EVIDENCE &CRIMINAL LAW CASES 1

1. CORROBORATION OF A RETRACTED CONFESSION

Michael Luhiye V. R.Criminal Appeal No. 77 of 1993 (CA Unreported)

Kisanga, J. A. Omar, J. A. and Mnzavas, J. A.

Quoting the **Case of RV Gae s/o Maimba and Another** (1945) 12 EACA 82:

> There is no rule of law or practice making corroboration of a retracted confession essential. Corroboration of a retracted confession is desirable but if the court is full satisfied that the confession cannot be true, there is no reason in law why it should not act upon it.

In another decision three years later the Eastern Africa Court of Appeal said in **RV Kaperere s/o Mwaya** (1948) 15 EACA 56

> A Court may convict on a retracted confession even without corroboration
> Though such confession must be received with great caution and reserve.

The celebrated decision is the case of **Tuwamoi v Uganda** [1967] EA 84 the Court of Appeal for Eastern Africa had the following to say:

> We would summarize the position thus: a trial Court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated **in some material particulars by an independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all materials points and surrounding circumstances that the confession cannot but true.** (Pg5}[Emphasis added]

2. LEGAL PROVOCATION

Masanilo Masembe VR, Criminal Appeat No. 98 of 1993 (CA unreported). Kisanga, J.A, Mnzavas, J.A. and Mfalila, J.A.

> Legal provocation is only **"**established where there is **a wrongful act or insult of such a nature as to be likely when done to an**

> **ordinary person to deprive him of the power of self control and to induce him in the heat of passion and before there in time for the passion to cool to assault the person by whom the act or insult is done or offered – RV Mushimbi s/o Muhinguzi** (1946) 13 EACA 139. [Emphasis added].

3. TESTIMONY BY WAY OF IDENTIFICATION BY A SINGLE WITNESS:

Pete Joseph Maneke & Kalisti Emmanuel VR, Criminal Appeal No. 36 of 1994 (CA Unreported), Ksanga J.A. Omari J.A. and Muzavas J.A.

Dealing with the question of identfication by a single witness **...** the Eastern Africa Court of Appeal in **Abdulla Wendo and Austher VR** (1953) 20 EACA 166 had the following to say:

> Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting the identification, especially when it is known that the conditions favouring a correct identification were lacking.
>
> In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

Where the evidence which implicates an accused is entirely that of identification, the evidence must be water tight before a conviction can be found upon it. That this is the law is evident from the decisions in **RV Erio Sebwato** [1960) EA 174, **Wilson s/o Allo VR** [1968] HCDn. 183 (Pg 4&5)

Another Case on the same matter: **Emmanuel Tumbotele** [1968] HCDm. 144

It was held in the case of **Miller v Minister of Pensions** [1947] 2 ALL ER 372;

> The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in this favour which can be dismissed with the sentence of course it is possible, the case is proved beyond reasonable doubt but nothing short of that will suffice – see also **Captain Manuzu Ambrose Lamu and Anoth. VR,** Criminal Appeal No. 145 of 1991 CA Unreported) Mzavas J.A. at pg 10, see also **Abdullah bin Wendo & others** (1953) 20 EACA 166, **Newphory Nestory VR**, Criminal Appeal No. 66 of 1992 (CA unreported)

4. CREDIBILITY OF WITNESSES

Christian s/o Kaka & Another, VR, Criminal Appeal No. 30 of 1992 (CA unreported) Mnzavas J. A. quoting from the Eastern Africa Court of Appeal case of **R.V. Gokaldas Kanji & Anoth** (1949) EACA 116 stated inter alia:

> Where a case is essentially one of fact in the absence of any indication that the trial judge has failed to take some material point or circumstance into account it is impossible and improper for a Court of Appeal to say that he has come to an erroneous conclusion as to the respective credibility he attached to the evidence of the Crown witnesses and that given by the accused (Pg 5 & 6)

5. BELIEF IN WITCHCRAFT – A DEFENCE?

Kasongi Yabisa VR, Criminal Appeal No. 16 of 1993 (CA unreported) Kisanga, J.A.

