

CHAPTER ONE.

MEANING, NATURE AND CLASSIFICATION OF LAW.

Meaning and Importance of Legal Method.

Legal method refers to the subject that teaches, students techniques of how to find the law, where to find it, how to apply the law. It is a subject that cuts across all legal subject because the skills that are learnt out of legal method will be applicable in all aspects of law.

The Importance of Legal Method.

- i) Legal method teaches students on how to apply abstract legal concepts to factual situation.
- ii) Legal method also teaches students how to find authoritative legal material and how to apply them in a given situation.
- iii) Legal method covers a broad task through statutory interpretation.

NB: In a state a smallest unit of a state is a family. So, in family normally governed by the rules, when families come together with different rules, they share common rules neutralize into customs with passage of time to time some of these customs crystallize to law which is recognized and passed by the state. Normally there must be usage considerable period of time become law.

When a person talks about the term “law” is normally used by people but not so much in terms of particular laws but in terms of system. When a person talks of law as a system it is normally equated to the Government and legal system, law in terms of legal system consists of parliament, courts, legal profession, a police and bureaucracy that services insists.

Law may also equated to legal process, when someone talks of law as a legal process one primarily refers to the legislative process, judicial process. When law is referred to as a legal process, one refers to how the

Judges decides cases or what is known as adjudication or how the laws are made.

Meaning of law.

Law has been a paradox of legal science over ages. John Austin defines law as a body of commands of sovereign authority with sanctions. However, this definition has been challenged because command is not integral feature for all laws apart from the penal laws. Law normally exists in a politically organizes society as to how man should conduct themselves. Holland on the other hand, defines law as rules of human action set by a determinate human authority. Also, Thomas Aquinas attempted to define law as a rational order for common good enacted by legitimate power.

In general, law entails a framework of principles that spells out what can be done and what cannot be done in a society.

In broader sense, law entails either legal order or the whole body of legal precepts agreement of men in a politically organized society. Basically law entails a body of agreement of men in a politically organized society as to their relations with one another. It is philosophically discovered system of principles which express the nature of things to which man's conduct ought to abide by.

Nature of Law.

Normativity is among the basic features distinguishing several rules or standards governing the society from the law. While moral standards are merely recommendations, law on the other hand is normative in the sense that it is obligatory hence the subjects do not abide by it as a matter of choice. However, compliance to law is not necessarily prompted by sanctions because at times compliance is a matter of internal convictions.

Generally, the law attracts legal sanctions in the form of fine, imprisonment or customarily recognized sanctions among others which are geared ensuring compliance. For example a common customary sanction among the Sukuma People in the lake zone, Tanzania is known as Kutulija in which a member of society may be declared outcast for social disobedience. However, customary or social sanctions are not necessary endorsed in the state legal system.

Law and Morality.

Although law plays an important role in the social intercourse, most of social actions are governed by morality and at some points law and morality intersect each other. Morality and law regulate social intercourse at different angles. Moralities are sanctioned by the community as a whole and not through determinate machinery as the case of the law. Also law concerns with the physical order as opposed to abstract phenomenon. Compliance to morality is normally appealed to supernatural, thus results from conscience or internal conviction. Conversely the law acts externally and normally enforced through external force through sanction.

FUNCTION OF LAW.

Regulatory function.

Law is a regulatory framework of the society albeit it is not the only one as noted before. Other values that regulate the society include morals, religious rites and ethics. Essentially, it regulates the social intercourse among the individual subjects inter se and the relationship respectively. The law ties up state authorities within the proportional and legitimate legal bounds. Thus it confines powers within the dictates of the law.

Preventive function.

Law inhibits or forbid various wrongs hence it is also known as prohibitive function. It essentially prohibits defiant behavior of the subjects and the state machineries.

Directive function.

The law provides both substantive and procedural directives on how responsibilities can be performed. For instance under the Constitution if the president finds it necessary to declare state of emergence there are set of directives such as submission of proclamation to the speaker¹ which is basically an example of procedural directive.

SOURCE OF LAW.

The legal system of any country recognizes diverse sources of law. Among the basic sources of law in Tanzania includes constitution, statutes, customary law, Islamic law, case law and received laws.

a) Constitution.

A constitution is also a source of law in Tanzania and all laws passed by the legislature must conform to the constitution, a law which is repugnant to the constitution or inconsistent to the constitution is null and void to that extent as per Article 64(5) of the Constitution of United Republic of Tanzania. All laws must conform to the constitution of United Republic of Tanzania. Therefore, the legislature can only passed law which can not contradict or contravene the constitution and that is why some authors argued that in Tanzania, there is no parliamentary supremacy but constitutional supremacy.

b) Statutes.

