Meaning, Nature and Purpose of Evidence law:

What is evidence law?

Before dealing with “evidence law”, it is important to discuss about the concept of “evidence” in general since evidence and law of evidence are two different things. The word “ evidence” is originated from a Latin term “***evidentia”*** which means to show clearly, to make clear to the sight to discover clearly certain, to ascertain or to prove. Thus, evidence is something, which serves to prove or disprove the existence or non-existence of an alleged fact. The party who alleges the existence of a certain fact has to prove its existence and the party, who denies it, has to disprove its existence or prove its non-existence.

However, all facts traditionally considered, as evidence may not be evidence in the eyes of evidence law. Rather, evidence is something presented before the court for the purpose of proving or disproving an issue under question. In other words, evidence is the means of satisfying the court of the truth or untruth of disputed fact between the parties in their pleadings.

The title of the course, is the law of evidence. That does not mean only the rules concerning whether a given piece of information is admissible or not, but also such questions as what happens if there is no evidence on a given point? How much evidence, if any must a party introduces to prevent a court from ruling against him on factual proposition? What are the roles of the judge in evaluating the evidence and the like. To this effect, Robert Arthur Melin [here after referred as Melin],

have made an attempt to define evidence law in a more comprehensive way. He defined it as follows.

The law of evidence is the body of legal rules developed and enacted to govern:

i. B.facts that may be considered in court? This is the issue of relevant evidence that one should adduce before the court to support his allegation.
ii. **1.**Facts in issue
iii. **2.**Facts relevant to facts in issue
iv. C.The methods of securing consideration of these facts
v. **1.**By proof
vi. i.Real (e.g. documentary, exhibits) evidence
vii. ii.Oral evidence

2. Certain facts, which need not be proved

i. i.Judicial notice- Facts so notorious as to facts in public knowledge ,capable of being verified by authoritative texts
ii. ii.Judicial admission (facts admitted in pleadings, at open court, in examination of parties, in testimony etc.)

C. The party that must secure consideration of what facts: This is about burden of proof and degree of proof required to win the case.

- The law of evidence therefore means legal means, exclusive of mere arguments, which tend to prove or

disapprove any matter of fact the truth of which is submitted to judicial investigation.

- The law of evidence covers aspects on:
  - Who should adduce evidence before the court
  - How to obtain such evidence
  - Procedures of adducing evidence
  - Admissibility & Evaluation of evidence
  - Application of the evidence to render final verdict
- In terms of section 3 of the Evidence Act, Cap 6 R.E 2002

"evidence" denotes the means by which an alleged matter of fact, the truth of which if submitted to investigation, is proved or disproved; and without prejudice to the preceding generality, includes statements and admissions by accused persons;

2. Nature of Evidence law

Where is the place of evidence law in relation to other laws?

It is important to know the place of evidence law in relation to other laws. Laws may broadly be classified in to substantive and adjective. Adjective laws are concerned with the method of presenting cases to court proving them or generally enforcing the rights and duties provided under the substantive laws. While substantive laws, are those that defines rights and duties. This forms the greater part of the law, it would seem that it is more important part, since it defines what rights,

privileges and duties one person may have against or owe another. However the rights, privileges and duties that exist under such law will mean nothing unless they can be enforced. This is why adjective law is just as important as the substantive law.

Law of evidence is categorized under adjective law together with procedural laws, both criminal and civil procedure. Of course some scholars suggested that there will not be any problem if we incorporate rules of evidence as one part of procedural law since they have similar purpose. However, the consensus has been reached in categorizing law of evidence as one part of adjective law for the sake of establishing more effective system of adjudication of cases before the court of law. Although one can see grains of evidence law in procedural laws, their main dealing is with how pleadings can be framed, investigation conducted, evidence collected etc... This does not necessarily make the law of evidence to be part of procedural law.

There are certain issues procedural laws never address and are left to evidence law. For instance, in the procedural law you did not study about the standard of proof, facts to be proved or need not be proved and the valve to be given to each term of evidence etc. These are left to evidence law therefore evidence law is not strictly speaking procedural law, but shares the commonality with procedural laws in the sense that both are means to the enforcement of the substantive law. Thus, evidence law suitably falls within the general category of

Adjective laws, which deal with the enforcement of the substantive law.

3. Purpose or significance of Evidence law

Evidence is the “Key” which a court needs to render a decision. Without evidence there can be no proof. Evidence provides the court with information. Proving facts through the presentation of evidence means convincing court to accept a particular version of events. Of course, one can search truth even through violating the constitutional rights of the parties. However, evidences obtained through unlawful means could not contribute for the maintenance of justice in the future. So the process of proof should be regulated by evidentiary rules and principles in order to achieve accelerated, fair and economic Justice.

In both criminal and civil proceedings, the law of evidence has a number of purposes. In short, the law of evidence regulates the process of proof. The rule of civil and criminal evidence, in conjunction with the rules of procedure, establish the frame work for the process of proof and the conduct of litigation, so that a lawyer advising his client or preparing his case for trial or presenting it to the court or tribunal will know what issues his client must prove in order to succeed.

HISTORICAL DEVELOPMENT OF THE LAW OF EVIDENCE

- One can trace the evolution of the law of evidence in Tanzania from pre-colonial societies.
- These used traditional forms/modes of dispute settlement characterized by;
    - Lack of clear distinction between executive and judiciary
    - Centralization of a system of dispute settlement
    - Lack of clear demarcation of law between substantive and procedural laws
    - Lack of clear distinction between law and morality
    - Lack of formal procedures of arriving to decision

PRE-COLONIAL METHODS OF DISPUTE RESOLUTION

- These were largely associated with the nature of the society and its level of development.
- Some of these methods were;
    - very cruel,
    - harsh and
    - inhumane

Nevertheless, were accepted within the particular society as a way of deterring atrocities in their societies.

- Some of these methods;

TRIAL BY MOOT

It was a method of providing disputants an opportunity for each one to make their defense after administration of oath. There was no formal procedure as such of providing proof rather parties were made to have strong beliefs on whatever will be decided by their clan leaders.

They were made to adduce their evidence in fear of God, fear of death, fear of being thrown out of the society. Beliefs on superstition dominated nature of proceedings.

TRIAL BY BATTLE

Under this method,a person who had a claim against another person had to get into battle with another person until the winner is found. In modern law of evidence, this could be termed as adversarial system of dispute resolution.

TRIAL BY ORDEAL

This was a method of collecting evidence through torture or mutilation. It was also a means of punishing an accused person. In some tribes they used local poisonous herbs called “MWAVI”.

MODERN LAW OF EVIDENCE

The Modern law of evidence, particularly in Tanzania, came as a result of colonialism which introduced the modern legal system which is still used till now that include

- Modern methods of dispute settlement

- Modern methods of acquiring, adducing and admissibility of evidence, etc
- During British colonial rule, the law which was applied in relation to evidence was the Indian Evidence Act of 1872.
- After independence Tanzania enacted its own law which was more less similar to the Indian Evidence Act, that law was named as the Evidence Act, 1967

Several amendments have been effected to this law and those have to be read together with the principal legislation

SOURCES OF EVIDENCE LAW

THE CONSTITUTION

THE STATUTES eg TEA, FOREST ACT

COMMON LAW AND PRINCIPLES OF EQUITY

CASE LAWS eg Trust Development bank vs Le-Marshal Enterprises Limited

PRECEDENT

PROMINENT AUTHORS' WRITINGS

FORMS OF EVIDENCE

The totality of what is provided under ss.8-18 of the Evidence Act can be said to be "Circumstantial Evidence"
Generally evidence can be categorized into the following types or forms;

a) Direct versus Circumstantial evidence

b) Oral evidence, Documentary evidence & Real Evidence
c) Primary versus secondary evidence
d) Opinion & Electronic evidence
e) Presumptive versus conclusive, etc

DIRECT EVIDENCE

- This is the evidence which goes straight to the proof of a fact in issue in the case.
    - e.g. in a murder case evidence of a witness giving oral testimony in court that she saw **D** kill **V**.
- It must be of a person testifying orally or otherwise of what the witness saw, heard, felt or perceived by any of his five senses as to the fact in issue.
- In most cases, it is not easy to get direct evidence to prove a case.
- S.62 of Cap 6 R.E 2002 provides that oral evidence must, in all cases whatever, be direct.
    - Must be made by the person who saw,
    - Must be made by the person who heard,
    - Must be made by the person who perceived, or
    - Must be made by the person who gave opinion.