> To constitute a defense in a charge of murder the belief in witchcraft must be found on some physical and not metaphysical act (**R.V Akope s/o Karuona and Another.**
> (1947) 4 EACA 131

6. PRIME FACIE & PRESUMPTION OF INNOCENCE

RV Said Mohamed Mrimi, Criminal Sessions Case No. 116 of 1993 (Mz He unreported) Masanche

On Prima Facie Case: quoting from Sakar, **Evidence** 6th Edn. At pg 24 where Sarkar quoted the American case of **State v Lawlor** 28 Minn. 216 where it was described as:

> Evidence which standing above and unexplained, will maintain the proposition, and warrant the conclusion, to support which it was introduced. (The Passage is also found quoted by McRoberts J, in the case **of Nanal Domodar Kanji v Tanga Township Authority** (No.2) (1940) 1 TLR (R) 239 (Pg 2- 3)

On Presumption of Innocence:

> As every Lawyer knows, every one is presumed to be innocent until the contrary is proved. McRoberts J, in the case of **Nanal Domodas Kanji v Tanga Township Authority(No 2)** (1940) 1 TLR (R) 239 emphasized that.
>
> The consequence of this presumption is that the onus of proving every thing essential to the establishment of the charge against the accused, who is not required to prove his innocence or to adduce evidence or to make any statement in rebutted until after the presumption is established a case which the court thinks he must answer, is upon the prosecution.

The passage goes on to say:

> The right to whichever man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of gaily were lightly entertained, or readly established in Court of justice – these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, then, is recognized a like by all tribunals, whether Civil or Criminal and is equally effective in all proceedings, whether the question of guilt be directly or indirectly raised.
>
> So strong is the presumption of Innocence, that even when guilt can be established only by proving negative, that negative must, in most cases to which no special statute is applicable, be proved, though the general rule of law devolves the burden of proof on the party alleging the affirmative (Sarkar on Evidence 6th (dn Pg 945) (Pg 3 – 4)

7. CREDIBILITY OF WITNESSES

Clemence BrichmanVR Criminal Appeal No. 128 of 1992 (Mz HC Unreported) Chipeta J said**:**

> It is time that in matters of credibility of witnessed, the appellate court must always be guided by the impression made on the trial judge who saw the witness as was stated by the Court of Appeal in the English case of **Coglan V Cumberland** [1892] 1 Ch. 704 which was quoted with approval by this Court **in Pazis Case**: Even where the appeal turns on a question of fact, the Court of Appeal's duty is to rehear the case, and the court must consider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind not disregarding the judgement appeased from, but carefully weighing and considering it, and not shrinking from over moving it if on full consideration the Court comes to the conclusion that the judgement is wrong.
>
> When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour. The Court of Appeal always is, and must be guided by the impression made by the judge who saw the witness. But there may obviously be other circumstances, quite apart from the manner and demeanour, which may show whether a statement is credible or no, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

8. EVIDENCE OF VISUAL IDENTIFICATION AT NIGHT

RV Muhoja Mugunya & Anor. Criminima Session case No. 164 of 1989 (No. HC Unreported)Sekule J. Said:

> **...** evidence of visual identification and by a single witness and at night **...** it needs to be carefully examined to determined whether or not the conditions obtaining were favourable to the case and correct identification was made bearing in mind the principle that a Court of Law can only act on evidence of visual identification after all possibilities of mistaken identify have been fully examined and eliminated and it is fully satisfied that the evidence adduced is absolutely water tight **Waziri Amani VR** [1980] [TLR 250] And further that this being a case of identification by a single witness, not only the credibility of the witness which was open for consideration but also the possibility that the Witness could have been **bona fide** but mistaken in her identification **Athumani Shaban VR** [1976] (RT No. 15)

9. SENTENCES TO RUN CONSECUTIVELY

Pascal s/o Yemen Malando VR, Criminal Appl No. 255 of 1991 (Mz HC Unreported, Masauche J had the following to say:

