

RELEVANCY & ADMISSIBILITY

Introduction

- Relevance is the fundamental condition of admissibility of evidence.
 - Evidence that is irrelevant is inadmissible
 - That is to say, relevant evidence is prima facie admissible
 - Relevant evidence will tend to promote the central aim of the law of evidence, that is, to prove or disapprove the case.

Continue

- Relevance and admissibility are common and most frequently used words in the field of law of evidence.
- Relevancy”: means connection or relation between two things.
- J.F. Stephen in his Digest of the Law of Evidence (12th edn) defines relevance to mean;

Continue

- The word 'relevant' means any two facts to which it is applied are so related to each other that according to the common course of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.
- It is for the court to determine whether a particular fact is relevant or not.
- In most cases it is a question that depends on the facts of each case.

Continue

- In case of doubts as to whether a certain fact is relevant or not, rules of syllogism can be used-a logical construction consisting of major premise, a minor premise and a conclusion.
- However, a creation of the general idea/major premise may be based on a wrong background generalization leading to wrong conclusion.

Continue

- For instance in *Hollingham v Head* [1858] 27 L.J.C.P. 241
 - The plaintiff sued the defendant for the price of a quantity of guano sold and delivered to the defendant.
 - The defendant said he was not liable to pay because of breach of a condition as to quality.
 - The defendant wanted to prove this condition by adducing evidence of other previous contracts containing the condition made by the plaintiff with other persons.

Continue

- In rejecting such evidence Willes, J stated;
 - It appears to me that the evidence, which was proposed to be given in this case, would not have shown that it was probable that the plaintiff had made the contract, which the defendant contended he had made; for I do not see how the fact, that a man has once or more in his life acted in a particular way, makes it probable that he so acted on a given occasion.
- It has however to be acknowledged that sometimes human behaviour is repetitive. Therefore in some cases, different conclusion could have been given in such kind of a case.

Continue

- It has to be noted that, the relevance of a certain evidence need not be established in isolation.
- If a certain fact is in connection with another fact, such relationship may influence its relevance to a case.
- In *R v Ball* [1911] A.C 47;
 - The accused persons (Brother and Sister) were charged with Incest.

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- Police officers gave evidence that when they visited the house which the accused shared, they found one bedroom in use containing a double bed.
- The House of Lords upheld the admission of evidence as showing a “guilty passion”.
- It follows therefore that, the question of whether a certain fact is relevant depends on the facts of each case.
- Courts will take into consideration a number of factors before deciding whether to admit or not a certain fact.

Continue

- Some of these factors include;
 - Superfluity (little probative value), delay and expense;
 - Multiplicity of issues;
 - Confusion and misleading of the jury
 - Remoteness
- In Tz, Section 3. of the Evidence Act defines the term to mean:-
 - *Anything is aid to be relevant when it is so connected with or related to the other in any of the ways referred in this Act.*

Continuation

- Generally, a fact is said to be relevant if it is connected to the fact in issue.
 - A fact in issue simply means the fact in which the dispute arises from-see s.3 of the Act
- An issue arises when one party makes an allegation which is denied by the other party or simply it is what has brought the parties to court.
- In Civil Proceedings if there is no what we call *litis contestatio* then there is no case and thus one cannot be summoned to adduce evidence.

Continuation

- The term “Admissibility” on the other hand refers to a state of a thing being allowed or accepted.
- A thing is said to be admissible if, for one reason or another, it is accepted by the courts of law.

S.7 General Rule

- Under the law of evidence there is a general rule that only relevant facts are admissible.
- This means that, if a fact is not relevant in the first place, it will not be admissible.
 - See section 7 of the Evidence Act
- A fact can be logically relevant, example:-
 - Previous conviction
 - Communication between a lawyer and client.
- Or, a fact can be legally relevant.

Continuation

- A fact is said to be logically and legally relevant when;
 - It is so connected with the fact in issue as to form part of the same transaction and;
 - It is so declared by any of the provision of TEA.

Continuation

- Wigmore on Evidence gives two important preposition with regard to this fundamental principles of evidence when he says:-
 - None but fact having rational probative value are admissible and;
 - All facts having rational probative value are admissible unless some specific rules forbids.

