

TOPIC FIVE

Witnesses

Introduction

2

- 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

3

- 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

4

- 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

Continue

5

- 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

Continue

6

- 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

Continue

7

- 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

Continue

8

- 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

9

- 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

Continue

10

- 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

11

- 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

Continue

12

- 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

Continue

13

- In ***Nguza Vicking (Babu Sea) and 30others 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

14

- 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

15

- 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

16

- 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

Continue

17

- 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.

Continue

18

- 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.

Continue

19

- 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.

Continue

20

- 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.

Continue

21

- 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

22

- 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 are 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

23

- 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

24

- 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.

Continue

25

- 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.

Continue

26

- 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

27

- 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.

Continue

28

- 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

Continue

29

- Make proper organization and structure of your examination:
 - Start strong/end strong;
 - Topical organization;
 - Do not interrupt the action;
 - End with a clincher;
 - Ignore any rule if necessary.

Refreshing Memory

30`

- 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 photo fit 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.

Continue

31

- 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

32

- 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

Continue

33

- 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.

Continue

34

- Some of the basic rules of cross-examination are;
 - Plan your attack, determining what your purpose is
 - Try to predict which witnesses will be called by the opposition and anticipate what questions your opponent will ask
 - Decide if your cross will be supportive (concession-based) and/or destructive (discrediting in nature), and, if both, decide which will come first.
 - Consider what limitations the rules of evidence and procedure place on the scope and nature of your questions.

Continue

35

- Determine whether some potential legitimate cross would blunt the force of other potential legitimate cross.
- Consider whether some available cross would be viewed as nit-picking, quibbling, petty, and or stale.
- Craft your questions. Learn the legal foundation for each relevant mode of impeachment.
- Cross-examination questions should be planned and organized in units (segments/blocks) by subject matter rather than in the chronological order
- Questioning within each specific subject unit should be from general to specific.
- The cross-examiner should make a dedicated effort to be aware of the relative safety or risk of posing each question. Avoid kamikaze cross.

Re-examination

36

- 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

37

- 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

Continue

38

- 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

Continue

39

- In *Jumanne Athman Mketto 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

40

- 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.

Continue

41

- 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.

Continue

42

- 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

Continue

43

- 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-ss 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

Continue

44

- 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.

Continue

45

- In **Godfrey Machage v R** [1977] LRT n. 37
 - The court held that when the question of credibility depends on the demeanor of the witness in court, the trial court stands at an advantage
 - But when the dispute is on the inference drawn from the disputed facts, the trial and appellate courts are in the same position

Continue

46

- 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.

Continue

47

- **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 outrightly.”

Continue

48

- See similar observations in the following cases;
 - *Omari Ahmed v R* [1983] TLR 52 (CA)
 - *Mohamed Katindi and Another v R* [1986] TLR 134
 - *Ali Abdallah Rajabu v Saada Abdallah Rajabu and Others* [1994] TLR 132
 - *Adventina Alexander v R*, Crim. App. No. 134 of 2002, the Court of Appeal of Tanzania at Mwanza (Unreported)
 - *Jumanne s/o Bugingo and Another v R*, Crim. App. No. 137 of 2002, the Court of Appeal of Tanzania at Mwanza (Unreported)
 - FRANK JONATHAN MUSHI V.R CR APPEAL No. 171/2004 (CAT) ARUSHA REGISTRY

Corroboration

49

- 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 onus 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.”

Continue

50

- However, the unreliability of such a single testimony which may be based on a passing occurrence such as a verbal confession or a fact recalled from the memory of an eye or ear-witness compelled judges to enunciate rules of practice under which juries must be warned of convicting on uncorroborated evidence.
- There are also statutory provisions which require that evidence should be corroborated before a person is convicted.

Continue

51

- The term “corroboration” is “evidence tending to confirm some fact of which other evidence is given.”
- In **R v Baskerville** Lord Reading CJ defined it as:
 - “We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also the prisoner committed it.”

Continue

52

- The two essential requirements of corroborative evidence are as follows:
 - *Corroboration must come from an independent source*
 - *Corroboration must implicate the defendant in a 'material particular'*

Witness Privileges

53

- 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

54

- This simply means an admission made in the letter, document or any form of communication which claim not to be binding.
 - It also means 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.”

Continue

55

- 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.

Continue

56

- 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.”

Continue

57

- 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

Continue

58

- 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.

Continue

59

- 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
- The rule however is not absolute.
- It has a number of exceptions

Continue

60

- Such exceptions include;
 - Where the communications have resulted into a concluded agreement.
 - Where there are grounds of impropriety, misrepresentation, fraud, or undue influence in a concluded agreement-case of **Wood v Cox [1912] 4 D.L 66**
 - Where there are circumstances that give rise to an estoppels.
 - Where there is a delay or apparent acquiescence

Refusal to answer self-incriminating questions

61

- In the US, a witness has a privilege not to answer questions that will incriminate him in subsequent criminal proceedings.
- The privilege against self-incrimination forbids the government from compelling any person to give testimonial evidence that would likely incriminate him or her during a subsequent criminal case.
- This right enables a witness to refuse to testify at a criminal trial on the ground of self-incrimination.
- According to the U.S. Supreme Court, it "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).

Continue

62

- Confessions, admissions, and other statements taken from defendants in violation of this right are inadmissible against them during a criminal prosecution.
- Convictions based on statements taken in violation of the right against self-incrimination normally are overturned on appeal, unless sufficient admissible evidence is available to support the verdict.
- The right against self-incrimination may only be asserted by persons and does not protect artificial entities such as corporations. *Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).

Continue

63

- 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]

Continue

64

- 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

65

- 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.

Continue

66

- 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

Continue

67

- 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.

Continue

68

- 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.

Continue

69

- 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.

Continue

70

- 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."*

Continue

71

- 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

Continue

72

- Read also these cases;
 - **Charles U.S Mwailunga v Advocate committee**, [1982] TLR 282.
 - **Akena Adoko v Advocates' Committee.** [1982] TLR 290.