CIRCUMSTANTIAL EVIDENCE

- In **Gai Ipenzule v Sumi Magoye** [1983] TLR 289 it was stated that,
- It is very rare for a party to a case to rely entirely on direct evidence.
    - “it is not the law that direct evidence of persons caught *inflagrante delicto* is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence”
    - This rule acknowledges the fact that there are other incidences where direct evidence will be hardly available to prove the facts hence for the need to accommodate circumstantial evidence.
    - Circumstantial evidence is indirect in that it tends to prove a fact relevant to the issue.
    - Circumstantial evidence deals with facts which are so much connected with the facts in issue such that taken together they form a chain of events either proving or disproving the fact in issue.
    - It involves evidence of circumstances that the fact finder must first accept as being true and then draw certain conclusions.
    - Different from direct evidence which once proven tend to prove the fact in issue, circumstantial evidence need to be taken in caution and the

conclusion must be reached after assessing carefully each circumstance.

- In the case of **DPP v ELIAS MWASHITETE AND ANOTHER** [1997] TLR 319 doubts were raised as to the chain of events.
- The court stated that;
- “There were a number of possibilities as to why some of the stolen coffee had been found in the first respondent's house. These were reasonable possibilities and it was accordingly inappropriate to use circumstantial evidence to convict the first respondent as **the circumstantial evidence would have to have lead irresistibly to the only conclusion that the first respondent was involved in the robbery in some way**. The acquittal was accordingly in order.
- The evidence relied upon under circumstantial evidence must not be capable of more than one interpretation.
- Read **HASSANI FADHILI v REPUBLIC** [1994] TLR 89 (CA)
- In **Hamidu Mussa Thimotheo & another v R** [1993] TLR 125 (CA), the court stated;
- “The chain of circumstantial evidence linking the appellants to the death of their father is unbroken

and **therefore leads to no other conclusion** but that the appellants were responsible for the death of their father."

- This is to say where the connection between the fact and the fact in issue is broken, then circumstantial evidence cannot be relied upon.

READ THESE CASES

- *Ahmad Chali v R,* Criminal Appeal no. 56 of 1995, Court of Appeal of Tanzania at Mwanza (Unreported)
- *Jurist Robert Mwaipopo & 2others v R*, Criminal Appeals No.33 of 2004, Court of Appeal of Tanzania at Tanga (Unreported)
- *John Magula Ndongo v R*, Criminal Appeal No. 18 of 2004, Court of Appeal of Tanzania at Dar es Salaam (Unreported)

PRIMARY EVIDENCE

- This is the best possible evidence – e.g. in the case of a document – its original.
- There is a rule that demands that the original of any document, photograph or recording be used as evidence at trial, rather than a copy.

That is to say, primary evidence is original evidence (s.64 of the Evidence Act, Cap 6)

SECONDARY EVIDENCE

- This is clearly not the primary source – e.g. in the case of a document –a certified copy.
- In the 18th century the rule canvassed was that a party must produce the best evidence that the nature of the case would allow-that is original evidence.
- The courts were wary of accepting copies of documents for fear of falsification.
- However, in modern times the best evidence rule has allowed some of the copies which are authenticated to be produced before the court.
- See the conditions for admissibility of secondary evidence under s.67&68 of Cap 6.

OPINION EVIDENCE

- This is the evidence given by expert witnesses.
- S.47 of Cap 6 provides that;

When a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion…of persons (generally called experts)…are relevant facts.

- Historically, the rule against opinion is an offshoot of the hearsay rule.
- The general rule is that witnesses must state facts, not opinions and the rationale for the rule is that if they are

allowed to give their opinions on ultimate issues, there is a serious danger that the jury will be unduly influenced.

- However, Lord Mansfield CJ in 1782 in **Folkes v Chadd** formulated an exception to the general rule when he stated:
    - “On certain matters, such as those of science or art, upon which the court itself cannot form an opinion, special study, skill or experience being required for the purpose, “expert” witnesses may give evidence of their opinion.”
- Lawton LJ in **R v Turner** , relying on Lord Mansfield's formulation, described the purposes for which expert evidence could be deployed in the following terms:
        - “Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments ... An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.
- Note that: the fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour

within the limits of normality any more helpful than that of the jurors themselves.

- This is to say, opinion evidence is not binding to the court-it is persuasive.
- Lord President Cooper in **Davie v Edinburgh Magistrates** described the duty of the expert as follows:
- “The duty of the expert is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions. Neither the judge nor the jury is bound by the views of the expert even if it is uncontradicted.”
- Expert witness must be peritus-that is a person who is skilled in his field of knowledge.
- Lord Russell CJ in **R v Silverlock** said:
- It is true that the witness who is called upon to give evidence founded on a comparison of handwriting must be *peritus* ; he must be skilled in so doing; but we cannot say that he must have become *peritus* in the way of his business.
- There the main questions the court need to establish are;
- Is he *peritus*?
- Is he skilled?
- Has he an adequate knowledge?

- If these questions are determined that evidence is admissible.
- The rest is merely a question of its value or weight.

PRESUMPTIVE EVIDENCE

- Sometimes known as prima facie evidence.
- It is a form of evidence which is a creature of a statute or judicial pronouncement and it is presumed to be true unless the contrary is proven.
    - E.g a production of a document of title is presumed to be an evidence of ownership of a property in dispute unless the contrary is proven.

CONCLUSIVE EVIDENCE

- Is the evidence which no party is allowed to contradict
    - e.g. a child under 5 years is incapable of committing an offence - doli incapax.
- If the evidence is incontrovertible, it tantamounts to a rule of law and should be so described.

HEARSAY EVIDENCE

- Evidence by that refers to statements made by the other person other than the one testifying before the court.
- Hearsay evidence is excluded under s.62 of Cap 6 which requires oral evidence to be direct.

WHY NOT ADMITTING HEARSAY EVIDENCE?

- Do not conform with s.61-62 of Cap 6.
- It is a second hand information or statements of persons who are not in court or are incapable of appearing to testify
- Such evidence is not given upon oath or affirmation
- The evidence cannot be tested by cross-examination
- It is not a better testimony for a case
- It requires prolonged investigation to find out the truth
- There is likelihood of distortion from the original

- **The rule against hearsay evidence evolved as part of the best evidence rule.**
- **Cross says;**

> *"Express or implied assertions of persons other than the person who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted."*

The inadmissibility of hearsay evidence was held in the case of **Kilongo v. R. (1958) E.A.C.A.** 152, where the accused had retained poll-tax money and then, fearing prosecution had handed it over to one Mwinyipembe to take to Wakili Mzee

refused to accept the money, the accused handed Mwinyipembe more money telling to go back to Mzee and offer this to him so that Mzee would refrain from reporting the matter. Mzee gave evidence as to what had occurred and had been said to him. The appeal court held: “The when Mzee deposed to Mwinyipembe’s coming to him with the sh. 500/- and latte with sh. 1000/-. It was not hearsay evidence, but we think that it was hearsay when he deposed to what Mwinyipembe had told him the accused had told Mwinyipembe to say to him (Mzee).”

In **Haji Ibrahim v. R. (1975)** L.R.T.N. 56 ,the court said that the testimony of a police witness about information supplied by third party who is not called as a witness is hearsays and inadmissible.

- The rule has its exceptions. These are provided under Part IV of Cap 6 R.E 2002.