Relevancy and Admissibility distinguished

- As seen already relevancy determines what fact is related to another and what is not.
- Admissibility, deals with what is allowed and what is not, after the former has been sorted out.
- Thus, relevancy and admissibility are not synonymous and they cannot be used interchangeably.
- In the case of *Ram Bihari Yadav v State of Bihar* [1994] 4 S.C.C 517 the court stated that the two terms are frequently used synonymously.
 - However, they are different because facts which are relevant may nevertheless be inadmissible. E.g communication between spouses or between Advocate and his client.

Continue

- On the other hand, there are certain facts which though admissible are nevertheless not relevant.
 - That is, their admissibility is grounded on other considerations and not consideration of relevancy.
 - For instance, character evidence elicited from cross-examination to find out credibility of the witness is admissible though it may have nothing to do with the facts of the case.

SPECIFIC DISCUSSION OF SECTIONS

ADMISSIBILITY OF EVIDENCE UNDER THE EVIDENCE ACT

S. 8-*Res Gestae* Principle

- *Res gestae* Simply means things done including words spoken in the course of transaction.
 - This section admits facts, which though not in issue they form part of transaction in the fact in issue provided that they are so connected with the fact in issue.
- The utility of this doctrine is that it enables the court to take into account all the essential details of a transaction.

Continue

- In the case of *Ratten v The Queen* [1971] 3 W.L.R 930;
 - A man was prosecuted for the murder of his wife.
 - He defended himself that the shot went off accidentally.
 - There was evidence that the deceased telephoned to say “Get me the police please”.
 - Before the operator could connect the police, the caller, who spoke in distress, gave her address and the call suddenly ended.

Continue

- The police came to the house and found the body of a dead woman.
- Her call and the words she spoke were held to be relevant as a part of the transaction which brought about her death.
- Her call in distress showed that the shooting in question was intentional and not accidental
- The term transaction may be described as any physical act, or series of connected physical acts, together with the words accompanying such act or acts.

Conditions for admissibility under section 8

- To be admissible the facts, which will normally include statements, acts and circumstances must meet the following criteria's.
- Part of the same transaction
 - Contemporaneous
 - Be connected with the facts in issue
- Must explain or point to the fact in issue

It should form **part of the same transaction**

- Facts are said to be part of the same transaction if:
 - Contemporaneous
 - Point the fact in issue
 - Facts are contemporaneous if is they occurred in the same period with the facts in issue.
- This means that, they should occur at the same time or merely the same time with the transaction which is the fact in issue.
- It should not be merely the narration of a prior event

Interconnectedness with the fact in issue

- The facts must be so connected with the fact in issue and leave no doubt that they are part of the same transaction.
- Example where **A** is accused of the murder of **B** by beating him.
 - Whatever was said or done by **A** or **B** or any of the by-standers at the time of the beating or shortly before or after the beating is relevant and admissible.

Explain or point out the fact in issue

- The principle talks about proximity to the fact in issue, however, time is very important, regardless of the fact that facts which constitute the transaction may occur at different time.
- If the incident which is claimed as part of *res-gestae* took place in isolation to the transaction, it cannot be part of it.

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- A transaction may consist of a single incident occupying a few minutes, or it may spread over a variety of facts e.t.c. occupying a much longer time and occurring on different occasion or at different places.
- However where the transaction consists of different acts, in order that the chain of those acts to constitute the same transaction they must be connected together by;
 - Proximity of time,
 - Proximity of unity of place,
 - Continuity of action, and
 - Community of purpose or design.

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- If the fact does not fall into the above set criteria, it will thus be irrelevant and thus inadmissible under this rule.
- See cases:
 - **Bedding Field's case (1879) 14 Cox cc 341**
 - **in R vs Premji Kenji (1940) 7 EACA 58**
 - **Ramadhani Ismail v R 7 ZLR 36**

Summary

- Acts or statement may be admissible if they form part of the same transaction.
- Facts or statements are deemed to form part of the same transaction if they are;
 - acted or spoken contemporaneously with the transaction facts, and
 - They are part of the chain of events in the transaction.
- The purpose of admitting such evidence is to link the circumstantial evidence in order to prove the case.

