MASAMBU,G

LECTURE ONE

CRIME AND CRIMINAL LAW

Introduction

In this subject an attempt is made to gather the general concepts from the various authors on the subject of what is crime and criminal law although an acceptable general definition of the term crime has not yet been reached.[1]

What is crime?

There is no agreeable standard definition of the term crime. However various definitions have been attempted by various authors to define crime depending on their philosophical views and material conditions in the society.

Generally the term crime is defined as:

> "A harmful conduct brought about by human being whom the sovereign power in a state desires to prevent by threat of punishment".

According to **Kenny** on his work titled "**Outline of Criminal Law",**[3] points out three major characteristics of crime:

(i) That it is a harm brought about by human conduct which the sovereign power in the state desires to prevent;

(ii) That among the measures of prevention selected is the threat of punishment;

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[1] Kenny's Outlines of criminal law – New Ed. Cambridge At the university Press 1952.p.1

[3] Kenny's outlines of criminal law 17th Ed p.5

(iii) That legal proceeding of a special kind is employed to determine the guilty of the accused before being punished.

Joel Samaha in his book **Criminal Justice**[5] defines crime:
"As a legal phenomenon because no harm however reprehensible, is a crime unless it is "against the law" and has a prescribed punishment".

Harris in his book titled **Criminal Law**[4] defines criminal law:
"*As that branch of Public law which relates to offences that may be subject of criminal proceedings instituted for the punishment of the offender."*

Chamblis in his work "The **Political Economy of crimes,**[6] attempted to develop a Marxist theory of crime and criminal law. He defined criminal law as:

> *"a set of rules, laid down by the state in the interest of the ruling class and resulting form the conflict that inhere in class structured societies".*

According to Chambliss therefore:
"Criminal behavior is then, an inevitable expression of class conflict resulting from the inherently exploitive nature of economic relations."

[5] Joel Samaha, criminal Justice West publishing Company 50 W. Kellogg Boulevard, p.34
[4] Harries. Criminal law 21st Ed. P.3
[6]
[6] Chamblis, the Political Economy of crime vol.2,1975

Criminal law is a branch of public law in which the state has an interest. For this reason criminal law consists of wrongs committed against the state which wrongs is the subject of criminal proceedings instituted for determining the guilty of offenders.

PURPOSE OF CRIMINAL LAW

Criminal law exists in any society for the purposes of governing and regulating human behavior in society so as to ensure there is an orderly and peaceful environment for productive activities to take place.

The main purposes of criminal law are as follows:

(i) To regulate the conduct of human behavior.

(ii) To maintain the political and economic stability

(iii) To administer justice to member of the society

(iv) To ensure the fundamental rights and freedom of individuals are protected.

(v) To establish effective procedures and regulations regarding the dealings among the individuals

(vi) To maintain order, peace and security in the country.

SOURCES OF CRIMINAL LAW

Sources of law mean, a jurisdictional operation of a legal subject within a particular legal system, and the recognition of principles, rules, from other

Legal systems applicable in a legal subject matter in question by that other particular legal system.

'**Sources of law'** also refers to the various factors which contribute to and determine the content of law and the organs through which laws are created.[1]

> *"Every law must have a 'Source'. A source of law is that which may be pointed out as forming the basis of law, i.e. what gives its force and validity".*[2]

THE CONSTITUTION

The constitution is the basic law of the land to which all other laws must conform. The importance of the constitution as a source of criminal law lies in the fact that, it provides for rights and duties of its citizen.

For example the constitution of the United Republic of Tanzania,[3] under part III provides for the Basic Rights and Duties. Article 13 (6) (b) provides that:-

> *"No person charged with criminal offence shall be treated as guilty of the offence until proved guilty of the offence".*

STATUTES

Statutes are other sources of criminal law. The majority of offences are defined and regulated by statutes, e.g. Acts of Parliament which have been duly passed by legislative body or parliament and received Presidential assent.

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[1] Saleem N.A & Ataeenyi T.K.,General Principles of law simplified, N.A. Saleemi Publisher, 1992 p.9

[2] The Constitution of the United Republic of 1977 as amended is referred as the base of most of the Tanzania laws.

[3] The Constitution of the United Republic of Tanzania of 1977 as amended.

The major source of criminal law in Tanzania is the Penal Code Cap.16 of the laws. In this legislation the most important offences and their respective punishments are provided.

There are other penal legislations covering specific crimes or a group of crimes such as *the Prevention of Corruption Act (1971), the Economic and Organized Crime Control Act (1984), the Road Traffic Act (1973), Education Act, Wildlife Conservation Act, Forestry Act, etc.*

SUBSIDIARY LEGISLATION

In some other cases, governmental departments, e.g. Ministries, local governments, public corporations, private corporations, non governmental organizations etc, may be empowered by parental Act to make legislations and regulations in their respective areas of jurisdictions and provide/prescribe punishments for their breach.

Subsidiary legislations have the same effect as the main Acts and they do cover vast areas of life such as *commerce, health, sanitation, planning etc.*

They contain penal sanctions to deal with defaulters in respective areas covered.

Examples of delegated legislations are:

(i) Statutory instruments, rules and orders, normally made by Ministers,

(ii) By – laws, e.g. made by local governments, public corporations or bodies

COMMON LAW OF ENGLAND, DOCTRINE OF EQUITY AND STATUTES OF GENERAL APPLICATION

Most of the laws in use are those inherited from colonial masters. But the current trend of legislation does not suffice the ever growing needs, and the effect of this has been that whenever there is in adequacy in our laws, the tendency is that the Courts of law resort to the common law of England.

Since the laws of Tanzania are based on English legal system in which Common law, Doctrine of equity and statutes of General Application forms an important part, the same forms part of the law in Tanzania.

PRECEDENT

This forms the basis of case law. It is the practice whereby subordinate courts take the decisions previously decided by superior courts in instances of similar factual situations before them. This means, decisions of superior courts are binding upon them in cases which are similar in material respects.

Many of the principles of criminal law or civil can be inferred from decisions of superior courts in particular cases. In formulating such rules the court makes law. For this reason decisions of the former East Africa court of Appeal, the Tanzania Court of Appeal, and important decisions of the High Court of Tanzania on criminal matters are a source of criminal law in the Country.

STARE DECISIS

Simply means “let the decision stand”. The quality and weight accorded to any particular precedent is determined by stare decisis.

This follows from the fact that the hierarchy of courts is such that some courts have greater authority than others.

The general rule as provided by the Doctrine of stare Decisis is that a decision made by a court higher up in the hierarchy binds all lower courts, and that it must be followed by the same.

INTERNATIONAL LAW

International treaties with some criminal law aspects are the sources of criminal law in the country.

REVISION QUESTIONS

1. Define the terms “Crime” and “Criminal law”
2. What is the purpose of Criminal law in a particular society?
3. Explain the sources of criminal law in your country.

LECTURE TWO

GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

Introduction

The Lecture intends to introduce the general principles of criminal law which are to be viewed within the purview of *actus Reus and mens rea* as the material elements of crime. Thus *actus Reus and mens rea* remain the basic form of criminal conduct determinant.[1]

Actus reus and Mens rea

Actus Reus and Mens rea form the basic elements of crime. Actus Reus generally refers to an act or omission that is forbidden by criminal law. Actus Reus is therefore the physical element or outward conduct of a human being forbidden by criminal law.

Mens rea on the other hand connotes the state of mind, guilty mind, or blameworthy state of mind in relation to the conduct.

Actus Reus and mens rea are expressed in a Latin maxim **"Actus non facit reum nis mens sit rea**" meaning that;

An act does not make a person legally guilty unless the mind is legally blameworthy.

[1] Joel Samaha, Criminal Justice West Pub. Co.50 W.Kellogg Boulevard. P.35

This maxim is based on proposition of what must be proved in order to secure a conviction although the accused person may avoid conviction by relying on a defense.

It must therefore be proved that;

(a) a certain event or a certain state of affairs which is forbidden by the criminal law, has been caused by the accused's conduct and

(b) This conduct was accompanied by prescribed state of mind. Both these elements must be proved beyond reasonable doubt by the prosecution.

The significance of the maxim has been stressed in a number of judgments.

In Brend V. Wood.[3] Lord Goddard CJ. said:

"it is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind".

Omission

In Tanzania omissions may form an actus reus in a number of cases.

Section 5 of the Penal Code[9] defines an "offence" as an act, attempt or omission punishable by law.

The following are examples:

[3] Brend V. Wood(1946) 175 LT 306 DC
[9] *ibid*

(i) *Driving a motor vehicle without a valid driving license*
(S. 9 Road Traffic Act[10])

(ii) Omitting to perform a legal duty,

(a) S.206 Penal Code –
"Every person having charge of another who is suffering from some incapacity which makes him unable to help himself has the duty of providing the other with the necessaries of life; the 'charge' may rise from contract law or by reason of an act whether lawful or unlawful"

(b) S.207 Penal code –
"Every family head must provide members of his household under the age of fourteen years with necessaries of life".

Other references in the Penal Code include; SS.121, 123,124, 167, 168, 208, 209, 210, 244, 284, and 383.

Mens rea

Mens rea forms a necessary ingredient of an offence unless by express language or implication the element mens rea is excluded.

Mens rea means a blameworthy state of mind or guilty mind. But this translation may be means leading. A person may have mens rea as it is generally understood to day, without any feeling of guilty on his

[10] Act No.30 of 1973

part. Therefore mens rea, in the context of criminal law, is more specifically a mental state.

As already stated mens rea is an essential element of an offence, for a person, except in certain cases to be considered later on, cannot be held criminally liable in respect of an act brought by him if at the time he had no the requisite mens rea.

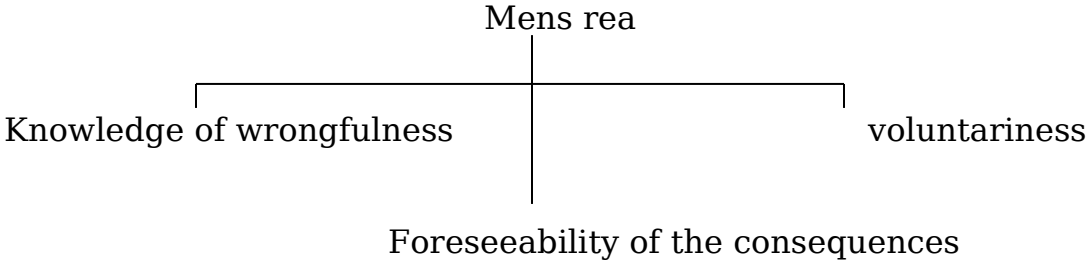
The development of the general principles of criminal law such as the need for actus reus and mens rea were intended to underscore the point that criminals acted out of their free will and therefore deserved to be punished.

As a general rule a person may not be held criminally responsible unless.

(i) He was acting voluntarily

(ii) He knew what he was doing, he was doing wrong

(iii) In those offences where particular consequences form part of the actus reus he fore saw the likely hood of those consequences.



2. .Mens rea flow chart.

Voluntariness

Since it is said that mens rea includes those acts willed by the accused, an involuntary muscular movement will not constitute mens rea. Generally involuntary muscular acts are excusable under the defence of "automatism"

and these acts may be caused by persons, as those who suffer epileptic while driving causing death thereby or sleep walkers, and unconscious states.

In Tanzania the nature of 'automatism' is covered under section 10 of the Penal Code[11] that provides:

> *"Subject to the express provisions of this code relating to negligent act and omissions a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident".*

For example, in the case of **Anthony Mhikwa V.R.**[12], the accused was convicted by a lower court of contempt of court c/s 114 (1)(a) of the Penal Code[13], on the grounds that he had shown disrespect to the court by laughing and making peculiar noises in the course of a trial in which he was involved.

On appeal he explained that a fly had flown into his nose **causing** him to snort and sneeze, and the High court of Tanzania accepting the explanation, quashed the conviction. The reason given was lack of mens rea because the

[11] Cap.16 *ibid*
[12] Anthony Mhikwa V.R. (1968) HCD no. 460
[13] Cap.16 *ibid*,

accused's reaction was instinctive and not subject to conscious control; it was involuntary.

In the case of **Bratty V.A.G. For Northern Ireland.**[14] Lord Denning stated that:

> *"No act is punishable if it is done involuntarily and involuntary act in this context....means an act done by muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleep walking."*

This shows that voluntariness is a very important element in conduct classified as crime.

Mens rea can be analyzed in the following degrees required in any given offence:

(a) Intention
(b) Recklessness and
(c) Negligence.

Intention

This forms the highest state of mens rea in the hierarchal order of degrees of mens rea. Once this is established there is no way an accused person can escape justice.

[14] Bratty V.A.G.For Northen Ireland (1763) A.C.386 at p.409

It is said a person acts with intent when he foresees the likely hood of the consequences of his act and desires that it should do so. If the consequence is desired, then it is immaterial that the chance of its occurrence may be small.

For example if 'X were to shoot 'Y' intending to kill him, from a miles range, knowing the chances of killing him were a thousand to one, it would be an intentional killing if the one chance came up.

In statutory offences intention is expressed in terms such as "*intentionally*" or "*with intent to*" or "*willfully*" etc.

In murder cases the term "*malice aforethought*" defined in section 200 of the Penal Code, is used to show intention. Section 258 (1) of the Penal Code uses the term *"fraudulently"* indicating intention on the part of an accused person of permanently depriving the other of his property.

Sometimes, in certain statutory provisions these terms are not provided, and what is important to understand in such situations is where an accused person is charged with an offence requiring specific intention then such intention must be construed and proved in terms of the actus reus.

In the case of **Brazila V.R.**[15] the accused, a messenger employed by Bukoba District Council was in charge of prisoners held at a primary court. He let two prisoners out of their cells and ordered them to wash their clothes while he went for a walk.

[15] **Brazil V.R.(1968) HCD no.304**

The prisoners escaped. The accused was charged under section 117(1) of the Penal Code which applies to "any person who aids a prisoner in escaping or attempting to escape from lawful custody."

Mustafa J., *held that the word "aid" imports an element of positive assistance and, or an intention of helping the prisoner to escape. The evidence showed that the accused was extremely negligent and careless.*

Recklessness

A man is reckless with respect to a consequence of his act, when he foresees that it may occur, but does not desire it nor foresee it as virtually certain.

Recklessness with respect to circumstances means realization that the circumstances may occur, without either knowing or hoping that they do.

For example 'X' points a gun at 'Z' and pulls the trigger. If he does not know that it is loaded, but realizes that it may be, he is reckless with respect to that circumstances, whether, he hopes it is unloaded or just does not care whether it is loaded or not.

If he is reckless with respect to this circumstance, it follows that he is also at least reckless with respect to the consequence of the death of 'y', that is he foresees that it may occur, but neither desires it, nor foresees it as certain.

In the same vein, if X buys goods from a notorious fence, realizing that they may have been stolen, he is reckless as to that circumstance.

A person who acts recklessly is then taking a deliberate risk; and the word connotes that the person has some actual awareness of the risk he is taking although he does not desire the consequences. It is an attitude of mental indifference to an obvious risk.

Recklessness is less blameworthy than intention. Although reckless people purposely or consciously create high risks of harm, they may not intend to hurt anyone in fact, for they may very much hope their recklessness hurts no one – but they risk causing harm anyway.

For example cases of people knowingly leaving their loaded gun lying within the reach of their Children. If a child picks it up, pulls the trigger and kills him self, in the absence of the occupier, the occupier in this respect is reckless.

He did not actually intend to kill the child, perhaps the only thing he would have contemplated is to cause injury to the child; but his recklessness led to the death of the child.

There are a number of offences in this instance, the bulk of them are covered under chapter XXIII of the Penal Code – on criminal recklessness and negligence, in which the degree of mens rea required, is that of recklessness.

Like wise section 42(1) of the Road Traffic Act [18]reads:

> **"***any person who on any road recklessly drives a motor vehicle or trailer shall be guilty of an offence*"

[18] Act No.30 of 1973

We can distinguish intention from recklessness from the fact that intention can not exist without foresight but foresight can exist without intention.

Negligence

Negligence or carelessness entails unconscious risk creation. Negligent people are not aware they have created risks. Criminal law however imposes liability on such people on the application of the "reasonableness standard."

This standard is based on what reasonable people under similar circumstances would know, and avoided the risk. A man is therefore negligent with respect to a consequence of his act when he does not foresee

The possibility of the occurrence of that consequence at all when he ought as a reasonable man to foresee it avid avoids the possible consequence of its occurrence.

Cases for example of parking car in residential areas are likely to attract "negligence's" because these areas are prone to kids playing. If in that case a driver starts a car without first securing the area, and in consequence he runs over the child who dies on the spot, this will be a case of involuntary manslaughter due to negligence.

In manslaughter cases it is sufficient to prove that the accused was negligent or reckless in the circumstance. **In R.V. Chepe Kalangali**.[19] The accused failed to take care of the deceased child

[19] R.V.Chepe Kalangali (1973) LRT no.77

who was in his custody, and known to him to be suffering from cold. The resultant exposure to cold hastened the death of the deceased.

Mnzava's J. found the accused guilty of manslaughter in the meaning of section 203 of Penal Code[20]. He observed that, for a person to be guilty of manslaughter by negligence, it must be proved that he had a duty to take care that he failed to discharge that duty thereby causing the death of the deceased.

A clear demarcation line between negligence and recklessness does not exist in a number of cases, particularly under the Road Traffic Act one may find both words used in the alternative.

For example, s.50 of the Road Traffic Act [21]provides:

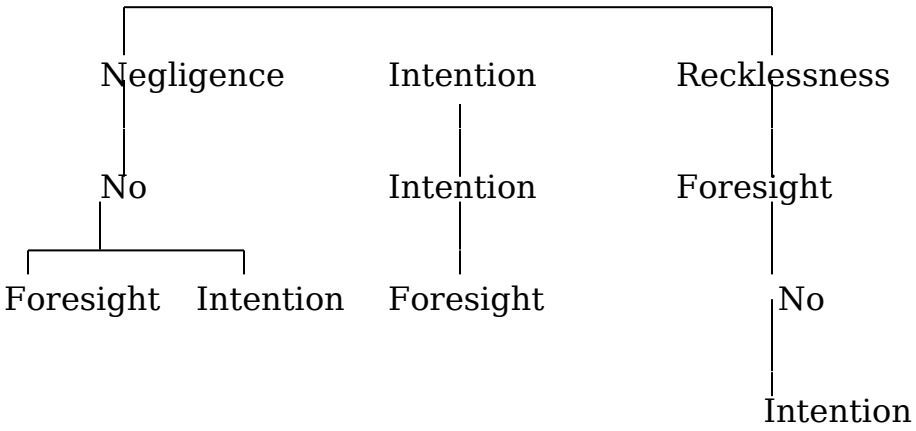
> *"Any person who uses, parks of stands a motor vehicle or trailer on any road carelessly or without reasonable consideration for the other persons using the road shall be guilty of an offence".*

The whole of chapter XXIII of the Penal Code[22] is devoted to offences of criminal recklessness and negligence.

The only difference however between recklessness and negligence lies on the fact that in recklessness there is foresight but no intention exists, where as in negligence there is no both foresight and intention.

Mens rea

[20] *ibid*
[21] *ibid*
[22] *ibid*



3. Degree of mens rea flow chart.

Presumption of Mens rea

There is a presumption of mens rea. The presumption of mens rea as an element of criminal liability was expressed in the famous case of **Sherra V. De Rutazen.**[23] where it was stated:

> *" There is a presumption there "mens rea" or evil intention or knowledge of wrongfulness of act, is an essential in gradient in every offence; but that presumption is liable to be displaced either by words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."*

But mens rea is not always required for criminal liability. In some offences a person can be convicted despite the fact of his blameless inattention. These are the exception to the general principles to be discussed later.

REVISION QUESTIONS

[23] Sherras. V. De Rutzen (1895) 1 Q.B.981

1. What do you understand by the terms Mens-Rea and Actus-Reus?
2. S.5 of the Tanzania Penal Code defines an Act to Include an Omission. Give three examples where a crime can be committed by an omission.
3. Mens Rea can be reflected in three degrees or categories. What are these categories? Explain.
4. Distinguish between Intention, Recklessness and Mens Rea by use of examples.

LECTURE THREE
EXCEPTION TO THE GENERAL PRINCIPLES OF CRIMINAL LIABILITY.

Introduction:

The lecture intends to discuss the areas where a person can be criminally responsible for the act done without the proof of requisite element of mens rea.

The general principle that a person can not be convicted and punished in proceeding of a criminal nature unless the act is done with a guilty intent has its exceptions as hereunder examined:

Strict liability

The general principle of criminal law, that mens rea is an essential element in every crime does not apply in strict liability cases. In such cases it has been held that the state of mind of the accused person is immaterial and irrelevant, if he has in fact done the actus reus which constitutes the offence.

In strict liability offences the accused person is held guilty on the strength of the actus reus only without the proof of mens rea.

Offences of strict liability are generally minor crimes which have the background from violations of health codes, traffic laws and regulations, migration regulations, etc[1].

Liability without the requisite mens rea came up to cope with the ever increasing injuries caused by the ever increasing science and technology that the contemporary world had to undergo since the industrial revolution. At this period factories and rail roads caused harm to large segments of the public, but it was difficult, in many cases to prove these harms intentionally[2].

It was for this purpose that liability without mental element of intention was to be imposed on acts (harms) which by reason of circumstances may have been negligently brought up, and the difficulties of proving mens rea at each such instance.[3]

It is not easy to recognize offences of strict liability. However the basic rule as laid down in the case of **Sherras V.De Rutzen** [4]with regard to the subject was to the effect that:

"There is a presumption that mens rea… is an essential ingredient in every offence, but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered."

[1] Samah J,criminal Justice, west publishing Co. 50 W.Kellogg Boulevard, 1988 p.37
[2] *ibid*,p.38
[3] Card cross & Jones, criminal law 12th Ed Butherworths London,Dublin, Edinburgh 1992 p.117
[4] Sherras V.De Rutzen (1895) Q.B.D.918

Thus one must first look at the actual words of the section of the Act which creates the offence in order to extract the intention of the parliament. The word of a statute may show the intention to create an absolute offence or not by the use of word 'knowingly' or a similar word apt to require mens rea.

The following authorities reflect the problem inherent in strict liability cases.

In **Cundy V. Le Cocg**.[5] D was convicted of selling intoxicating liquor to a drunken person contrary to section 13 of the licensing Act, 1872. it was proved that D did not know that the person was drunk and nothing had occurred to show that he was drunk. While some sections of the Act contained the word knowingly; section 13 did not do so.

The divisional court held that:
"It was not necessary to consider whether D knew, or had means of knowing or could with ordinary care have detected, that the person served was drunk. If he served a drink to a person who was infact drunk, he was guilty". This is a very remarkable case and on the face of it has unjust results.

In Maulid V.R[6] the appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees and failure to pay minimum wages. The appellant pleaded ignorance as to

[5] Cundy V.Le Cocq (1884) 13 QBD 207
[6] Maulidi V.R.(1970) HCD no.346

the requirement of having employees insured or having contracts made for them.

Biron J held that:
" apart from the fact that ignorance of law is no defense the statutory offences are absolute and no mens rea is required".