Generally, hearsay evidence can be admissible where;

- The maker of statement cannot be found without undue delay
- The maker of statement is incapable of making evidence
- The maker has acquired diplomatic privileges or immunities
- The maker is dead, etc- (see s.34 of Cap 6 R.E 2002)

READ THESE CASES

- Kioko v. R. [1971]H.C.D 224
- R. v. Basilh [1971] H.C.D 307
- Ramesh Rajput v Mrs Sunanda Rajput [1988] TLR 96 (CA)

DYING DECLARATION

- Statement relating to cause of death is known as “Dying Declaration”.
- A dying declaration is one of the exceptions to the hearsay evidence-s.34(a) of Cap 6 R.E 2002

In order for a statement to be admissible under the above section the following conditions must be fulfilled;

  - The person who made declaration must be really dead.
  - The alleged declaration must be that which was made by the deceased person in its original form.
  - The statement must refer to the cause of death or the circumstances of his death or the transaction leading his death.

In Tanzania, dying declaration is admissible in both civil and criminal cases where the cause of death is an issue

- Dying declaration may be admissible;
  - Orally,
  - In written form, or

    - By signals provided that such signs can be proved to have been meant what is said before the court.

- In Chandra Sakra v R [1930] All ER 865;
    - The deceased was found with her throat-cut
    - The wound rendered her unable to speak but she was fully conscious and understood what was said to her.
- The credibility of a dying declaration is the matter of discretion of court.
- The court may take into consideration the following factors;
    - Capacity of witness who seeks to submit dying declaration to remember the chain of events during declaration
    - Consistence of the contents of the dying declaration with other circumstances relating to death
    - Opportunity of a person adducing dying declaration to identify the accused person
- The more capacity of a person, the more credibility of the evidence.
- If the crime occurred in dark place (Mid-night)-extra caution may be taken by the court.
- The court should warn itself before relying its decision on a dying declaration.

- In most cases it needs to be corroborated.

The Cause of Death

It is required that dying declaration must relate to the cause of death of the maker (declarant) and not the cause of another's death. When the victim is not proved to have died as a result of the injuries received in the incident his dying declaration cannot be said to be the statement as to the cause of his death or to any of the circumstances which resulted in his death. In the case of **R. v. Abedi bin Kasanga (1938) 5 E.A.C.A 120** the appellant was charged with murdering Sowedi, Bushiri in a dying declaration stated that he (Bushiri) had been instigated by the appellant to shoot Ali and had in fact shoot Sowedi, mistaking him for Ali. This was held to be inadmissible.

In **R. v. Kayanda alias Msila s/o Mkuyu and Others (1943) 10 E.A.C.A. 117**, a dying declaration by one Rubogi who was in fact murdered on the same occasion as Mfanye for whose murder the appellants had been charged, though the two murders were not made the subject of a single information, was held to be inadmissible since it was not Rubogi's death which was in question.

◊ Circumstances of Transaction

Dying declaration may be admissible if they are made as to any circumstances which resulted in the deceased's death. In the case of **Swami v. Emperor [1939] 1 All E.R. 396,** the court extended the suggestion that the statement must be made after the transaction has taken place, that the person making it

must be at any rate near death, that the circumstances can only include the acts done when and where the death was caused. Thus the statement may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. In the case of **Kabateleine s/o Nchwamba (1946) 13 E.A.C.A 164** the appellant was convicted of the murder of his mother by setting fire to the hut in which she was sleeping at night. The evidence against him was entirely circumstantial and consisted inter alia of a complaint made by the deceased to a headman two days before the fire the appellant was threatening to burn her hut because he said she had caused the death of his father by witchcraft. The appeal court held that the complaint made to the headman two days before the fire was admissible in evidence under section 32(1) Indian Evidence Act (34(a) Tanzania Evidence Act as it was directly related to the occasion of the deceased's death and was a circumstance which resulted in her death. In Swami's case the court said that the circumstances must be circumstances of the transaction, general expression indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. In the case of **Antonio Barugahare and Others v. R [1957] E.A. 149**, the only point in the appeal was the admissibility of certain evidence by a friend of the deceased woman. The witness gave evidence that the deceased had told her some week before her death that the first defendant had asked her to marry him and to lend him some money to pay his poll tax.

The appeal court held that the admission of such statement by the trial court was irregular. It further stated that:

"*The statements of the deceased indicating motive would have been rightly admitted if made after the attack, and perhaps even if made in clear reference to an imminently expected attack which later took place; but we think that in the present circumstances they were neither statements as to the cause of death nor as to the circumstances of transaction which resulted in the death. In one sense a murder may be said to result from a long-nurtured grudge, and the source of the grudge may be said to be a transaction which itself results in the death; but we emphasis the requirements laid down by the Privy Council that there must be 'some proximate relation to the actual occurrence.' Whether or not facts here alleged bear a relation to the murder, there was certainly no proximate relation.*"

Manner of eliciting the Statement/ Opportunity of a person adducing dying declaration to identify the accused person

In the case of Pius Jasunga s/o Akum **v. R (1954) 21 E.A.C.A. 331,** among other issues raised on appeal was the admissibility of dying declaration taken by asking leading questions. The court said that this does not make the statement inadmissible, but it will affect the weight to be given to it. In **R. v. Mitchell (1892) 17 Cox 503,** the court said that declaration must be in the actual words of the deceased and that if questions had been put, both questions and the answers must be given; furthermore since questions might be leading ones, there

always a very great danger of each question being answered without their force and effect being full comprehended.

◊ Incomplete Statements Incomplete statements are not admissible. In the case of **Cyril Waugh v. R. [1950] A.C 203,** the deceased fell into a coma while making the statement and never recovered. The court held that:

“The dying declaration was inadmissible because on its face was incomplete and no one can tell what the deceased was about to add; that it was in any event a serious error to admit it in part, and that it was further and even more serious error not to point to the jury that it had not been subjected to cross examination.”

In the case of **R. v. Charles Daki [1960] E.A. 34,** the deceased was interrupted by the doctor when he was making his statement to the police officer, whereas later he died without completing his statement. The court held that—on the face of the recorded statement and footnote there to the deceased was interrupted by the doctor; the deceased might or might not have added something. Thus the statement was held to be inadmissible. In the case of Pius Jasunga the deceased did not sign his statement and thus the court said that since the statement was unacknowledged it was inadmissible.

“*The statement was unacknowledged and there was no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it had he been able to do so.”*

Corroboration

Apart from exceptional cases where the statement of the deceased was admitted without corroboration, courts have from time to time insisted on the need of corroboration as was said in the case of Pius Jasunga:

"we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where conviction has been upheld which was based upon a dying declaration without satisfactory corroboration unless in Epungu's case there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused"

READ THESE CASES

- Hamisi Said Mchana v R [1984] TLR 319 (CA)
- R v Mohamed Shedaffa and 3others [1984] TLR 95 (HC)
- Damian Ferdinand Kiula & Charles v R [1992] TLR 16 (CA)
- Godson Hemedi v R [1993] TLR 241 (CA)

4. PROOF

4.1 Direct/Oral Evidence

According to section 3, oral evidence means all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. This is the evidence which is given direct by the witness and can be both things and documents. Section 62(1) requires that oral

evidence must in all cases whatever be direct. When the evidence refers to:

• Fact which could be seen, then it must be the person who saw such fact should give evidence.

• Fact which could be heard, it must be given by the person who claims to have heard it.

• Fact which could be perceived by any other sense or manner, it must be the person who perceived it by the sense or that other manner.

• Opinion or grounds on which that opinion is held, it must be the person who hold such opinion or who holds it on those grounds. The proviso to subsection 1 provides that the opinion of experts expressed in treaties commonly offered for sale or grounds on which such opinions are held, may be proved by production of such treaties. However, before such production, it must be shown that:

• The author of such treaties is dead, or

• Cannot be found, or

• Has become incapable of giving evidence, or

• Cannot be called as witness without undue delay or expenses. Section 62(2) provides that where the evidence refers to the existence of condition of any material thing other than a document, the court may require the production of such material thing for inspection.