S. 9 state of affairs in which fact in issue took place:

- This section deals with evidence of state of affairs in which facts in issue took place.
- It admits a large class of facts connected with the fact in issue although not forming part of the same transaction as discussed in the previous section.
- The section admits facts which are;
 - The occasion
 - Cause or effect
 - Immediate or otherwise, of relevant fact or fact in issue.

Continuation

- This section is divided into the following parts:
 - Facts which offer suitable opportunity for the occurrence of facts in issue or facts which offer opportunity for the occasion of facts in issue or otherwise
 - E.g the fact in issue may be whether X robbed Y:
 - The fact that shortly after the event, **X** was seen drinking beer and offering drink to everyone is relevant

Continuation

- Or if the question is whether **X** poisoned **Y**.
 - The fact that **X** lived with **Y** and that his health was good before he moved to **X's** house is relevant as affording of proving opportunity for administration of poison.
- Facts which are cause or effects of a relevant facts of facts in issue.
 - It admits all facts which are the effects of relevant facts or facts in issue
 - Also it takes all facts , which constitute a state of things under which relevant facts or facts in issue happened as relevant

Continuation

- In *R v Richardson*;
 - A young girl was killed in her cottage.
 - The prosecution wished to tender evidence on prints of footsteps.
 - The evidence was said to be relevant and hence admissible since they formed impression that it was the accused person's presence in the room that causing the deceased's death.

Contin...

- Further illustration: Suppose the facts in issue is murder and the issue is whether **A** killed **B**
 - The fact that before **B** being murdered he went to **A's** house demanding payment of a loan which **A** owed him, is admissible showing occasion, cause and effects of murder.
 - It is also showing the suitable opportunity under which such murder was committed.

Continuation

- Facts which are immediate or otherwise
 - Illustration:
 - The fact that X was living with Y in the same room and the health of Y was perfect before moving to X and that X generally new Y's habit and sleeping habits. Such facts are relevant and suitable to show the probability of the administration of poison to Y.
 - In R v Donellan
 - The deceased suffered from a trifling ailment for which he occasionally took a laxative draught.

Note

- The draught was usually served by his mother.
- The accused knew all this and also the time at which it was usually served.
- He accordingly replaced the bottle with a bottle containing the poison.
- The mother accordingly innocently administered poison to her son of which he died.
- The fact of the accused's knowledge of the deceased's habit was held to be relevant as it afforded an opportunity to the accused.

Continuation

- Take note that, evidence under this section is generally regarded as weak.
- It cannot be used to prove that the accused person committed a particular offence unless it is collaborated with other evidence.
- In the case of **R v Brabin Khosa (1947) 14 EA CA** It was stated that;
 - Although evidence relating to state of things or affairs is admissible, it is only relevant to provide evidence of circumstances under which the alleged crime was committed and not to prove that the accused committed the crime charged.

Continuation

- **Read also John Makin v R (1961) EA 227**
- In this case the issue was whether the evidence which culminated into murder of the deceased was relevant, the court held that:
 - It is only admissible to show circumstances of facts which demonstrate the state of affairs under which the crime occurred.
- This is to say, evidence under s.9 of the Act is not conclusive. It needs to be collaborated with other evidence.

S. 10 Motive, preparation & Conduct

- This section can be discussed into three main subheadings;
 - Motive
 - Preparation
 - Previous and or Subsequence Conduct
- Therefore, evidence of motive, preparation and conduct is relevant and admissible under this section

Motive

- Motive means an inducement of invitation to action.
- It is something, which pushes or compels someone to do or to forbear doing a particular act, or simply it means, that which moves a person to do or not to do something.
- Motive may be implied from the results of somebody's conduct.

Continue

■ Illustration:

- **A** is a rich man. He has houses and cars in all major cities in Tanzania. In his account he has more than 20 Billion Tshs. His Son **B** does not want to work. He only spend money with friends. **A** refused **B** more money to spend. A week later **A** is attacked and killed on his way back home.
- Here the motive for killing is nothing but to inherit A's estate.