¹ Art. 32(3), CURT

Statutes are all laws passed by parliament in its legislature capacity. Statutes can be principal and subsidiary legislation. However, principal legislation all laws passed by parliament and subsidiary legislation are normally not passed by parliament but by the Minister concerned but sometimes are called Delegated Legislation.

c) Received Law.

Apart from legislations, Tanzania applies received laws. Just from the colonial era, diverse English laws were received covering the gap of the existing legal framework. The colonial state imported the Common law, doctrine of equity and Statutes of General Application which were in force in England before the reception date, 22nd July, 1920. Of to date the courts have been resorting back to received laws where a gap is spotted in the existing laws.

d) Customary law.

Customs are consistent long standing usages and practices of the society with inherent legal force. Customs were applicable in Tanganyika before and during colonial period and of to date. In the pre-colonial era it extended to civil and criminal matters; however the colonial state limited it to civil matters. Currently, the customary law governs personal matters such as marriage, legitimization of children and succession among others provided that parties to the same community.² However, not all customary rule will be accepted as a source of law unless it is not repugnant to the Constitution or rules of natural justice.

e) Islamic law.

² Section 11(1), The Judicature and Application of Laws Act [CAP 358 R.E 2002].

It is a religious law applicable in matters of personal nature such as marriage, succession and divorce where both parties confess Islamic religion. In the coast of East Africa, the application of these laws can be traced from the early contact with the Arabs by the 7th Century having dominated the coastal areas and the long distance routes in Central and North West Tanganyika.

f) International law.

International legal instruments and customs are other sources of law in Tanzania. States are bound by international instruments and indeed, derive various legal principles from international law. Once become a source of law, the country has to ratify a treaty and become applicable in domestic legal system.

For example, the law governing exploitation of marine resources in Tanzania has significantly borrowed its principles from the UN Convention on the Law of the Sea, 1982. Similarly, most of the constitutions extract the fundamental human rights from diverse international legal instruments.

g) Precedents.

Are decided case or precedents form a bed rock of the Common law legal system. Case law among other things reduces the gap in the existing laws besides developing the legal principles.

CLASSIFICATION OF LAW.

Classification of law may hardly be exhaustive. Generally it may depend on factors such as scope of application, role, form and other factors. Amongst the common categories of law include the following;

1. Common law.

It is a body of norms, doctrines and rules rooting from the common values or customs of the English people which were which developed by the court governing their intercourse. The development of common law owes much from the Norman (French) Conquest by 1066. Following the conquest King Henry II appointed representatives in all shires (provinces) in 1154 to study the conduct of local courts and administration of justice. The recommendations of the representatives resulted into formation of circuits of courts popularly known as *justiciaeerrantes* (wondering justice) replacing the local courts, it also extracted diverse English rules which due course developed a body of rules applicable in the court through out the state namely Common Law. It was “Common Law” because it evolved from common values of the people and refined from embryonic stage to fully fledged development through judicial decision.

2. Equity.

Literary equity means natural justice.³ It is a branch of English law which was developed to complement common law which was so harsh and rigid. Initially people aggrieved by common law courts petitioned their grievances to the crown being the fountain of justice. In the due course court of chancery was established to administer justice on substantial justice applying the rules of fairness namely equity.

3. Substantive law.

It refers to the law that is concerned with rights, powers and duties of the people. For example, the Law of Contract creates rights and duties of parties and Family Law deals with matrimonial rights and obligations.

4. Procedural Law.

³ Williams, G, (1982), Learning the Law; Universal law Publishing Co. Pvt Ltd, p.26

This lays down a framework for realization of rights by facilitating enforcement of rights. This category of law is also known as adjective law, the good example being the Civil Procedure Code [CAP 33 R.E 2002].

5. Public Law.

Public law deals with the relationship between the state authorities and the individual subjects, spelling out the reciprocal relationship between the state machineries and the people. Criminal Law, Constitution and Administrative law are among the public law.

6. Private Law.

Individuals normally fall into spontaneous relations for which requires legal framework to define and protect rights and obligations. These relationships are governed by the private law. Thus, private law is concerned with the private interests, rights and duties among the individual subjects *inter se*. Private law principally is concerned not with the state but with the private domain of the individuals such as contracts and torts.

NOTE.

The distinction between public and private law may not be watertight because the modern states enter into contractual relationship thereby falling into the purview of private law. In that case defining private law by focusing on private individuals and excluding the state may create debate. All in all the state falls into private law as an exception to the general rule. Of importance, private law is significantly subjected to the wish, interests and discretion of the individuals who may set standards of their own choice. For example in contract, parties have freedom to set terms of their choice and even when it comes to suing it remains a question of choice as opposed to public law that may not have no such room, thus the state normally intervenes in accordance to the existing rules whenever public law is disobeyed.