In the case of **Joseph Hawksworth and Another V.R**[7], the appellant who were English mens, crossed Songwe River from Malawi to Tanzania and walked to Kyela and reported at the Police Station. There they were arrested and charged with unlawfully entering into Tanganyika c/s 23 (1) (i) of the immigration Act, cap.534.

The particulars alleged that they had entered into Tanganyika by way of Songwe River which was not an official point of entry. During their trial, the first appellant was recorded to have said: *"I realise my mistake now, I entered unlawfully into Tanzania. I was misled by customs officials in Malawi to come this way."*

The second appellant was recorded to have said, *" I admit the offence. I did not follow official ports of entry in to Tanzania "*they were convicted and fined Shs.3000/= each.

On appeal the defense counsel submitted that the trial magistrate should not have entered a plea of guilty since mens rea was an essential pre requisite for commission of the offence.

[7] Joseph Hawksworth and Another V.R.(1970) HCD no.271

In neglecting this submission Georges C.J. (as he was then) put three factors for consideration before a court could hold an offence to be of strict liability.

(i) the intention of the register

(ii) the problem of proving mens rea

(iii) the gravity of the harm (not the offence)

Note in item (3) that the gravity of the offence could not contribute to the making of the offence one of strict liability since penal statutes are construed strictly i.e. in favor of the accused.

Following the arguments above the appeal was dismissed but punishment was reduced to a fine of Shs.500/= each.

As observed earlier on this subject, the strict liability offences are normally centered on violation of health codes. In this respected therefore they are intended to protect the public from adulterated foods.

In Hobbs. V. Winchester Corporation.[8] In this case the issue was whether a butcher could be held criminally liable under section 117 of the Public health Act 1875 for exposing for sale or selling meat which was unfit for human consumption, in circumstances where he did not know that the meat was unsound and could not, by the exercise of reasonable diligence, have found out. The provision in question made no reference to any requisite state of mind, although other sections in the Act included the word “knowingly”

[8] Hobbs V.Winchester Corporations (1910) 2 K.B.471

The court held that the provision imposed strict liability. It was stated that it is the butcher and not the public who should take the risk of the meat being unsound. It may be added that the prosecution could have a difficult time in establishing mens rea had the butcher contended that he did his best to check the meat before selling the same.

This position was different in **Mumir V.R** [9]where the High Court of Kenya did not apply the strict liability rule in more or less similar facts. In this case the appellant was found in possession, in his cold store, of diseased meat which had been brought to him for storage.

It was fresh when bought to him and bore what the appellant supposed to be an official stamp appearing to show that it had been inspected. The appellant was convicted, by the lower court, of being in possession of diseased food without reasonable excuse contrary to section 131 (10 of the Public Health Act. He appealed. The High Court of Kenya held that: " *it was the duty of a man in the appellant's position to take all reasonable steps to ensure that the meat he stores is free form disease, but in accepting possession of this meat the appellant behaved reasonably and his excuse for possessing it was reasonable"*

For this reason conviction was quashed.

However, the point should be made clearly that, in these offences of strict liability the act of the accused must be willed. The fact that the accused brought about a particular conduct i.e. the actus reus is not sufficient in itself, unless it is proved that the accused person was

[9] Mumir V.R.(1967) E.A.430

responsible for the conduct he brought about, that is to say that the muscular movement was willed.

For this reason the liability is "*strict*" and not "*absolute*"

Vicarious liability

Clearly there is no doubt that every person should shoulder his own burden for wrongful act he commits. Liability in this case is personal. In certain circumstances one may assume the responsibility of another for the wrongful act committed by that other person.

If that situation happens, then the liability so endured is categorized as vicarious liability. Vicarious liability is the liability of one person on the behalf of the other person.

In the law of tort the kind of liability is created in the following circumstances:

(i) That there must be master / servant relationship between the parties

(ii) That the servant must have been acting in the course of his employment at the material time.

The criminal law does not generally regard the master as having any criminal liability for the act of his servants unless he has himself actually authorized them or aided, or abetted them.

The position in Tanzania is covered under section 54 of the interpretation of laws and General clause Act[11] which provides:

[11] Cap 1 of the Laws, Act 1972

"where an offence under any Act is committed by a person as an agent or employee then unless a contrary intention appears, as well as the agent or employee the principal or employer shall be guilty offence and shall be liable to be proceeded against and punished accordingly unless he proves to the satisfaction of the court that he had no knowledge and could not, by the exercise of reasonable diligence, have had knowledge of the commission of the offence." **In Ali Mohamed Osman V.R.**[12] The appellant was found guilty of permitting a motor lorry to be used on a road while the tires were not maintained in such a condition as to be free from any defect which might in any way cause danger to persons on or in the vehicle or to other persons using the road. As a result of tires burst a turn boy fell off the lorry and was injured. On appeal the High Court held that:

" the owner of any vehicle who leaves it entirely to his driver to look after his vehicle takes the risk that the drive may not comply with the requirements of the traffic laws and if in the circumstances the driver drives the vehicle with defective tires the owner has "permitted" him to do so."

The reason for holding a master liable for act of his servant a statute would be rendered ineffective and the will of parliament thereby defeated if he were not held so.

In some other instances certain duties cast upon the master through license may be delegated by the master to his servant. If for example, the servant in the course of his employment breaches any of the special conditions of the road service license as stipulated under the

[12] Ali Mohamed Osman V.R.(1952) T.L.R.391

Transport Licensing Ordinance[14] the master can be vicariously liable for the acts of his servant though he may not be party to nor aware of the breach.

This position was well illustrated the in case of Hamed **Abdallah V.R.**[15] In this case the owner and holder of a license for public service vehicle was convicted for failing to comply with a special condition of his road service licence contrary to section 23(3) and s.26 of the Transport Licensing Ordinance. On appeal against conviction it was common ground that he was not on the vehicle when the offence was committed or that he was a party thereto or even knew of it.

It was submitted that no offence had been committed by the appellant, as s.26(1) did not impose absolute liability upon him Biron J. dismissing the appeal held that section 26(1) of the Transport licensing Ordinance creates an absolute liability, and it was no defense that the appellant was not a party to or even aware of the breach of the special condition.

Collective liability

The law in this circumstance provides the possibility for punishing a person without having performed the actus reus. In this circumstance therefore collective liability has just the same application and impact as vicarious liability, and for this reason it is regarded as a form of vicarious liability.

The law applicable in this situation is the Collective Punishment Ordinance[16] (1921) Cap 74. In section two of the ordinance the

[14] Cap.373,
[15] Hamed Abadallah V.R. (1964) E.A. 270
[16] Cap.74, of 1921

president may impose fines on all or any village, area or district or member of any tribe, sub-tribe or community if, after inquiry he is satisfied:

(a) that they or any of them have colluded with or haboured or failed to take all reasonable means to prevent the escape of any criminal.

(b) that they or any of them have suppressed or combined to suppress evidence in any criminal case;

(c) that stolen property having been traced to within the limits of any village, area or districts, they have failed or neglected to restore the property or to trace it beyond the limits of such village, area or district.…"

(d)

Powers to impose collective punishment lie on the president and not the courts.

Corporate liability

A corporation is a legal person in that it has its own rights and obligations recognized by law. However a corporation has no physical existence and can not therefore act or form an intention of any kind except through its directors.

It follows that a corporation's legal personality though directly created by law but it has sensitivity imputed from the natural person's legal personality. This is so because the corporate as such cannot practically act on its own, but rather it acts or omissions are those derived from the mind of those who control it.

It is from this background, therefore, that the corporation's legal liabilities are all, in a sense vicarious.

A corporation has no physical existence and it cannot therefore either act or form an intention of any kind except through its directors or servants. Since a corporation's legal liabilities are in a form vicarious then its liability is in fact wider than that of a natural person.

The acts of its managers and directors within the scope of their employment, are the company acts, and the company is held liable, not for the acts of its servants, but for what are deemed to be its own acts.

The doctrine of corporate liability operates and applies only to offences punishable with fine, and not to offences such as murder. The corporate is liable only to those acts done by the senior members within the scope of their employment, that is those acts done in the actual fulfillment of its duties and obligations.

LECTURE FOUR
PARTIES TO CRIME

Introduction

This lecture attempts to discuss who the parties to crime are. A crime can be committed by more than one person and yet it may be difficult to prove to what extent a party has taken part in the commission of the particular crime.

When two or more persons have taken part in the commission of crime, then the problem remains how each or everyone should be liable for the particular crime committed.

An account as to the nature and extent of each participant to the crime is important in determining the different roles played by each or

every one in the execution of a common deed, as well for their criminal liability.

Parties to crime in Britain

Parties to crime under English law are classified as follows;

(i) A principal offender in the first degree,
(ii) A principal offender in the second degree,
(iii) An accessory before the fact
(iv) An accessory after the fact

Principal in the First Degree

This is the actual offender, the man whose act is the most immediate cause of the actus reus. In murder, for example, he is the man who, with malice aforethought fires the gun or administers the poison which causes death.

Principal in the second degree

A principal offender in the second degree is one by whom the actual perpetrator of the crime is aided and abetted at the very time when it is committed.

Thus, when A is inside a house, committing a burglary, B and C may be waiting outside, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the Police. They are all principal offenders.

Accessory Before the Fact

This is a person who in one way or another procures, advises, or instigates the principals in the first degree to commit crime.

The kind of procurement, advice, or instigation must be so active that the principals in consequence of which counseling, procurement or instigation act accordingly. This means the principals must have appreciated the particular deed contemplated.

For a person to be an accessory before the fact, it must be observed:

(i) that he must have known the particular deed contemplated
(ii) that he approved of it
(iii) that his approval was expressed in some form which operated to encourage the principal to perform the deed and
(iv) That those first three elements came into existence before the time when the offence was being committed.

The fact that a crime has been committed in a manner different from the mode which the accessory had advised will not excuse him from criminal liability.

For example if A hires B to poison C, but B instead kills C by shooting him, A is nonetheless liable as accessory before the fact to C's murder.

But a man who has counseled a crime does not become liable as accessory if, instead of any form of the crime suggested, an entirely different offence is committed

Accessory After the Fact

This is a person who, knowing that an offence had been committed, subsequently shelter or relieves an offender in such a way as to enable him to elude justice.

For example A conceals a fugitive murderer in his house or supplying him with the means of escape or by helping a convicted murderer to get out of prison.

In order to be guilty as an accessory after the fact, it must be proved that an active assistance to the offender was rendered.

Parties to crime in Tanzania

Principal Offenders

The law in Tanzania (EA) is not the same as that in England. The Penal Code of Tanzania does not adopt the classification made in English law.

The Tanzania Penal Code recognizes only two main parties to the offence i.e. the principal offender (under section 22 of the Penal Code) and accessory after the fact (section 387 of the same code).

The definition of principal offenders is found in section 22 of the Penal Code and includes:

- Every person who actually does the act or makes the omission which constitutes the offence.
- Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.
- Every person who aids or abet another person in committing the offence
- Any person who counsels or procures any other person to commit the offence.

The law as it is does not adopt those categories found in English law, for accessory before the fact and persons committing procurement, aiding or abetting in offences are principal offenders as defined under the Penal Code. The same is true in Kenya. In the Kenyan case of **Kamau V.R.**[3] It was said:

> *"the law of Kenya, like that of Tanganyika citing Sita V.R.*[4] *does not use the expression accessory before the fact but by section 20 of the Penal Code, (in Tanganyika section 22 of the Penal Code makes every person who counsels or procures or aids or abets the commission of the offence a principal offender"*

Section 24 of the Penal Code is an amplification of section 22 (d) of the Penal Code in that it clarifies further under which circumstances counseling may be punishable.

The section provides:

> *"when a person counsels another to commit an offence and the offence is actually committed after such counseling by the person to whom it is given, it is immaterial whether the offence actually committed is the same as the counseled or a different one, or whether the offence is committed in the way counseled or in different way, provided in either case that the facts constituting the offence actually committed were a probable of carrying out the counseling. In either case the person who gave the counseling is deemed to have counseled the other person to commit the offence actually committed by him."*

In R.V. Betts and Ridley.[6] Betts and Ridley agreed that Betts should rob 'X' by pushing him down and seizing the bag he was carrying,

[3] Kamau V.R.(1965) E.A.501 (CA)
[4] Sita V.R. (1957) E.A.308 (CA)
[6] R.V.Betts and Ridley (1930) 22 Cr. App. R.148

while Ridley would wait around the corner in a car wherein Betts could make his escape. Betts struck X with such force that he died. Both were convicted of murder and appealed.

In dismissing the appeal the court, in effect, stated that if a person in substance complies with a counseling to commit a crime, varying only in circumstances of time or place or in the manner of execution, the person soliciting / counseling the offence is guilty of the offence committed.

For this reason the appeal was dismissed. In English law Ridley was an accessory before the fact. Under section 22 of the Tanzania Penal Code he is a principal offender.

Section 23 of the Penal Code, determines the liability of offenders where an offence is committed by more that one principal offenders. There are three conditions given by section 23 of the Penal Code, to find a person liable under it.

(i) More than one person should form a common intention to prosecute an unlawful purpose in conjunction with one another.

(ii) In the prosecution of such purpose an offence should be committed;

(iii) The offence so committed should be a probable consequence of the common purpose.

Where two persons embark on a joint unlawful enterprise each is equally liable for the consequence of such acts of the other as are done in pursuance of a common agreement.

In the case of *R.V. Mughuira and Others.*[7], nine appellants having formed a common intention during a period of famine, of burgling a house, carried their plan. During the burglary one of the appellants who were armed speared and killed the owner of the burgled house, who on being aroused had fired an arrow at the party, gracing the head of one of them.

The appellants denied any intention of murder. On appeal the court of Appeal held that even though only one member of the party i.e. the first appellant, who had formed the intention of committing burglary was armed the enterprise of burglary was unlawful and the resistance by the owner of the premises burgled was a probable consequence and the overcoming of such resistance and by violence if necessary, by the burglars would probable be resorted were sufficient factors to bring all the accused persons within the doctrine of common intention, thus making them equally responsible in law for the act of the first accused.

Sometime it may happen that two or more people have similar or same intention. If such situation occurs, it does not necessarily mean that they have common intention for the circumstances may be such as to show that each had acted independent of another. This was the position in the case of

The existence of common intention does not necessarily mean that there should be a previous agreement. Common intention on may be formed at the spur of the moment.

Accessory after the fact

[7] R.V.Mughuira and Others (1943) 10 EACA 105

MASAMBU,G

This is another category of parties to crime in Tanzania. The definition of an accessory after the fact is found under section 387 of the Penal Code, providing as follows:-

> A person who received or assist another who is to his knowledge, guilty of an offence in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.

In Tanzania law, just like English law, under this rule, a married woman does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him escape punishment, or by receiving or assisting in her husband's presence and by his authority, another person who is guilty of an offence ink the commission of which her husband has taken part in order to enable that other person escape punishment, nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her escape punishment.

A married woman, is not criminally responsible as accessory after the fact to any offence if she receives or assists that other man who is to her knowledge guilty of any offence under the following circumstances:

(i) she receives or assists that other man
(ii) in her husband's presence and by his authority,
(iii) that other person who is guilty of any offence of which her husband has taken part.

To found a conviction under this section, that is section 387 of the Penal Code, the accused must knowingly take an active part to assist

the principal offender to escape punishment. He must have appreciated the commission of the offence and formed an intention which is part of the offence so committed by the principal offender. Mere knowledge on the part of an accused person of the commission of the offence does not involve that accused to be accessory after the fact to such an offence.

In Andrea Nicodemo V.R.[12] the accused person were charged for theft. There was evidence that the first accused person had stolen a bicycle and had taken it to the accused house of the second accused. The second accused kept it for several days and assisted the first accused in removing the saddle. The bicycle was later recovered by the Police. The trial magistrate found that the second accused knew that the bicycle had been stolen and convicted him of being an accessory after the fact c/s 387 of the Penal Code.

On appeal the High Court stated that to be convicted as an accessory after the fact an accused person must not only know or have reasons to know about the offence but also must take steps for the purposes of enabling the offender to escape punishment. In this case there was no evidence that the second accused took such steps and his convictions was therefore quashed.

Paskazia d/o Kabaikye V.R.[13] 21 EACA 359

To support a charge of receiving or assisting an offender to enable him to escape punishment there must be some act proved to have been done to assist the felon personally, not necessarily an act done in the physical presence of the offender, but some active steps taken

[12] Andreq Nicodemo VR (1969) HCD n.245
[13] Paskazia d/o Kabaikye V.R (1954) 21 E.A.C.A359

with the object of hindering his apprehension trial or punishment. It is not sufficient merely to show that an accused has given false information in answer to inquiries , for it may have been given merely to divert suspicious from himself or to save himself from arrest, and this is so even if in fact, the result of such information was / is to deflect, the course of acquiry from the actual offender, where untrue statement are relied on as alone constituting the alleged act assistance, it is essential for the tribunal of fact to be directed specifically that if the motive of the accused person was merely a desire to avoid his own arrest, that would not be enough to bring him within the purview of the charge.

ATTEMPTS AND CONSPIRACIES

8.1: Introduction

Criminal law is not only restricted to actual harms, i.e. the complete commission of crimes, but also it extends to encompass potential harms, those harms or crimes that are at a certain stage likely to be committed but for the existing circumstances either within or out side the knowledge of an accused person become impossible in fact to be accomplished or committed. The criminal law, however, in this instances draws a line within which such crimes are defined and may be punished. These crimes includes attempts, conspiracies and solicitations etc ,[1]

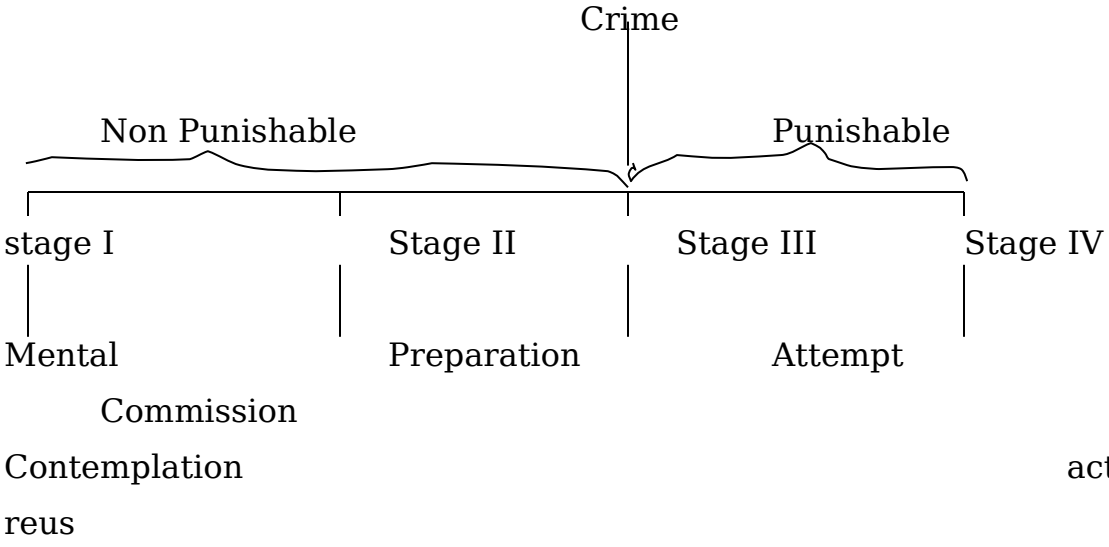
[1] Solicitation – not commonly used in our jurisdictions, but in other countries like U.S.A consists in urging another person to commit a crime, and it requires no substantial steps toward competing a crime or an agreement to commit one. It is punishable even if a solicitee turns down the offer.

8.2 Attempts

Attempt is one form of preliminary crimes, other forms being as indicated in the introductory part, such as conspiracy and solicitation. This is so because in all crimes to the exclusion of those crimes brought about by omission to perform a legal duty, some active conduct on the part of the accused person must precede his attainment of the desired goal, i.e. the actus reus. Attempt is therefore classified as essentially preliminary crime, for it is effected as a means to achieve a desired objective. It is like conspiracy and solicitation technically known as inchoate crime"[2] Attempt in its nature is a preparatory crime to the main purpose, as theft, murder, robbery, burglary etc. However for the crime attempt to be punishable its actus reus must be fully complete. This means the accused person must have in this respect done an act which is more than a mere preparation to the commission of the desired offence in question. With this, therefore the real problem in this crime as in other crimes of similar nature rests on actus reus rather than in mens rea.

It is a common phenomenon in most of the commission of crimes to observe that a crime is preceded by a series of steps performed by an accused person before he attains the actus commission of the crime he intends to commit. These series of steps are in fact related to one another as to form a chain of events leading to the desired objective. This chain of events presents important features for understanding the nature of the problem of inchoate crimes. And these will be represented as follows:

[2] Inchoate: cannotes something which is not complete. For purpose of this subject " inchoate offences" must not be taken in that definitions, for the said offences up to the stage of being punishable must be complete in themselves even though they be links in chains of events, for their actus reus are fully complete.



4. Chain of events flow chart

Generally there are three stages which are distinguishable before crimes are committed. The first stage is that which a potential criminal contemplates on the intended offence. At this stage the accused person is just planning as how to go about the intended offence and in so far this plan just remains in his intention only, that is confined in his own mind, there is no way he can be panelized. The second stage involves a preparation in a way to make his plan effective. The third stage is putting his intention in to action with a view of committing the offence in question. And the last stage is when he actually commits the offence. Stages, third and forth, may be very close to each other in such a way that it may not be easy at times, to

distinguish them clearly. All the same a person is normally punished at the third and fourth stage, but for conspiracy this is not the case.[3]

It is therefore the third stage which is of the utmost concern. For this reason offences at this stage are called "inchoate crimes" for the reason that they are incomplete. Suppose ink the following hypothetical case; 'X' 'Y' and 'Z' happened to frequent a certain local Pombe Shop. And prior to that 'X' and 'Y' had a quarrel over a woman whom each claimed to be his lover. To end this state of affairs X decided to eliminate Y by killing him. X intending to kill Y prepares a kind of poison (Sumu ya Mamba) and waits for the day to materialize when all will be at the Pombe shop sipping liquor. On the material day XYZ having bought liquor, they sat together enjoying the day, while sharing the bowel. When X's turn was over and before he would share out the bowel to Y, he secretly dropped into a bowel a tip of his finger containing the deadly poison, a fact which was immediately noticed to "Z" who sat between the two. When "Y" accepted the bowel and was about to drink, Z forcibly intercepted by punching the bowel off the mouth of Y, thus rescuing him from drinking the already poisoned liquor.

From this hypothetical case the following features are obviously; X's mental contemplation consists when he planned to kill 'Y'. His plan was illustrated by the time he began to prepare that kind of poison. That was the preparation stage. The third stage was when X put the poison in to the liquor ready to be given to Y before interception. This is the stage when X's intention was put into overt act with a view of committing the murder. This is the stage which is punishable by law.

[3] Conspiracy is the earliest punishable offence just on the strength of agreement of the parties.

This is so as it leaves no doubt as to the explanation that had it not been Z's interception 'Y' would have been killed. 'X' in this case is guilty of attempted murder.