Continue

- In **Alli Kassam v. R. [1972] HCD n. 186,**
- Motive was defined as "something that animates an intentional act - the ulterior intention with which an intentional act is done."
- In *Mandia v R* [1966] E.A. 315, 318 the Court of appeal stated that;
 - For without motive an intention to corrupt can hardly arise.

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- In *Mohamed v R* [1994] TLR 138 (CA) the issue was whether motive is necessary to establish murder.
- The court had the following to say:
 - The conduct of the appellant of disappearing from his abode soon after the event of murder and his explanations show that he was responsible for the murder.
 - Although motive is not discernible on the record but motive does not have to be established to bring the charge home.

Preparation

- The term means and includes the devising or arranging the means and measures for the commission of a crime.
- Preparation can be seen from different angles such as;
 - accomplishing a crime
 - Preventing its discovery
 - Aiding the escape of the accused person, etc

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■ **Illustration;**

- **A, B** and **C** are charged with burglary and Stealing. The facts that **A & B** were spotted hiding near the house In question holding instruments of house – breaking is relevant as showing preparation for burglary.

Conduct

- The term conduct can be explained to mean:
 - The behaviour of a person before, during or after the event complained of.
- Section 10(4) restricts conduct to acts than statement' however, any statements accompanying and explaining conduct are relevant and admissible under section 10(3) of the Act.

Continue

- The evidence of the conduct is allowed if two conditions are fulfilled;
 - The conduct must be in reference to the facts in issue or the facts relevant to them, and
 - The conduct is such as influences or is influenced by the facts in issue or the relevant facts.
- The evidence of conduct is relevant whether it is previous to the happening of the facts or subsequent to them.

Continue

- Illustration;
 - A is accused of committing a crime.
 - The fact that after the crime had been committed, he absconded to a distant place or was in possession of property acquired from the proceeds of the crime or attempted to conceal things or items which could have been used to commit the crime is relevant and admissible (doctrine of recent possession)

Continue

- The reason why evidence of conduct is allowed was stated in *Amina v Hassan Koya* [2003] 6 S.C.C 93 that;
 - A man's conduct is always influenced by what he has been doing before or after the act.
- Wigmore says;
 - Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt. The wicked flee, even when no man pursueth; but the righteous are bold as a lion.

Continue

- This is therefore to say acts like;
 - Accused's flight
 - Escape from custody
 - Resistance to arrest
 - Concealment
 - Assumption of a false name, and related conduct
- Are admissible universally as evidence of consciousness of *guilt-Queen-Empress v Sami* [1890] 13 Mad. 426

Read also the following cases

- *Protas john kitogole and another v R* [1992] TLR 51 (CA)-Concealment of a wound
- *Katabe Kachochobo v R* [1986] TLR 170, being found with blood stains of the blood group equal to that of an accused
- *Martin s/o ernest v R* [1987] TLR 130 (HC) Being found with the stolen property

Take note that

- The term conduct under section 10 can be an act or omission (silence).
- However for an omission to be relevant and thus admissible, there must be a duty to act (to speak).
- This is because for silence to be an incriminating factor the circumstance must be such that a person is given an opportunity to speak but he kept quite or walks away
 - That may imply guilty conscious.

Continue

- Illustration;
 - When things are stolen and a person is found in (recent) possession, when asked he remains silent.
 - This may amount into a conduct which may be admissible under section 10.
- Cases like Katabe Kachochobo and Protas Kitogoles can provide a better picture on this

S. 11 Explanatory, introductory facts

- This section deals with the facts which introduce and explain relevant facts or facts in issue.
- This section can be divided into 5 areas;
 - Facts necessary to explain or introduce
 - Facts which support or rebut inference
 - Facts which establish the identity of anything or person
 - Facts which fix time or place; and
 - Facts which show the relation of parties.

Necessary facts to introduce or explain facts in issue

- Example:- **A** sues **B** for a libel imputing disgraceful conduct to **A**;
- “Any evidence” showing/introducing the relation of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.
- In *State of T.N v T. Thulasingham* [1994] S.C.C 1504 it was stated;
 - Background story prior to the duration of conspiracy can be received as evidence of introductory facts.