7. International law.

It is a branch of law that deals with the interaction among the states and international societies. Basically international law came to regulate an inevitable interaction in the international community. As a body of law, international law encompasses conventional and customary rules. Conventional rules result from agreement while customary rules entail usages and practices of the international community.

8. Municipal Law.

This entails the legal framework or laws governing the domestic or internal affairs of the state with territorial implication in the sense it binds every subject in the state. Although the municipal law does not generally extend beyond the territorial boundaries, for citizens it has nationality implications. Thus it binds a citizen irrespective of residence or territorial consideration.

LEGAL LANGUAGE, LANGUAGE OF THE COURT AND LEGAL RESEARCH & WRITING.

Legal Language.

This refers to the language customarily used by lawyers in the course of discharging professional responsibilities. Legal language or language of law does not refer to a particular language; it entails a species of language with distinctive features normally used by lawyers or legal personnel. Indeed it is peculiar because its features make it difficult for laymen to understand even when used in a common lingua franca. Basing on its salient features a legal document may hardly be understood even by a specialist in language.

Historical background to the legal language.

Legal language evolves in a historical discourse and basically it owes much from the latin speaking missionaries, Normans, and Germans since its development was invariably associated to European expansionism. The expansionism left a significant legacy in the British legal system where as several French words such as attorney, defendant, indictment, jury, demurrer as well as Latin words like versus, caveat emptor, owes were imported.

Features of legal language.

a) Use of common words with uncommon meaning.

Normally lawyers use common words with technical meaning. Although the words may have common use, may hardly be understood by lay persons when used in legal context. For example, a word suit which in the ordinary sense refers to attire or clothes, in legal context it means a case or legal action contrary to the ordinary meaning of the words.

b) **Use of old language.**

In legal document it is common to come across archaic or to find words which are no longer commonly used. Currently archaic words such as ***bequeath, witneseth, thy and doth*** are still largely used apparently for the sake prestige.

<i>OLD ENGLISH: I doth witneseth the testament on this 15th Day of January, 2016</i> <i>MODERN ENGLISH: I do witness the testament on this 15th Day of January, 2016</i>
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c) **Latin words are frequently used.**

As noted before the legal science owes much from the Continental Europe especially from the Latin speaking states. Banking from the history of legal science it is not surprising to find legal language featured with many Latin words such as ***alibi, locus standi*** and many others. These words serve the purpose of uniformity, brevity and retention of the original impression or meaning of words.

d) **Frequent use of format words.**

Legal language is normally very formal, indeed frozen style, for instance a judge is normally addressed as Lord or Lordship, my Lord while a Magistrate as your honour or honourable.

e) **Use of appealing words or phrases.**

A lawyer normally use an art of language to convince the bench, for instance an Attorney may say ***“if it pleases your lordship, I pray for a temporary injunction.”***

f) Polite expression of disagreement.

Principally the lawyers use polite ways in expressing disagreement with the bench. For example, when a judge has made a decision in ignorance of law or contrary to the law, a lawyer cannot say the Judge was wrong but will normally say his lordship erred in law or mislead himself.

g) Use of phrases and complex sentences.

In legal language complex sentences are commonly used. The rationale behind this approach is to attain clarity by accommodating several conditions, for instance in the Criminal Procedure Act there are several complex sentence as demonstrated below.

S.9(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolleprosequere, either by stating in court or by forming the court concerned in writing on behalf of the Republic that the proceeding shall not continue.....

h) Clustering of different words with similar meaning.

Lawyers may say the same thing in different ways. Although the lay persons may perceive it as a deliberate abuse of language calculated to confuse them, the practice is geared towards realizing emphasize and clarity.

I, ALLEN KAMINDA, of the town of Kinondoni in Dar es Salaam City, do here by and unreservedly make, ~~publish-and~~ declare this as my last Will and *Testament*, hereby revoking all subsisting wills ~~and codicils hereto I made prior to this will.~~

For example, declare and publish or will testament bear similar meaning but they may be used together as portrayed above. Under normal circumstances it makes no difference if the testator simply said I declare this my will to revoke all subsisting/previous wills.

Also in the Law of Contract lawyers normally say “this contract ~~is null and void ab initio~~ and of no legal effect whatsoever thereby conferring no rights and duties to the parties” instead of simply saying this contract is void *ab initio* or simply *void*. It is however; important to note that this pattern aims at attaining emphasis.

Words may be similar yet with different impressions hence by clustering words together the message becomes more effective and the chances for misconception may be reduced.

LANGUAGE OF THE COURT.

It refers to the language(s) authorized by the law to be applicable in legal proceedings and records of the court.