Some case laws which have been decided on this line of argument are; the case of White V.R.[4]. In this case the accused person put potassium cynide into a drink called 'nectar' with intent to murder his mother. She was found dead shortly after wards with the glass, three parts filled, beside her. The medical evidence showed that she had died, not of poison but of heart failure. The accused was acquitted of murder but convicted of an attempt to murder. Although the consequence which the accused intended occurred, he did not cause it to occur and there was no actus reus of murder .

The importance of this case is demonstrated by the fact that though an act may be an innocent one but is unjustified by the accused's mental element of intention through the overt acts exercised towards the commission of the intended crime.

8.2.1 What is an Attempt?

The legal definition of an attempt to commit a crime is given under section 380 of the Penal Code. That section defines.

> When a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfillment and manifested his intention by some overt act, but does not fulfill his intention to such extent as to commit the offence, he is deemed to commit the offence. It is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete fulfillment of intention is

[4] What V.R (1910) 2 K.B 124

> prevented by circumstances independent of his will, or whether he desists of his own motion form the further prosecution of his intention. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

It follows from this definition, that an attempt to commit an offence is an intention to commit that offence and to put that intention into execution by means of overt act as to its fulfillment.

8.2.2 The Actus reus in Attempt

In attempt the actus reus consists of an act done in actual furtherance of the crime intended. It must be of such a nature as to raise a presumption that the accused person was aiming at the crime in question. Or it consists of a series of acts intentionally done by an accused person in furtherance of a specific aim, and which in point of time are sufficient in themselves to suggest beyond reasonable doubt what that specific aim was. For the actus reus of attempt to be complete, the accused person must manifest his intention by “some overt act” although it is not necessary that he does everything to the completion of the offence. The overt act is required as a demonstration of his intention towards the commission of the crime in question, as it is more often than not an accused person denies mens rea. The establishment of overt act is required so as to constitute the attempt and there is no attempt in law until the requisite overt act has been committed.

The application of overt acts in the furtherance of the commission of the offence in question by an accused person was more emphasized in

the case of; **Mwanahamisi Abdullah & Hamis V.R**[5] where the court was of the view that "a mere acceptance of a proposal for love making against the order of nature without any further act directed at the fulfillment of the offence is not sufficient to constitute an attempt".

In an English case; **in R.V. Miskell** [6], the court said:-

> The more intention to commit a misdemeanor is not criminal, some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempt to commit but acts immediately connected with it are.

This quotation qualifies further the nature of the 'overt act' required to constitute the actus reus of attempt. Out of these statement three rules governing the act of attempt may be formulated.

(i) It must be sufficiently proximate to the crime attempted

(ii) It must aim towards a crime, not towards non criminal conduct.,

(iii) It need not be an act capable of bringing about the crime intended, in other words the crime intended need not be possible.

An attempt has been made to advance some of the major theories of criminal attempts[7]. This was purposely done in view of the management of attempt offences. There are two major theories concerned:-

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[5] Mwanahamisi Abdullah & Hamisi V.R.(1983) TLR 265

[6] R.V. Miskell (1954) W.L.R. 438 p.440

[7] Mapunda B.T.Criminal Law and Procedure Part one General Principles of Criminal Liability,1st Ed, The Open University of Tanzania, 1996 p.75

8.2.2.1 The Equivocality theory

According to this theory an act is proximate to the crime in question if and only if it indicates beyond reasonable doubt what is the towards end which it is directed. In this theory A is guilty of an attempt to commit Y when in pursuance of his intention to commit Y he has done an act which is such that it can equivocally be inferred from a consideration of that act that it was done with the intention of committing Y. The theory relies on the overt act as evidence of criminal intent and the inference can be drawn from the set but the inference that it was done with that intention. The difficulty of this theory is that no act is unequivocally referable to anything when regarded in isolation.

An application of this theory was evidently in the case of Kombo **AbdalahamanV.R** [8] when the court held that "in order to constitute an attempt the acts of the accused must be such that if not interrupted them would end in the commission of a particular offence. A good test in the crime of attempt is that the last act which is interrupted is an act in furtherance of the commission of the offence and that after stopping there must be only one inference and that is the commission of the intended crime and not otherwise".

8.2.2.2 The Proximity theory

According to this theory the act of attempt must be sufficiently proximate to the crime intended. The general principle in this rule is that acts remotely leading towards the commission of an offence are not to be considered as attempts to commit it , but those act

[8] Kombo Abdalaham V.R.(1968) HCD 306

immediately connected with it are. In each case the nature of the act immediately connected with the commission of the offence will be a matter of fact.

In Mwandikwa Mutisya V.R[9] in this case the appellant was convicted by the Resident Magistrate, Nairobi of attempted theft of articles which were in a locked car. The facts found by the trial court were that the appellant tried to unlock the door of the car and that his purpose was after an entry had been forced, to steal articles in the car. The appellant was intercepted before he was able to force open the door of the car. The substantial point taken on appeal was whether the attempt to open the car was, in the circumstances, immediately connected with his attempt to steal, since as the offence occurred at night, the appellant might not have known exactly what was in the car or if he did, he might not have intended to steal all the articles in the car.

It was held that, it was an act which was immediately and not remotely connected with the intended theft and it was an act which went far beyond mere preparation .

In an English case of R.V. Cook,[10] the accused was found in another person's car and there were evidence that he was fiddling with the ignition lock on the board. The court held that there was sufficient evidence on which the accused could be convicted of attempting to take and drive away a vehicle without the owner's consent.

[9] Mwandikwa Mutisya V.R.(1959) EA 18
[10] R.V. Cook (1963) 48 Cr. App.R.98

In Comer V. Bloomfield,[11] the defendant seriously damaged his van due to his own fault. He knew his insurance policy did not cover damage caused by his own fault but was uncertain as to what it did cover. He left the van in some woods told the police it had been stolen and told the insurance company the same thing. He then asked his insurance company whether he could claim under his policy for theft. The insurance policy in fact did not cover him for theft. The charge of attempting to obtain money by deception against him was dismissed on the submission of no case on the ground that there was merely an inquiry which was insufficiently proximate to obtaining of money by deception to constitute an attempt.

A similar view was expressed in the case of **R.V. Robinson,** [12] where the court quashed the conviction on a charge of attempting to obtain money by false pretences on the ground that his acts of preparation had not reached the point which the law requires.

What is gathered from these cases is a rule that:-

- The requirement of proximity refers to the sequence of events leading to the crime that the accused had in mind to commit
- The act of the accused is necessarily proximate if, though it is not the last act that he intended to do, it is the last act that would have been legally necessary for him to do if the result desired by him had been after wards brought about without further conduct on his part.

[11] Comer V.Bloomfield (1971) RTR 49 D.C
[12] R.V Robinson (1915) 2 K.B.342; 11 Cr.App. R.124

- An act is proximate if it is the first of a series of similar acts intended to result cumulatively in the crime

8.2.2.3 Judicial Interpretation of Attempt Cases in East Africa

Judicial interpretation of attempt cases in East Africa is presented in two ways; the narrow view which is commonly adopted by English law and the wide view which was a result of judicial decision taken care of in the case of **Andrew Avarity V.R.**[13] originating)n Tanzania. Both approaches are applicable in interpreting of attempted cases in East Afrh#a. The practical application of the two approaches may be exaeined in the following caser, In the caqe of **Mulira V.R** [14] the facts wer% to the effecp that, the arpellant was convicted of att %mpted rapa of his employer's wife. T(e woman's evidence accepted by the court, was that the appellant entered her bed room where she 7as lyi.g on the bed, switched off the light, put his hand ofer her mouth an$ with the other hand ramoved (is shorts and difted his petticoat, that shd screamed for help, and that when ` boy shone a torch into the room thd appellant ran asay. The court of Appeal of East Africa on appe!l, held that the fact indicated that assault with intent to rcvish, the facts were not sufficiently proximate to fkund a conv)ct)on for at4empted rape. According to the court to constitute an attempt to rape there must be an intention to have intercourse with a woman not withstanding resistance on Her part, plus an attempt to put his intention in to effect and that mere preparation does not suffice.

[13] Andrew Avarity V.R.(1973) LRT.92
[14] Mulira V.R 20 EACA 223

Other cases subscribing to this view include;

- R.V. Haruna Ibrahim[15]
- Omar V.R[16]
- Gamaiyo Melau V.R[17]

The general view given to these cases is to the effect that only proximate acts are punishable. These cases adopt, in that respect a narrow approach.

The wide view in this connections represented by the case of **Andrew Avarity[18].** The facts of this case was that on 13.6.72 the complainant one **Gaudensia s/o Mwangesera,** was walking to her home from a shopping expedition. This was at night around 10:00 PM. The path she took passes through mango trees and as she was walking the accused came upon her from behind he got hold of her and stated stripping her clothes. The complainant shouted for help. People appeared on the scene therefore the accused ran away. But he was the court of arrested two days later and charged with attempted rape. In deciding this case the judge distinguished other authorities by arguing that those cases imported concepts of “preparation” and “proximity” which were non extent in section 380 of the Penal Code which defines attempt. According to judge Mfalila section 380 laid down three ingredients for the offence of attempt – viz

(i) the intention by the accused to commit an offence

(ii) the manifestation of intention by embarking upon it by means adopted to its fulfillment by way of an overt act and

(iii) proof of the overt act

[15] Haruna Ibrahim V.R.(1967) HCDE no.76
[16] Omary V.R.(1971) HCD no.362
[17] Gamaiyo Melau V.R (1968) HCD no.228
[18] Supra

In other words, to constitute attempted rape there must be evidence of an attempted to have sexual connections with a woman notwithstanding her resistance and execution of this intention by overt acts clearly adapted to its fulfillment. More over where the existence of overt act is established, it is not required to classify further the overt act into preparation and non preparatory proximity and remote concepts. The conviction of the accused was upheld.

8.2.3 Mens rea of Attempt

In order to convict a person for an attempt it must be proved that the accused intended to commit the particular crime or rather intended to procure the consequence that in law amounts to crime. However, in the case of murder there must be evidence that the accused intended to kill. The requisite mens rea in attempt may be proved:

(i) circumstantially by evidence of what the accused did on the occasion in question

(ii) by evidence of similar facts where that is admissible or

(iii) by confession on the part of the accused, or other direct statement of intention.

The criminality of attempt in those circumstances lies in the intention, that is mental element of intention to commit an offence in question, or the mens rea which in all cases must be evidenced by what the accused has actually done towards the achievement of his desired objective. The required mens rea, however, in attempt cases may be better understood in actual cases, for example in the following cases:-

In the case of R.V. Ngambilo,[19] the accused came to the victim's house and thereby pointed his gun towards the victim's knee and said "today you shall die". He then fired the gun on the said knee. He was

[19] R.V. Ngambilo (1967) HCD no.388

charged as a consequence, of attempted murder. The court held that in order to convict a person for attempted murder the actual intention to kill must be proved. You may notice in this case that the fact that the accused pointed his gun at the knee is showing more of intention to injure or harm rather than causing death. The court convicted him of unlawful wounding.

However in **R.V. Mlatende**,[20] the accused who was divorced from his wife 1964 after living with her for 8 years, moved to a nearby house where he lived as a tenant. On the night in question the accused after securing the front and back doors of his former wife's house, set fire to it. The wife awoke and after vainly trying the doors broke out through the wall of the hut. She later rescued a child who was in the hut and another person in the hut also escaped. The accused was charged with arson c/s 319(a) and attempted murder c/s 24 of the Penal Code. The court held that the positive steps taken to prevent escape by the inmates of that house established beyond reasonable doubt that accused intended the inmates of the house to burn to death. The accused was convicted on both offences.

In R.V.Robinson [21], the facts were to the effect that, Robinson, a jeweler, had insured his stock against burglary and theft. He subsequently hid some jewellery under his safe and, after binding himself up with cords, called for assistance. A Police Officer entered the shop and Robinson stated that he had locked all his jewellery in the safe and was going upstairs when he was attacked from behind by a stranger who had tied him up and rifled the safe, which was then seen by the officer to be open and empty. The officer was suspicious

[20] Mlatende V.R.(1971) HCD no.471
[21] Supra

of the story, took Robinson to the Police Station to make a statement, and in his absence the shop was searched and the jewellery discovered under the safe. When Robinson was told this he confessed that his story was a lie and that his intention had been to obtain from the underwriters the amount for which the jewellery had been insured. He was charged with attempting to obtain money by false pretences and convicted, but his conviction was quashed by the court of criminal Appeal on the ground that his acts of preparation had not reached the point which the law requires. (see also the case of **R.V. Mlay** [22])

Attempt as said earlier, is a question of men rea than actus reus. In the offence of attempt the mental element assumes paramount importance than actus reus.

The actus reus may be perfectly innocent and harmless act, as where B, intending to murder D, puts sugar in his tea; believing that it is not sugar but deadly poison. The actus reus may be an act provided it is done with intent to commit the offence and goes beyond mere preparation when an act is done. The law judges, not only of the act done, but of the intent with which it is done, and if it is coupled with an unlawful and malicious intent though the act itself would otherwise have been innocent the intent being criminal the act becomes criminal and therefore punishable. In the offence of attempt the prosecution has to show:-

(i) the actus reus that the accused had done something which in point of law marked the commission of the offence.

[22] R.V. Mlay (1960) HCD no.348

(ii) the mens rea, that in taking this step he was inspired by the intention to go on to reach a definite objective which would constitute a specific crime if not interrupted

8.2.3.1 Impossible Attempts

The fact that it is impossible to commit a certain crime does not mean that no one can be convicted of attempting to commit it . section 380 of the Penal Code provides, in part, as follows

> "It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

However, there has been controversy about the circumstances in which impossibility will afford a defence and those in which it will not. The following examples may assist to shed some light to this issue;

(i) Suppose that D who comes from a country where adultery is a crime and thinks that adultery is a crime in Tanzania. He may attempt to commit adultery with someone's wife. The "offence" he has in mind is non existent in Tanzania, its commission is impossible and he has, in fact and law, committed no in choate offence.

(ii) A intends to shoot B; He goes to B's house at night and shoots at B's coat hung in B's bedroom thinking that it is B. Here A has committed a crime as shooting B is a crime.

Out of these examples, two rules develop in respect of attempts which are distinguishable;

(i) Attempting a non – existent crime

(ii) Attempting a factually impossible crime.

Attempting a non existent crime needs no demonstration. A person who commits or attempts to commit what is not crime in law cannot be convicted of attempting to commit a crime, and it makes no difference that he thinks it is a crime.

Attempting a factually impossible crime. An act will amount to an attempt although the commission of the meditated crime is impossible by the means chosen. In such cases some circumstances, which is an element of the intended crime, does not exist. To find someone guilty of this type of attempt there must be evidence to show that the culprit intended to commit the offence contemplated. Once that is established the only question is whether, with that intent, he has done an act which is more than merely preparatory to the commission of the offence i.e. evidence of some overt act towards the commission of the offence.

8.3 Conspiracy

It is unfortunate that the Tanzania Penal Code law, which is Cap.16 of the law, does not defined what conspiracy is, though it creates it as an offence under section 384. However, in some quarters conspiracy is defined as an agreement resting in two or more persons to do an unlawful act or to do a lawful act by unlawful means. It is therefore an agreement consisting of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a mens to it. This definition, brings forth the following features in respect of conspiracy as; the actus reus, persons agreeing, the purpose agreed upon and the mens rea.[23]

8.3.1 Actus reus of Conspiracy

[23] Kenny's (ibid) p.339

There is no way that can be said of conspiracy as consisting in mental criminality only resulting form the mere concurrence of the intentions of the parties. For just as every where in criminal law sphere, bare intention amounts no crime. An 'act,' in this connection, therefore, needs to be done, reflecting what was the intentions of the parties. The 'act' for that reason is an 'Agreement' which as Lord Chelms Ford clearly put it in **Mulcahy V. The Queen,**[24] is an act in advancement of the intention which each person has conceived in his mind." It is not mere intention, but the announcement and acceptance of intentions. Bodly movement, by word or gesture, is consequently indispensable to effect it. In order of time, this proceeds the act agreed upon. It follows therefore that once the parties have come to such an agreement, that agreement itself is sufficient to constitute the offence of conspiracy. It is not, in these circumstances, necessary to establish that the parties went on to commit some overt act towards carrying it out, and in the same way a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act to carry out the agreed purpose has been committed. The implication of this is that the offence is complete once the parties have agreed as to their unlawful purpose though they would not have concluded as to the means and devices to be employed for affecting it. For example if "B" and "C" agree to commit suicide together, but later on they withdraw their plan, they nevertheless are liable to a charge for conspiracy. This illustrates of the fact that conspiracy as stated earlier is complete even if no further act is done in pursuance of the agreement. In addition some reservations express or implied, do not negative the fact of conspiracy although this will depend upon the nature and extent of the reservation made. The actus reus then is the agreement involving spoken or written words or other overt acts. **In**

[24] Mulcahy V. The Queen (1868) LR.3 H.L. at p.328

Walker V.R.[25] In this case a conviction was quashed although it was perfectly clear that D had discussed with others the proposition of stealing a payroll, because it was not proved that they had got beyond the stage of negotiation when D withdrew. And in **MulchV**.[26] The queen it was stated that; "when two agree to carry it into effect the very plot is an act in it self…."

If, however, the actual commission of the crime agreed upon has taken place, the original offence of conspiracy will not become 'merged' in the substantive offence. It will be possible to bring a charge for conspiracy to commit such substantive offence, and then support it by evidence that tends to show an actual consummation of the offence; but judges discourage such a course as unfair to the accused.

Conversely a charge for conspiracy to steal and in another court for the completed crime of stealing, then if an accused person is found not guilty of stealing, that is not guilty of doing the things which he was charged with conspiring to do, but on the same evidence, guilty of conspiracy he must be acquitted on the ground that the verdict of guilty of conspiracy as a specific offence under the first count was unreasonable.

8.3.2 Two or Morepersons

The nature of the offence implies that, a man by himself cannot conspire.[27] The position under English law (whether it remains the same up to date) is that, for certain purposes husband and wife can be counted as one person, so that an unlawful combination by him and

[25] Walker V.R.(1962) Crim.L.R. 458
[26] Supra
[27] kenny's *ibid*,p.340

her alone does not amount to a conspiracy[28]. However such a rule does not find a room in Tanzania law. For the position is made clear under section 386 A in respect of the couples for the offence. That section stipulates that;

> For the avoidance of doubt, it is hereby declared that a husband and wife may be guilty of conspiring together whether their marriage is a monogamous marriage or a polygamous marriage.

The application of this provision, however is not mandatory, for it seems the offence in question by the couples will be subject to the circumstances it is committed and most probably only to the exclusion of offences such as murder and treason[29], otherwise the application of compulsion as a defence on the part of a wife by her husband may be brought in to play, (see section 20 of the Penal Code)[30].

8.3.3 An unlawful purpose

Though the term unlawful purpose is not so statutorily defined, but as in this connection of the offence of conspiracy, the unlawful purpose may amount an agreement to commit a substantive offence such as a conspiracy to steal, to commit robbery, house breaking, murder etc. all these are unlawful enterprises, and there fore an intention by the parties to embark into such enterprises is unlawful purpose.

8.3.4 Mens rea of Conspiracy

It must not only be proved that there is an agreement between the conspirators to carry out an unlawful purpose but also an intention in

[28] *ibid*
[29] the observation and emphasize is casual research based on the general rules as to criminal responsibility.
[30] Cap.16 of the laws

the mind of an individual conspirator to carry out that unlawful purpose. In **R.V. WhitChurch**,[31] Whit Church believing herself to be pregnant agreed with others that they should use instruments and administer things to her with a view of procuring her miscarriage. The instruments were used and things were administered but there was no evidence that whit Church was pregnant a fact which would if proved have meant that she could be convicted of a crime. Whitchurch was convicted of conspiracy.

8.3.4.1 Proof of Conspiracy

It rarely happens that the actual fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swifty and secretly. They can therefore ordinarily be proved only by an inference from the subsequent conduct of the parties, in committing, some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen form an agreement to bring it about. It is not necessary, however to prove that the persons accused of conspiring together were in direct communication with one another, for they may have operated through third party. In this context X may have been in touch with each D1, D2, D3 though they are not in touch with one another ("a wheel conspiracy"). Provided that the result is that they have a common design, for example tk rob a particular bank – D1, D2 and D1 may properly be charged for conspiring together though tj%y have never been il touch with one another un4il they meet in the dock. It musd be proved that each accused has conspired with another guilty person in relatio. to dhat single conspiracy.

[31] R.V.Whitchurch (1800) 24 Q.B.D.420

> “what has tg be ascertained is always the same matter; is it true to say…. That the acts of the accuse` were done in pursuance of a criminal purpose held in common between them?„

These propositions, for 7hich there is ample authgrity, are stated in the case of **Mey rick**[32] though that cas% itself seems a questionable appnication o& them. D1 and D2, night club proprietkrs, ea#h offered bribes to a Poliae Sergeant, E$ to induce him $o cohnive at braaches of the dicensing laws and “to effect a public mischief by obstructing the Police…….in the execution of their public duty and by corrupting officers of that force.”

The jury were directed that there must be a “common design” and, by their verdict of guilty, they so found but it is difficult to see how the evidence justified this finding. The design of each night club proprietor was simply to evade the licensing laws in respect of own premises. **Meyrick** was distinguished in **Griffiths**[33] on the rather unconvincing ground that;

> “the conspiracy alleged (in Meyrick) was……..in relation to a comparatively small geographical area, namely soho. In view of the size and nature of the locality, there were clearly facts upon which a jury could come to the conclusion that the night club proprietors in that district well knew what was happening generally in relation to the police.”

Even if D1 and D2 each knew that the other had made a similar agreement with E, it would seem that there were two conspiracies not one. It should be noted that the event in this case did not arise out of the same sources simultaneously though similar in nature for each part acted on his own in respects of his own premises.

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[32] Meyrick (1929)21 Cr. App.Rep.94 at p.102
[33] Griffiths (1965) 49 Cr.App. Rep.279

Though the conspirators may not be in touch with each other or one another, it is sufficient if it is proved that each conspirator knows that there is an existence of a scheme that goes beyond the illegal acts that he agrees to do and attaches himself to the scheme.

In R.V. Karia.[34] The court of appeal for East Africa stated that an agreement to conspire may be deduced from any acts, which raise the presumption of a common plan.

As already noted earlier conspiracy can rarely be proved by direct evidence in most cases proof of conspiracy is by circumstantial evidence. It depends then on inferences to be drawn from the conduct of the parties. In the case of **Ongodia and Erima V. Uganda**.[35] The facts of the case were that on February 24th 1966 the two appellants arrived at officer's mess at Entebbe at about 2 PM. The first appellant Ongodia in the presence of the second appellant Erima informed Anguram and Guweddeko in the mass that war had broken out, that the army head quarters at Mbuya had been surrounded and they had managed to escape. Ongodia asked Anguram if he had confidence in his platoon and on receiving an affirmative reply, Ongodia asked Anguram to take his platoon to Bait ababiri on the Kampala / Entebe road and set up a road block with the object of arresting the Prime Minister – Dr. Obote. Ongodia added that other troops were advancing from Kampala and they could be arriving at any moment. Erima remained silent – throughout the conversation but nodded his head from time to time. It was not established at what precise moment of time of the conversation he

[34] R.V.Karia 16 E.A.C.A.116
[35] Ongodia and Erima V. Uganda (1967) E.A.137

nodded his head. The Judge, Advocate in his direction stated that if the evidence of Anguram and Guweddeko was believed the trial court could be justified in finding each appellant guilty to both charges (conspiring to set a road block with a view of arresting the Prime Minister) and occasioning false alarm to the officer of the army)

The court of Appeal held in the first charge that the evidence was sufficient to justify the inference that the first appellant Ongodia conspired with a person or persons unknown to arrange for a road block to arrest the Prime minister and the finding on the first charge was confirmed. It was also found that the evidence was insufficient to establish that the second appellant was acting in concert with the first appellant and a finding of not guilty was substituted.

