without caring their effects on the charged offence. The most important part of the particulars of offence which is grudging by this Court is as follows: "Did corruptly solicit, accept or obtain for himself." The setting of the particulars of offence in disjunctive and conjunctive form normally raises the danger of duplicating offences. For example, one could say to corruptly solicit is an offence which is different from the offence of corruptly accept or obtain so that when all are put together and disjunctive expression used, it becomes very difficult for the appellant to defend himself in my view. But as I said before, since this appeal must succeed on different grounds, I do not intend to dwell on this legal technicality at all.

At the hearing of appeal, the appellant did vigorously contend:- (a) that the magistrate erred in treating P.W.8 as hostile witness as no proper application was made to that effect, (b) the complainant saw the appellant for the first time at Kilimanjaro Bar and he could not have given the money so immediately without intimacy, (c) that in view of the fact that some policemen had come to arrest him after receipt of that corruption money, the appellant could not have escaped so easily, (d) that the magistrate did not insist on adducing the evidence of the powder alleged to have been found on different parts of this person. The State

attorney representing the Republic, told the Court that the Republic did not intend to support the conviction because: (i) the case was not proved beyond reasonable doubt against the appellant, (ii) that there were contradictions on the evidence as to the position of powder on the appellant, (iii) that the magistrate misdirected himself in relying on the statement of P.W.8 as if it was evidence.

The above submissions both by the appellant and learned State attorney, appear to have a lot of weight as will be shown hereunder, shall analyse and scrutinize the evidence in view of these submissions. The facts of the case appear to be that P.W.1 Joseph Aschal went to Mabatini to visit one Augustino who is a police officer. He went there with Pastori Wilson who is P.W.2. While they were at P.W.1's home, they requested him to make efforts to look for employments for them. As a result Augustino the police officer accompanied by P.W.1 and P.W.2 went to one Justini P.W.8 with the view to seeking employment from Mwatex. The whole group together with P.W.8 went to Mwatex. It would appear they could not get into the factory but P.W.8 went inside as an employee of Mwatex and is said to have talked to the appellant, only to come back, subsequently conveying a message to them that the appellant would like to meet a group at Igoma next day and that P.W.1 and P.W.2 should pay 400/- if they wanted a job.

It appears that Augustino a police officer after reaching Mwatex left for destination unknown for when P.W.8 came back, Augustino was not there. It is not known whether Augustino only intended to escort P.W.1 and P.W.2 to Mwatex gate. However, it would appear that P.W.1 and P.W.2 did convey the message to Augustino that the appellant wanted 400/- as corruption money and that this amount should be given to him at Igoma Bar. It would appear that Augustino the police officer decided to lay a trap against the appellant and hence he got 400/- from the police. There is no evidence up to this level that the numbers of the currency notes were ever taken down and the only person who talks of the numbers is P.W.4 incidentally a civilian. None of the police officers ever told the court that the numbers were ever recorded anywhere. Again there is no evidence at all that this money was ever treated with any powder.

On the day they were to meet at Igoma and before such meeting, a message is said to have come that the appellant would meet them at Kilimanjaro Bar and a procedure whereby the appellant was to be arrested with the money was contrived - that is P.W.1 was to hand the money to the appellant. After handling the money to the

appellant P.W.1 was supposed to go out as a signal. The appellant did actually go to Kilimanjaro Bar and it is said that when he went to the Bar and after being introduced to P.W.1 and P.W.2 the appellant said: "Fanyeni la maana" and that P.W.1 handed him 400/- which the appellant put in his shirt pocket. P.W.1 as pre-arranged, went out to signal to Augustino, a police officer but it would appear that there was no police officer outside. The appellant is said to have given the money to P.W.8 and walked out. If police officers were around, and came there specifically for the arrest of the appellant, after being signalled to, where were they when P.W.1 went out? How come Augustino was no where to be seen. P.W.1 when cross-examined, told the Court that actually Augustino was in other rooms but how could Augustino get into rooms if he was to be signalled outside. It may well be that this was true but how is it that P.W.1 who is said to have gone out to signal to Augustino never saw the appellant go out? It would appear that when P.W.1 came back, the appellant had already gone and if P.W.1 had no glimpse of the appellant when departing, we wonder as to how far P.W.1 was from the bar if his story is true. P.W.2 in his evidence after confirming that P.W.1 gave 400/- to the appellant and that P.W.1 went out to signal the police officers and after waiting for P.W.1 in vain, he went out and went his way. This shows that if P.W.1 ever came back at all, he neither saw P.W.2, nor did they meet outside the bar where P.W.1 had gone to signal to the police officers. These stories appear too good to be true.