In Tanzania, the language of court is provided for under the Magistrate Courts Act [CAP 11 Revised Edition, 2002] where as in the Primary Court Kiswahili⁴ is applicable in the legal proceedings and records but in the Resident Magistrate and District Court both Kiswahili and English is used except that all records are required to be in English.

The High Court and Court of Appeal use both English and Kiswahili in legal proceedings while records are kept in English. The use of English in court is not free from criticism; the stakeholders find it as an impediment to many people who are not conversant with English language.

In the early years of independence the use of English was justified by the circumstances since the court was largely dominated by White Judges also

⁴ Section 13(2)

there was one Court of Appeal cutting across the whole East Africa in which English Language was inevitably used.

It is also important recapitulate that most of the precedents referred are in English which might have fuelled use of English Language leave alone the fact that lawyers are trained in English and the Regional and Global influence of this language.

English is the lingua franca of the world estimated to have vocabulary of 1 million words including scientific and technical terms and indeed its vocabulary is extensive than any other language in the world save only the Chinese⁵

LEGAL WRITING AND RESEARCH.

For lawyers legal drafting, drafting and research is inevitable.

Legal writing.

Legal writing is an art required of the legal profession which has been labeled as a rare profession for many centuries this art and always lawyers have their own style of writing just from the diction to the formulation of sentence structures geared to influence the recipients.

In legal writing one must avoid ambiguity and ensure that every key aspect is clearly and comprehensively elaborated while observing proper citation of authorities.

Preparation of documents.

⁵Jundu, F (2010), HotubayaKiongoziwa Tanzania naMgeniRasmiKatikaMahafaliyaTatuya Azania College of Management, Diamond Jubilee, Tar 6th November, 2010, p.10.

It is important to make sure that a legal document contains relevant authorities. For instance when you prepare pleading or charge sheets there must be a supporting provision of law. Failure to cite proper provision or a total omission may be detrimental to your case. You may end up losing your potential case simply for wrongful citation or non citation of law.

There are certain documents which are required to have minimum contents which a party or legal representatives have to observe. Thus as much as possible a drafter should remember the basic contents and observe form or style required of a document.

Likewise one has to follow several stages before a document is finally done starting from the preliminary stages which may involve search of relevant authorities and brainstorming of the issues.

After gathering important information a first draft or a rough work may be prepared and subsequently refined as often as possible until the prerequisite standards are satisfied.

LEGAL RESEARCH.

Research seeks to inform the society of various developments in the fields for which the research is undertaken or to uncover hidden or obscure truth in legal jurisprudence. The other purposes of legal research are to acquire and impart knowledge for purposes of proving or disproving a legal issue or develop new ideas. Lawyers do normally undertake researches to address pertinent legal issues in the field but research may simply entail search of cases bearing fundamental principles which can be achieved through library survey.

BASIC STAGES OF RESEARCH.

a) Problem identification.

A problem is any situation or fact with hidden truth and normally a research problem emanates from a phenomenon encountered by the society such as car accidents, diseases or habitual rape.

b) Hypothesis/ research question.

It is literary a tentative conclusion or prediction on the factual correlation between existing phenomenon and the underlying forces which may finally be proved or disproved. For example, where most of secondary school students encounter teenage pregnancies, one may predict that the situation is fuelled by poverty.

c) Literature review.

Normally a problem may be new to one person and not to others hence it is recommendable to go through what others have studied to find out whether there is any gap in the existing literatures in regards to purported research problem. Research should only be conducted if the existing literatures do not cover such problem or part for which research is geared to.

d) Data collection.

After establishing a gap in the existing data one may resort to data collection using relevant or tools such as interview, observation and questionnaire.

e) Data presentation.

In this stage all the relevant data are presented, this stage may involve tables and graphs.

f) Data analysis and interpretation.

This is a technical stage of the research because the researcher is expected to make the data to speak. The research must be able to tell the correlation between the data to speak. The research must be able to tell the correlation between the data and the existing phenomenon. For example, when the data show high rate of gender violence may create impression that the society is lacking civic education.

g) Formulation of theory/conclusion.

At the end of the day a research is expected to offer an answer or solution to the research problem or at least tell about the underlying factors behind the social phenomenon.

ANSWERING PROBLEM TYPE QUESTION.

To most of the students answering problem type question suffers headache and among the reasons for fearing problem type questions is the lack of knowledge on how to do these questions since answering such questions is an art.

Procedures of attempting problem type question.

There are four basic aspects in attempting a problem type question namely, issues, rules, application of rules and conclusion which together form the so called **IRAC** model.⁶

1. Identification of issues.

After coming across a problem type question a candidate should read it carefully to uncover various contentious issues taking into account that in a

⁶ Name suggested by Professor. HussainSaheb Mohamed (UDSM).

scenario there may be several facts. You should bear in mind that some issues may only aim to the issues from a bundle of facts otherwise they may end up wasting time on irrelevant facts. Focus should always base on facts which have some legal implications. In the scenario below validity of marriage is the key issue hinged on consummation and pregnancy by a third party (pregnancy *per alium*).