On the second charge both appellants were found not guilty for lack of sufficient evidence.
Other references:

- Musinga V.R.18 E.A.C.A 211
- R.V.Mattaka and others

GENERAL RULES AS TO CRIMINAL RESPONSIBILITY

9.1 Introduction:

It should be remembered that a crime is composed of two basic elements, i.e. “actus reus” and “Mens rea” which in other words constitutes the basic or general principles of criminal liability. It follows therefore that a crime is not as a general rule (subject to

exceptions) constituted unless and until the requisite elements of actus reus and mens rea are established. At this point a person's criminal liability is determined on the strength of both the actus reus and mens rea. The general rules in this context underlie the general principles of criminal liability to the effect that a person is not criminally responsible for an act or omission which would otherwise constitute an offence unless in so doing or omitting to do an act the said accused person was reeling under the requisite element of mens rea.

The practical application of the general rules as to criminal responsibility is always to the effect that although an act or omission may be brought about by an accused persons conduct, the tendency is to negate the "mens rea" that in so circumstance the accused person acted so accidentally or did not appreciate the nature or quality of his act, or he acted so as the only means of defending his life or property and etc. From these premises, these rules are sometimes known as defences. They are mainly divided into "justification" and "excuse".

The general rules of criminal responsibility are provided from section 8 up to section 21 of the Penal Code.

9.2 Ignorance of the law

In most of the jurisdictions ignorance of the law does not afford an excuse or defence for an act or omission which is an offence notwithstanding that the accused person did not at the time of the act or omission know that the law in question entitled him not to do as he did.

The source of this rule of the law in Tanzania context is provided under section 8 of the Penal Code. That section provides that:-

> Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.

This rule is ambiguous unless it is clearly made from this context that knowledge of the law, discloses a kind of mens rea, that the law requires the accused person to have had at the time of the commission of the offence in question. But if knowledge, means notice to the public of a particular piece of legislation either antecedently or subsequently, then the application of the rule will only be relevant in relation to a particular time and the subjects during which of most of the time the law will be in the processes of becoming in force. Otherwise knowledge of the law will be irrelevant so long as the law remains in force; unless the knowledge of law underlies the requirement of mens rea in the circumstance.

In Westminister city Council V. Groyalglange Ltd.[1] the court held that the accused must have knowledge not only of the premises use as sex establishment but also that, that use is without a licence.

The rule under section eight is an exception to the general rule requiring proof of actus reus and mens rea. This means the rule imposes strict liability on the offender just on his own act. It is one of strict liability rules. Section 8 therefore has to be construed strictly, and a detailed discussion on this point was by justice Biron to the case

[1] Westminster city council V.Groyalglange Ltrd (1986) 2 All ER 353

of: **Maulid V.R**.[2]. In this case the appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees, failure to in sure in respect of liability to his employees and failure to pay minimum wages. Evidence established that the appellant who owned a bar paid his barmaids sh.60/= per month where as the minimum wage was 170/= per month. The appellant pleaded ignorance as to the requirement of having employees ensured or contract made out for them. The prayer was rejected on the ground that ignorance of the law does not afford an excuse.

Dealing with the issue the judge observed that "apart from the finding on the facts that the appellant did not know the law I am inclined to the view that these statutory offences are absolute and no mens is required, even so it is pointed that there is no such presumption that every body is presumed to know the law. In fact, I very much doubt if such presumption would hold good of even those who administer the law. The principle is that ignorance of the law does not afford a defence that, as the magistrate will appreciate, is not the same as presuming that every one knows the law. From these he went on to dismis the appeal in that lacked merit.

9.3 Bonafide Claim of right

Section 9 of the Penal Code provides,

> "A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done or omitted to be done by him with respect to the property was done in the exercise of an honesty claim of right and without intention to defraud".

[2] Maulid V.R.(1970) HCD no.346

What is observed from this provision is that claim of right is only a defence when an accused is charged with an offence relating to property. When a person claims that he has a right in interfering with another person's property either by taking, using or destroying, thus depriving him the use of the property and consequently commits an offence relating to property he can plead a claim of right to the offence.

It is clea, therefore, from the aforegoing, that in order to determine whether the application of claim of right is available to an accused person or not is to find out which offence the accused is charged with. If the offence in question is one relating to property then the defence of claim of right will be available.

Another test to be applied is that the commission of the offence in that the respect by the accused person comes by way of a contest over the conflicting rights or interests over the property as between persons, i.e. the accused and his rival, in this case the complainant. This situation has a far reaching effect, for it may encompass; loss, damage, forfeiture, denial of property in such a way as to make the accused person commit the offence in question, say theft, or malicious damages as a means of compensating himself from the results of the above premises. The circumstances must be such that the other (the accused) is doing an act or making the omission in respect of the other person's property to enforce his rights. That is why the offence committed in most of the cases must be relating to property. For it will be unwise for example, where A beats B's Child simply because his father B injured his (A's) cow. In this circumstance apart from the unreasonable act, the defence of bonafide claim of right will not be a available to the accused person, that is A. The claim in this context

will be ungenuine on the ground that it is directed to the person of another and not to the property. A therefore will be charged with unlawful assault.

Bonafide claim of right as a defence to an accused person is widely applied in areas such as 'theft', malicious damages even in most violence offences such as robbery, house breaking or burglary provided in all these cases the claim is genuinely based. This position was illustrated in an old case of Yusufu Hussein V.R.[3] where it was decided that the defence of claim of right does not apply to offences of the theft only but also to offences relating to property such as malicious damages to property.

Another requirement for the application of claim of right is that the claim of right should have been made bonafide or in good faith, honest and without fraudulence in respect of the other persons property. Thus where a person appropriates property belonging to another, he is not to be regarded as honest if he appropriates that property in the belief that he has in law the right to deprive the owner of it on behalf of himself or a third person.

In John Chize Bahinganyi V.R.[4] the court stated:-

> However, this defence of bonafide claim of right is not available to any and every conceivable case. This defence which is embodied in section 9 of the penal Code is only available where the claim of right is faithfully, honestly and reasonably held having regard to all the facts and circumstances.

[3] Yusufu Hussein V.R. (1969) HCD no.36
[4] John Chize Bahinganyi V.R (1988) TLR 234

It is therefore a question of fact. As Onyiuke J. stated in the case of DPP V. Henry Rweganuza.[5]

> " A person who asserts a claim of right must be acting honestly, that is to say that he honestly believes in the right he asserts. If however the claim is merely a colorable pretex for a fraudulent act then the alleged claim of right can not avail him".

Again the test to be applied in order to determine whether the claim of right against another person's property was made bonafide, we have to look for the intention of the accused when he interfered with another person's property. If his intention in interference with another's property was not fraudulent as defined in section 258 of the Penal Code then his claim of right is said to have been made bonafide. In John Chize.[6] the court went on to say:-

> ……. I am of the view that the appellant's alleged claim of right was no more than a colorable pretax for a wilful and unlawful act. The defence of bonafide claim of right was not therefore available to the appellant.

In the case of **Mohamed Hassan V.R**.[7] The accused was charged with burglary and stealing therein. The facts were that the appellant (accused) had previously been employed as a house servant by the complainant. He admitted that he had taken clothes from the complainants room by opening the window and "pole fishing" themout. He justified this by declaring that the complainant had dismissed him from his employment owing him three months wages, and despite repeated request, he decided to take his clothes. It was held that if the accused took the clothes in an honesty belief that he

[5] DPP V.Henry Rwegamiza (1973) LRT 15 p.63
[6] Suppra
[7] Mohamed Hassan V.R. (1969) HCD 71

was entitled so by law, there was a defence of claim of right made bonafide.

Lastly the accused must show, in order to be entitled to the benefit of the defence of claim of right, that he honestly believed that he was entitled in law to do what he did. The claim of right should not refer to the actual legal right. But should be based on a belief in legal right. It is sufficient to show that the accused believed that the law permitted him to do what he did. This position was demonstrated by Ugandan case of Oyat.[8] where the accused having seized five oxen that had damaged his crops, the owner was ordered to pay to the accused Shs.20/= for compensations of damaged crops. The accused returned some of the oxen but retained one. Later on he sold it in order to get his Shs.20/= and remit the rest to the complainant. Before he could do so he was arrested and convicted. On appeal it was held that he had a good claim of right.
Care should be taken of where close relation ship exists as between the parties. There is no ground for the deference of bonafide claim of right if one takes his relative's property without his permission. In this context he will be equally a thief as just in other criminal spheres, if that other person in the absence of any color of right takes his relative's property however close they may be (married couples exceptions may be noted).

In Salum s/o Athuman V.R.[9] The appellant was charged with and convicted of the offence of stealing cattle c/s 268 and 265 of the Penal Code. He was sentenced to a term of 5 years imprisonment. He is appealing to this court against that verdict and sentence.

[8] Oyat (1967) EA 827(u)
[9] Salum s/o Athuman V.R(1991) TLR 137

The appellant had admitted before the lower court of taking the goat belonging to his uncle, one Athuman r+o Abdallah (Pw1). The only excuse and defence was that 4he goat belonged to his uncle with whnm he had been living at the time of the event. It was held that this ap0eal is b/und to fail. As the law stajds to dcy in this country the relationship that exists between uncle and his nephew, or a father and his s/n does .ot 'peruse' 0roperty. Hence, if ether takes the other's property without the other's permission or authnrity, one thereby faces a fi.e or imprisonment.

The appellajt, having takan afoat bdlonging tn his uncle without the uncle's permhssion or authority he cannot take shelter behind th$ provirion of section 9 at the Penal Code.

Summary:

(i) In th% absence oF any col/r of right cl.se relation ship between"an accused `nd the `omplainant is not enough gr/und for the defe.be of bonafide claim of right.

(ii) Dhere w!s sufficient evidence to show that the appellant took the goat vithout the latter's permission or authority.

Other references

- Athuman V.R.(1967)HCD 147
- Kandege V.R (1967) HCD 398
- Mahumbila V.R.(1970) HCD 283
- Haram J. Ndolanga V. Sangula Chigonela (1992) TLR 1
- Said V.R. (1970) HCD 145
- Salum Ibrahim V.R.(1977) HCD 222
- Lendarito Laidosoli V.R. (1972) HCD 168

- Salim Mbegu V.R (1981) TLR 79

9.4 Intention, motive

Intention is not statutorily defined, but from judicial decisions, as in the case of Mohan V.R.[10] the court of appeal defined as:- a decision to bring about, in so far it lies within accused's power (a particular consequence),no matter whether the accused desired that consequence of his act or not. As the court recognized this can be described more briefly as the "aim". Alternatively, it can be described as the accused's purpose. The definition in Mohan could be described as a common sense definition since it probably accords with most people's ideas of what constitutes intention as well being the relevant meaning given by the diction aries – such as shorter Oxford English dictionary; Chambers Twentieth Century dictionary.[11]

In Walker and Hayles V.R[12] Loyd L.J. said " It has never been suggested that a man does not intend what he is trying to achieve." Provided that he had decided to bring about a particular consequence, in so far as it lies within his power, a person acts with intention in relation to it even though he believes he is unlikely to succeed in bringing it about. For example a person has an intention to kill if he fires at someone whom he believes to be out side the normal range of his gun in an endeavor to kill him.

It follows, therefore, in reference to the definition in **Mohan's** case[13] that it is irrelevant that the accused did not desire a consequence which he had decided to bring about, that a person can be said to act

[10] Mohamed V.R.(1976) QB1
[11] Edinburg 1992,p.58
[12] Walker and Hayles V.R. (1989) 90 cr. App Rep – 226 at 230 card,cross & criminal Law, 12th Ed, Butterworths London, Dublin
[13] Suppra

with an intention to cause a particular consequence even though it is not desired in itself, if it is the mens (i.e. condition precedent) to the achievement of a desired objective and he decides to cause that consequence, in so far as it lies within his power. It is argued that not only is this implicit in that definition, but also support for it can be found in the speech of Lord Hailsham in : **Hyam V. DPP**[14] decided by the House of Lords a year before Mohan. Lord Harlsaham, adopting a definition very similar to that in Mohan stated that it should be held to include the means as well as the end (i.e. that a person who has decided to bring about a consequence as a means to a desired end or objective falls within the definition in relation to that consequence). Suppose that a person is charged with an offence that person is charged with an offence that requires him to intend cause economic loss to another, and that the accused admittedly acted to make a gain for himself by depriving another of something. It is no defence for him to say that, since his desired objective was to make a gain for himself, he did not intend to cause economic loss. However this concept ((intention) should be taken or construed with a lot of care, and the point may be that what is its end or objective towards, which is aimed. For the concept of intention is relative, for a person may act with an intention to prevent some more harmful event in the course of which at the sometime, he brings about unlawful consequence, e.g. a person who rescues prisoners from about a burning gaole. In fact the act of rescuing or freeing prisoner from the burning gaole cannot be regarded in the real sense of the law (Cr.law) to have been made intentionally, as the desired objective was in no way connected with the act of unlawfully releasing prisoners, it was rather to save the lives of the prisoners. Other examples includes; people breaking through car's windows to escape from the accident or where one in an

[14] Hyam V.DPP (1975) AC 55 at 74,(1974)2 All E.R 41 at 52

attempt of rescuing a child from an expected explosion, pushes him or her so hard that he or she falls on his back against a hard substance and thereby sustaining severe injuries. These situations may arise out of necessity', mitigating the extent of intention with which the unlawfulness of the act in relation to the offence in question would have been demonstrated.

This may be so manifested as in this following hypothetical case:- a strife situation took place between country 'A' and 'B' each of which suspects of the other of carrying out subversive activities against the other. Suppose that C in country 'A' has some close relatives living in country B which is engulfed by internal civil war alleged to be instigated by country 'A' The two countries are separated by a big river. Borders on either side of the river are heavily guarded by the respective armies of the two countries, and therefore crossing the river is difficult and dangerous. However, 'C' on the material day in an endeavour to rescue his relatives, crossed the river secretly into country B. In the course of doing so some infiltrators from country 'B' manoeuvred through the vessel on to A country where they carried out subversive activities. In this instance ;

> 'C' cannot be regarded to have intentionally acted with subversive conspiracy, for his aim was to save the lives of his relative, the likely hood of infiltrators into A's country notwithstanding.

In Steane,[15] the accused made broadcasts in Germany during the war in order to save his family from a concentration camp. It was held on appeal that the broad casts were not made with intent to assist the enemy even though the accused knew full well that his purpose of

[15] Steane(1947) K'B 997,(1947)1 All ER 831 CCA

saving his family could only be achieved by doing acts assisting the enemy. This decision perverted the concept of intention so as to excuse an accused who was deserving.

9.4.1 Motives

A person's motive is his reason for acting as he did. Thus A's motive for stealing may be financial gain, and C's motive for stealing may be his wish to feed his starving children. The general rule is that the accused's motive, whether good or bad are irrelevant to criminal liability, though they may affect punishment imposed.

This position was manifested in the following cases:-

In Sharpe V.R.[16] where the accused, motivated by affection for his mother and religious duty, had removed her corpse from a grave in a cemetery belonging to Protestant Dissenters in order to bury it with the body of his recently deceased father in a church yard, it was held that his motives however estimable they might be did not provide a defence to a charge of removing a corpse without lawful authority. However Sharpe's 'good' motives were reflected in the punishment awarded a fine of one shilling being imposed.

Likewise **in R.V. Windle**,[17] the appellant was married to a woman 18 years his senior, she was certifiably insane and led him a most horrible and wretched life. She was always threatening to commit suicide. As a result of living with her he too suffered from a form of communicated insanity known as "folio adeux." He gave her 100 aspirin tablets from which she died. At the time he did so he knew that it was against the law, but he believed that what he was doing

[16] Sharpe V.R.(1857) Dears & B 160,26 LJMC 47
[17] R.V. Windle (1952)2 Q.B 826

was right and that in view of his wife's conditions, it was something which should be done and which he ought to do. It was held that since the appellant knew that his act was contrary to law, he was guilty of murder.

9.4.2 Application of the rule of law relating to intention – Tanzania law

The term intention is not so clearly defined under the Penal Code. However, under, section 10 of the Penal Code, it embraces all acts relating to intentional, recklessness, negligence or omissions and in the main, acts, the consequences of which, an accused person must have foreseen as possible results and desired to be so. It must be an act which falls within the accused's power. It follows, therefore, from this line that acts which are freely the occurrence of the exercise of one's will, or which occurs by accident, will not be said to have been governed by the muscular movement of the said person. An expression of this situation can be illustrated by the following two examples; where 'x' falls from the height of the roof and on so falling falls on another person, say "Y" walking down the street. In this case there is no 'intention' or 'motive' it is purely an accident; consider again this situation; 'T' and 'S' are together in a forest collecting firewood's, in the course of which 'T' while chopping down a tree an axe comes off its handle and hit 'S' on his head, resulting in severe hemorrhage, and dies later on. 'T' in this case cannot be said to have caused the death of 'S' intentionally, as his act was so automatic such that it was not within his power to control it. Therefore it was an accident.

Section 10 of the Penal Code, to this effect provides;

> subject to the express provisions of the Penal Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or an act which occurs by accident.

Intention in some statutory offences is frequently expressed as "intentionally" or "with intent", or "willfully", motive, not withstanding. For example section 196 of the Penal Code, which creates the offence of murder provides; the 'intention' for murder as,'…. 'A' person who of malice aforethought causes the death of another person…" section 258 (1) of the Penal Code, provides, " A person who fraudulently and without claim of right takes anything capable of being stolen".

In Songereti V.R[18] it was held that where there is a clear intention to commit an offence and overt acts are done, which manifests that intention and start to put it into effect an attempt has been committed and it matters not whether the means employed were adequate to achieve the end sought.

Other references

- Anthony Mhikwa (cited)
- Bratty V.Ag For Northern Ireland (cited)
- Lewis V Cox (1985) QB 509,(1984) 3 All ER 672 DC

9.5 Mistake of fact

Section 11 of the Penal Code provides that:-

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to an

[18] Songereti V.R (1973) LRT n.22

greater extent than if the real state of things had been such as he believed to exist.

The rule envisages a situation, where the state of things is alike in each and every aspect, but to which the state of things faced by the accused person is not a truly one, though in his mind, has all the reasons and he honestly believes it as what it is. Thus if he goes on bring about his conduct in respect to such state of affairs, reasonably and honestly, but mistakenly, believing that he was entitled to do as he did, then he is not criminally liable, than if the actual state of affairs existed as he believed. In this circumstances an accused person may avail himself with the defence of mistake of fact.

Mistake of fact can operate on so many forums; as theft, murder, malicious damages, receiving and retaining offences, etc. One of the basic requirements upon which mistake of fact is built is on reasonably mistake as to identity of factual situation at a given time and place or at 'different times and places' provided clusters of circumstances when viewed as a whole may reasonably reflect a sense of similarities in the mind of the accused believing it to be right as he thinks it.

Secondly, the act of the accused person in relation to the offence in question must have been held honestly, that the accused acted in good faith, believing he was entitled to do as he did, though mistakenly. Further more, in all this, the accused must be taken to have been acting reasonably and reasonableness in this circumstance is a question of fact. For this reason negligent acts cannot be accommodated under the question of "reasonableness", and mistake of fact as a defence can not avail to an accused person.

9.5.1 Practical Application of Mistake of fact

Mistake of fact as a defence to an accused person for an offence can be best illustrated in case laws. Leading cases in this subject are as follows:-

In the case of **R.V Khamis Haji Bajun,**[19] the accused was charged with casting away a versel c/s 296(b) of the Penal Decree. The accused had decided to leave Zanzibar and go to Tanga where he had relatives. He took the canoe of the complainant, thinking that it was his brother's, and went to Bagamoyo.

The boat of the complainant and that of the accused's brother were usually moored next to each other. The court held that the accused was suffering from a mistake of fact, that mistaking the complainant's boat for that of his brother. This was a good defence in law, entitling the accused to a full acquittal.

In another old case of **R.V.Sultan Maginga**[20] the facts of this case were that, the deceased and the woman were lying in a rice Shamba (field) at night after having sexual intercourse. The accused, on his way to guard his shamba against the incursion of wild pigs, saw a movement in the grass and shone his torch in the direction, but the batteries were weak and could see little. He called out, asking whether it was an animal or people. There was no reply. The couple then ran off in different directions. The accused threw his spear at one of the shadows hitting and fatally wounding the deceased,. He was charged with murder . The court held that the evidence shown

[19] R.V.Khamis Haji Bajun (1969) HCD 114
[20] R.V.Sultan maginga(1969) HCD 33

that the accused did not know that he was throwing a spear at a man, and the charge of murder could not be sustained. It was a mistake of fact. The accused was set free. As noted earlier, the element 'reasonableness' and 'honest' is very important when the question involved is one of negligence. This means as that the presence of 'reasonableness' and 'honest' negative the issue of negligence. If the accused person acts unreasonably as to a state of things, but mistakenly believing it to be as what he thinks, he will nevertheless be negligent in the circumstances. This is so, though he did not intend the consequence of his act, his liability will be based on negligence.

One of the illustrative case on this point is the case of **R.V. Seleman hassan**[21]

Sometimes circumstances can be such that an accused person may be in state of a drunkenness as to mistake the evaluation of a state of affairs, that he brings about a conduct which would constitute a crime otherwise not committee had he been a sober.

In this context, therefore, drunkenness can be a factor influencing mistake of fact, and whether in that circumstance the accused person may have been capable of forming specific intention or otherwise.[22]

In R.V. Michael Chibing'ati[23] The accused person in this case was charged of the murder of one Yonas, his brother. He claimed on that material day to have got dunk after drinking Kangara brewed out of

[21] R.V. Selaman hassan (1969) HCD 250

[22] Onyiuke J; (as he then was), had this to say in the case of R.V. Richard Hiyari (1971) HCD 458, that "intoxication takes various forms. It may lead to total incapacity amounting to temporary insanity or it may create a condition which induces extraordinary violence and in this connection it may become relevant in determining whether a person in such a condition is capable of forming a specific intention…

[23] R.V. Michael Chibing'ati (1983) TLR 441

honey from 1 pm until night and there was sufficient corroborative evidence which enabled the court to find without hesitation that the accused was drunk at the time though he was not insane in the legal sense.

Considering his degree of intoxication the accused had reasonable ground to believe that his brothers were about to attack him and or his family, a believe which entitled him to rely on the defence of self defence based on mistake of fact.
Accused guilty of manslaughter.