4.2 Documentary Evidence

According to section 3 document means any writing, handwriting, typewriting, printing, photostat, photograph and every recording upon any tangible thing, any form of communication or representation by letters, figures, marks or symbols or by more than one of these means, which may be used for the purpose of recording any matter provided that such recording is reasonably permanent and readable by sight. Documentary evidence is defined by section 3 to mean all documents produced as evidence before the court.

4.3 Types of documents

1. Public documents

2. Private documents

4.3.1 Public documents

Under public documents we have those which form the acts or records of the act, like the acts of:

(a) The President of the United Republic, (b) The official bodies and tribunals, (c) The public officers, whether legislative, judicial or executive. Another category is the public records kept in the United Republic of private documents.

4.3.2 Private documents.

According to section 84 all documents other than public documents are private documents.

4.4 Primary and Secondary Evidence

Generally under section 63, the contents of documents may be proved by the production of the document (primary evidence), or by copies or oral accounts of the contents (secondary evidence).

Primary evidence is evidence which may be given first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better record.

4.4.1 Primary Evidence

According to section 64 (1) primary evidence means the document itself produced for inspection of court.

• Document executed in several parts

Where under section 64(2) the document is executed in several parts, each part is a primary evidence of the documents. Sometimes each party to a transaction wishes for the sake of convenience to have a complete document in his own possession, thus a document is written out as many times as there are parties, each document is executed by all parties. Any one of the document may be produced as primary evidence of contents of the document.

• Document executed in counterparts

Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the party

executing it. A document is executed in counterpart when there are two parties to a transaction. E.g. contract between A and B, the document is copied twice and A alone sign one copy, while B alone sign the other copy. A hand B a document signed by him and B hands A a document signed by him. Then as against A, the document signed by A is a primary evidence, while as against B a document signed by B is a primary evidence.

• Documents made in one uniform process

Where under section 64(4) a number of documents are all made in one uniform process e.g. printing, lithography or photography, then each is primary evidence of the contents of the rest. However, when they are all copies of a common original, they are not primary evidence of the contents of the original. E.g. a carbon copy made by one uniform process of the certificate of a doctor (e.g. as to the condition of a rape victim) given in the performance of professional duty is a primary evidence.

4.4.2 Secondary Evidence

Section 65 describes what constitute secondary evidence. Secondary evidence is evidence which may be given under certain circumstances in the absence of that better evidence which the law requires to be given first. Secondary evidence includes:

• Certified copies (s. 65(a)) e.g. a photocopy of an original is secondary evidence of its contents, though the two have not been compared, it is proved that the thing photographed was

the original. Certified copies are defined under section 85. The correctness of certified copies is presumed under section 88.

• Copies made by mechanical process (s. 65(b)) e.g. a copy compared with a copy of a letter, made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

• Copies made from the original (s.65(c)) copies made from the original or copies compared with the original are admissible as evidence. A copy transcribed from the original, but afterwards compared with the original is secondary evidence, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

• Counterparts (s.65(d)) when a document is executed in counterpart, each party signing only the part by which he is bound, each counterpart is the best evidence against the party signing it and his privies. As to the other party it is only secondary evidence.

• Oral statements (s.65 (e)) secondary evidence includes oral accounts of the contents of a document given by some person who has himself seen the original document. Written statements of the contents of a copy of a document. The original of which the person making the statement has not seen cannot be accepted as secondary evidence. However, it is not necessary that a person who is called as a witness to give evidence as to a lost document must have himself read it, he

will b a competent witness if has physically seen the document and the contents has been read out and explained to him. Secondary evidence of a document which is lost or difficult to trace may be adduced in two ways: (i) By oral evidence of persons who were present when the document was executed (ii) By a certified copy of the original

4.5 Proof of Documents by Primary Evidence

Section 66 is based on the best evidence rule i.e. documents must be proved by primary evidence except as otherwise provided. This section has to be read together with sections; 63, 64, 67 to 69.

4.6 Proof of Document by Secondary Evidence

Section 67 enumerates the seven exceptional cases in which secondary evidence is admissible; secondary evidence may be given of the contents of a document in civil as well as in criminal cases. The contents of a document may be proved by secondary evidence under the following circumstances:

4.6.1 Original shown in possession but not produced (s. 67(1)(a) This paragraph deals with three situations under which secondary evidence may be given; a) When the original is in the power or possession of the person against whom the document is sought to be proved. b) When it is in the possession or power of any person who is out of reach or not subjected to the process of the court. c) When it is in the possession of any person legally bound to produce it but fails to produce it after notice mentioned in section 68 is given to him.

4.6.2 Existence of original admitted in writing (s. 67(1) (b) Under section 67(1)(b) when the existence, condition or contents of the original have been proved to be admitted in writing by person against whom it proved or by his representative in interest, secondary evidence can be given. However, this paragraph has to be read tighter with section 24 which provides that oral admissions as to the contents of a document are not relevant unless and until the party supposing to prove them shows that he is entitled to give secondary evidence of the contents of such document.

4.6.3 Original destroyed or lost Section 67(1) (c) consists of two parts; a) When the original document had been destroyed or lost, he can produce secondary evidence. b) When a person offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time.

4.6.4 Original not easily moveable Section 67(1) (d) covers things not easily moveable, things fixed in the ground; or buildings (e.g. notices painted on walls, tablets in buildings, tombstones, monuments, or marks on boundary stones or trees). Secondary evidence is admissible in such cases on account of great inconvenience and impracticability of producing the original.

4.6.5 When the original is public document

Section 67(1) (e) intends to protect the originals of public records from the risk to which they would be expressed by

constant production in evidence. Secondary evidence in the case of public document mentioned in section 84.

4.6.6 When the original is a document whose certified copy is legally permitted. According to section 67(1) (f) certified copies are admissible as secondary evidence. The provisions of sections 85, 87 and 95 may be read together with section 67(1) (f).

4.6.7 Originals consisting of several accounts or cannot conveniently be examined. Section 67(1) (g) is designed to save public time. Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document and the document as such cannot be conveniently examined in court, evidence may be given under this paragraph as to the general result of the documents by a person who has examined them and who is skilled in the examination of those documents. In the case of John Babtist Marcus D'Sa and Another v. R. [1957] E.A. 627, two bank clerks, were jointly tried and convicted of fraudulent false accounting and of stealing from their employer. Bank inspector gave evidence of his searches in books of accounts of the bank and magistrate in his judgment made reference to an unproved documentary exhibit. They appealed on the ground that neither the original accounts referred in the inspector's evidence nor copies were produced and accordingly the inspector's evidence being secondary were inadmissible and that he unproved exhibit to which the magistrate referred was also in admissible. Section 63 of the Evidence Ordinance (s. 67 Tanzania Evidence

Act) sets out exceptions to the general provisions in section 62 (s. 63 TEA) which requires documents to be proved by primary evidence. The subject matter of the inspector's evidence; its purpose and his capacity fulfilled the requirements of section 63(g) (s. 67(g) and (5) TEA) and accordingly this secondary evidence was rightly admitted. In the case of Edward Dick Mwakamela v Republic 1987 TLR 122, the magistrate admitted as secondary evidence a buff-copy of a pay-in-slip as secondary without summon bank officials to testify on the banking of the money. The High Court said that for secondary evidence to be admissible, it must satisfy the provisions of section 67 of the Evidence Act 1967 on the admissibility of secondary evidence.

COMPETENCE AND COMPELLABILITY OF WITNESS

- ☐ The discussion on this topic will revolve around the following aspects;
    - Meaning of a witness
    - Competence and compellability
    - Examination of witnesses
    - Privilege of witnesses
    - Evidence of Experts
    - Hostile witness
    - Corroboration of evidence

MEANING OF A WITNESS

- ☐ The US Supreme Court in the case **of United States v Hubbell, 530 U.S. (2000)** defines a witness as a person who provides testimony.
- ☐ A witness is a person who is required to come to court to answer questions about a case. The answers a witness gives in court are called evidence.
- ☐ As a general rule, before giving evidence, the witness promises to tell the truth. He/she does so by taking oath/affirmation declaring what he/she is about to say is true to the best of his/her knowledge.