Scenario

Monica and David, aged 17 and 21 respectively, married in Kibaha District Office in June 2015. The marriage followed a two weeks colorful honey moon at Paradise Hotel. Monica did not tell her parents that she was getting married. The marriage was not consummated because Monica was afraid of intercourse despite the fact that her friends had been narrating about the enjoyment of sexual intercourse. In December 2015 David began seeing a psychiatrist so as to resolve this difficulty. David who was repeatedly urged Monica to consummate the marriage has discovered that she is having a long standing sexual relationship with her Psychiatrist and she is four months pregnant. Advise a David on any course available in this cenario.

2. Proper rules.

A lawyer is trained on how to find a right rule and apply in a right scenario. Rules can be obtained from relevant authorities such as statutes, case law, received law and customary law and normally a candidate having identified the key issues in the scenario finds a proper law from among the known sources. At this point one has to locate the general rule and any available exceptions.

3. Application of rules.

Essentially this aspects entails discussion of the rules in the application of law a candidate should be able to synthesize law and the facts logically and confidingly and normally an examiner expects to see sufficient art craft in the discussion of rules with due references to relevant authorities.

4. Conclusion.

As a matter of principle conclusion sums up the main discussion hence one should not come up with new issues at this stage. Conclusion should reflect logical sequence of the premises while avoiding deviating from the minor premises. For example in one judgment inconsistency between the minor premises and conclusion were alarmingly spotted where as the Magistrate discussed in details in details the standards of proof in criminal cases apparently suggested apparently suggested to agree that particular case the standards of proof was not attained but at the end of the day accused was convicted leaving a lot to be desired.

LAW REPORTS

In a legal system which is based on precedent are repositories of cases decided by the courts especially Appellate Courts or what are known as Courts of records.

In Tanzania most of the cases reported in the Law reports are those of or from High Court and Court of Appeal.

The law reports are repositories of cases and provide information relating to cases and rule of law laid down by the courts and they also contain information related to statutory provisions.

WHICH CASES ARE REPORTED IN LAW REPORTS?

It is not possible to report all cases decided in courts, therefore cases to be reported must be selected. In selection of cases to be reported, this is a matter of **editorial discretion** in deciding what cases are to be reported in the Law Reports.

The Editorial body considered the following matters;

- Whether the cases make a new rule of law or re-state an existing rule of law.
- Whether the case clarifies conflicting decisions of lower courts.
- Whether a case interprets a statute which is likely to be of wide application
- Whether the case interprets a common clause in documents such as wills, contract.
- Whether the case clarifies an important point of practice or procedure.

CITATION OF CASES ON LAW REPORTS.

Citation is a process that requires sufficient knowledge and in fact it is advisable to read the instructional note of the statute before adopting an appropriate style.

a) Citing using page.

In this pattern a case is referred by the year in which it was reported followed by page number. For example in Tanzania Law Reports follow this pattern is used such as **R v. Rweyemamu s/o Mukandara [1985] TLR X**, where X stands for page number.

b) Citation using volume and page.

This pattern indicates volume number of the Law Report. Volume is necessary where in one year several reports are authorized by the same person for the sake of convenience. If simply refers say to Weekly Law Report of 1985 without specifying volume may cause trouble to the users.

This pattern is common in the Weekly Law Reports Kings Bench and Queens Bench reports in England as well as some reports in East Africa. Example of this pattern: X represent page number where as Y stands for volume number.

c) **Citation using case number.**

This pattern makes no use of page numbers, the important thing is the case number. The High Court Digest is among the Law Reports of Tanzania where normally a case number is indicated by letter “n”. For example, **James Shayo v. Juma Issa (1970) HCD n. x.** where **X** stands for case number.

CITATION OF REFERENCE AND BIBLIOGRAPHY.

Bibliography and reference are often used interchangeably but the two words do not mean the same thing, while bibliography entails any relevant authorities not necessarily cited in the literary work but reference confines itself to literatures which are used in the work.

System of reference and bibliography (A.P.A).

There are diverse styles of citing books but in Tanzania most of the institutions use the American Psychology Association (A.P.A) system that commences with the surname of the author followed by the year of publication, title, place of publication and publisher. Mind you when the author is unanimous, the citation will commence with the title or subject covered.

Where a book is authorized by two persons instead of mentioning both authors one may simply mention one author followed by the word another and where the authors are more than two the name of the first author will be followed by the phrase “and others” or et al.