9.6 Insanity

The defence of insanity is relevant only at the time when the alleged particular act was committed. Relation of reasoning to the circumstances surrounding the commission of the crime is determined at this stage therefore the defence of insanity by the accused person is concerned with his legal responsibility at the time of the commission of the offence and not simply with whether he was medically insane at that time. In other words it is a legal rather than a medical question, as insanity may be further removed from what would be as insanity by a doctor or psychologist.

The law in this regard is formulated under sections 12 anl 13 of |he Penal!Coee.
Uection 12 nf tje(Penal$Code is0oG gene2al preSulptioî. PhaT section`0rovides;-

> “Dver} person is prestmed to be on soufd mifd,"and to have`been of sould mind!at81an}time which comeq io u§estinn, untél tje coNtrarY"xs prored.”

Dhe lefal iiplication oæ thir ppofision82is thau a pmrsoL aq taken to be!in`abtual aware~ess of`his akt or ommssiof }nluw{ the Evidence proves otèerwise.

ThéS cállq for legal insan)ty, cnD l%gal in{aNyty, is coveret 5nd¥r section 13 of0the Xen`l code. $Th% effegt of thms segtion is that, a person is no4 c2iminally rdsponsyble vor an aãt or!Omissiol snnsta| utijg an offeîce(ifpht is e{tab|ishgd thAt`at phe tiíe of the act or mmiwãion he qs a result of a disease afFmcting has mind iNfaãt was incapable oF õnDers|an$ing what he War domng ns og kngWing tHat he ought not to d{ tjå aCt or make`the omisSik®.

That section goes on to sayz-

> A person`is`not ãriminally responsib|å for an acô or omisskon ig at the time of doing tj% act or`omi3sion he is through0any `ira`se affecti~g iis mènl éncapabl!82of unde2qtandinç wêat he was dkmnG0or og knowing that)e ovwhd not to dn thebakv op maëe thå omis3ioî.

Wection 12$and 13 are,"thepegore0the rgproduction(ïf Mnaghteî's Ruìes* Uxese are tHe r}les foòmulq4ed by Englmsh kudge3 in!1843. the formunatIon occasiongd io **Mnaghten's casg.**[24] In thIs cace pHe accuse$ muRdered Syr!Robert Peel's$pritate sEcredapy`and was$cha2oed with mureer.p$Je was agquitted"on the ground of insanéty.` Queóti□ns were pet!by thE house of$Ìkrds$to"judges to dete2miNe the nat}re and epVenvof unskunDness o& m)nd whig`$wotld`sav%$as`á defen"e vo such a chiòge. Uheir ráply incmuded The followino$points:1

[24] Manghten's case (1843) 10 CI & Fin 200

(i) if the acsused did the act Complained of,`knowing at the time he was actmng c/ntrqry to the laws, tHen nntwithst! oding`a pcrtiad dulusion regqrdijg has purpose, he83is neuepthdLess punéshable‰th@t every man is"presumeä po be¡oF sane, and`to possess a sufbicient degrem of¡seasof to!be rå3ponsible for His cvame, ugtIl thE`contrary`@e proved.

(ii) that to establish(a defence on the grow~d ob`insqnIty!it must be slearly$provåd that, at the time of soo-ittkng an offencu or ict$ the!party acc}ced vas labouring uneeò such a83defect of reqson, arising froM d)sease of$the mind, that he did not k~own he w`s doiNg □hat was(wr/ng.

Whether a`pa2ticemar cjndiviol amounts to0á lysease /f the mind within the0RUles is not a meliCal queótion to be decided by éedicAl doctmr buô it is"a legal&qumsôion to be deiced by Thg coõrt ïf law c#aordmng To the oreijary rules of leg!l0interprítadion.(the medi#al report is jus| cn op nion0which need not bind thE c/urô.

This`rule õas giVeN its impkstAncå in"tje sase of **Nyinge Wkuatu V.R**.[25]. Th% áppellant in th)s case uoder the felusion(hAd kiLled an inspecpor of Poli#% bù83ste`Niîg hMm with e kniFe, nn vHe còound tiat th% dåceased$was plovting$his dea|h. He tlen surreldere$ ôo The Pklice anD!s|ated that hav)ng kilded the inspec|or I heve ckoe (ere$to be {inlçd becaese tiey wa.ted m{!`ead". At his trial a MeîtaL sxecmali3t gave evidence for t(e crown that the acaused 'oul$ know what he83was dïinf, bõt`îot tHat it was wzong. µhe$trial judge, wHilst acseptiog, that0the accused wqs,`at the83material,`insana if a

[25] Nyinge Siwatu V.R (1959) E.A

eetical se.sU, heLd thau the accusee’r0st`te}ent to The poli#a showed thit he kne what he(had ìone wa3 wrong and convi£ted him gf m5rDer.

Ôhd84c/Urt normall{ is"influeoced by legal ifsaNitx aU the mátebial time, buô if a pers/n wac ilsane in the medycal sensm of phe teri at vhe eateric,`time to$rel%!óe him frOm criminal resp/fsibility°it mEqt `e prmved that the$accused ei4har déd not know what hå ÷as doing wcr ldfally wronc. ÔiÅreVore, in!this case the sordc, namely” I have come here to be kilhed (by wéich he obviously meqNt” uo suffer the death pEnalty”) indicate!cleaRly, in our vies. that he kngw a~d that he was acco2dineLy not meruly admitting q jwstifi!ble killk.g (such!as ëhllinç b9 acCident ïr even oìe i~ ju3tifiablg qelf de&ence) A similAr view was expressed in the fillnwinw cñse which though taken it length, but it is gsseOtiallx equip`ed(With ieterkal ne#essary to Unler3tand the Concept"of énsaêity;$es`eciallY when 4hesame is pleafud as0a defence. This ca[% iw one of à**Hiüda A"u, V.B**[26]84Fakts: The vicôim of uhe$dragic decth uas a thrue ajd$a half year ond84boy, /ne Bethlehem Joh~. On the favefUl 84eay (5th@May 19x5+ while ôhe paben4s 'g txe duce!sud John0Urio (Pw2) and Advecta w/o john`(Pw£9`were away.` Appellant came with a bil| look84hidden in her slothes with which!she 8app%llqnt) hacked Tlu Deceayed 4o teath.84 Thm deceased was then in thå coopany of"hms e|der sicters Ju`iba(JïhN (Pw6*,Doreen and Refina® D %cecqed was"the youngesp of $hemàáld. Immedmaôely `fte2 thå tragic incide.t the appelmant wenT to her fathur’s house in the nmighbourhood`uhere she cleqogd a.d hid the bill hook, the weaton used84if`thd muster. Thgre after(shg went to`hiD herself at the `ouse ïf her awnt"in84Ko.eeni vil|age ne!rby`frïm where`she$7as

[26] Hilda Abel V.R.(1993) TLR 246

arpested vhe bollowing daY. 85Two `ayr after thu`incident, the axpa| lant íide a cautiondd sta4ement85ij!whéch cèe adoittedhhaving(killed ôje decearmd if revengå against Atestc John)@w3) the"Deceased’s mothmr, in the cautioned statemen| thg ippel<ant %afe%a detailmd cna!r accou|t nf(tja ejtird sequence of the incitent. Ôhe`statement was admitted in evidence !t!the trial as (gxh R1).

At t`e trial, th% appellaît denied her invonvgmgîp in thå offunce. 2As! the eain line of dedeNce$was insanity, the appmllcnt uas cïimitted to IWazga I~stitwtion nor examinqtioî in`order to determiîe ·èethmr she was mental,y sound%at t`e(time0of bommitting uhe offence. dr Ngonyani, the specialist`Psychiatryst at Iganga85Hnstitutio~. Dodoma Repoztmd on the apPellant’s cf~Ditioj&85It wa3 t`e gpinion of the Docpor tjat tje appmllajt wa3 Insane at the time85mf the a,legEd0mUrder.0 AccordinG ôo him – )D/ctor)(t`e appellant 7as suFbering grom85defeãtiv% reasonëng due to vedusio~(of txoueht anl Imper`divm auditOry hAlluCinatiol.E

The(learned triel ju`oe havi^g aNalyzed and eva\Uated thå evidenCe and dyrectinG himsehf on tje cqutioned óta4ement85as well as(the debence od insqnity raised, held(that, thouïh t¨á `ppgllant was meot! lly disttrbed85at the timel still she 7as qane within the meanijg of sec| mon 13 of the Pezal Code.

On appeal it85was hele tha4, the evédence as believed end abcåpted by tie trial!court waq such that thg appmhlaot was at`the(time nou i.sane witlin the cnntmxP85of section 13 of the Penal Gode> S(õ kneW what she!was doino. This is`th% qeestimn of faCt that vhich85cowld be infårVed fromhthe circudstankes o&(the case a□d the conduct of the accusedat the85mAtesie, ti|m. Thare was ! epme evidence to show that the axxell`nt came$÷ith a biml(hook

hidden in her clo4hes, the apreLlant’3 quicK retseat$to her ~atheòs86house wiôè!ple bIll hook soon afteV the"comiisóion of`the offence,0uxe cleaning of(the béli/ Iook a~d the subsequent hiding of )t foìlowEd by hez h)ding a}86her aunt av Konteni until the t)me of her Arrest. All tiese go 4o show0t`at the appellant knaw ajd }nderstood thå navqrE of w@at shd had done ant t(e consåqumnces og cuch an cct.¨ Apart(fzom 4he(bondqct mf the apðeldant txepe was the evyDencm gf86thg cau|ùoned stadement, whm#h!Was admitted at thg trial ¨exh0P19.

Though at th}(trial there was an autdmpt87by vxe appE,lant to repu %iate the cáutioned statu-ent, hu was neverth%less properly admétted,`as there was suæficient aod independent evidence to supp/rt and coròmborate it. An the statement, the appglla.t qu-te clmarly staues"that she had killed0the deceaseL as rewenge egEinst the decmcsed–s mother Pw3) on s5spicign0of witchcraft. It is therEforg87quite`clear tiaT on thd baqis4of tHe cauti/ned statement in which the cxpellant seus out in detiil the motive "ehind the0murder of the0dece`sed&qs sell(qs t`e co.duãt of the appellant émmddiatelù prior and qfteR the incideot thå"urial budge`cnjcluded that 0he appanlaot was sane at the commissioN of vhe offeìce. We"are sauisfiem that the learned jt`ge sufficien|ly, anaìyzed an$ addòescEd himseìf on the law and evifence relatinf vk the defence of insan)tx shen`i% c□îcludeä$by saying ‘all this 3õçgests!that she iust have known`vhat87what!she did gas wro.g’.

(i) THe suímar} of the above case are:-IfsaNyty$within87the conuext oæ s.!3 of the PEnal Cofe is a quåspyoj of fact that whiCh could be inferred from the ãArawmst`nces of the CaSe87and vhe conduct of the person át the material timm?-Courts are not bould µo accept meämcal expert’s efidenae, )f 4heRe aru good!re`so.s for not! doing so?

(ii) As ôhelaw stands in Tanzeoia, though the appel,ant may well have been!undeR diminañhmd responsibilIty, no distinction could be made in tevms$of criiinal ruSponsibility, there Is nded to update t`e la÷0in this field.

9.6.1 Diseasd od]ind

ThE aacqsEd must show!txau he waS suffering fvoM a disUase of the mhnd (in |he lefal sense og thet term) when he äid the prohibiteä acv. Uhå disease must be gf the mind: it neeD not be Of88the brain. $The meaîIng of diseqse of mind wáS expleined by the Houce kf **Lopds in Sullitan V.R**.[27]$ Lord Äiplock,$where the view |aken in previous gases was evdorsed. Lord`T)plocK with whosm speech the res4 Of tieir Lordships agreed stated th88law$as follows.“Mind if phe M’naghtwn R4leR is use$ il the oreiniry sense of the mental &aculTies f ruasoning, memory and`uod%rsta.diîg. If the enfáct of the diseAse88is0to impair these facultig3….. it íeters not whether$t`e aetiolooy (i.E. assiglmeft of the catqe+88of the impairment0is"organia,$as epilepsy (-r arteriosclerosiu) or func|ional, ir whcthur the impairmånt itwelf is pesManenT or és transiejv `n$ intermkttent provided kt subsiqtmd at the time¤of ôhe commisSion o6 the acT.”

Po this one lay add tèat it is irrelevajt(wh}t`er vhe coldition of the eind is curajle or incuòable. The diqtinctiOn betweel"mdntal impairmunt0due0tg disease$and mg~pam émp!iRme.t not due to dmsease is now estaBlishad as being be|ween antgrNal and exteZnal$bauses. F/r the mental impairment to be due to tiseasE, the immetiatg cause of(the impairmen| must be!i.tepnal!to!the accused. A malfunctiofing of the Min$ ïf tran{itor{ ebfect88caused by the epplicatioo to the!bodù of some"ex4ern!l€faator stch as viole~ce, drugs, including(anes4hetics

[27] Sullivan V.R.(1983) 2 All ER 673 at 677

alcohod cnd hypnotic influences Ca.not fñirly be sait"to be fuE to disuase and does not consdituve a disease oF uhe oi.d.

The same iq true herg a Woman suFferq a stite of dirsociáted"resulting (ac post traumaTic Wtress`disoräer) from beilg rcped, os"wieûe a diab%4ic wjo get30into a hypoenycae-ic coma as a result`of fciling to takm food!After taking insulin és dud to(An dxternel factor).890It"woule be different if a diàbeuic failed to take his mnsulin!aîd got$into hyperglycáemic coma as restlt, becaure it would be the di!jutes ktSdlf (iN|ernal factïrs),$which WOuld have"saused tde coma.` Thí`DisTincTion which the law draws, between hyzoglycáemic$(not dIsease of t(m mind) and h}purglYcaemia (`hsease of$tHu`mind) is not easy tO"$efmn$. Why a0distincfion should bg Dragn betwe%N a diabetiC who ggts ynto2a hypogl{cammic0soma As a Result nd taking too ouchbinswìin or æailing tg eau a idåquatelq afver taking the correct dou389and a liabetic whm gets ijto a hyperg|ycagmic coma as a result of not taking insulin?

In Kemp,[28] the accused was charged with causing grievous bodily harm to his wife by striking her with a hammer. It was accepted that at the time of the act the accused was suffering from arteriosclerosis and that he did not know what he was doing that he did not know the nature and quality of his act. One Doctor was called by the prosecution, gave as his opinion that this was due to melancholia, a disease of the mind, which was induced by the disease of arteriosclerosis. Two other doctors, one called by that prosecution and the other by the defence gave as their opinions that whereas arteriosclerosis can cause degeneration of the brain cells which

[28] Kemp (1957) IQB 399 – (1956)3 All ER 249

would in time amount to disease of mind, in the present case that stage had not been reached, and that at the time when he committed that act the accused suffered from a congestion of blood in the brain (due to the arteriosclerosis) which caused a temporary loss of consciousness as a result of which he acted irrationanly(and irresponSibi¬ity. It(Was ðhmrefore submitted by the defence t(`t altho}gh txe acc5sed did no| koow1the nature and suality kf his act hg was not,(there&ore insane within the tust daid down in"**O'nAghtEr ca3e**.[3;]

Devlin J3 holding:

> The!mai. objgct in my jUdgmeNu,$waq that it shoedd âe decided whutherp5heve!7as(defg#t f 2eason whic` h`d been caused ây á`dasease adfectino the mInä: if it were so Deãided, Then90there w_uld be insanity within the -eaning of **'Fagh| en's(case**.[30]

The jardening {f the arturyes is a diseice why#h90is sho÷n o. the evidence tg he caðable mf"afbecting the mind in sush a way as(to caUse a!d%wect, temprarily or `ermanEntly of`its(seasonilg and uneerstanding And is tdis a disease of The mind ithin þhe meanilg(of 4he ry,e.

Thés(positign was f}2déer reilfor#ed in Ea3t African case; ;iN **Dadeo Oyee S/o Duru .V.R.**[31] The appedlant!if this caqe was knvicted of -erder by thg high"couòt* At thm t2ial evhdmNce was given that the appel|ant waq(a hhgh grade mentcl defecvive, but!medical witness was unable to suggest any disease of the mind from which the

[329] Suppra
[30] Suppra
[31] Tadeo Oyee s/o Duru V.R (1959) EA 407

appellant was suffering. The trial judge rejected the defence of insanity holding that this defence was not open to the accused because s. of the Penal code (s.13 of Tanzania Penal Code) uses the words "he is through any disease affecting his mind in capable of understanding what he is doing…"

On appeal it was argued that the appellant was at the time of the incident a high grade mental defective, and for this reason and also because he had some drinks when he attacked the deceased, he was incapable of knowing that what he was doing was wrong. It was held that, high grade mental defective may be a disease affecting the mind within section (s.13 of the Tanzania Penal Code)

In R.V. Thomson s/o Msomali,[32] the accused, who was subject to epileptic fit slept in the same house as his father so that he could be taken care of if a fit came on. On the night in question he was found by his mother and others outside the house, standing by the dead body of his father with a heavy stick along side. He told his mother that he had killed a thief. While under observation in hospital after the killing he suffered three epileptic fits, remaining in a confused state for about two hours, after which medical evidence was given that the accused could not at the time of the killing have been able to appreciate the nature of his act. After examining the evidence and the accused, by reason of the disease affecting his mind was unable to understand what he was doing and that he ought not to have done the act. As a consequence the court found him guilty but insane.

9.6.2 Diminished responsibility

[32] R.V. Thomson s/o Msomali (1969) HCD 26

Though there may be cases falling under this field, the law in Tanzania with regard to this field has not been updated

At common law ‘diminished responsibility’ is a defence available in respect of murder charges only. The burden of proof is on the defence which must show that the defendant was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing’.

The defence is wider than that of insane and covers other mental conditions. In fact the defendant may know what he is doing and that it is wrong. His alleged problem is that he finds it substantially more difficult to control his actions than would a normal person, and this difficulty is caused bx some `bnormality of his mind.

A killin' arising from drinking or drugs is not covered because; these conditions do not come within ‘disease /r)njury’. However the taking of excessive drink or drugs over a period have in effects, cau3ed mental disease, then"the defence has been applied.

In R.V. Tandy, thd Timas, Lind! Mary Tandy[33] was an alc/hol)c who drank nineteenths of a bottle of Vodka over part of ! day and then strangled her daughter aged eleven years. They had a good relationship over the years. She was convicted of murder. The defenca of diminished responsibility was not available. Her drinking was not involuntary, She had the Vg$ja oj Monday but had not started to drink i4 until the W%dnesday of the killing& Her firqt

[33] R.V.Tandy, The Times,23 Dec.1987

drink was not involu.tary"even if later `rinking was. This amounted to voluntary dr)nking a.d could amou.t to a dis%ase of the mind as diminished responsibility reqqired.

However in **R.V. Cit4ins**,[34] thd position was different. In this case Gittans iilled his wife ajd raped and killed his step – daughter while suffering from depression and the effects of drinking and drugs. He was charged with murder and convicted. He then appealed to the court of appeal. His conviction for murder was reduced to manslaughter on the ground of diminished responsibility. The court was careful to point out that normally the taking of drink or drugs would not amount to diminished responsibility but where other elements were present, such as the mental state of depression in this case which night have been brought on by an extended period of drink and drugs, nevertheless it remained an abnormality of the mind whatever its source and, provided, it existed, could be a ground for reducing murder to manslaughter on the grounds of diminished responsibility.

Comment

Presumably in the absence of a medically certified mental state of depression the defendant would not have had the defence of diminished responsibility merely because he was under the influence of drink and drugs at the time.

Other references

- Mbeluke V.R.(1971) HCD No.386
- Agnes Liund V.R. (1980) TLR 46
- Abel Hild V.R. (1993) TLR 246
- Kemp (1956) All ER 249 (1957) IQB 399

[34] R.V. Gittins (1984) 3 All E.R.252

9.7 Intoxication

Intoxication as the word implies, is a state produced by taking in, alcohol, drugs or any narcotic substances. The impact of these stuffs may be realized on the person's failure of restraints and inhibitions necessary to govern his body and conduct. The more one takes in these stuffs the more he expects weaker and weaker restraints and inhibitions, and the result is, the degree of perception and judgment of things is impaired. That is the state of perception and judgment is affected. What happens, then in such circumstances, is that one would find himself, doing things which had he been sober would not do. However intoxication can be said, the reason why the accused is said to lack mens rea of crime charged.

Intoxication as such, which may influence an accused person into commission of an offence is not a defence to such effect.
Section 14(1) of the Penal Code provides:

> save as provided in this section intoxication shall not constitute a defence to any criminal charge.

This section implies that one should not rely on intoxication in respect of his conduct which would otherwise constitute an offence, unless it is proved that at the time of the act or omission, the accused person did not know what he was doing was wrong. For this reason intoxication is taken as a defence only in certain circumstances. Section 14(2) of the Penal Code provides that;

> Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omissioned complained of did not know what he was doing and,

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person.

(b) the person charged was by reason of intoxication insane temporarily or otherwise, at the time of such act or omission

Section 14(2)(a) therefore distinguishes between voluntary and involuntary intoxication. Under the heading therefore, intoxication voluntarily induced can not be subject to a defence. This is taken so, because, an accused person in certain circumstances, may, with a premeditated plan to commit a crime, go on drinking in abid to gain courage i.e. "Dutch courage" before committing it. In such circumstances the accused person may not avail himself with the defence on the ground of intoxication as he had the intent of committing the crime before he went on drinking.

However, section 14(4) of the Penal Code can be construed to mean, intoxication whether voluntarily or involuntarily induced, a factor to determine whether the accused person had formed any intention, specific or otherwise.

Onyiuke, J; in **R.V. Richard Hiyari**,[35] stated:-

Intoxication takes various forms. It may lead to total incapacity amounting to temporary insanity or it may create a condition which induces extraordinary violence and in this connection it may become relevant in determining whether a person in such a condition is capable of forming a specific intention…..

[35] Suppra

In A.G. For Northen Ireland V. Gellagher[36] in this case the fact that the accused was intoxicated at the time he killed the deceased was taken into account in determining whether the killing was pre meditated or not. The accused was convicted of murder on the ground that the killing was pre meditated. The accused was not insane when he made up his mind as he did before drinking whisky to kill his wife.

What can be gathered from this case is that a psychopath, who goes out intending to kill, can not escape the consequences by making himself drunk before doing it.

Therefore where drunk ness is induced with an intention to commit crime, one can not rely on his self induced drunkness. The wickedness of his mind before he drunk is enough to condemn him coupled with the act which he intended to do and did do.

In DPP V. Beard[37] The appellant ravished a girl of thirteen years and when she struggled to escape from him he placed his hand upon her mouth and his thumb on her throat, thereby causing death by suffocation. The sole defence was a plea of drunk ness. He was convicted of murder and the court of criminal appeal substituted a verdict of manslaughter on the ground that it was not proved that the appellant was capable of knowing what he was doing was dangerous. The House of Lords restored the conviction as Beard had not been so drunk as to be incapable of forming the intention to have sexual intercourse with the girl without her consent.