COMPETENCE AND COMPELLABILITY

- ☐ A person cannot give evidence in court unless he/she is competent to testify
- ☐ Witnesses play a vital role in the administration of criminal and civil justice
- ☐ Judgments are normally given on the basis of evidence adduced by witnesses
- ☐ Witnesses are grouped into three groups;
    - Witnesses who are competent and compellable to testify
    - Witnesses who are competent but not compellable
    - Witnesses who are competent but for some reasons the court cannot allow them to testify

☐ A witness is competent if he may lawfully be called to give evidence

☐ This person is expected to be conversant with the facts of the case

☐ A witness is competent to give evidence if his testimony is admissible

- In order a person to be allowed to testify he must be competent

☐ Determination of competency has to be done before administering oath or affirmation

☐ A witness is compellable if, being competent, he can lawfully be compelled to give evidence

☐ The general rule is that all witnesses are competent and compellable

☐ A witness is compellable if he can be obliged to go into a witness box and answer questions put to him

☐ A witness is competent to testify if his evidence/testimony can be admissible

☐ A witness is incompetent when he is not understanding the rational questions put on him-s 127(1)

- Competence is determined by the court

☐ Therefore the rule is;

- Any person is a competent witness in any proceedings
- All competent witnesses are compellable unless an exception lies

☐ Competency in special cases;

- Children of tender age
    - ☐ The general rule is that a child is a competent witness unless the court considers that he is prevented from understanding the questions put to him-s 127 (1) of TEA
    - ☐ A child of tender age is a child of or below the age of 14years-s 127(5) of TEA
- Where in a criminal case a child of tender age does not;
    - ■ in the opinion of the court,
    - ■ understand the nature of and value of an oath,
    - ■ his evidence may be received though not on oath or affirmation if in the opinion of the court,
    - ■ to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth

☐ The process of examination of an intelligence of a child of tender age is called *'Voire Dire'*

- *This process is governed by s 127(2) of TEA*

VOIRE DIRE TEST

☐ The minimum conditions needed to allow a child of tender age to give evidence in court are;

- The possession of sufficient intelligence; and
- The understanding of the duty of speaking the truth

☐ If the court is satisfied that the child has such requirements then it may proceed to receive the evidence given by the child

☐ As a matter of practice, evidence of a child of tender age requires corroboration.

☐ Corroboration simply means confirmation or support by additional evidence or authority

☐ However, such evidence will not require corroboration if it falls under the Sexual Offence Special Provision Act (SOSPA), Act No 4 of 1998 where the child is the victim of the offence as per section 127 (7) of the TEA as amended by section 27 of Act No. 4 of 1998.

☐ Read also s 127(3) of TEA

☐ **OVERVIEW OF CASE LAWS ON VOIRE DIRE TEST**

☐ In the case of ***Kibageny v. R (1959) E.A 92 C.A***

- it was stated that when the court conducts a voire dire test it should ask questions to the child as to his age, religion, if any, and such other questions as will assist it in determining whether the child understands the nature of an oath or affirmation and its obligation;

☐ In ***Dhahiri Ally v R [1989] TLR 27***

- The court stated that the trial court must record in the proceedings that such investigation has been made to establish the two requirements of voire dire test
- Failure to comply with the requirements of voire dire test may be fatal in the proceedings
- This is in accordance with the case of **Gabriel s/o Maholi v R [1960] EA 159**
- However, the Court of Appeal in **Deemay Daati and 2others v R**, Crim. App. No. 80 of 1994, Court of Appeal of Tanzania at Arusha (Unreported) it was stated that;
- The omission to conduct voire dire examination of a child of tender age makes such evidence to be treated as unsworn evidence which will require corroboration

- In ***Nguza Vicking (Babu Sea) and 3Others v R,*** Crim. App. No. 84 of 2004, High Court of Tanzania at Dar es Salaam (Unreported) Mihayo J stated that
- The amendments done by SOSPA 1998 to the Evidence Act as per s 127(7) has changed the position, at least in sexual offences cases, that the requirement of corroboration is now no longer necessary as it used to be.

PERSONS WITH DISEASE OF MIND

☐ These are persons of unsound mind and it applies to idiot and lunatic persons

- An idiot is a person who was born irrational
- A lunatic is a person who was born rational but subsequently became irrational

☐ A person of unsound mind is competent to testify unless prevented by his condition from understanding the questions put to him and giving rational answers-s 127(6) of TEA

☐ The court must assess such understanding before such person is allowed to give evidence

DUMB WITNESSES

☐ A person is not necessarily incompetent to testify because he is dumb

- A dumb person is a person who is unable to speak

☐ This person can give evidence by using intelligible things like writing or signs provided that such writing is recorded and the sign is made in the open court-s 128(1) of TEA

☐ If the court is satisfied that the witness is fit to testify he may be sworn or affirmed and allowed to give evidence by means of interpreter

- There must be a record of the signs and not the interpretation of the signs.

EVIDENCE OF SPOUSES

☐ In civil proceedings, the parties to a suit and the husband and wife or wives of any party to a suit are competent and compellable witnesses-s 131 of TEA

☐ In criminal cases the position is different

- Where a husband or wife is an accused person, his wife or her husband is a competent witness for defence but not compellable
- If that spouse is a witness for the prosecution, the general rule is that such witness is competent but not compellable-s 130(1) of TEA
- That is to say the husband and the wife are competent witnesses against each other but they are not compellable witnesses to testify in the favour of the prosecution side.

- In the case of ***R V. SIWAJIBU KIBAYA*** (1989) T.L.R 12 the issue centered on spouses who were living under cohabitation.

- The court held that where the line between a valid marriage and concubinage is obscure and where cohabitation takes on the typical features of a durable establishment; a spouse of such cohabitation is not under duty to testify for prosecution.

- Section 130(3) of the TEA does not close the room for the spouse who desire to testify against the other spouse or in favour of the prosecution side.

- The condition precedent for the admission of such evidence is that the spouse must be made aware of his or her rights that he or she is not forced to testify.

- But if he or she is willing to do so then the evidence of such person shall not be admissible unless the court has recorded in the proceedings that section 130(3) of the TEA has been complied with.

- The policy of protection of the spouses is thus stated by an American judge in the case of ***STILLMAN V. STILLMAN*** 115 Misc. c. 106 N.Y.S of which the court observed that communication and transactions between husband and wife were early recognised as privilege and neither could be compelled to disclose what took place between them and neither is a

competent witness to testify to such transactions or communication of a confidential nature.

- In Tanzania, in the case of ***Augustino Kente v R [1982]*****TLR 122** the court stated that;
- The liberal attitude of this law is not difficult to understand; for marriage being an institution whose foundation is marital love, it is the policy of the law that where the two are bonded by marital love no circumstances that will generate hostility and consequently put them asunder should be imposed on them by compelling such witness to testify, if she or he would otherwise elect to avoid such possible consequences.
- That general rule has the following exceptions;
- Where the charge is under chapter XV of the Penal Code or under the Law of Marriage Act.
- Where the person charged is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them

AN ACCOMPLICE EVIDENCE

- An accomplice is a competent witness against a co-accused-s 142 of TEA
- But such person is not compellable witness

COMPELLABILITY OF WITNESSES

- ☐ Compellability means a witness is required by law to attend the court after being summoned to give evidence and answer questions on any matter relevant to the facts of the suit or proceedings
    - The witness must answer the question even if the question may tend to incriminate him
- ☐ However there privileges which witnesses have in legal proceedings
- ☐ S 129 of TEA deals with privileges of judges and magistrates
- ☐ A category of privileged witnesses extends to advocates, police officers and public officers with knowledge of official communication-see s 133-147

EXAMINATION OF WITNESSES

- ☐ A witness is brought before the court to reveal certain information relevant to the fact in issue
    - He is there to assist the court to reach to a decision
- ☐ The information which the witness has will be explored by the process of questioning and the witness responding to the questions posed on him
- ☐ That process is called examination of witnesses which is done in three stages;

- Examination in chief
- Cross-examination
- Re-examination

EXAMINATION IN CHIEF

☐ It is also known as direct examination-s 146(1) of TEA

☐ Aimed at exploring all material facts within a witness's knowledge which are important to the party calling him and which are relevant to the case

☐ The general rule is that the witness should not be asked a leading question unless with the permission of the court-s 151(1) of TEA

☐ A leading question is one which suggests a desired answer or assumes the existence of a disputed fact or a state of affairs.