P.W.3 a police officer, is the one who collected the money 400/- from the police. He told the Court that he did take down the numbers involved but at the time giving evidence and the numbers of the currency notes he had no record of the same nor could he remember any. He did go to Kilimanjaro Bar with one Inspector Machunda and other policemen and that they did sit in other rooms waiting for P.W.1 and P.W.2 to signal to them. He does not tell the court where and when, and how, this signal was to be done. When ultimately P.W.3 went where the appellant was said to be, the appellant had already left and could not be traced till 30th November, 1973 when he was arrested. P.W.3 further told the court that when they arrested the appellant, they took him in the darkroom where powder was seen at his fingers and pockets. I did point out earlier that there was no evidence that the money has been treated with any powder, and even if it had been the evidence of P.W.4 shows that the money was handed to the appellant in the envelope and there is no evidence that this envelope was leaking. The evidence of P.W.2 also shows that the appellant handed the money to P.W.8 almost immediately it was handed to him. To me if the money had been treated with powder it was to defeat the purpose to put it in the envelope and if it was indeed

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enveloped then chances of the appellant's hands catching powder are not there considering the time the appellant is said to have held the envelope. Another point of importance is that if the appellant could not be arrested till next day and to still think that this powder could still be on his hands is perhaps to exaggerate. Furthermore, P.W.3 said that the powder was detected on the fingers and pockets but P.W.4 said that this powder was detected on the head and the leg. This powder on the leg was not detected by P.W.3 who also failed to see any on the head. Again if the alleged money was in the envelope and assuming that this money had been treated with powder, I cannot see how this powder got to the leg on the day in question. P.W.6 gives another piece of evidence which is surprising. To him the powder was in the hair. He did not see the powder on the pocket nor see the powder on the leg and yet P.W.6, P.W.4 and P.W.3 were together in the same dark-room and for the same purpose. Why should they differ in their testimony? We have the evidence of P.W.5 he was at Kilimanjaro Bar hopefully waiting to arrest the appellant. He told the court that when they were about to arrest the appellant he ran away but the evidence of P.W.3 is that when they went in, the appellant had already gone so that it was not easy for P.W.5 to know that the appellant ran away. So noted on the evidence of these witnesses, is a high degree of contradiction prominently exhibiting a destructive degree of inefficiency rendering acceptance of their testimony highly dangerous. The trial Magistrate should have noted these unsatisfactory features.

Now I come to P.W.8. When he came to give evidence and in the course of evidence the prosecution suspected that P.W.8 was being hostile to the prosecution's case and in my view is that he wanted him to be treated as a hostile witness. His application if I may call it so, is as follows:-

PROSECUTION: This witness is turning hostile. I would like to read over his statement recorded.

COURT: Application granted and statement read over. Entered, accepted and marked as exhibit B.

This was the procedure that was accepted by the trial court in treating the witness as hostile. With due respect, this procedure so allowed by the trial court, is unknown to the law we know. If I have to understand that this application was made under Section 164 of the Evidence Act 1967, then the procedure

must be different. In Madafi Radiba v. R. 5 E.A.C.A. 52 the Court of Appeal in applying Section 155 of the Indian Evidence Act, it is the equivalent of Section 164 of Tanzanian Evidence Act had this to say on the right procedure:-

The proper procedure is to apply for leave to treat as hostile, prove and put in, the former statement and then put to the witness the passages which are alleged to be inconsistent with the evidence given by the witness at the trial. It is essential that the witness should be given an opportunity of explaining the alleged inconsistencies as it sometimes happens that appellant's inconsistencies are capable of completely satisfactory explanation.

This is the procedure that must have been applied, if the prosecution thought that the witness was being hostile to their case but it must be noted that not everybody that gives unfavourable evidence is hostile, for a witness may only be found to be a hostile if he prevaricates or suppress the truth in an endeavour to destroy or damage the case of the party that called. As was stated in the commentary by Sarkar on Evidence 11th Edition on page 1317 "merely giving unfavourable testimony cannot be enough to declare a witness hostile. for he might be telling the truth which goes against the party calling him. He is hostile if he tries to indure the party's case by prevaricating or suppressing the truth." In this case and vide the procedure adopted, it is not easy to know that P.W.8 was actually hostile to the prosecution's case although it is categorically clear that after this procedure P.W.8 was in all terms and purposes considered a hostile witness in the mind of the court.