> It is pretty rare that courts order sentences to run consecutively.
> I am aware of only two cases, one an English case, another a local one: **DPP. V Hadija Ally Kimbau alias Sara Martin Simbaulanga,** Criminal Appeal No. 20 of 1988 where Mnzavas JK (as he then was) ordered sentences imposed on the appellant to run consecutively and the English case of **RV White** [1972] Criminal LR 193 where three judges Lord Widgery CJ. Sacks J and Ackner J sitting in Queens Bench are reported to have commented: "The general principle that offences committed in close association with each other should not normally attract **consecutive** sentences applies only when the offences concerned are brandly similar in character or related in terms of subject matter. Were two wholly different offences are committed at the same time, even against the same victim, consecutive sentences may propery be applied. Lowe J in the case of **Regina V Kasongo s/o Luhogwe** of TLR 9R) 47 stated: it is a well established principle that offences committed in the same transaction should carry concurrent sentences, and before any departure is made, from this principle, the trial magistrate must be satisfied that there are very exceptional circumstances which warrant that course being taken.

10. ONUS OF PROOF

Ryoba Merengo Wambura VR, Criminal Appeal No. 291 of 1990 [Mz HC Unreported) Masanche, J quoting from McRoberts J in the case of **Nanal Damodas Kanji v Tanga Township Authority** (1940)1 TLR (R) 239 quoting a passage from Sakar on **Evidence** 6th Edn. 945:

> The consequences of this presumption [that a person is innocent until proved guilty] is that the onus of proving everything essential to establishment of the charge against the accused, who is not required to prove his innocence or to adduce evidence or to make any statement in rebuttal after the prosecution has established a case which the court thinks he must answer, is upon the prosecution.

11. TORT: VICARIOUS LIABILITY

Mathias W Happe V Christopher Mpinya and Mwanza Municipal Council, Criminal Appeal No. 4 of 1990 (HC Unreported), Masanche J stated **inter alia**

> The doctrine of vicarious ability is a doctrine well known both in Civil and Criminal Law. It derives from the fact that a relationship of employer and employee, or master and servant is a relationship which is not at par, that is that an employer, or master, will always be more powerful than the employee or servants. In that respect, therefore, it is envisaged that the employees or servant's action will always be imputed to the employer or master. Lord Edwards, in the case of **Linnelt V Metropolitan Police Commissioner** [1946] KB 290 has suggested that: **...** the doctrine of vicarious liability be aligned with the principle that he who chooses to delegate any duties, powers and responsibilities upon him by Act of Parliament, should remain liable for acts of any person appointed to act on his behalf.

In the case of **Aghna v Msubuja and Bahrba District Council** [1971] HCD No. 190 Mnzavas J cashe then was, quoted the favour author Winfield on **Tort** 7th Editn at Pg 741 thus:

> **...** a wrong falls within the scope of employment if it is expressly or impliedly authorised by the master or is unauthorised manner of doing something which is authorised or is necessarity incidental to something which the servant is employed to do.

Again, a passage is quoted in the case if **Anghna** from **Mitchell v Crass Weller** 138 ER 1189:

> No doubt a master may be liable for injury done by his servant's negligence where the servant, being about his master's business, made a small deviation or even where he so exceeds his duty as to

> justify his master in at once discharging him **...** if a master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant had originally started on his masters business in other words he must be in the employ of his master at the time of commuting the grievance[cf**: British Wagon Comp v Lea & Comp** [1880] QB 149]

12. DOCTRINE OF RES JUDICATA

H.S. Sodha & J.K. Sodha v Nara Bhawan & Company civil Appeal No 54 of 1993 (HC Unreported) Masanche J had the followings to say:

> The doctrine of **Res judicata** is provided for in section 9 of the Civil Procedure Code, 1960. It derives from the principle that **litigation like life must have an end**.[emphasis added]**.** An old case **Re south American Co.** [1895] 1 Ch. 37 has put up the proposition that: judgement recovered **...** is conclusive between the parties as to all matters by way of estoppel to a subsequent action in which the same matters are brought in question.

The Dictionary of English Law – Earl Jowitt says that:

> A final judgement already decided between the same question by a legally constituted court having jurisdiction is conclusive between the parties, and the issue cannot be raised again.