In other style the year does not come after the name of the author but it is put at the end. Remember to bold or italicize the title and where the title has a subtitle the two must be separated by colonies for example:

- Mzava, John (2016), Meru Customary Law and Practice, Vuga Press, Arusha/

Footnote and End note.

The two terms serves the same purpose except that the footnotes appear at the foot or bottom of each whereas end note are appended at the end of the chapter. Basically these notes facilitate quick reference, ensure credibility of the literary work and serve as an acknowledgement of the source of the information or concepts.

Normally when the same reference is repeated the writer should not reproduce the notes verbatim instead one may use the word *ibid*, *loc.cit*, or *op.cit* depending on whether the references are consecutive or same page is referred.

Ibidem (ibid) means “*at the same place*” and it is often used where reference is made to the same publication without interruption hence instead of repeating to cite the same publication, the writer would instead use the phrase *ibid* followed with the page number. For example in the first citation one may write:

- Ruhangisa, J (2013), *Juvenile System in Tanzania: Law and Practice*, p.33.
- *Ibid*, p.35

Op.cit is an abbreviation of the latin phrase “*Operecitare*” which literary means in the work(s) already cited. It is principally used where an author makes reference the same publication more than once provided the references are not consecutive.

- Mwakaje, R, (2013), Women discrimination in Tanzania, p.33.
- Ngambilo, M (2000), Customary Marriage among the Bena People: A case study of Inheritance of Widows, p.20.
- Mwakaje, R, (2013): op.cit,p.25

Loco citati (loc.cit) a latin word which means the place cited, which is always used to refer to the same author, title and page of an earlier footnote or endnote but it is not very common perhaps because it is more or less complementary to *ibid*.

In research reports the use of in text reference is very common whereas instead of putting footnote one may put the name of the author in the brackets beside the concept borrowed from the author(s).

Scenario

In 1985 Doctor Chris Peter Maina identified what he saw as the major reasons why the executive was not being challenged in the court, most prominent was the “timidity and mediocrity on the part of Judges accompanied by loyalty born out of pressures and expectations of favour from the executive” (Maina 1985:7).....This cartoon came in the wake the groundbreaking of favour early 1990’s Judgments of Justices Mwalusanya and Lugakingira. JwaniMwaikusa (1996: 245) argues that a heightened perception that the judiciary was or could becoming an ally of the emerging opposition during this time may have been sharpened by the Attorney General request to remove the vocal government critic and activist Judge Mwalusanya from hearing a petition filed by opposition activist Reverend Christopher Mtikila.

HOW TO READ A CASE.

The way of reading a case will depend on purpose of which case. However, there are two major methods of reading a case namely,

a) Orthodox method.

This refers to a method of briefing or summarizing a case by reading a single case. The outline form of precise includes;

- Name of the court
- Title of the Court
- Identity of the parties i.e natural or legal person
- Facts of the case
- Issues
- Decision

b) **Unorthodox Method.**

This does not involve reading a single case but involve reading group of cases. In facing a problem one may decide to research on particular subject, now in conducting a research it is insufficient to read a single case but rather one should read a group of cases so as to come up with concrete authorities.

WHY READ A GROUP OF CASES?

Reading a group of cases it serves different purposes;

- To resolve doubt about the law.
- A group of cases may be read to show their sequence on particular topic. For example, the development of the law of negligence through a sequence of cases it helps the court to develop new rules applying existing rules.
- To analyse style of reasoning judicial opinion where by Judges used different type of reasoning like Formal Style and Grand style.
 - Those following the formal style of reasoning are very reluctant to advance the law and apply the law as it is, are known as **Timorous souls**.
 - Those following grant style they are not afraid of advancing the law and interpret the law to meet the prevailing social economic conditions and Judges are known as **Bold Spirit**.

- A group of cases may be studied in order to make a critical analysis of the corpus of the opinion of a single judge or making a critical analysis of alleged political biases of one or more courts.

THE ART OR STYLE OF LEGAL WRITING.

In being a lawyer constantly it is required to write for their clients. In law language is a tool of trade, lawyer may either write in a predictive or persuasive manner.

1. Predictive writing.

This refers to a written document called *Office Memorandum* which is a confidential document between lawyer and client.

In predictive writing a lawyer will foretell the court how to resolve particular dispute and normally employ predictive writing when giving legal opinion to a client. However, such prediction given must base on sound legal reasoning.

2. Persuasive writing.

This refers to a document which is required to be in written submission namely, *Motion Memorandum*.

In persuasive writing, the lawyer has a duty to convince the court to make a favourable decision in order to influence the court to have the skills in arranging points and arguments in a logical manner. However, in our legal system we normally have a written submission which are both in Trial Court and Appellate Court which are more general and normally used in a interlocutory proceedings.