☐ Leading questions are objectionable because of;

☐ The danger of collusion between the examiner-in-chief and the witness; and

☐ The impropriety of suggesting facts which are not in evidence.

☐ So for example, in a hit and run case question like:

☐ 'Did you see a car driving at top speed?' is not desirable in examination in chief because it is a leading question.

☐ Nevertheless, leading questions may be asked at the beginning of the examination-in-chief.

☐ For example;

☐ Is your name Nyanyama?

☐ Are you a law student?

☐ Do you live at Nyanguge Ujamaa Village?'

☐ These are introductory and undisputed matters.

☐ However the same questions may be prohibited in case they are the focus of the dispute.

☐ It may also be allowed in-chief at the discretion of the judge or put in cross-examination.

THEORIES OF EXAMINATION-IN-CHIEF

☐ When you prepare yourself for examination-in-chief, you may wish to consider the following theories;

- Identify the evidence that you need to make your case; and
- Then identify which witnesses, documents or other evidence are available to prove it.
- If you have documents or tangible evidence, identify which witnesses can authenticate the evidence to make it admissible.

- Identify all possible witnesses and then decide who to call:
- available,
- friendly,
- credible,
- necessary (i.e. adverse inference if not called).
- Decide what to include or exclude
- What to include: facts which can establish your case and collateral facts make relevant fact more plausible
- What to exclude: Untrue facts; implausible facts; unprovable facts; clutter; impeachable facts, door openers
- Make proper organization and structure of your examination*:*
- Start strong/end strong;
- Topical organization;
- Do not interrupt the action;
- Ignore any rule if necessary

REFRESHING OF A MEMORY

- The general rule is that a witness is not allowed to read from a document prepared for litigation as this will destroy spontaneity.
- But a witness is allowed to refresh his memory from a document or photofit made contemporaneously with the facts.
- The rationale for this is that human memory is probably not as good as we believe and that notes made by witnesses are likely to be fuller and more accurate and, if referred to, may help to stimulate the memory to recall the facts.
- Refreshment of memory in court depends on the following conditions:
- Contemporaneity
- Documents read over or accepted as accurate by the witness
- Production of the document to the other opposite party
- Production of the original
- See sections 168-176 in relation to refreshing memory and production of document.

CROSS-EXAMINATION

☐ Is done when Examination in chief has been completed-s 147 of TEA

☐ It is an examination done by the opposite party to the witness called by the other party

☐ The aim is to discredit the witness or explore some facts which may be favourable to the party which is cross-examining the witness

☐ Failure to afford the opportunity to cross-examine is a fatal error in the proceedings

- See ***Issa Jakala v R [1968] HCD no. 100***

☐ When the party decides to cross-examine a witness called by the other party, there should be a purpose of so doing.

☐ Therefore cross-examination can be classified under two major purposes;

- *Supportive (Concession Based) Cross-Examination*: This type of cross is employed when you want to ask questions and get answers that support and advance your case.

Discrediting Cross-Examination: A discrediting cross-examination occurs when you attempt to discredit the believability of a witness' factual testimony by showing that it doesn't jibe with common sense and/or with what others say.

RE-EXAMINATION

☐ A process that allows the witness to explain anything he said in cross-examination through inadvertence,

excitement or misunderstanding and which damaged ones case

- ☐ It comes after cross-examination
    - If no cross-examination, no right for re-examination
    - See section 147 of Cap 6 R.E 2002
- ☐ re-examination is aimed therefore at;
    - Giving opportunity to remedy discrepancies
    - Explain statements inadvertently made in cross-examination
    - To clear ambiguity or doubts raised in cross-examination

HOSTILE & UNFAVOURABLE WITNESSES

- ☐ A hostile witness is one who, in the opinion of the court, shows no desire to tell the truth at the instance of the party calling him and to whom he displays such a ‘hostile animus’
- ☐ Unfavourable witness is one who, although he displays no hostile animus to the party calling him, he fails to come up with proof or evidence in favour of the party calling him
- ☐ Therefore a witness is not merely hostile simply because he is unfavourable
    - Unfavourable witness may be telling the truth but which injures the case of the party who called him

- A hostile witness is one who intentionally decides to distort the truth for the purpose of affecting the party who called him

☐ In deciding whether the witness is hostile or unfavourable the court may consider the following;

- The attitude and demeanour displayed by the witness
- His willingness to cooperate
- The extent to which any of prior statements made by him is inconsistent with his current testimony

☐ The party who has called a witness who has turned to be hostile may be invited by the court to cross-examine the witness in order to discredit such a witness

☐ In *Jumanne Athman Mketo v R [1977] LRT n. 63* the court observed that;

☐ Before a court permit a party to put questions to his own witness by way of cross-examination, it should call for the previous statement of the witness so as to determine whether an application to declare a witness hostile has any factual basis

☐ The question whether a witness has in fact turned hostile is to be determined by the court and not by the party

☐ As a general rule when a witness is treated as hostile the effect of it is to make his evidence unreliable

CREDIBILITY OF THE WITNESS

☐ The court will trust the evidence of a witness if such evidence is trustworthy

☐ This is what determines the credibility of the witness

- The court will not trust the witness's version of the story without checking his credibility
- Trustworthiness of the evidence is not determined by the number of witnesses brought by the party before the court-s 143 of TEA

☐ There is no hard and fast rule of determining the credibility of witnesses; simply the weight of their evidence and the sufficiency of the same.

☐ In the case of **John Sapuli and Others v Rajabu A Athumani Mrope and the A.G** (1985) TLR 148 at 154, the court stated that;

☐ What is basic, in establishing the credibility of a witness is the witnesses knowledge of facts, intelligence, integrity, veracity, *ejusdem generis*.

☐ Literacy is an added advantage but not a conclusive one.

☐ Therefore, Credibility of a witness depends on a number of factors such as;

☐ Knowledge of the facts

☐ Disinterestedness and independence in relation to the issues in the case and the results

☐ Intelligence

☐ Contradiction in the evidence

☐ Integrity

☐ Veracity of the witness

☐ The Evidence Act provides two main ways of testing the credibility of a witness;

☐ **By impeaching the credit of the witness, through;**

☐ Cross-examination-ss 155, 156, 141, 155, 158

☐ Discrediting the witness using independent evidence-s 164(1)(a) & (b) of TEA

☐ Confronting the witness with her/her previous conflicting statement-ss 154, 164

☐ Contradicting him/her on relevant matters-ss 154 & 164(1),(3) of TEA

☐ **By observing his/her demeanor in court**

☐ Observation of a demeanor of a witness is done by the court

- The court looks on the manner in which the witness answers questions, how affected by the questions put to him, etc

- It follows therefore a trial judge or magistrate is better placed to know the demeanor of the witness other than the appellate court

☐ In **Ibrahim Ahmed v Halima Guleti** [1968] HCD 76

- It was held that where the issue is entirely one of credibility of a witness, the weight of evidence is best judged by the court before whom that evidence is given.

☐ In the case of **Sahoba Benjuda v R**, Crim. App. No. 96/1989 Arusha (CAT) (unreported), it was held that contradiction in the evidence of a witness affects the credibility of the witness and unless the contradiction can be ignored as being only minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.

☐ **Emmanuel Abraham Nanyaro V. Peniel Ole Saitabu** (1987) TLR 47 where it was held that, “unreliability of witnesses; conflicts; and inconsistencies in their evidence entitle the Judge to reject their evidence out rightly.”

Corroboration

☐ There is an ancient rule which support plurality of witnesses.

- This rule presupposes that the case cannot be disposed off relying on a single witness.

- It is a rule which is derived from the Latin maxim *testis unus testis nullus* (one witness is no witness).