Facts necessary to support the inference of fact in issue

- Example:- the fact in issue may be whether **A** wrote an intimidating Letter to **B** requiring him to meet **A** at a particular place and time.
- The fact that A went at such a particular place at a pointed time will be relevant and admissible under this section.
- It is upon the accused person to contradict the inference of guilt by adducing evidence to that effect.

Continuation

- Therefore in an illustration above a rebuttal can be:
 - Say for example **A** had some other business to transact at such a particular place and time, this will prove that **A** is not necessarily the author of the alleged letter.
- In *Matru v State of U.P* A.I.R 1971 S.C. 1050 the court stated;
 - Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime, such is the instinct of self preservation.

Facts necessary to identify a person

- These include all facts which will help the court to learn that the accused person is the right person to face the charge and non-else
- It also help the court in verification of things involved in the scene of crime like arms and others
- This provision therefore treat all necessary facts that leads to personal identification as relevant and admissible as far as it links with the fact in issue

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- This can occur during the identification parade where witnesses are required to identify the culprits.
- This stands as a second opportunity to check the ability of the witness to identify the suspect.
- Take note that, the evidence of identification parade is not conclusive.

Contin...

- In *Paul Mugo v R* (1966) EA it was stated that; when the identifying witness has pointed out the right accused, then the identification evidence will be valuable though not conclusive.
- Identification however is not strictly on individuals but also on things like weapons, chemicals, and other exhibits

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■ **Illustration;**

- **A** is accused of assaulting **B**.
- **B** states that in defending himself he struck his assailant on foot with a stone.
- The fact that **A** was seen the following day with a swollen foot is relevant as establishing identity of the assailant.

Continue

- Phipson says;
 - When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics, for example. Age, height, size, complexion, voice, handwriting, manner, dress, distinctive marks, faculties or peculiarities including blood group as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places or facts and other details of personal history...

Read these cases:

- *Raymond Francis v Republic* [1994] TLR 100 (CA)
- *Mohamed Alhui v Rex* [1942] 9 EACA 72.
- *Rex v Mwango s/o Manaa* [1939] 3 EACA 29.
- *Hassan Juma Kanenyera and others v R* [1992] TLR 100 (CA)
- *Nuhu Selemani v R* [1984] TLR 93 (CA)
- *Eva Salingo and Others v R* [1995] TLR 220 (CA)

Facts necessary to fix time or place to facts in issue

- These are the facts that set time or place where or when the fact in issue took place.
- The fact that he was seen on Easter/Uhuru day is relevant as it specify time & date.
- Read the case of *Mohamed Musero v R* [1993] TLR 290 (CA)

Facts necessary to show the relationship

- These are the facts that establishes the relation between the relevant fact and the fact in issue
 - Example:- **A** is charged of poisoning **B**.
 - The fact that they quarreled before **B** was poisoned is relevant fact as it shows relationship or state of relation immediately before offence was committed.
- For this section to be operative to show relation of the parties or transaction, courts should consider the lapse of time between what is alleged and the occurrence of event.

S. 12 evidence to prove conspiracy

- This section provides admissibility of evidence (things) done by conspirators in reference to common design.
- Conspiracy consist of an agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means.
 - Lawful Act but unlawful means
 - Read:- *R v Mulji Jamnada & other* (1946)
13 EACA 147

Continue

- The conditions of admitting evidence under this section are;
 - There must be a reasonable ground to believe that two or more persons have entered into a conspiracy.
 - The act in question must have been done after the time when the intention to conspire was first entertained by any of them.
 - The act must have been done in reference to their common intention.

Continue

- The evidence admitted in this section is for the purpose of;
 - Proving the existence of the conspiracy; and
 - Showing that a particular person was a party to the conspiracy.
- Thus, once an agreement to do or commit an unlawful act is proved between two or more persons, then anything said, done or written by any one of such persons in execution or furtherance of the common intention is relevant.

Continuation

- Generally each conspirator is regarded as an agent of the other and just as a principal is liable for the acts of his agent, a conspirator is liable for the acts of his fellow conspirator in furtherance of their common intention-*John Moody v R* (1947) EA 371
- Take note that, the time at which one joins the conspiracy is not important;
 - It is immaterial as long as it is proved that he entertained the conspiracy at one of its stages.