CHAPTER THREE.

COMMON LAW CASE TECHNIQUE.

1. Ratio decidendi.

The part of a case which is binding is called Ratio Decidendi of the case. It is only the ratio decidendi of the case that has binding authority.

The finding of ratio decidendi is an art which needs to be learnt and it is not a mechanical process. However, finding of ratio decidendi is an important part of the lawyers training because their argument and in citing precedent lawyers only cite authoritative part of a precedent which contain the legal rule.

Formulating the ratio decidendi of a case is a creative process and one will have to choose between the various possibility. The ratio decidendi is a part of a judgement or decision.

Granville Williams in his book *"Learning the Law"* states that, *"the finding of ratio decidendi is not a mechanical process but an art one gradually acquires through practice and studying."*

What is the ratio decidendi of a case?

There are various conflicting theorist show how extract ratio decidendi is. So, various Jurist expose different views on ratio decidendi such ProffesorGood Hart, Professor Julius Stone and Oliphant.

1. Professor Good Hart said that;

- The material facts of the case.
- The decision of the Judge based on the material facts.
- Judge make conclusion upon the facts as he sees them.

However, further Professor Good Hart said that, the Judge reaches a conclusion upon the facts as he sees them. It is by the Judge choice of

material facts that creates law and the reason given by Judge in his opinion or statement.

Therefore, one is not to state the facts and conclusion but rather state the material facts as seen by the Judge and his conclusion based upon them.

What facts are legally material?

It is generally agreed facts as to place person and time are immaterial, in extracting the Ratio Decidendi one should pay attention to the following matters:

- Material facts.
- Issues are drawn by the parties to the disputes or by the courts.
- Decision of the court.

The essence of Prof. Good Hart argument is that the ratio decidendi can be discovered by taking into account the material facts and the decision based on those facts.

2. Professor Julius Stone, he criticized on Good Hart theory on finding of the ratio decidendi by saying that Good Hart attempting to provide prescriptive rather a descriptive. Professor Julius Stone argues that, *"the process of finding the ratiodecidendi is basically one of choosing an appropriate level of generality."*

Professor Julius Stone his convinced that, Good Hart neglect of a level of generality and concentrate on material facts which led him into error. So, professor Julius Stone continue say that, it is not a question of material facts to the decision in the earlier case but rather what he consider most is level of generality (analogical relevance) or obstraction.

NB: Analogical relevance refers to the prior holding to the latter case requiring the latter court to choose between possibilities presented by the earlier case.

3. Oliphant.

Oliphant said that, the ratio decidendi of the case can be identified by studying facts and the conclusion. He argued that, one may ignore the opinion entirely and work out to the principle from the facts and the judgment merged on those facts. According to Oliphant *"it is what the Judge does and not what he says that matters."* However, Oliphant suggestion is faulted on the ground that facts are not constant but relatively (facts play an important role in deciding the case). However, the Judge founds its conclusion upon a group of facts selected by him and materials.

Therefore, in analyzing a case it is not a matter simply stating the facts as suggested by Oliphant and conclusion, but a matter of stating a material fact as seen by the Judge and his conclusion based on them, on those facts.

TYPES OF RATIOS.

a) Descriptive Ratio.

This refers to the way in which the earlier Judge reached his decision. However, in descriptive sense a later Judge must acknowledge the material fact of the case.

b) Prescriptive Ratio.

This refers to the earlier case binds on the later Judge. However, it is the interpretation which a later Judge places on an earlier Judgment when deciding whether it is binding or not.

According to one Jurists called Karl Llewellyn in his book called *"The Bramble Bush"* he contends that, *"The Importance of prescriptive ratio decidendi cannot be underscored as no one case has a meaning by itself and this is because other cases give you a background and give you guidance and assurance."*

OBITER DICTUM.

This refers to mere say by the way, it is not binding because it may be made without full consideration of the case on the point. It's merely a rule of law stated by the way of analogy or illustration.i.e. hypothetical. It is suggested that rule from which the decision is not finally rested unlike the ratio decidendi. Some author divided this categories into two;

a) Gratis dicta.

These are mere saying that are given away as if they were free, this contain very little value. They are considered to be a product which has not been much thought.

b) Judicial dicta.

A normally pieced by careful thought and extensive argument on the point in questions. However, a judicial dicta carries more weight than gratis dicta.

CHAPTER FOUR.

DISPUTE SETTLEMENT METHODS AND PROCEDURES.

Meaning and rationale.

Dispute settlement is a process that aims at resolving misunderstandings affecting mutual relationship between the opposing sides. Disputes are normally prompted by conflicting interest over a matter, belief, or something of interest. They are spontaneous outcome of political, economic, social, cultural or religious divergence. The rationale behind disputes settlement is to attain social harmony as a basic socio-economic fabric.