[36] A.G. For Northern Ireland V.Gellagher (1961) 5 Crim App.316
[37] DPP V. Beard (1920) A.C.479

The position in Tanzania a is manifested in the following case laws:-

In R.V. Stephans Alois,[38] the accused was charged with murder in that he fatally stabbed the deceased with a dagger on Sunday the 17th October 1971 in the premises of one Mohamed Chorogo. There was a mass circumcision of the boys in the village and many people gathered at the house to celebrate the occasion. There was plenty of free drinks and people helped themselves liberally to the Pombe. Among the guests were the deceased and the accused, who came into confrontation with each other after a quarrel had erupted over the Pombe, consequently the accused stabbed the deceased who died of shock and severe hemorrhage as a result of the injury on the 4th day of the incident.

It was established during the trial that the accused drank a lot of Pombe at the ceremony and that he was drunk. There was evidence that the accused had no previous ill will against the accused. There was no motive for the killing, although motive is not an ingredient of the defence of murder but its presence however, tends to strengthen the prosecution case just as its absence tends to weaken it.

The court was satisfied that the accused took more Pombe than he could cope with and that he acted in such reckless and wanton manner because he was acting under the influence of intoxication and that he did not intend to kill or cause grievous bodly harm to the deceased. Thus he was convicted of manslaughter rather than murder.

[38] R.V. Stephano Alois (1972) HCD 199

This seems to have been the court's views in **R.V. Michael Chibing'ati**,[39] where it was stated:

In the instant case the accused claimed to have got drunk after drinking Kangara brewed out of honey from 1 P.M until night and there was sufficient corroborative evidence which enabled the court to find without hesitation that the accused was drunk at the time though he was not insane in the legal sense.

Considering his degree of intoxication the accused had reasonable ground to believe that his brothers were about to attack him and or his family, a believe which entitled him to rely on the defence of self defence based on mistake of fact. Following these findings the accused was found guilty of manslaughter.

In addition to the application of section 14(4) of the Penal Code, motive, and other surrounding circumstances of the case and the conduct of the accused person at the material time should be taken into account.

Other references:

- R.V. Nyode Wopera (1948)15 EACA145
- R.V. Stanslaus (1969) HCD 32
- R.V. Pawson simbacungile (1967)HD 71
- R.V. Lipman (1969) 3 All ER 140
- Kahekea Buzoya & Others V.R. (1996) LRT 16
- RV. Magoma (1971) HCD 44

9.8 Immature age

[39] Suppra

For the purposes of criminal law under the **Sexual Offences and Special Provisions Act**[40] immature age takes the group of children under 10, of and above 10 but below 12 years. This group of persons is regarded to be incapable of committing crimes. Due to their tender age, there is a presumption in the legal circles (Cr. Law) that they cannot form intention necessary for the commission of a crime. They are for this reason, referred to as "doli incapax", it is again for the same reason that the law tends to protect this group from the rigours of the criminal law administration.

Section 15 of the Penal Code as repealed and replaced by section 4 of the Sexual Offences Special Provisions Act, categorizes this group in the following:-

(i) A person under 10 years of age,

(ii) A person of and above the age of 10 but below 12 years,

(iii) A male person under 12 years of age in respect to sexual offences only.

Section 15 of the Penal Code as amended by the said Act provides;

> 5(1) A persons under the age of ten years is not criminally responsible for an act or omission.

This rule is conclusive, for no evidence is required, to prove otherwise; once it is proved that the person in question is of the age below ten. It is irrebutable presumption that no Child under that age (i.e.10) can be guilty of an offence.

> 15(2) A person of the age under 12 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission. He had capacity to know that he ought not to do the act or make the omission.

[40] Act No.4 of 1998

> " 15(3) A male person under the age of twelve years is presumed to be incapable of sexual intercourse".

It follows from this subsection (i.e. s.15(3)) that where the offence is one of rape or un natural offence and in each case the accused person is a person of the age below twelve years, then there will be no commission of such offences on the ground that the accused person is presumed to be incapable of sexual intercourse.

A common line drawn at common law with regard to liability of minors, is that those under ten years are presumed to be incapable of any criminal offence and the presumption is irrebuttable (children and young persons Act,1963 s.16). Those between ten and fourteen years, the presumption which is wholly dependent on the common law is that a minor is incapable of forming a guilty intent, but this can be rebutted by proving 'mischievous discretion', that is knowledge that what was done was morally wrong. Evidence as to this must be before the court before a conviction can properly be made. This position was clearly demonstrated in the case of:

H.V. Chief Constable of South Wales, The Times,[41] a boy aged ten was convicted of murder on evidence which showed that, after he killed a five years old girl, he concealed the body and then told lies about what had happened.

Likewise in McCV.Runeckles, The Times,[42] a girl of 13 years was convicted of assault occasioning actual bodly harm c/s 47 of the offences against the person Act, 1861, she stabbed another girl with a broken milk bottle and ran away when police officers arrived. She hid

[41] H.V. Chief Constable of South Wales The Times, 5 July 1986 Thus in York (1748) East.70 CC.R
[42] MCCV Runeckles, The times, 5 May 1984,

in a garden where she was apprehended. These acts indicated to the court that she knew that what she had done had gone beyond childish mischievous.

In I V. DPP,[43] a boy aged ten took some items from an ambulance which was parked in hospital grounds. He threw a first aid box over a wall and climbed over the wall. He was caught in possession of the box and said to the police, 'it aint nothing to do with me, I didn't steal it.' He was convicted of theft and it was held that he knew what he was doing so that his conviction was affirmed. The boy had indicated by his words that he knew about theft and that it was wrong.

In Tanzanian case of **R.V. Makeja s/o Mashauri**,[44] The accused was charged with unlawful causing the death of one **Kunyali s/o Minunga c/s 195** of the Penal Code. The accused and deceased both were young boys aged 11 and 10 respectively at the time of the incident. It was held that as the accused is under the age of 12 years it was necessary for the prosecution to prove not only that he committed an unlawful act but at the time he had capacity to know that he ought not to do the unlawful act.

9.9 Judicial Officers

Judicial officers are protected from criminal proceedings in respect of their acts or omission which would cause injuries to the other parties in judicial proceedings, if in so doing they honestly believed and in good faith were acting within their jurisdiction.
Section 16 of the Penal Code to that effect provides that:-

[43] I V. DPP (1980) Crim.L.R. 498
[44] R.V. Makeja s/o Mashauri (1959) HCD 220

> Save as is expressly provided by this code, no act or thing done or omitted to be done by a judicial officer shall, if the act or omission was done or omitted bonafide in the exercise of his judicial function, render such judicial officer criminally liable for such act or omission.

In Said Bakar V.R,[45] the accused was a divisional executive in charge of a self help scheme. In his capacity as justice of peace he issued a warrant for the arrest of the complainant on a charge of obstructing the project c/s 89 C (1) of the Penal Code after the complainant had refused to participate in the self help scheme. The accused accompanied by a special constable arrested and hand cuffed the complainant. He and the constable fled when the complainant's uncle threatened them with a spear but the hand cuff was not remove for some hours. The appellant was charged and convicted by a lower court under section 253 of the Penal Code. He appealed to the High Court. The High Court held that the trial court erred in trying to consider whether the accused believed in good faith that he was acting within his jurisdiction as justice of peace. His appeal was allowed.

In another development, **Mzee Seleman V.R**,[46] the complainant went to the accused house (division executive officer) to seek a permit to hold a ngoma. When the accused replied that no such permits were available the complainant apologized for bothering him. At this point the accused rebutted the complainant for interrupting a Bwana Mkubwa and ordered a clerk to arrest the complainant, no arrest warrant was used. The complainant was charged for disobeying a

[45] Said Baker V.R.(1969) HCD 443
[46] Mzee Seleman V.R. (1968) HCD 60

lawful order under section 124 of the Penal Code and was released on bail after being detained for about a short period. The charge against the complainant was latter dropped. The accused was latter charged with wrongful confinement c/s 253 of the Penal Code and abuse of office c/s 96 of the Penal Code.

In defence the accused argued that because he was ex- officio justice of peace he was immune under section 16 of the Penal Code.
On appeal the court held that:

(1) The immunity of the judicial officers extends only to this actions taken by

the officers in the performance by the officers in the performance of

judicial function.

(2) Although the issuance of a warrant of arrest has been held to be judicial

function, the arrest of a person without a warrant for an offence allegedly

committed within the officer's view does not consti4ut% a jud)cial function.

(3) S%ction 124 of the Penal Code presupposes the existence of a lawful order

and since no order was made by the accused the arrest of the complainant

was unlawful.

¤(4) µhe acctsed knew that the arrest was wrongful arbitrary and prejudicial to

the complainant. The appeal w!s dismissed.

10 C/mpulsion

Compulsion tnder thiq 3ubjecp and fo2 the purp/ses of criminal law, means and includas a forceful iftimidation or threats of immediate deadh or a serious physical personal injury or violence proceedangs from 'n% person to afother in such a way that, that oth%r person to whom such forceful antimidation, threats kf)mmediate death, or seriouc phys!cal personal injwry or viol%nce is directed, is unabhd to /ver bear and nver coie the said such circumstances and consequently forced to do an ac4 or make an omission constituting an obfence. Thd person in question is in fact faced with two si4u`tio.s both of which are evils; that is shall he break the criminal law or submit him self to the infliction of some evil on himself or on another?

Compulsion is a defence, made available under section 17 of the Penal Code. That section provides:-

> A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodly harm, if he refuses, but threats of future injury do not excuse any offence.

10.1 Application of compulsion as a defence

Compulsion as a defence is applied in the following circumstances:
It must be shown that the accused together with another person or person did commit the offence charged with if the accused person committee the offence alone he can not plead the defence of compulsion in the absence of evidence to the effect that there was another person exercising threats on him.

Secondly, it must be shown that the accused person was at the time, under threats of instantly being killed or being grievously injured in case he refuses to commit the crime with which he is charged. On the other hand if the threats to the accused were not directed at causing immediate death or grievous bodly harm or if the threats to kill or cause grievous bodly harm were directed to another person than the accused, the defence of compulsion cannot help him in any way. Furthermore threats of future injury will not excuse any offence.

Thirdly, for the accused person to be entitled to the defence of compulsion the accused must show that the threats directed to him continued to operate through out the time of the commission of the offence.

In R.V.Joasiah.[47] The facts of this case were that, the appellant and the deceased had gone for fishing in a canoe. At the river bank they met or came across a hippo and because of terror both of them fell into the river. The appellant managed to swim ashore but the deceased could not do so. The appellant went to tell Yeronimo, of the incident and there upon Yeronimo decided that the deceased should be killed and his property taken over. The appellant led Yeronimo where the deceased was (he was still alive) and Yeronimo threatened to kill the appellant if he didn't kill the deceased. Yeronimo handed a panga to the appellant and the appellant cut the deceased several times. Later the appellant and Yeronimo shared out the property of the deceased.

[47] R.V. Josiah (1972) HCD n.60

The trial court held that the alleged threats against the appellant were not present at all the time, they ceased to exist when Yeronimo handed the Panga to the appellant for the purpose of killing the deceased.

Other references:

- R.V. Hudson (1971) 2 All E.R.244
- Lynch V.DPP (1975) All E.R 113

11. Compulsion by husband

The law regarding offences committed by wives under the compulsion of their husbands originated from the common law of England. At common law, that appears to have been a presumption of law that a wife who committed a criminal offence in the presence of her husband, was acting under the compulsion of her husband. This was however only a prima facie presumption rebuttable by proof that the wife took an active part in the criminal act and that she acted independently of her husband.

In 1925, however, the presumption was abolished by criminal justice Act, s.47; Any presumption of law that an offence committed by a wife in the presence of her husband is committee under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of , and under the coercion of the husband."

In Tanzania the position has also changed with the introduction of the miscellaneous Amendment Act. No.2 which amended s.20 of the

Tanzania Penal Code. Section 20 of the Tanzania Penal Code, reads as follows:-

> A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes peace in the presence of her husband. But on a charge against a wife for any offence other than treason or murders, it shall be a good defence to prove that the offence was committed in the presence of , and under the coercion of her husband.

It follows from the above provisions that a married woman has a defence of compulsion by her husband if the offence she is charged with is:-

(i) Any offence other than murder or treason
(ii) Committed in the presence of her husband, and
(iii) Is committed under his coercion

It is not exactly known what coercive acts on the part of the husband should constitute compulsion, but acts such as instantly causing serious physical injury or endangering the health of the accused person must be taken into consideration to accommodate compulsion as a defence in the circumstances. Any act of future injury, or of endangering the health of the accused person will not amount to compulsion, for the accused person may have the opportunity of evading such threats and in this circumstance the accused person can not be claimed to have been operating under compulsion and in the presence of her husband.

12. Defence of Person or Property

The law under section 18 of the Penal Code extends to an individual the right of self defence, the defence of another or the defence of property whether be it in his lawful possession, custody or under his care or the property of any other person. This right is only relevant and applicable in case of any unlawful act of seizure or destruction or personal violence proceeding on the part of another person (s).

The law, however, does not extend such right absolutely, for a person is entitled only to use such reasonable force and to take such measures as may be necessary for that defence, having in mind the nature of the assault. For this reason a person is not excused from criminal liability, for any offence committed by him as a result of excessive force used in such self defence, or in defence of another or property. And if he causes death in such circumstances he shall be guilty of manslaughter (s.18 B (1),(2) & (3) of the Penal Code).

At common law a distinction was made and still is drawn between a felonious attack and a non felonious attack. A felonious attack is where the attacker intends to kill or cause grievous harm as in case of a rapist attacking his victim. If a felonious attack is made on a man, he has a legal right to stand his ground and resist, and if he kills his assailant the homicide will be justifiable, provided the measure of resistance which he takes are reasonable in the circumstances. But if the attack is not felonious then the person attacked must if necessary and safely possible retract and must not use force against a person unless he is placed in such a position that he cannot other wise evade the attack. It used to be said that a person must flee until he is driven to the wall.

Such distinction is not clearly made under Tanzania law, however, under section 18(c) (1) of the Penal Code, such stand seems to be adopted, when the right of defence extends to causing death in circumstances where the unlawful act on the part of another person is of such a nature as may reasonably cause an apprehension that the death or grievous harm to the body of another should be the occurrence of that unlawful act or where the intention is to commit rape, abduction, kidnapping or in cases of robbery, burglary, arson or any offence endangering life or property, if the victim acts in good faith and with honest belief based on reasonable grounds that his act is necessary for the preservation of his own life or limb or the life or limb of another or of property.

A demonstrative case in this connection was that of **Manzi Mengi V.R**.[48] In this case, the appellant found cattle on his shamba being tended by two children who said that the deceased had told them to bring the cattle there. The appellant drove away the cattle and went to fetch a panga to repair the fence. On his return he found the cattle there again and the children told him that they had brought the cattle back on the deceased's instruction The appellant again drove away the cattle and while he was repairing the fence the deceased appeared armed with a bow and arrows and after abusing the appellant, threatened to kill him. He then fired an arrow at the appellant but missed. The appellant then told the deceased not to kill him and the deceased replied" I am going to kill you" the deceased then crossed the fence and entered the shamba and struck the appellant twice with the bow and tried to stab the appellant with the arrows where upon the appellant struck the deceased repeatedly with the panga as a result of which the deceased died.

[48] Manzi Mengi V.R.(1964) EA 289

During the trial for murder he pleaded self defence. The trial judge found that the appellant used excessive force in defending himself and convicted him of manslaughter but on appeal it was held that he rightly defended himself to save his life. His appeal were allowed.

In another case of **R.V. Mohamed**.[49] The application of this case in defence of property is shown. In this case three accused persons who were watchmen were charged with murder. On the date in question an unknown number of thieves including the deceased came to steal corrugated iron sheets from a house which the accused persons were guarding. The deceased himself broke into the house through the window. The first accused person Mohamed Ndowe, tried to throw at the deceased, a club which the thieves had come with. Then the deceased came at him with a bill hook which he had at that time, and the first accused struck the bill hook with a club but the club was broken. The second and third accused helped the first accused and they tired to struck the billhook with clubs but these too were also broken. It was then that the thief fell down and the accused persons held the bill hook and struck the deceased with it. The accused persons heard a bullet shot which was fired by the other thieves who had come with the deceased, and they, the accused ran off into the bush. While finding the accused person not guilty the court *inter alia* stated:-

> ….. None of the accused used more force than was necessary in law, and they were doing so in defence of their lives and their employer's property.

[49] R.V. Mohamed Ndowe (1970) HCD 211

The position was different in the case of **Said s/o Abdallah V.R.**[50] In this case the complainant slapped the second accused who was his niece and adult hard enough that she fell down. There upon the niece picked up a large pestle and started hitting the complainant with it. The first accused immediately joined the fray on the side of the niece. The injury to the complainant was superficial mainly a few lacerations and a abrasions. The accused were convicted for assault and sentenced to eight months imprisonment each. On appeal to the High Court, it was held that even though this quarrel was initiated by the complainant, the accused persons were not justified in retaliating as they did. In other words, they used excessive force in the circumstances.

In a situation where the unlawful act on the part of another person is with the intention to commit rape or defilement, the case of **R.V. Nyakao**[51] is of utmost importance. In this case the deceased an old man of 60 years old entered the house of his son, the husband of the accused, where the accused (a woman) was sleeping convalescing from a T.B attack. The accused was suddenly awakened to find the deceased lying between her legs, his trouser stripped down to his feet trying to have sexual intercourse with her. When she refused to have sexual intercourse with him, he tried to throttle her, to stop her from shouting for help, where upon accused jumped out of bed picked up a panga and cut the deceased several times on the head and arms. The deceased died from these wounds.

The court held that the accused had right to defend her chastity and the right to defend her life when the deceased tried to throttle her in

[50] Said s/o Abdallah V.R.(1967) HCD.266
[51] R.V. Nyakao (1970) HCD no.344

a bid to over come her and be able to ravish her, as a consequence the accused was acquitted.

Other references;-

- Ilapala Ibrahim V.R 20 EACA 300
- Mengi V.R. (1964) EA 280
- Marwa Robi V.R. (1950) EA 660
- Uganda V.Muherwa (1972) EA 44
- Mohamed Ally V.R.(1969) HCD 54
- Daud Sagaya V.R. (1995) TLR 148

12. Use of force in effecting arrest

The law entitles any one to use force in effecting arrest of any person who has committed an offence, or is committing or is about to commit an offence. However, such force required for the apprehension of such person must be reasonable taking into consideration the gravity of the offence committed, or being committed or which is about to be committed together with all circumstances under which such offence was committed, being committed or about to be committed.

This requirement of the use of reasonable force in the exercise of effecting arrest aims at ensuring diligence and care in that course is made to preserve health, safety and the life of the person so apprehended.

To this effect section 19 of the Penal Code provides that:-

> " Where any person is charged with a criminal offence arising out of the arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested,

> the court shall, in considering whether the means used were necessary or the degree of force used was reasonable for the apprehension of such person, have regard to the gravity of the offence which had been, or was being, committed by such person and the circumstances in which such offence had been, or was being, committee by such person."

It is an obvious fact, from the above provisions, that a person will be entitled to a defence from a criminal liability of an offence, say causing grievous bodly harm or death, arising from arrest by him of a person, if in the court's view, the means used by him were necessary or the degree of force used was reasonable for the apprehension of such person with regard to the gravity of the offence and the circumstance under which it was committed by such person.

It will not be reasonable in this connection, say for a police officer in the course of effecting arrest to shoot and kill an unarmed person who attempts to evade his arrest for the offence of selling goods with out licence. or where such force is arbitrarily used to a submissive person.[52]

In Muhidin s/o Asuman V.R.[53] the court was of the view that "the gravity of the offence the deceased was suspected of having committed must be taken into account when considering whether the means used by the accused in his attempt to arrest the deceased were in the circumstances necessary.

[52] The criminal procedre Act, Act No.9 of 1985, s.11 (1) & (2) provides for the mode of effecting arrest, however under s.12, of the same Act, limits the officer effecting arrest to unnecessary use of restraints against the person arrested.
[53] Muhidin s/o Asuman V.R.(1962) E.A.383

In this case the appellant had been convicted by her Majesty's high court of Tanganyika of murder. Using a panga he had stabbed to death a fourteen year old boy who was found together with two other boys in the maize shamba in such a manner as to lead one to believe that they had been stealing maize in the shamba. After quoting section 19 of the Penal Code (which is similar to s.11 of The Criminal Procedure Act 1985) the court of appeal for Eastern Africa said:

> There can be no doubt here and the crown counsel conceded that, the persons running towards him had committed a felony. It must be therefore considered, under section 19 of the Penal Code, whether the degree of force used was reasonable in the circumstances for the purpose of apprehension of the deceased taking into account the gravity of the offence believed to have been committed.

It is obvious that this rule will not apply as a defence to an accused person if the court is of the satisfaction that the means used by the accused making apprehension and which resulted in the harm of the person apprehended were unnecessary and the degree of force thereof in the circumstances was unreasonable in relation to the offence committed.

In R.V. PC Jones Wambura,[54] Samatta AG.J. (as he then was) stated:-

> ….. I am of the settled view that the accused is protected by the provisions of the Criminal Procedure Code and Penal Code…. It follows that I gree with the view expressed by 2nd , Assessor that the degree of force which the accused used was not excessive in

[54] R.V. PC Jones Wambura (1978) LRT 52

the circumstances. I find the accused person not guilty and acquit him accordingly.

13 Person not to be punished twice for the same offence

Section 21 of the Penal Code provides that:

> A person shall not be punished twice either under the provisions of this code or under the provisions of any other law for the same offence.

For a person to avail himself of a defence under this section he must show that he was tried by a competent court with competent jurisdiction under the same provisions of the law. It must be added that the verdict must be binding and conclusive in all subsequent proceeding between the parties to the adjudication.

The points to be looked for are:-

(a) Was the prisoner in jeopardy in the first charge?

(b) Was there a final verdict?

(c) Was the previous charge substantially the same as the present one?

The prisoner can not have been in jeopardy if the charge was legally invalid for no conviction upon it would have been (entered) effective.

If he defends (e.g. charged in a wrong court) or by getting it quashed he will still remain liable to be charged again on the same charge. But a conviction quashed on appeal becomes an acquittal. It is necessary that verdict should actually have been given.

There are difficulties in determining whether the two charges are substantially identical. The test is not whether the act relied upon are the same in the two trials, but whether there has been an acquittal on an offence which is the same or practically then same as that charged in the subsequent charge.

OFFENCES AGAINST PROPERTY

14.1 INTRODUCTION:

The law relating to offences against property is provided under Division V of the Penal Code Cap.16 of the laws. The classification of the offences under this division is mainly centered on the problems of the means of acquisition, the necessary state of mind of an accused person and the nature of the property.

14.2 Theft

The offence of theft is covered under sections 257 –275 of the Penal Code. It is important to bear in mind that in any alleged offence, the facts surrounding it must be disclose all the necessary elements of the alleged offence. In theft, therefore, the prosecution is duty bound to ensure that all statutory ingredients constituting the offence of theft are present, if the charge of theft is to sustain. These ingredients can be deduced from the statutory definition of theft.

Section 28(1) of the Penal Code defines the offence of theft and in the process furnishes all important ingredients that make the offence of theft.