☐ However, this ancient rule is not part of our law.

☐ S.143 of the Evidence Act, Cap 6 R.E 2002 provides that "Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."

Witness Privileges

☐ There are several privileges to witnesses and these can be grouped into the following;

- Without prejudice rule
- Refusal to answer self-incriminating questions
- Attorney-client privilege
- Other statutory privileges

Without Prejudice Rule

☐ This simply means and admission made in the letter, document or any form of communication which claim not to be binding.

- It also mean a rule that allows written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties but such communications are generally not admitted in evidence.

☐ That is, “I make you an offer. If you don’t accept it; this letter is not to be used against me in subsequent litigations.”

☐ The policy behind the rule of without prejudice lies on the fact that;

- Parties should be encouraged to settle their disputes without resorting to court litigation
- It is also aimed at preventing statements or offers made during negotiations to be used against makers in court litigation

☐ The rationale for this was stated in the case of **Hughton v H,** 15 Bear 278.

☐ In that case it was said that;

- For if parties were to be afterwards prejudice by their efforts to compromise, it would be impossible to attempt an amicable arrangements of difficulties.

☐ In **Muller and Muller v Lindsey and Mortimer**, Hoffman LJ said:

- “...the rule has two justifications. First, the public policy of encouraging parties to negotiations and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly known understood to be the consequences of offering or agreement to negotiate without prejudice. In some

cases both of these justifications are present; in others only one or the other."

- ☐ It could therefore be said that judicial basis of the rule of without prejudice is partly contract and partly public policy.
- ☐ Unlike other privileges, without prejudice privilege can only be waived with the consent of both parties to the correspondence-see **Rush & Tompkins v Greater London Council** [1989] AC 1280
- ☐ This is envisaged in s.25 of the Evidence Act and for it to apply there must be;
    - Persons in a dispute;
    - Who are negotiating; and
    - There are terms offered.
- ☐ In **Madharav v Gulabhai (1898) 23 Bom 177** it was stated that;

The rule which excludes documents marked "without prejudice" has no application, unless same person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation.

- ☐ For s.25 to apply, generally there are two circumstances which will warrant the application;
    - An express condition that evidence of the admission is not to be given

- Circumstances from which the court can infer that the parties agreed together that the existence of the admission was not to be given

REFUSAL TO ANSWER SELF-INCRIMINATING QUESTIONS

☐ In TZ, Section 141 of Cap 6 provides that;

☐ A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings, upon the ground that the answer to that question will incriminate, or may tend directly or indirectly to incriminate the witness, or that it will expose, or tend directly or indirectly to expose him to a penalty or forfeiture of any kind, or that it may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit: Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any subsequent criminal proceedings, except to a prosecution for giving false evidence by such answer. [Emphasis is mine]

☐ So the rule in Tz is that self-incrimination is not a ground for a witness to refuse to answer a compelling question.

☐ Nevertheless, the witness is privileged not to be arrested or be prosecuted on the ground of the answer given in any subsequent criminal proceedings.

☐ A witness can be prosecuted or arrested if he gave false evidence when answering questions put on him.

☐ ATTORNEY-CLIENT PRIVILEGE

☐ A lawyer is under fiduciary duty to his client and in all circumstances he should maintain trust and confidence.

☐ This duty allows clients to freely discuss intimate details without fear that such information could be subsequently disclosed to the general public.

The duty of confidentiality is a constant reminder to lawyers of the loyalty they owe to their clients.

☐ The principle of confidentiality requires that information shared by the agent with the principal in the course of performing duties is not shared with others.

☐ The lawyer’s duties with respect to information provided to him by his client is the duty not to reveal information relating to his client during and even after their relationship has been ceased.

- See section 134 (1) and (2) of **The Evidence Act.** CAP.6 R.E.2002

☐ Advocates have immunity on what they say before the court if spoken in good faith.

☐ The rationale behind this solicitor’s privilege lies on public policy.

- Lord Reid said:
- "It has long been established that judges, witnesses and barristers alike have absolute privilege with

regard to what is said by them in court: for the reasons similar to those which apply to proceedings in Court."

- See Rondel V. Worsely (1967) 3 W.L.R. 1966.

☐ However, the privilege not to disclose confidential information is not absolute.

☐ That is to say, there are exceptions which include:

- Client authorization

  ☐ As lawyer-client confidentiality exists for the benefit of the client, the confidence is the client's to waive or modify.

Hence, the lawyer can reveal confidential information to third-parties where the client allows such an action.

  ■ However, consent to allow the disclosure of confidential information does not entitle the lawyer to disclose or use the information for other purposes than those specified by the client.

- **Disclosure compelled by law**

Where expressly provided for in statute, lawyers must comply with any parliamentary requirement necessitating breach of the duty to confidentiality.

  ■ Lord Denning in **Parry-Jones v Law Society** [1969] 1 Ch 1 at page 6-7 stated:

- "*The solicitor must obey the law, and, in particular, he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose his client's affairs, then he must do so.*"

- Public interest or criminality

  - Lawyers may disclose confidential information where information is based under public interest or prevent criminality.

  - These position was reiterated in **National Bank of Commerce v. Nabro Limited and Meeda Reuben Naburi**(supra)

☐ See how this duty extended to other agents:

- Sections 135,136 and 137 of The Evidence Act

4.7 Proof of Execution of Document

According to section 69, if a document is alleged to be signed or to have been written by any person, the signature or writing must be proved in that person’s handwriting. Section 75 provides that court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with those alleged to have been written by the person. Section 79 provides that a document required by law to be attested can not be used as evidence unless at least one attesting witness, if available has been called to prove its execution. According to section 71, if no attesting witness can be found, then it must be proved that the attestation of at least one of the attesting witnesses to such a document is in his writing and that the signature of the person executing it is in the handwriting of that person. Section 72 provides that the admission of a party to an attested document of its execution by himself, it sufficient proof of its execution as against himself whether or not the document is required by law to be attested. If the attesting witness denies

or does not recollect the execution of the document its execution may be proved by other evidence. An attested document not required by law to be attested may be proved as if it were unattested. (Sections 73 and 74)

4.8 Presumption as to documents

The Evidence Act requires courts to presume that certain types documents which come before them as evidence are genuine. Such presumption is however rebuttable by evidence to the contrary.

• Genuineness of certified copies Section 88(1) the court may presume as genuine every document purporting to be a certificate, certified copy or other document which:

a) Is by law declared to be admissible as evidence of any particular fact. b) Purports to be certified by a public officer in the United Republic.

c) Is in the form and purports to be executed in manner directed by the law. Furthermore under subsection 2 of section 88 the court is required to presume that any officer by whom the document purports to be signed, held at the time the official character which he claims in the document.

• Documents produced as record of evidence

According to section 89 when a document is produced purporting to be a record of memorandum of evidence given in a judicial proceeding or before an officer authorized by law to take such evidence and purporting to be signed by the judge or

a magistrate or any such officer, the court shall presume that; a) The document is genuine, b) Such evidence was duly take, and c) Any statements as to the circumstances in which it was taken purporting to be made by the person signing it are true.

• Regarding Gazettes, Newspapers, Private Acts of National Assembly and other documents According to section 90 official gazettes of the United Republic or of Revolutionary Government of Zanzibar, newspapers, private Acts of National Assembly and other documents required by law to be kept by any person and are produced from proper custody are presumed to be genuine.

• Regarding Maps or plans made by authority of Government According to section 91, maps or plans made by authority to be made or published on the authority of the government are presumed to be so made or published and to be accurate; however maps or plans made for the purpose of any legal proceedings must be proved to be accurate.

• Regarding collections of laws and reports of decisions

According to section 92, books containing laws and judicial reports purporting to be published under the authority of the government of any country are presumed to be genuine.