13. EACH PERSON CARRIES HIS OWN BURDEN FOR HIS WRONGS

Odol Otieno v Peris Adeyo Mwanga Criminal Appeal No.4 of 1992 (HC Unreported) Masanche J. Each person carries his own burden in matters of wrongdoings. A father may not be harrassed for sins of the son (see the case of **Gwao bin Kilimo v Kifunda bin Kfuti,** 1 TLR (R) 403.

> In that case Wilson J said it is just according to our ideas to take away a man's property in order to compensate a party who has suffered injury at the hands of a man's son, the son being of full age and fully responsible for his own actions? I hold most strongly the opinion that it is not just **...**

14. ASSESSORS SHOULD BE RESPECTED

Jaluo Luben v Magesa Mgeni (PC) Civil Appeal No.190 of 1995 (Mz HC Unreported) Masanche J

> Where, in the Primary Court, the decision is an unanimous decision, the District Court on appeal, must scrutinize the record more, and be really, satisfied that the decision was wrong. **The Law provides that the opinion of assessors should be respected.** When assessors are unamimous in their opinion the court should

> generally follow their opinion unless their reasoning and holding is against the weight of evidence or perverse (see the case of **Kidnkila d/o Alli v Rashid Rashid** [1967] HCD No.229**; Chibaya Mbuyape v James s/o Mlewa** [1967] HCD No, 434

15. ACQUESCING IN LAND MATTERS

Maria Masalu v lusana Mabula, (PC) Civil Appeal No. 397 of 1991 (Mz HC Unreported) Masanche J said

> Acquescing in land matters can be devastating. A passage in the case of **Randsen v Dyson** (1866) LR 1 H.140 quoted in **Customary Land Law of Tanzania** by James and Fimbo at Pg 551 says: If a stranger begins to build in any land supposing to be his own and I perceiver in his error, a court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen it was my duty to be active and to state my adverse title, an the it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.

As the respondent has cultivated the peace of land for twenty years upwards, the court cannot dispossess him of that peace of land. **See also: Phinias Nyangero v Manyasi Saguti** (PC) Civil Appeal No.243 of. 1993 [Mz HC Unreported] Masanche J quoting Mwalusanya J in the case of **Serikali ya Kijiji cha Ujamaa v Samson Mukenyi** (PC) Civil Appeal No.30 of 1990 [Dodoma unreported] . It is the law that if someone occupies somebody's land, under **adverse possession** for over 12 years with no protest from the **owner** of that land the occupier obtains the ownership of that land (see also **Said Ndambucha v Ally Mohamed Kipengele** [1977] LRT No. 49 Mwakibete J**. Kandi Naa v Hussein Saidi** [1976]. LRT No. 1 **Selemani s/o Daudi v Luta d/o Ali** [1968] HCD No. 498 **Nassoro Uhadi v Mussa Karunge** [1982] TLR 302 **Shabani Nassoro v Rajab Simba** [1967] HCD 233 **Balikuliji Mpanagi v Nzweli Mashangu** [1968] HCD No.20.

16. EVIDENCE OF RELATIVES NEED CORPOBORATION

DPPV Chacha /Nyamboha and 20th Criminal Appeal the 164 of 1992 (Mz HC Unreported) Masanche I had the following to say:

> My be right now I should hasten to add that Sir Sidney Araham CJ in the case of **RV Lutakambe s.o Mikwalo & Anoth** (1939) 3 EACA 43 has categorically stated: There is no rule of law or

> practice which permits the evidence of near relatives to be discounted because of their relationships to an accused.

That case was quoted with approveal by Samatta J (as he then was, in the case of **Mahmud Mbata VR** Mbeya Criminals Appeal case No. 154/1978 [unreported] reiterated the rule for he said and I quote him, that:

> These is neither a rule of law nor rule of practice which says that the evidence of relatives must be discounted because of their relationship to the victim of the alleged offence.

DR. M. C. MUKOYOGO
MWANZA MAY TO JUNE 1999

Word processed by: JACQUELINE NYAULINGO
THE OPEN UNIVERSITY OF TANZANIA
P.O. BOX 2281
MWANZA.