Continue

- The above principle means that, a person who joins a conspiracy is responsible in law for all acts done by his fellow conspirators regardless of whether the acts were done before, during or after his joining or were done immediate after he has ceased to form part of it.
- In *Ogandia & Karma v R* (1967) EA 137 it was stated that;
 - "... a person who joins conspiracy is liable not only for that acts done during conspiracy but also for acts done by other conspirators after his acts have ceased"

Continue

■ **Illustration;**

- **A** and **B** are charged with an offence of car theft.
- A letter written by **A** to **B** classifying on how they could go about to acquire new car license and subsequent registration are relevant under section 12 to prove conspiracy.
- Similarly any statement or declaration made by either of them at the time of receiving the vehicle is relevant to prove conspiracy.

Continue

- In *R v Blake and Tye* [1844] 6 Q & B 126 it was emphasized that evidence of an act of a conspiracy is relevant against others only if the act was done to carry out the conspiracy.
 - The act should relate to the furtherance of the common object.
- It will be left upon the court to determine whether the fact is part of conspiracy or not.
 - See *Minza Akbar v Emperor* A.I.R 1940 P.C. 176

Read the following cases

- *Kaiji Karma v R (1949) 16 EACA 116*
- *R v B.K Patel (1957) EA 416*
- *Stanley Musiga & others v R (1957) EA 211*
- *J.L.M Broron v R (1957) EA 371*
- *Mataka & others v R (1957) EA 495*

S. 13 Facts not otherwise relevant are relevant

- This section provides for a situation, where or when facts otherwise not relevant (in other sections) may become relevant.
- It is a residual provision intending to cure some defects.
- It applies to facts which could not be treated as relevant and admissible under other provisions, but in order to cure this situation, some of facts, which could not be treated as relevant may be relevant under this section.

Continue

- To be admissible under this section two conditions need to be fulfilled, that is the facts must;
 - Be consistent with the facts in issue or relevant fact
 - Make the existence or non-existence of the facts in issue or relevant facts highly probable or improbable.

Continue

- In other words, only facts which disprove or tend to contradict fact in issue or relevant facts or which render the existence of a fact in issue or relevant fact highly probable or improbable are themselves relevant and admissible.
- Illustration
 - The issue is whether **X** committed a crime at Morogoro on a certain day.
 - The fact that on the same day **X** was in Nairobi/Mbeya/Iringa is relevant.

Continue

- The fact that at the time the offence was committed **X** was far away from the place where it was committed renders it highly probable though not impossible that **X** committed the crime.
 - This makes such evidence relevant.
- Read the case of *Nguza Vicking (Babu Seya) and 3 others v R*, Crim. App. No. 84 of 2004, High Court of Tanzania at Dar es Salaam (Unreported)
 - See also the judgement of the Court of Appeal.

Note that

- Admissibility of facts under this section in each case must depend on how near is the connection of the facts sought to be proved with the fact in issue;
 - That is to what degree do they render facts in issue, probable or improbable when taken with other facts in the case; and
 - To what extent would the admission of the evidence be inconsistent with the principles (**enunciated**) provided else where in the Act.

Continue

■ **Illustration;**

- The issue is whether **A** committed a crime.
 - **A** adduces evidence which show the circumstances that the crime must have been committed by either **X**, **Y** or **Z**.
 - Every facts showing that the crime could have been committed by no one else than **A**, and it was not committed by **Z**, **Y** or **X** is relevant.
- Therefore, facts which are irrelevant on other sections, may nevertheless be relevant under this section.

S.14 Facts enabling the court to determine the amount

- This section admits facts, which affect the quantum of damages, that is amount in monetary value.
- This section applies in Civil cases only.
 - It is mostly invoked at the end when the court want to determine the amount recoverable as damages.
- Basically, the section enables the court to admit any fact which will help it to determine the amount of damages which ought to be awarded to the party.

Continue

- Damages are the pecuniary satisfaction which the plaintiff may obtain by success in an action.
 - They are limited to the loss which the plaintiff has sustained.
- This being the case therefore, all facts affecting the amount of damages are regarded relevant and admissible under this section.