That section provides:

> A person who fraudulently and without claim of right takes any thing capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof any thing capable of being stolen, is said to steal that thing.

Section 254(1) has two specific definition of the offence of theft. In the first place the definition takes the following form:-

(i) A person who fraudulently and
(ii) Without claim of rights
(iii) Takes
(iv) Anything capable of being stolen

The second form extracted from section 258(1) of the Penal Code provides thus:

(i) A person who fraudulently and
(ii) Without claim of right
(iii) Converts to the use of any person other than the general or special owner thereof
(iv) Anything capable of being stolen,

Is said to steal the thing.

Those ingredients covered above constituting theft can be examined as follows

14.2.1 Things capable of being stolen

Unless the alleged stolen article is one which the criminal law regards as being capable of being stolen, the offence of theft can not be said to have been committed. Section 257 paragraph one describes things capable of being stolen. Paragraph one to that sections, therefore, provides:

> Every in animate thing whatever which is the property of any person and which is movable is capable of being stolen.

To constitute an item capable of being stolen, the elements extracted from the above definition must be full covered, that is the item in question:-

(i) Must be in animate – e.g. table, fan, chairs etc
(ii) Must be a property of somebody
(iii) Must be movable

14.2.1.1 Ownership

The question "must be a property of somebody", establishes in law what is ownership. A thing which has no owner can not in law be the subject of theft, and as such it lacks the quality of being capable of being stolen. It is therefore, important to establish that the thing stolen belonged to a person. For example, if 'A' picks up a discarded book, he can not be regarded in this circumstance to have stolen it , for the book, the subject matter of theft, has no owner, it belongs to no one ever since it was thrown away. And it is for this reason again that 'A' can not be said to be taking "something capable of being stolen".

The word 'owner' goes beyond the real, which is the legal owner. It covers situations where one has special property in it; e.g. a person entrusted with property by another.

From this observation then we have, "legal owner" or "special owner". Legal owner entails the general or real owner, and special owner implies interim owner or possessor. As far as theft is concerned, it is quite possible for a legal owner to steal from a special owner, that (is to say, it is possible for one to steal his own property so long as the elements constituting the offence of theft are established. For example: 'K' lends 'Y' his bicycle to 'Y', who parks it out side post officer building for posting expedition. 'K' later on quietly comes up and takes the bicycle and hides it. 'K' as a result asks 'Y' to pay for the lost bicycle. In this case 'K' as a legal owner will be liable for theft.

In English case of **Rose V.Matt**[1] it was held that an owner of goods who entrusts them to another person in such circumstances that the latter has a special property in them, is guilty of larceny (theft) if he fraudulently takes them away again.

The principle as laid down by this English case is also applicable in Tanzania, under section 258(1) of the Penal Code defining the offence of theft.

14.2.1.2 Movable

The quality of immovability imbedded in the 'things capable of being stolen.' Literally it means "displacement inherent naturally". That a thing may have. The general rule drawn from the definition of theft is

[1] Rose V.Matt (1951) 1 K.B.810

to the effect that immovable things like land, water and houses can not be stolen. This is to say they are fixed items and naturally they can not be displaced unless by extra physical force employment. However, there are exceptions to this general rule that immovable things like land, houses etc can not be stollen.

The second paragraph to s.257 of the Penal Code envisages the exceptions to the general rule in a situation where fixtures of an item which otherwise can not be moved, are made movable for purposes of stealing. This paragraph reads:

> Every in animate thing which is the property of any person and which is capable of being made movable is capable of being stolen as soon as it becomes movable.

The main components of the above definition are as follows:-

(i) Every in animate thing e.g. water, house, land electricity etc
(ii) The property of an person – (ownership)
(iii) Capable of being made movable
(iv) Becomes capable of being stolen as soon as it becomes movable

Situations covered in this instance, is when a person removes a door, window or roofs from a house in order to steal it. Such items are fixed to the house and therefore are immovable. A thief makes them movable for the sole purpose of stealing them, for example by physical removing a door and carrying it away for the purposes of stealing it.

It should be noted that the second paragraph to section 257 of the Penal Code also covers situations where other intangible things such

as water air, electricity etc are made movable for the purpose of a stealing. The general rule to this effect is that intangible things are not capable of being stolen but again this rule is subject to exceptions provided for under this paragraph (2nd para. S.257 PC). It is possible under this circumstance to make water (intangible thing) movable for the purpose of stealing it. This was illustrated in one important case of **R.V. Ndesario**[2] .....Where the accused person (Ndesario) was charged with theft c/s 265 of the Penal code and Malicious Damage to property c/s 362 (1) of the Penal Code. Ndesario was alleged to have stolen (water) from a furrow on the first count and to have willfully damaged the furrow on the second count.

The facts of all the case were; the accused had an agreement with the complainant there under, he (the accused) was allowed to draw water from a furrow which crossed the complainant's land. According to this agreement the accused person was only allowed to extract water between hours 6 a.m and 9 a.m. The accused was arraigned of having stolen water and breaking the furrow at night. Justice Platt, as he then was, held that so long as a fluid such as water could be sufficiently appropriate to the user it could be stolen and the accused had no right to extract water at any other than stipulated time. Justice Platt held that the accused person was therefore taking a movable object not belonging to him.

Like water electricity is also intangible and it can be stolen. In the case of electricity the same principle of appropriation apply. Electricity is not a tangible thing for the purposes of stealing. But the Penal Code clearly provides for a possibility of stealing electricity in section 283 of the Penal Code which provides:-

[2] R.V. Ndesario (1969) E.A.267

> any person who fraudulently abstracts or diverts to his own use or to the use of any other person any mechanical, illuminating or electrical power derived from any machine, apparatus or substance, the property of another person, is guilty of an offence.

Paragraphs third, fourth, fifth and sixth to section 257 of the Penal Code covers cases of domesticated animals like cattle, sheep, goats, dogs and tamed wild animals (like lions in cages), being moved away for the purposes of being stolen.

Third paragraph, for example provides that:

> Every tame animal, whether tame by nature or wild by nature and tamed, which is the property of any person, is capable of being stolen.

The seventh paragraph is to the effect that:-

> Wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen.

The phrase, “but their dead bodies are capable of being stolen” implies that the carcasses of any such creature can only be stealable if reduced into possession by another and so long as possession has not been subsequently been lost or abandoned, or if another person is in the course of reducing it into possession.

The last paragraph to section 257 of the code provides that:-

> “ Every thing produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.”

14.2.1.3. Must the thing stolen have any value?

The question of the value for the purpose of theft is not much counting to establish the offence of theft. What counts in this respect is whether there was 'fraudulent taking'. If the taking of a thing though to be valueless is motivated by 'fraudulence' then such an act will amount to stealing, meaning that the taker of the alleged valueless thing will still be liable for theft.

In R.V. Kambengwa,[3] the accused person was charged with theft by public servant c/s 265, 270 of the Penal Code. A bonnet stand was missing from the car and the accused person (kambengwa) was seen some days later using it as a walking stick. In mitigation he said that he thought that the bonnet stand had no value and decided to use it as a walking stick. On appeal it was held that it is irrelevant that the property taken may be of no value or that the owner may intend no further use of it.

What is important in so far as the value of the thing is concerned is the intention to deprive the owner of the thing. If one proves that the taking of the so called valueless thing was taken with fraudulent intention then in this circumstance the value is not important.

The question of fraudulent taking in the case of Kambengwa was considered to be more important than whether the thing stolen has an value.

14.2.2 Fraudulent taking /conversion of the thing

[3] R.V. Kambengwa (1968) HCD 333

Section 258 (1) of the Penal Code effects that taking or conversion of something capable of being stolen must be done fraudulently. For this reason subsection(2) of section 258 of the Penal Code identifies various, circumstances in which the 'taking' or ' conversion' if established will be deemed to have been done fraudulently. Fraudulence, therefore, is regarded to be present if the taker takes or converts with any of the following intents:

(a) An intent permanently to deprive the general or special owner of the thing of it, for example if, a person picks up a watercan from another's garden intending to use it for a while but all the same sells it, an intention to permanently deprive the owner of the watercan is obvious. Once the watercan is sold, the owner of it will be deprived of it permanently.

(b) An intent to use the thing as a pledge or security; An example in this instance, is when 'X' borrows a 277 radio brand from 'Y' intending to use it for two days, then after takes it to 'Z' as a security to secure loan from Z. if X fails to repay the loan, Z will be entitled to sell the radio and recover the loan, thus depriving Y of his radio.

(c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform.

This is when the person taking or converting the thing attaches conditions as to its return which the owner becomes unable to fulfill. This is to say the accused person may have failed to redeem the property pawned say for Tshs:10,000/= and now seeks to extend

liability to the owner in which case the owner likewise is unable to fulfill.

This paragraph is of the effect that if the accused person parts with the property, by pledging, pawning or otherwise under a condition as to its return which he knows he can perform then he would not be guilty of theft.

(d) An intent to deal with it in such a manner that it can not be returned in the condition in which it was at the time of the taking or conversion.

Suppose one borrows a car from another person, but his intention is to remove some of the spare parts from the car and replace them with old ones. In this scenario theft will be committed, as the return of the car to the owner would not be in the same condition in which it was before the taking or conversion.

(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

This provision is specifically meant to cover taking or converting of money. The provision emphasizes that the taking or converting, in the case of money however temporarily is fraudulent.

For example, a cashier working for a cooperative society takes some cash from the cash box knowing fully that he is going to refund the amount back in to the cash box the following hour.

The above example amounts to theft according to section 258(2)(e) of the Penal Code. Subsection 258 (2)(a) – (d) above do not cover money. But subsection (e) cover money which has been entrusted on

to another person, as in our example to a cashier of a cooperative society.

In the case of **Yusufu Salim Mkaly V.R.**[4] the accused was charged with stealing by servant c/s 265 and 270 of the Penal Code. It was alleged that, being a person employed by TANU as a Regional Executive Secretary, he stole Tsh:695 which came into his possession by virtue of his employment. Yusuf Mkaly had been given the money to pay for repair to a Land Rover at Peramiho Mission. Peramiho Catholic Father in charge of the garage had reused to take the money before proper estimate had been prepared for the probable cost repairs.

On his return to Songea Yusufu Mkaly received a message from TANU Head Quarter's authorizing him to travel to Morogoro to see his sick relative. As there was no superior officer at Songea he decided to use part of the vehicle's repair money to pay his fare home and while home he used more money. He later reported to TANU Head Quarters and informed the head accounts section. Mr. Mkaly was told by the accounts that deductions would be made from his salary. The deductions were actually made. Later on Mkaly was arrested, charged and convicted of stealing money which came into his possession as a servant. He appealed.

On appeal, CJ Georges, as he then was referred to a number of cases; like **R.Vs Cockburn**[5] **and R.V. William**[6] and held that theft must inevitably carry with it a connotation of fraud. The chief justice thought that it was incredible to suppose that if one is handed a

[4] Yusufu Salim Mkaly V.R. (1969) HCD 264
[5] R.Vs Cockburn (1968) 1 All E.R.466
[6] R.V.William (1953) W L R 937

Tshs:20/= note to take it somewhere and on the way uses it but all the same on arrival hands over a different Tshs:20/= note he should be held to have stolen the money unless, argued the Chief Justice, it is shown that a particular Tshs:20/= note had some intrinsic value.

The chief justice decided that there was no 'fraudulence' on the part of **Yusufu Mkaly** when he used the money originally meant for Land Rover repairs. The decision of the chief justice appears to be reading the word 'fraudulence' into strict wording of section 258(2) (e) thereby showing some leniency in construing the strict provision pertaining to taking / converting money held on trust.

14.2.3 Takes or Converts

Takes or converts is another ingredient as far as the offence of theft is concerned. Takes or converts is an important ingredient of the offence of theft. This constitutes **ACTUS REUS** of theft. To establish that theft has taken place, one must show that there was either the taking of something capable of being stolen or there was a conversion of something capable of being stolen.

There are two categories of conversion in criminal law;

(a) Fraudulent conversion

(b) Conversion not amounting to theft

14.2.3.1 Fraudulent conversion

In fraudulent conversion the taking of anything is at first lawful. But it is only later when an intention develops to deprive the owner permanently of the thing when it (conversion) becomes unlawful.

For example, if a person takes another person's property on borrowing terms, to inform him, that is the owner that his property has been stolen, while actually it was sold by him (the converter) amounts to permanently depriving the owner of the property.

- the act of borrowing in this instance was lawful
- when he sold it, that action aimed at permanently deprivation

14.2.3.2 Conversion not amounting to theft

This offence is governed under section 284 of the Penal Code. The offence is restricted to draught or riding animals, vehicles and vessels of various propellants.

This section provides:

> Any person who unlawfully and without colour of right, but not so as to be guilty of theft takes or converts to his use or to the use of any other person any draught or riding animal or any mechanically propelled cycle of any description or any vessel shall be guilty of an offence….

The late Justice Onyiuke, in the case of **Melick V.R**[7] had the following observations on conversion not amounting to theft.

> "If a person who initially was in lawful possession of his employer's vehicle, subsequently does an act in relation to it which is inconsistent with the owner's right, although without intent to deprive the owner permanently of the vehicle."

Conversion not amounting to theft, therefore lacks the desire to deprive the owner permanently, that is it lacks fraudulence. The important thing to note is that, one goes contrary to his employer's or

[7] Melick V.R. (1973) LRT no.12

owner's instructions in relation to the property envisaged in section 284 of the Penal Code. For example, X who is required to bring a car to a nearby garage for repairs and instead is found with the car some where else for his personal purposes, is said to have converted the same, but not in a manner as to constitute theft. For in the above example there is no intention whatsoever, on the part of X to permanently deprive the owner of the car but used the car without color of right for his personal purposes.

This position was illustrated in the case of **Leonix Odutu V.R.**[8] In this case the appellant who had borrowed a bicycle for a day disappeared with it for four months was convicted of theft. On appeal it was held that the bicycle was loaned hence the original taking was lawful and there was no subsequent overt act showing an intention permanently to deprive the owner thereof. However, since the bicycle was retained for four months when it was only lent for a day, the appellant unlawfully converted the bicycle for his own use. Hence the conviction for stealing under section 265 of the Penal Code was quashed and a conviction for minor offence of conversion not amounting to theft under section 284 of the Penal Code was substituted.

14.2.3.3 Taking

Is the 'actus reus' of theft and is technically known in criminal law as **ASPORTATION.** Taking or asportation may be actual or constructive. Actual taking or asportation involves physical taking of anything capable of being stolen. One's muscular movement is or in relation to the thing stolen must be physically seen. Whereas constructive taking or asportation may be made through an agent who

[8] Leonix Odutu V.R. (1970) HCD 32

may even be innocent, e.g. where 'X' tells his infant child to go and steal an orange from a tree. Here although 'X' did not do the act physically, nevertheless such taking or asportation of an orange done by an infant child is deemed to do so as by himself. The taking implies a bit of asportation i.e. must involve a movement of the thing stolen from its usual place.

Asportation in this sense, therefore, refers to the fact that the slightest removal of a thing will suffice and the crime is complete even though the thief abandon the thing at once, or subsequently changes his mind and return it. There may be a sufficient asportation even though part of the thing still occupies the place which some other part of it previously did. e.g. by half drawing a sword from its scabbard, pushing a bag part way out of the boot of a coach or pulling a pocket book not quite out of a man's pocket.

So in the same way there may be sufficient asportation if a thief were to lift an orange from a market stall with intent to steal but later on drops it when the owner looks on his way. This will amount either to stealing or an attempt to steal even though he has not actually carried away that orange. Or where a thief snatched an earring, the ring drops and is stuck in the victim's hair. There is taking, an asportation in this example.

Taking or asportation to constitute a crime of theft is emphasized in section 258(1, of the Penal Code where the word 'take' is deliberately used and in section 258(5) of the Penal Code where it was categorically stated that:-

> A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

A ‘movement’ or asportation or taking of the thing stolen as an aspect of theft was discussed in the case of **Mazengo Magale V.R**.[9] Mazengo was charged with two counts of cattle theft and criminal trespass. He was found guilty of attempted theft and convicted. Evidence was led to show that at 3 am in one morning, herdsmen were awakened by the sound of cattle being out side their usual bomas. They found out that the boma had been broken open and they spotted Mazengo and apprehended him, as he was about to flee.

The main issue on appeal by Mazengo was whether the act of driving the cattle out of the boma but within the compound of the owner was ‘taking’ in the real sense of the word. Biron J as he then was held that in this case there was more than sufficient asportation to constitute a ‘taking’ within the definition of theft.

Asportation is always present as long as anything has been removed from its usual place. If taking is not complete one will be charged with an attempt. However in **Samwel Msirangala V.R**.[10], the court was of the view that, since the appellant drove the bull from where it was to another place asportation was proved and therefore, the offence committed was one of cattle theft, that since the appellant drove the bull from where it was to another place asportation was proved and, therefore, the offence committed was one of cattle theft.

However in **Samweli Msivangala V.R.**

Without claim of right

This is another ingredient in the offence of theft. In order for any taking or conversion to amount to theft, the taking or converting must

[9] Mazengo Magale V.R.(1969) HCD 156
[10] Samweli Msivangala V.R. (1981) TLR n.l319

not have been done under genuine claim of right over the stolen article.

Section 258(1) of the Penal Code emphasizes that fraudulent taking or conversion must be made without 'any claim of right'. It is a fundamental principle of administration of criminal justice that a person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him in respect to the property was done in the exercise of an honest claim of right and without intention to defraud. A claim of right may be unfound in law,, but if honestly made and is not manifestly unreasonable, can be a good defence to a charge of stealing.

"Without claimed of right " as has been refered in section 258(1) of the Penal Code indicates that the defence of bonafide claim of right is a perfect defence which can negate the claim that the taking or conversion of a thing capable of being stolen was done fraudulently.

Therefore the 'mens rea' of theft (fraudulent taking or conversion) may be negated by a successful defence of bonafide claim of right.

In Mohamed Hassani[11], the late justice Biron allowed the appeal holding that the appellant, who was but a youth thought he was acting under a 'bonafide claim of right' over the clothes as a way of recovering his wages.
And in **Salum Ibrahim V.R**.[12] it was held that a claim of right may be unfounded in law, but if it was honestly held and was not manifestly unreasonable, it can be a good defence to a charge of stealing. Thus,

[11] Suppra,
[12] Salum Ibrahim V.R.(1971)HCD 481

an honest claim of right may exist even where the accused takes by force against the will of the owner.

Other references

- Mpembee V.R.(1969) HCD 222
- R.V. Daniel (1968) HCD 332
- Olipa Selemani V.R. (1970) HCD 167
- Braison Sachayo V.R.(1970) HCD 365
- Lerunyan V.R (1968) E.A
- Juma Athuman V.R(1965) HCD 197

The general punishment of theft is provided for under section 265 of the Penal Code.

14.3 Other forms of theft

So far the general over view of the defence of theft is covered. However there are other forms of theft, which are created from section 266 – 275 of the Penal Code.

These include:

(i) Stealing wills – s.266

(ii) Stealing from the person; stealing goods in transit s.269(a) & (c), other stealing in connection to this section (b) (d) (f) and (g)

(iii) Stealing by persons in public service – s.270

(iv) Stealing by clerks and servants s.271

(v) Stealing by directors or officers of companies s.272

(vi) Stealing by agent – s.273

(vii) Stealing by tenants or lodgers – s.274

(viii) Stealing after previous convictions 275

These other forms of theft share common ingredients with the offence of theft, though in case falling under sections 270,271,272,273 and 274 of the Penal Code, the only difference is capacities and status of the offenders involved in respect to each of the premises above. For example where one's employment is one of public enterprises, then he should be charged in that capacity as a public servant as distinct from the one employed in a private enterprise. But in both cases the item stolen should come into possession of the offender by virtue of his employment, or an account of his employer, that is, it is the duty of the employee to take care and account for his employer's property.

Section 270 of the Penal Code provides:

> if the offender employed in the public service and the thing stolen is the property of the public or came into the possession of the offender by virtue of his employment.

The offender is guilty of the offence of stealing by public servant. Important components in this offence are:-

(a) that the accused person was employed as a public servant
(b) that the thing stolen was the property of his employer or come into his possession by virtue of his employer
(c) that he (without claim of right) fraudulently took the thing (capable of being stolen) or fraudulently converted the thing (capable of being stolen).

In the case of **Issa s/o Nkalinga V.R**[13] a man gave money to an Assistant field officer in the Agricultural Department in order to repay a part of his loan at the Revenue Office. The officer appropriated the money for his own use. It was held that he could only be convicted of theft by Public servant if it was proved that it was party of his duty to collect loan payments, or that the complainant would not have entrusted money to the accused had he not been an Assistant Field Officer. Without prove of these matters, the Field Officer would be in the same position as any private person entrusted with money for some errand. In such a case, the safest way or charge would be simple theft, although a charge of stealing by agent would probably lie.

It is theft for a servant to take his master's goods fraudulently. This is so where the master has entrusted his goods to the servant, or where the servant received goods on behalf of his master for a servant is only regarded as having "custody" and not possession of the goods. Section 262 of the Penal Code expressly states that where money is deemed to be the property of the person on whose behalf it is received, unless the money is on the terms that it shall form an item in a debtor and creditor account. Section 271 of the Penal Code provides:-

> If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer.

The offender is guilty of stealing by clerk or servant.
The main components under the section are as follows:-

[13] Issa s/o Nkalinga V.R. (1969) HCD 74

(a) That the accused person was employed as a clerk or servant (private enterprise, master – servant relationship)

(b) That the thing stolen was the property of his employer – master or came into his possession on account of his employer

(c) That he (without claim of right) fraudulently took the thing (capable of being stolen) or he fraudulently converted the thing (capable of being stolen)

14.3.1 Stealing from the person of another

This form of theft, takes place within a person's body. Normally there are articles which are subject to this kind of theft which form part of a person's body. Such articles include, earrings, wristwatches, pocket money, chains, handbags etc. if the offender snatches any one of these items from a person, such offender is deemed to have stolen from the person of another.

Section 269 (a) of the Penal Code creates the offence of stealing from the person of another. That section provides:

If the thing is stolen from the person of another

The offence is therefore one of the offence committed under circumstances envisaged under section 269(a) of the Penal Code.

In Gadi Kidava V.R.[14] In this case the appellant was charged and convicted of two offences:- stealing from the person of another c/s 269(a) of the Penal Code and disorderly conduct in a Police station s/o 101 and 102 of the Police Force Ordinance. The accused was found

[14] Gadi Kidava V.R.(1982) TLR 105 -106

guilty on both counts by the lower court. He was convicted and sentenced to a fine of 600/= or 6 months imprisonment in the first count and Tshs200/=, fine or two months imprisonment in default in the second count. He appealed against conviction.