• Regarding private documents executed outside the United Republic Section 93 provides that, the court will presume private document purporting to be executed outside United Republic was duly executed and such execution duly authenticated if:

a) It purports to be authenticated by a magistrate, registrar or under the seal of the court or by a notary public under his signature and seal of office if the document is executed in Uganda, Kenya, Malawi and Zambia.

b) Where the document executed in Uganda, Kenya, Malawi or Zambia and which affects or relates to property not exceeding 5.000/- purports to be appealed or endorsed on such document a statement signed by a magistrate or a justice of peace:

i) That a person executing the document is known to him,

ii) That two other persons known to him have separately testified him that the person executing the document is known to each of them.

d) For document executed in any other place outside the United Republic, if it purports to be authenticated by the signature and seal of office: i) Of a foreign service officer of the United Republic or diplomatic representative of a Commonwealth country in that place, ii) of any Secretary of State, Minister, Under-Secretary of State or any other person in such foreign place, who shall be shown by the certificate of the foreign service officer of the United Republic or a diplomatic representative of a Commonwealth country in that place, to be duly authorised under the law of that place to authenticate the document.

• Regarding powers of attorney Section 94 provides that a document purporting to be a power of attorney is to be presumed executed and authenticated. It is presumed that

every document called for and not produced after notice was attested, stamped and executed as required by law. (s.95)

• Regarding certified copes of foreign judicial records The court according to section 95 may presume that the certified copy of a judicial record of a foreign country is genuine. • Regarding books, maps and charts Section 96 provides that the court may presume any book to which it may refer to information on matter of public or general interest and any published map or chart the statement of which are admissible fact and which is produced for inspection was written and published as the book, map or chart purports.

• Regarding telecommunication messages

The court may presume that a telegram message as received corresponds with the message as delivered for transmission, as provided under section 97.

4.9 Exclusion of Oral by Documentary Evidence

• Evidence of terms of contracts, grants and other dispositions of property reduced to from of document.

Section 100 deals with terms of contracts, grants etc. reduced to form of document. Under section 100(1) ii) When the terms of (a) a contract, (b) a grant (c) any disposition of property have been reduced to the form of a document; or iii) When any matter is required by law to be reduced to the form of a document then; a) The document itself b) Secondary evidence of its contents, must be put in evidence. The first part (i.e. i) refers to transactions voluntarily reduce to writing. The second

(i.e. ii) refers to the document itself. E.g. (i) If a contract is contained in several letters, all the letters in which it is contained must be proved. (ii) A gives B a receipt for money paid by B oral evidence is offered of the payment the evidence is admissible. (ii) if a contract is contained in a bill of exchange, the bill of exchange must be proved. (iii) a contract in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible. (iv) if a bill of exchange is drawn in a set of three, one only need be proved. For example where the disposition of property is a matter required by law to be reduced to writing, oral evidence in proof of the terms of the disposition is inadmissible whether or not it has actually been reduced to writing. In **Damodar Jamnads and Others v. Noor Mohamed Valji [1961] E.A. 615,** it was held that the Money-lenders Ordinance of Kenya which states that no contract for payment of money lent is enforceable without a signed note or memorandum in writing of the contract, placed upon the money-lender the onus could only be discharged by the production of the note or memorandum itself

(except in cases where secondary evidence would be admissible) and that oral evidence of such note or memorandum was inadmissible. The document may not be itself in issue, but merely be used as evidence to prove some fact, it may for example be a receipt for payment of money and in such cases oral evidence of payment may be given. The

document may contain reference to matters outside the actual terms of the contract and in such cases oral evidence of these matters may be admissible. (s.100 (6)) The date on a document is not a term of the contract, and therefore oral evidence to prove the date on which the contract was written is admissible, so too oral evidence is admissible to prove the date of any alteration to a document.

Exception to the above rule:

• When a public officer is required by law to be appointed in writing and it is shown that any particular person has acted as such officer, the writing by which he was appointed need not be proved.

• Wills admitted to probate in the United Republic may be proved by the probate. (s. 100 (2)).

• Exclusion of Evidence of Oral Evidence

Section 101 deals with several grounds of exclusion of extrinsic evidence. Under this term: i. When the terms of (a) a contract (b) a grant (c) any other disposition of property have been reduced to the form of a document, or ii. When any matter required by law to be reduced to the form of a document has been proved by the production of the document or by giving secondary evidence of its contents, no evidence of oral agreement or statement shall be admitted as between the parties to any such document or their representative in interest, for the purpose of (i) contracting (ii) varying (iii) adding to, or (iv) subtracting from its terms. E.g. (i) A agrees

absolutely in writing to pay 200,000/= on 2nd July.The fact that at the same time an oral agreement was made that the money should not be paid till 15th July cannot be proved. (ii) A orders goods of B by letter on which nothing is said as to time of payment and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired. (ii) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this. This section only applies, upon the fact of it the written agreement appears to contain the whole contract if the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible but if they intended only to reduce to writing a portion of the terms of the contract then they are entitled to give parol evidence of terms which they did not intend to reduce to writing.

The preclusion in this section applies only to parties and their representative in interest, while section 108 specifically permits persons who are not parties to a document to give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document. Despite the terms of this section oral evidence is admissible to establish that a party who signed a contract is in fact acting as agent for another. In Rashid Nanji v. Salim bin Issa (1918)7 E.A.P.L.R. 127, the issue was whether or not evidence is admissible of the acts and conduct of the parties as showing their real intention when the contract was entered into. Hamilton, C.J. having referred to the fact that there was some difference in opinion in the Indian

Courts on this point, held that the trial court had been wrong to admit such evidence to show that what purported to be a sale, was in fact a mortgage. Woodfoff and Ameer Ali, in their book Law of Evidence (9th ed) pp. 643-652 examined this issue in detail and concluded that: “The true rule would therefore appear to be that any evidence, whether of conduct or otherwise, tendered for the purpose of contracting, varying, adding to, etc a document is excluded by the terms of [section 92 (s. 101)] unless it can be shown to be admissible under the provisions as on the ground of fraud.” There are a number of important provisions to the general rule excluding evidence of an oral agreement—section 101 (a)—(f). i) Any fact which would (i) invalidate any document, or (ii) entitle any person to any decree or order relating thereto may be proved such as fraud, intimidation, illegality, failure of consideration, mistake in fact or law. ii) Any separate oral agreement (i) as to any matter on which the document is silent, or (ii) which is not inconsistent with its terms, may be proved. If it is clear on the face of a contract that the written document does not contain the whole of the agreement between the parties, the terms not embodied in the writing may be proved by oral evidence. In Jos Hansen and Soehne **A.m.b.H v. Jetha Ltd [1959] E.A. 563**, it was held that a contract of guarantee in which a space for the signature of the fourth surety had been left blank, was silent as to whether the signatures of the four guarantees was a condition of guarantee and that the oral statement of the three sureties that their signatures alone were sufficient security was not a subsequent modification of the guarantee but a collateral

oral term, and that evidence of this was therefore admissible. iii) Any separate oral agreement consisting a condition precedent to the attacking of any obligation under the document may be proved. iv) Any subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except when such contract or grant (i) is required to be in writing or (ii) has been registered. It should be borne in mind that this provision is irrelevant in a case where, subsequent to the making of a contract an oral assurance is given by one of the parties which when acted upon by the other rises an equity in his favour, since the very basis of the argument on equitable estoppel is that there was no subsequent oral agreement.

v) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not repugnant to or inconsistent with its express terms. vi) Any fact which shows in what manner the language of the document is related to existing facts may be proved. This proviso applies only where the document is not perfectly plain and its terms require explanation. In **Mohamed Roshan v. Santa Singh [1959] E.A. 717,** it was held that the proviso was applicable in the following circumstances: a contract was entered into for certain excavation work to be done at the rate of sh. 15 per 100cu. ft. At some stage the figure 17 was substituted for 15 in the appellant’s copy of the agreement and the alteration was signed by the respondent. In fact the work fell into two stages, the appellant undertaking to carry out the second stage on

similar terms, but at a higher rate of payment. It was sought to prove that the altered figure in the agreement applied only to the second stage. Forbes, V. P. held that under proviso 6, evidence is admissible to show how the language of the altered document was related to the existing fact. •