Continue

- Examples of these facts include:
 - Contributory Negligence
 - Motive, malice or any intention of the wrongdoer
 - The mode and manner of breach, etc
- Take note that the use of word determining in the section refers to factors that increase or tend to diminish of the damages and thus all such facts are relevant and admissible.

Continue

- Damages are normally paid upon proof of actual loss or damage.
- However, under special circumstances damages can be awarded for a breach which result into injury to the feelings.
- In *Dieson v Samson* [1971] S.L.T 49
 - A photographer failed to appear at a wedding in breach of his contract.
 - The court held that the injured feelings of the plaintiff were relevant to the question of compensation.

Section 15 Rights or custom in question

- This section deals with how a right or a custom can be proved or disproved.
- Thus any fact which affect existence of a right or custom, if right or custom is in question, is relevant under this section and thus can be admissible.

Continuation

- The following two instances provides a basis of admissibility rule under this section;
 - Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.
 - Particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed , asserted, or departed from.

Continue

- Where a certain piece of land is claimed to be the property of a particular family;
 - A (sale) deed showing that land in question has been sold to a third party is relevant and admissible as showing ownership right.
- The section deals with the continuing rights which may be interrupted without being necessarily destroyed.
- The term right involves every right recognized under the law.
- It may be private or public, e.g a right of way

Note

- Facts relied on as showing right on custom must have existed before the proceedings arose and not afterwards.
- **In Marimba Wanyangi Vs Romara Romana (1977) LRT No.7**, the court had the following to say:
 - The customary law claimed by the appellant is already obsolete.
 - A grown up son is answerable for all his deeds and a father cannot be held liable for torts committed by the son.

Continuation

- It would be repugnant to reason/morality and natural justice to hold father responsible for the torts or criminal acts committed by his grown up son.
- In order to be recognized a custom, a customary right must be established.
 - That is, it must be certain, unaltered, uniform, constant and definite.
 - E.g in a Claim based on a customary owned land, evidence may be brought of particulars of a person claimed to have been buried there.

Continue

- *Kazungu Lushinge v Juakali Degulla* [1986] TLR 98 (HC), the court stated:
 - Before the court applies any customary law, it must first be proved by adducing evidence that such a custom exists and is practiced in the particular area and by the community concerned; in this case no evidence was adduced to show the existence of the custom whereby a parent is bound to settle the debts of his adult independent son;

Continue

- In *Mafuru Magabanya v Joseph Mulya* [1987] TLR 22 (HC) the court stated that:
 - Under the law, damages for adultery or enticement is in the discretion of the court and in the exercise of its discretion the court is obliged to pay due regard to any relevant custom of the community to which the parties belong;
- Read also *Didas Rwakalila & 3 others v Thomas Matondane* [1992] TLR 314 (CA)

S.16 Facts showing existence of state of mind, or of body or bodily feeling

- This section declares facts which show the existence of any state of mind, body or bodily feeling are relevant when such state of mind, bodily or bodily feeling is at issue.
- It therefore deals with:
 - State of Mind
 - State of body
 - Bodily feelings

State of Mind

- This can be seen through conduct, it can be seen through intention, knowledge, negligence, good will good faith, bad faith etc.
- In *Rawson v Haigh* [1824] 2 Bing 99;
 - The question was whether a debtor had left the country in good faith or fraudulently with intent to hinder his creditors. Letters written by him from abroad, indicating such an intention were held to be admissible.

State of Body

- This is also internal as it relates to internal state of body. However, sometimes a state of body can be seen directly, example when a person is injured.
- In *Aveson v Kinnard* [1805] 6 East 188;
 - The case concerned life insurance policy. The issue was whether statements of the good health of the assured given at the time of effecting the policy were false.
 - The court allowed evidence to that effect be given.

Bodily Feelings

- This would be proved by implication i.e. feelings. It can simply be implied by or through the conduct.
- S. 16 therefore is applied to particular acts which are more or less criminal, according to the state of mind or feeling of the person who does it as for instance in action for;
 - Slander
 - False imprisonment
 - Malicious prosecution; where malice is one of the ingredients in the wrong which is charged.