Justice Munyera (as he then was) admitting this appeal minute:

(i) Conviction in count 1 appears sound

(ii) In count 2 no evidence to the disorder the appellant created in the Police Station

The evidence that was adduced in support of the first count came from Yusufu Ndeki the complainant, Ayub Lwakatare (Pw2) and Othiambo Angola (Pw3). Briefly the complainant stated on 3/2/ 1982 at about 2:00 PM he was at Geita market trying to get a travelling ticket to Msalala. As he concentrated on getting his ticket his wallet containing Shs.1600/= was snatched from him. Stolen also were a baby shirt and beans. He immediately suspected the accused person. The accused started running away. The complainant and Ayub Lwakatare gave chase and at the same time appealing for assistance. When Othiambo Angola saw the accused running and at the same time the complainant chasing and appealing for help he intercepted the accused. The accused was found with the complainant's wallet, which the complainant identified by his CCM card, and job identity card, which were still in it. The money had vanished.

The defence of the accused was that he was merely arrested on suspicion and then his CCM card was put in the wallet of the complainant in order to make it appear that he had stolen the wallet. He however could not explain why he ran the whole way to the Government Hospital and why Ayub Lwakatare and Othiambo Angola

should fabricate evidence against him while they were in no way related to him or the complainant. Like the trial magistrate I find the evidence against the accused in the first count was over whelming. The sentence imposed was if anything lenient.

Regarding the second count the evidence relied on by the prosecution was that of PC Manjura (Pw4) who received the accused at the Police Station. According to him the accused refused to give his name. There was no allegation of a disturbance of any kind such as shouting, fighting etc. section 101(1) of the Police Force Ordinance envisages " a riotiouns, indecent disorderly or insulting" conduct it is obvious that keeping silent is not ejusdem generis with the above categories of behaviour and therefore conviction in the second count was not supported by the evidence adduced. I accordingly allow the appeal in the second count.
The conviction thereon is quashed and the sentence set aside:
In the result the appeal in the first count is dismissed while the appeal in the second is allowed.
Other references

- Ambokile Mwamalongo (1967) HCD 275
- Ramadhani Mugwema V.R. (1969) HCD 159
- Selaman V.R. (1970) HCD 39

14.5.2 Stealing from the Motor Vehicle

This offence is created under section 269 (c) of the Penal Code. It must be established that the thing stolen, was anything stolen from any kind of vessel or vehicle or place of deposit in such vessel or vehicle. That is goods stolen while in transit etc. It does not apply to a thing attached to a vessel or vehicle as part of such vessel or vehicle. Spare tyres attached to the body of the vessel or vehicle right

from the manufacture do not form to this form of offence, otherwise the offence is one of simple theft. Nevertheless there are circumstances where spare tyres are so placed in such a way as to be part of the body of the car while actually they are in the place of deposit. If that is the case, then the offence committed is one of stealing from the Motor vehicle.

This position was demonstrated in the case of **Hassan Ramadhani V.R**[15]. In this case the accused was convicted of stealing from a motor vehicle c/s 269(c) of the Penal Code upon evidence that he had taken the gear box of the vehicle it self.

It was held that section 269 (c) of the Penal Code provides for thefts in which the "thing is stolen from any kind of vessel or vehicle or place of deposit…" This wording refers to things being conveyed by or deposited in vessels or vehicles rather than to parts of the vessels or vehicles themselves. Secondly in interpreting a statute marginal notes may be referred to for assistance. In the present case the relevant portion of the marginal notes reads" stealing goods in transit" suggesting that portions of vehicles themselves were not included. Conviction of simple theft substituted (s.265 PC).

In Said Ally V.R.[16] The accused was convicted of stealing from a motor vehicle c/s 269
(c) of the Penal Code. He entered a truck and sorted through its contents picking out what he desired. Just as he was about to depart the owner arrived and locked him in the truck. It was held that the asportation requirement for a conviction simple theft is fulfilled by

[15] Hassani Ramadhani V.R.(1968) HCD 244
[16] Said Ally V.R.(1968)HCD 198

any movement of the item involved. Here, however the charge was the graver one of stealing from a motor vehicle. For conviction of this offence it must be show not merely that the items were removed, but that they were removed from the vehicle.

14.4 Positions with regard to spouses

14.4.1 At Common law: The Property of husband and wife

At common law it used not to amount to criminal liability for spouses to steal each other's property. The position was that goods and chattels of a married woman belonged to her husband and were held to be equally in the possession of both. From this developed the rule that an appropriation of goods by her would not constitute a charge of possession, and therefore (at common law) did not constitute theft nor did even adultery put an end to this.[17] So if a wife went away with money of her husband's and then met her adulterer and gave him this money, he cold not be convicted of receiving stolen goods; for they had not been 'stolen'. Yet if the adulterer had instead assisted her in the original taking of the goods, he could have been convicted of theft of them, for then he would have taken them out of the actual possession of the husband himself.[18]

But there has been a change in law (s.36 of the larceny Act 1961), husband and wife are criminally liable for stealing each other's property if:-

(a) they were not living together at the date of the offence – they may live together though geographically a part

[17] Kenny's outlines of Criminal Law, New Ed Cambridge At the University Press, 1952, p.227
[18] *ibid*, p.228

(b) the property was appropriated with a view to their ceasing to live together. But when they once again are living together no prosecution takes place.

Thus a wife, so long as she has no intention of ceasing to cohabit with her husband, retains even under the Act 1961 her immunity for committing theft of his property. And even if she were to abscond from him temporarily and to take away with her some of his property, but in the expectation of ultimately returning to him and bringing it back with her, then she would commit no theft. For she would not satisfy the final clause of the definite on the word stealing; since she does not intend to deprive him of the property permanently.[19]

14.4.2 The position in Tanzania law

The law in Tanzania, with regard to spouses stealing each other's property is not the same as that obtaining at common law.

Section 264 of the Penal Code categorically states:

> For the avoidance of doubt, it is here by declared that a husband may be guilty of stealing from his wife or a wife from her husband.

This means, spouses are criminally liable in respect of the offence of 'theft' for stealing each other's property. Though it may be true that the goods and chattels of a married woman belonged to her husband and are equally in possession of both, but in reality if the other takes or appropriates the other's property without the consent of the other, then she or he commits the offence of theft.

[19] *ibid*,

This position was observed in the case of **Kasese Mbugha V. Zainabu Swalehe**[20] where it was held that; section 264 of the Penal Code provides that:

a husband may be guilty of stealing from his wife or a wife from her husband.

Since the trial court was unanimous that the respondent had taken her husband's money and the District Court endorsed that view, the conviction was inevitable.

This position, however, is subject to the limitations of the provisions of the law of marriage Act[21] and likewise it may be a defence if, the spouse in so stealing was acting under an honest claim of right.

In the present case, however, the respondent had at no time claimed that she had taken the shs: 30,000/= under an honest claim of right.

15 ROBBERY

15.1 Introduction

This offence has the origin of the offence of theft. This is so in that an act of robbery by an accused person is no less than the act of steeling only with the exception that in the former offence the said act is orchestrated by the use of force or the threat of force as against the victim or property.[1]

[20] Kasese Mbugha V. zainabu Swalehe (1991)TLR 90
[21] Act No. of 1971, s.64(1) and (2), however this position does not extend to s.64(3) and (4) see s.258 of the Penal Code Cap.16 of the laws establishing the offence of theft.
[1] Ibrahim H.J,Criminal law and Procedure Part 2, 1st Ed, The Open University of Tanzania,1996 p.35

The nature and character of this offence will be observed in the context of both English and Tanzania laws.

15.2 The position under English law

Robbery is defined as:

> A person is guilty of robbery if he steals and immediately before or at the time of doing so and in order to do so he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.[2]

Robbery is therefore 'theft' aggravated by the use of force or the threat of force. It follows; therefore, in this respect that robbery is not committed unless the necessary ingredients constituting the offence of 'theft' have been proved. In other words the offence of theft need be established to allow for the offence of robbery to exist, so that a person who forces another to hand over money, believing that he has a legal right to it, is not guilty of robbery since not being dishonest, he is not guilty of theft, and this is so even though he does not believe he was entitled to use force to get the money.[3]

In Robinson,[4] the accused person in this case, who was owed £7 by the complainant's wife, approached the complainant brandishing a knife. A fight followed, during which the complainant dropped a £5 note. The accused picked it up and demanded the remaining £2 owed to him.

The court of Appeal held that the prosecution had to prove that the accused was guilty of theft and that he would not (under s.2 (1) of the

[2] s.8 of the Theft Act of 1968
[3] Card, Cross & Jones, Criminal law 12th Ed, Butterworths London, Dublin Edinburg, 1992 p.289
[4] Robinson (1977) Crim L.R. 173 C.A

Act 1968) if he honestly believed that he had the right in law to deprive the complainant of the money, even though he knew he was not entitled to use the knife to get it.

To constitute robbery, the force must be used or threatened immediately before or at the time of the theft. It need not be used against the owner or possessor of the property stolen, so that if a gang uses force against a signal man only in order to stop and steal from a train, its members are guilty of robbery.[5]

There is no robbery if the force is used or threatened after 'the time' of theft. The thief who uses force to defend his possession after he has taken the goods is guilty of robbery only if it can be established that he is doing so at 'the time' of the theft. This is not limited to the period (possibly a split of second of time) during which the initial appropriation with the mens rea for theft occurs, since an act of appropriation may be a continuing one. It may be that 'the time' of the theft lasts as long as the theft can be said to be still in progress in common sense terms.

Where force is used, it must be used on a person, this does not however, require that force be used on the actual person to over power his resistance, and that force used only to get possession of property can be used on a person. In the case of a threat of force a threat of future force is insufficient; the threat must be 'then and there' to subject another to force.

[5] Card, cross & Jones, criminal law, 12th Ed. Butterworths London, Dublin, Edinburgh, 1992 p.290

The force must be used or threatened in order to steal; a man who for example, knocks a woman to the ground to rape her, but then changes him mind and instead takes her hand bag which she has dropped is not guilty of robbery or assault with intent to rob, although he may be convicted of theft and of attempted rape.

15.3 Tanzania law with regard to robbery

The law with regard to robbery is governed by the Penal Code[6] where this offence is defined as:

> Any person who steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or overcome resistance to its being stolen or retained, is guilty of the offence termed robbery

As it can be observed from the definition above, robbery is related to the offence of theft and for this reason it consists of the following ingredients or elements

(i) that the accused stole something

(ii) immediately after such stealing he used or threatened to use actual violence to any person or property

(iii) with intent either

  (a) to obtain, or retain the thing stolen, or

  (b) prevent or over come resistance to its being stolen or retained.

[6] Penal Code Cap.16 of the laws, s.285

It is important, therefore, that all the elements of the offence of theft or ‘ simple theft’ it must be proved that the robberer actually took or had physical control of the thing the subject matter of robbery or else it would only amount to an attempt to rob. The gist of the offence of robbery is the actual taking of the property against the owner’s will as a result of force or intimidation causing fear in the mind of the owner, or more importantly the property must be handed over by the victim or at his request.

In Nuru Ayub V.R.[7] the accused were convicted of robbery. They threatened to shoot the complainant unless he gave them Shs: 600/=. The complainant’s son, without a request from the complainant got the money and handed to the accused persons. Convictions for demanding money with menaces were substituted because the money was not taken from complainant nor at his request but was given by his son.

It must also be prove that the accused formed the intention to steal at or before he used or threatened to use violence. If the intention to steal is formed after the assault that can not be held to be robbery. This position was illustrated in the case of **Mkwepu V.R**.[8] The accused met the complainant, a woman, and overtures to her, she rejected them, where upon he seized her by the wrist and as she struggled, he snatched her basket of food and clothing, away from her and run a short way in to the bush. He then invited her to come after him under no illusion as to his intention declined and went off in search of help. The accused was arrested the next day, but the complainant’s goods were not recovered. It was held that, since at

[7] Nuru Ayub V.R. (1968) HCD n.279
[8] Mkwepu V.R

the time the accused took away the woman's basket he had no intention of steeling it, and that he did so in the hope that she would be enticed to follow him and further that he formed the intention to steal the goods after his request of enticing in the bush had failed he could not be convicted of robbery because the intention to steal was not formed at the time that he assaulted her. A conviction for theft substituted.

Similarly general belligerent behaviour in which theft is committed with no rational connection between theft and the belligerent behaviour is not robbery.

In Miderege s/o Bemeye V.R.,[9] accused was convicted of robbery with violence c/s 286 of the Penal Code. There was evidence that the accused while drunk, assaulted a number of persons in a Pombe Shop. After assaulting complainant, accused took complainant's coat and walked away with:-

> The court held that; s.285 of the Penal Code provides that any person who steals anything and uses violence to obtain or retain the thing stolen is guilty of robbery. Here, the actions of the accused were not in order to obtain or retain the coat, but rather were part of general belligerent behaviour which had no rational connection with the theft, conviction for simple theft substituted.

In addition, the connection between the theft and violence must not be too remote in time, place in relation to the theft. In the case of **Gatheri Njuguna V.R**.[10] the facts in this case were that, the

[9] Miderege s/o Bemeye V.R.(1968) HCD 74
[10] Gatheri Njuguna V.R. (1968) E.A 583 (K)

complainant had left this house at 7 am and while returning at about 9 pm the same day, when he saw the appellant proceeding from the direction of his house carrying a bundle. On discovering that it was his house that had been broken into, he alerted his neighbours and they set out after the accused whom they found about 500 yards away. The appellant resisted and hit the complainant with a club before being over powered.

On appeal the court said, that at p.584:-

> We think that the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after that act. We do not think it extends to a case such as this where the offence was committed clandestinely without discovery or chase until after the offender had left the premises and had proceeded so far on his way as he had in this case without being discovered to be the thief. A conviction for burglary and theft was substituted.

Robbery as it has been pointed out earlier is characterized by the use of force or threat of violence. The use of force or threat of violence we in this respect not only must be for the purpose of obtaining or retaining the thing stolen, but must occur at the time of the theft or immediately before or after it.[11]

Where as it so happens, there is an interval as between the time of stealing and the assault, the said assault can not be said to be connected with the act of steling.[12]

[11] Mkwe Laki Moja V.R.(1967) HCD n.372
[12] Suppra,

In this context therefore, what is important is 'time factor' and the use of violence or force or threat of violence should be simultaneously with the act of stealing. Lapse of time as between the act (stealing) and the use of force in this case will not suffice, for the offence of robbery to be accommodated, and in most cases as such the offence, occasioned will be one of 'simple theft'.

Time factor as the utmost important element in the offence of robbery was re echoed in case of Jackson **Simon Manitu V.R**.[13] The appellant in this case was charged with and convicted of robbery c/s 285/286 of the Penal Code. The facts were as follows.

On 28.3.1979 at about 6:45 am the complainant **Theopista Mugashingwe** (Pw1) was inside the train at Gulwe Railway Station. She had just received her suit case from a friend when suddenly the appellant snatched the suit case and threw it out of the train. The appellant pushed her away and managed to jump out of the train and disappeared with the bag.

It was held on appeal as:-

(i) Per s.285 of the Penal code:

> any person who steals anything and at or immediately before or immediately after the time of stealing uses… or threatened to use…. In order to obtain or retain the thing stolen or to prevent or over come resistance to its being…or , is guilty of the felony termed robbery.

[13] Jackson Simon Manitu V.R.(1981) TLR38

(ii) by violently pushing the complainant away immediately after stealing the suit case he was not only resisting arrest but also seeking the retain of the stolen suit case.

(iii) it is not necessary that at the time of using violence an accused person must have in his possession the stolen property what is important is the time factor and the fact that actual violence is used in order to retain the stolen property.

Importantly, as demonstrated in the present case, although the accused person must not necessary have in his possession the article stolen at the time of using force, he is nevertheless regarded to have been in possession of the said article though indirectly, e.g. throwing the article stolen away or passing it on to his fellow immediately after being stolen, where he will have physical control of the article stolen after wards.

16 THE DOCTRINE OF RECENT POSSESSION

16.1 Introduction

Sometimes, and in cases of theft one may not be in a position to accumulate sufficient evidence establishing the ingredients necessary to constitute the offence of theft. If this is the case, proof of the commission of the offence may be inferred from the circumstances surrounding the offence and this situation can be best saved by the application of the doctrine of recent possession.

16.2 RECENT POSSESSION

The doctrine of recent possession is not statutorily defined nor does how recent the possession may be, however the meaning subscribing to the doctrine has been developed through case laws, effecting the

fact that if a person is found with an article recently reported stolen, that person may be held to have stolen it.

In DPP.V.Joachim Komba,[1] the court was of the view that, the doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or guilty receiver.

The court held further that, an inference under the doctrine of recent possession may be drawn to up hold any offence however penal it may be including the offence of murder.

In Said Mkuyu V.R.[2] it was alleged that the appellant (said Mkuyu) and others broke into a house and made off with the radio. The radio was recovered 2 hours after the theft. The radio was found in one Yahya's house. Yahaya alleged to have bought the radio from the appellant. Justice El – Kindy (as he then was) used the occasion provided by Mkuyu's appeal to elaborate and apply the doctrine of 'Recent Possession'

> " Where an accused is found in possession of stolen property shortly after the commission of the offence of house breaking, it can be presumed that in the absence of a probable explanation, he came into possession of it either through house breaking and stealing or receiving it knowing it to have been stolen or unlawfully obtained"

[1] DPP V. Joachim Komba (1985) T.L.R. 228
[2] Said Mkuyu V.R.(1972) HCD No.41

From Justice El – Kindy's dictum we can deduce the doctrine of recent possession in the following sequence:

(i) an accused person is found in possession of an article recently reported stolen,

(ii) a presumption is raised that the accused person came into possession fo the article by stealing it or by receiving it knowing it to have been stolen,

(iii) this presumption is rebuttable and it lies upon the accused person to give a probable explanation showing that he came by the article innocently.

The recency of a thing, reportedly stolen is a matter of fact, to be determined by the facts of the case in question. In other words, no definite principle which can determine the period of time which is recent enough to justify the application of the doctrine of recent possession.[3]

However, in the circumstances of the case of **DPP.V. Joachim** [4] , eight months after the disappearance of the said stolen radio cassette was said to be too long for the doctrine of recent possession to apply.

It therefore, follows that the test in determining the period of time which recent enough for the purposes of the application of the doctrine of recent possession is a subjective test depending on the nature of the stolen thing.

[3] DPP.V.Joachim Komba (suppra)
[4] Supra

For example a stolen pen may change hands quicker than say a gun. Some guideline to determine the question how recent is recent was perhaps best furnished in the following cases:-

In Peter Mtengo and Four others,[5] the appellant s were found with the stolen cattle in D'Salaam on 9th September 1985, four days after the theft, and applying the doctrine of recent possession they were deemed to have stolen them.

In Naftali Ngalya V.R,[6] the court observed that:

(i) in deciding whether possession is recent the court must have regard to the nature and value of the property.

(ii) the period of four and a half months between the stealing of the head of cattle and the finding it in possession on of the accused entitled the court to involve the doctrine of recent possession

(iii) a conviction of receiving stolen property c/s 311 was more appropriate than the conviction for theft.

The facts of this case were as follows:

The appellant, Naftali ngalya and one Malugu Malanga, were jointly charged with and convicted of cattle theft c/s 265 and 268 of the Penal Code and each sentenced to five years imprisonment.

Malugu's appeal was commonly rejected by Mapigano Ag.J. (as he then was) on 22nd June 1974.

The appellants's appeal was admitted for argument as to whether the period between the theft of the cattle and the finding of the appellant

[5] Peter Mtengo and Four Others (1994) TLR 112
[6] Naftali Ngalya V.R.(1976) LRT 1245

in possession of one of the stolen cattle was so recent as to entitle the trial court to invoke the doctrine of recent possession.

There was undisputed evidence that on 7 / 3 / 73 one said Ally (Pw1) had his two head of cattle stolen as they were being gazed. One of the cattle was found (already slaughtered) in the possession of Malugu only two days after it had been stolen. Four and half months after the theft (21/7/1973) the second head of cattle was found in the possession of the appellant as he was about to sell it at Kigwe cattle market.

There was ample evidence that the appellant was found in possession of a head of cattle which the complainant amply identified as his cattle stolen on 7/3/1973.

The learned resident magistrate did not believe accused's defence that he was not in possession of the animal. On the evidence he was entitled to come to this conclusion.

The only question this court has to look into is whether a period of four months and a half from the time the head of cattle was stolen to the time it was found in the possession of appellant was recent enough to support the doctrine of recent possession.

The learned state Attorney argued that the period of four and a half months was too long to support the doctrine of recent possession and he therefore didn't support the conviction.
The law on the subject of recent possession is this:

> If a person is in possession of stolen property recently after the stealing, it lies on him to give a reasonable; explanation to

account for his possession if he fails to do so he is presumed to have come by it dishonestly, that is he is either the actual thief or guilty receiver.

Whether he is to be found guilty of stealing the property or guilty of receiving it will depend on the surrounding circumstances. Lapse of time progressively weakens the doctrine of recent possession and finally extinguishes it.

In deciding whether possession is recent regard must be had to the nature and value of property. Shop – goods and all wearing apparel such as shirts, which easily change hands will only be presumed to have been stolen or feloniously obtained if they are found in the possession on of an accused a very short time, say two or three days after they had been stolen. Four months have for example been held to be not 'recent' where a watch was stolen.[7]

Five months have been held to be recent where the property stolen was not common article which easily change hands.[8]

A month has been accepted by this court as "recent" where a radio was stolen.[9]

In the present case the accused was seen in possession of the stolen cattle four months and a half after it had been stolen. A head of cattle can not in my view be said to be a property which easily changes hands. While a period of four months and a half can be said to be too long a period to support the doctrine of recent possession in case of

[7] Gasper s/o Jovin V.R.(1968) HCD n.483
[8] Dongwa s/o Masiku V.R. (1967) HCD n.454
[9] Musa Ali Mahambi V.R. (1968) HCD n.157

common articles which easily change hands articles which easily change hands such as watches, shirts and the like, it can not in my view be so said in a case of head of cattle. Four and a half months period between the stealing of the head of cattle and the finding it in possession of the accused did in my view entitle the learned Magistrate to invoke the doctrine of recent possession.

And if the court was satisfied that the prosecution had proved that the head of cattle belonged to the complainant (Pw1), and there was as I have already said, ample evidence in support of this conclusion, the learned magistrate (Resident) was right in finding that the accused was either the actual thief or a guilty receiver of the head of cattle.

Taking into account the totality of the evidence it is my view however that a conviction of receiving stolen property c/s311 would have been more appropriate than the conviction for theft.

The conviction of theft is accordingly varied to one of receiving the head of cattle knowing or having reason to believe that it was feloniously obtained c/o 311 of the Penal Code.

As to the sentence of five years imprisonment this has also to be varied as the offence of receiving stolen property – cattle c/s 311 of the Penal Code is not a scheduled offence under the minimum sentences Act.[10]

The sentence of five years imprisonment is hereby set aside and in substitution thereby the accused is sentenced to two years imprisonment.

[10] Act No. of 1972

MASAMBU,G

Other references

- Ally Bakari and another (1992) TLR 10
- George Mungwe V.R. (1989) TLR 10
- Hamisi V.R. (1963) E.A.11
- Malawi V.R.(1969) HCD n.172
- Maziku V.R.(1972) HCD n.174
- Michael Mhuto V.R.(1975) ZRT 18
- Omparkash Gandhi V.R.(1961) E.A.643
- Ramadhani V.R.(1969) HCD n.218
- Said Malee V.R.(1967) HCD n.37
- Seif Aloo V.R.1976) LRT 55