The trial Magistrate after so treating this man hostile witness, he proceeded to rely on the statement previously made by this witness and tendered as exhibit B to ascertain important issues which without it would have remained unclear in the minds of trial Magistrate. The extract from the trial Magistrate's judgment showing his heavy reliance on the statement as if it was a piece of evidence is reproduced hereunder:-

This conclusion is reached after also taking into consideration the evidence of P.W.8 Justini Masama the person who while in court was treated as a hostile witness as what he testified to was very much different to the statement he made to the police station exhibit B on the 30th November, 1973 while his memory was still fresh. In

that statement he had explained that he had on 29th November, 1973 been approached by some people who were seeking to be employed and how he had connected the same to Teddy of Mwatex now accused. He had also explained how this accused had demanded Shs.200/- from each person. Also that at about 17.30 hours while at Kilimanjaro Bar the accused received the amount from those and that in time as the accused saw the C.I.D. officers approaching, the accused took out the money and threw it to him Justini after which he disappeared. As I can see, this statement answers at least two important questions which had for a while disturbed my conscience, (1) that the accused was really given that sum of 400/- which he had solicited from the two people namely Pastori William and Joseph Paschal as an inducement to find them employment, (2) that the money was not found on him on arrest because he had before running away from the place where it was given to him thrown it to Justini after realising that the C.I.D. officers were approaching.

In my view, the above cited extract from the trial Magistrate's judgment show how heavily influenced the trial Magistrate was by exhibit B. It also shows that without a trial Magistrate's reliance on the same the appellant would have been acquitted. As was pointed out by the learned State Attorney, the trial Magistrate did misconceive legal position of the statement Exhibit B. The statement made by the said witness is never evidence at all. It has been held in Sandali Idi v. R. (1952) I.T.L.R. (R) 372 thus:-

It is under this section that a person calling a witness may attack that witness once the leave of the court has been obtained and treat that witness as hostile. The effect of that action is to discredit the witness and render him unworthy of credit not to make his former statement evidence. This principle is well set out in the judgment in the case of Mabati bin Ruadiba v. R. (1938) 5 E.A.C.A. 52

Even if the witness had properly been treated hostile witness the evidence of such witness given either before or after such treatment is not worth much. It has been diminitively described - i.e., in Solder v. R. (1960) 2 W.L.R. 1169 that evidence by hostile witness is negligible and unreliable and should not be given much weight. Again in Kyagante v. Uganda Crim. App. No.27 of 1974 (not reported) the Court of Appeal had this to say:-

must be different. In Madafi Radiba v. R. 5 E.A.C.A. 52 the Court of Appeal in applying Section 155 of the Indian Evidence Act, it is the equivalent of Section 164 of Tanzanian Evidence Act had this to say on the right procedure:-

The proper procedure is to apply for leave to treat as hostile, prove and put in, the former statement and then put to the witness the passages which are alleged to be inconsistent with the evidence given by the witness at the trial. It is essential that the witness should be given an opportunity of explaining the alleged inconsistencies as it sometimes happens that appellant's inconsistencies are capable of completely satisfactory explanation.

This is the procedure that must have been applied, if the prosecution thought that the witness was being hostile to their case but it must be noted that not everybody that gives unfavourable evidence is hostile, for a witness may only be found to be a hostile if he prevaricates or suppress the truth in an endeavour to destroy or damage the case of the party that called. As was stated in the commentary by Sarkar on Evidence 11th Edition on page 1317 "merely giving unfavourable testimony cannot be enough to declare a witness hostile, for he might be telling the truth which goes against the party calling him. He is hostile if he tries to induce the party's case by prevaricating or suppressing the truth." In this case and vide the procedure adopted, it is not easy to know that P.W.8 was actually hostile to the prosecution's case although it is categorically clear that after this procedure P.W.8 was in all terms and purposes considered a hostile witness in the mind of the court.

The trial Magistrate after so treating this man hostile witness, he proceeded to rely on the statement previously made by this witness and tendered as exhibit B to ascertain important issues which without it would have remained unclear in the minds of trial Magistrate. The extract from the trial Magistrate's judgment showing his heavy reliance on the statement as if it was a piece of evidence is reproduced hereunder:-

This conclusion is reached after also taking into consideration the evidence of P.W.8 Justini Masama the person who while in court was treated as a hostile witness as what he testified to was very much different to the statement he made to the police station exhibit B on the 30th November, 1973 while his memory was still fresh. In

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The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling him to cross-examine him and destroy his evidence. If a witness is unreliable none of his evidence can be relied upon whether given before or after he was treated as hostile and it can be given little, if any, weight.

From the above authorities, it is obvious that the trial Magistrate erred in relying on the statement tendered to convict and furthermore the trial Magistrate erred in thinking that the contents of exhibit B were evidence.

Considering the aspects of this case as reviewed above, it would be extremely unsafe to uphold the conviction. The appeal is therefore allowed, convictions quashed and sentences or any order relevant there at all set aside.