Continue

- Such evidence is thus admissible to show that the defendant was actuated by spite or enmity against the plaintiff.
- Example
 - X is charged with committing a crime.
 - The fact that he said something indicating intention to commit that particular crime is relevant

Conti...

- X is accused of receiving stolen goods, knowing then to be stolen.
- It is proved that he was in possession of that particular stolen goods.
- The fact that at the same time he was in possession of other stolen goods is relevant to show that he knew each and all the goods he was in possession to have been stolen.

Continue

- **X** is charged with shooting at **Y** with intent to kill him.
- The fact that previously **X** shot **Y** may be admissible to show **X's** intention to kill **Y**.
- Note that:
 - Where the question is as to knowledge, intent, motive or any bodily or mental state, evidence of other acts done showing the existence of such knowledge, intent, motive of bodily or mental state are admissible even though it involve the proof of other crime.

Continue

- *Nurdin Akasha Alias Habab v R* [1995] TLR 227 (CA) the court stated:
 - Where, as in this case, the evidence was capable of supporting more than one count in the charge, such evidence could be used in support of any count in the information, notwithstanding that such evidence supported some count or counts which were found to be invalid or void;
- See also *King v. R* [1987] LRC (Crim) 153

Continue

- In *Saeed Akrabi v R* (1956) 23 EACA 512;
 - The accused was charged with the use of criminal forces with intent to outrage modesty in respect with two boys.
 - The evidence that on previous occasion the accused had committed similar acts in respects of other boys was held to be admissible to show intention of the accused ad rebut the fallacy of mistake.

Continuation

- See also: *Sixuns Kimaro v R* Criminal Appeal No. 141 HC (DSM) 2006
 - Evidence of previous commission of the same offence is admissible under this section not to prove that since he committed the previous offence he must have necessarily committed the present offence but rather, it is admissible as relevant to show the existence of state of mind or intention in relation to the present offence.
- Evidence of previous conviction is best evidence of bad character.

S.17 facts which are accidental or intentional

- This section deals with the admissibility of facts which are done accidentally or intentionally.
- This section therefore, should be read together with section 16 as it deals with state of mind.
- The application of this section is governed by a rule under section 16 and the words show that it is not necessary that all acts should form part of one transaction but should be part of the series of similar occurrence.

Continue

- In other words the difference between section 16 & 17 is that section 16 is general.
- It gives admissibility to facts relating to state of mind, body or bodily feelings while section 17 deals with admissibility where the acts are done accidentally or intentionally.

Continuation

- A is charged with Arson to get insurance money, the fact that the former house was destroyed by fire and the same person received money under the same series of events may be admissible under section 17.
- Read these cases in books;
 - Makin v AG for New South Wales (1894) AC 57
 - R v Smith (1915) 11 Cr App 229
 - R v Armstrong (1922) KB 555
 - DPP v Bardman (1975) AC 421

Note that:

- With regard to evidence of state of mind the evidence must show that the state of mind existed not just generally but in reference to the particular matter in question.
- So much so evidence of reputation, general disposition and habit or tendencies are inadmissible.
- Evidence of previous conviction is also contemplated under this section

Example

- Where A is charged with theft. If he was previously convicted of theft, the previous conviction is relevant and admissible.
- *A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under s.10 as showing the motive for the fact in issue.*

S. 18 Existence of the course of Business

- This section deals with admissibility of existence of facts in course of business both in public and private
- Under this section where the ordinary course of the particular occasion is in question, then there is no departure from the ordinary and general rule.
- For instance the issue may be whether a particular person did a certain act.

Continuation

- If in normal course of business such person normally does such act, then this fact may be relevant and admissible
- This is because the cardinal rule dictates that it must have been conducted in a uniform manner to preserve certainty.
- This section is used on issues related to delivery, entries in a book of accounts, execution of courts orders etc
- Under this section there is a presumption that the acts are rightly done.

Continuation

- However, such a presumption may be rebutted.
- Example:
 - Where the dispute is on when the particular letter was posted, the stamp on the latter may be relevant and admissible under this section.
- Generally the term “course of business” means the ordinary course of professional avocation or mercantile transaction or trade or business.