Indeed social life has never been without disputes in fact the history of mankind has been greatly shaped by disputes. Just from the pre-colonial society, the society has social machineries such as elder's councils to

resolve disputes. Every society establishes a framework for dealing with transgression of the law and basically even the developments of the modern states have been influenced by disputes.

HISTORY OF DISPUTES SETTLEMENT IN TANZANIA.

Disputes settlement is a social dimension that varies over time and from one society to another depending on the material setting. In the pre-colonial society there were modes suited to the material setting known as pre-capitalist modes of disputes settlement or traditional modes of disputes settlement which were greatly affected in the second half of 19th century following colonialism.

Western disputes settlement system was adopted in the colonies albeit, the traditional system was similarly retained. In the Germany East Africa territory and subsequently during the British era, the traditional disputes settlement existed side by side with the Western system where as the disputes between the indigenous people per se were regulated by the customary laws and the Western laws were applicable when the European were involved which was known as double tier system. The double tier system was retained until 1963 when Tanganyika went through significant legal reform geared towards harmonization of laws where as the application of the customary laws had to be limited to personal matters such as marriage, contract and succession.

BASIS FOR CLASSIFICATION OF MODES OF DISPUTES RESOLUTION.

Disputes settlement may be classified in various ways basing an underlying factors behind each mode such as the machineries involved, procedures, outcome, beliefs, and role of technology in dispute resolution, involvement or non-involvement of the third parties and their role in the dispute

resolution. For example when a dispute is referred to the court of law is known as **Judicial Dispute Settlement** because judicial machinery is involved but when it is settled without assistance of the court it amounts to **extra judicial dispute settlement**. Modes of disputes settlement can therefore be classified in the following categories;

Judicial Settlement and Extra Judicial Settlement.

Judicial settlement entails dispute resolution through the aid of the court of law. This is also referred to as litigation. In this mode an aggrieved person refers the matter to the court of competent jurisdiction as opposed to extra judicial settlement as noted before. Judicial settlement is subject to some legal details that one has to go through to realize the remedy or remedies seeking to.

MODES OF DISPUTES SETTLEMENT.

1. TRADITIONAL DISPUTES SETTLEMENT.

Traditional disputes settlement basically entails customary approach of disputes settlement. It comprises of ancient modes of disputes settlement which do not abide by strict rule of procedure. Traditional disputes settlement was focused at amicable settlement hence at the end of the day no one was a loser or winner as to modern system where specialized machineries are established and the winner always takes all. Amongst the traditional methods of disputes settlement include trial by ordeal, trial by drumming the scandal, trial by oath, mediation, conciliation, trial by battle and trial by jury.

a) Trial by Ordeal.

Ordeal may be traced from an old English "*ordl*." In Germany it is "*urteil*" or dutch "*oordeel*." It is one of the universal classical judicial practices by exposing persons to dangerous of fearsome circumstances or situation such

as hot object. In this practice proof of innocence was between death or injuries and survival. This mode was also referred to as judgment by verdict.

The method was not hinged to ideal procedure but it had spiritual or magic or mythical connections. In this method the judgment was believed to be made by God or supernatural, thus *judicium dei* on assumption that God stands for innocent person hence death or injuries sustained by the accused person symbolized guiltiness and conversely, the survival implies innocence. This was evidenced in the case of ***Rex v. Palamba s/o Fundikira 14 E.A.C.A 96***, this was a trial by ordeal to discover who had by witchcraft caused death of the innocent children and the appellants takes a traditional medicine used by witches known as “Mwavi”. If a person takes it and he has done something wrong he will die, whereas if a person takes it, and he or she has not done anything wrong, he/she will not die but only vomits. The court held that, Wamlunda was innocent of witchcraft for it does not exist. On this basis, Mwavi medicine does not work on an innocent person because has not cause death hence this navigated malice aforethought as per section 200 of the Penal Code for intent to cause death or the knowledge that the act will probably cause death were absent. The appeal was allowed and conviction and sentences were quashed.

b) Trial by drumming the scandal.

This method involves exchange of words between the parties to the disputes but a more creative approach may be elected by the parties whereby one

may recite a son or poem to convey message. At the end of the day a defeated person is believed to be guilty since the method was build on beliefs that the supernatural have no championship with the evil doers. There was a dispute between ***Torgindi v. Mtswen***, the parties quarreled each party live in different village, each party went home and sung a song, each party sung as loud as they could, so that the whole village would heard. Now the drumming contest went on more three weeks now the village elder took note of this and he was of the view that, if the contest proceeded any favour it would end in the fight. The village elder called Torgindi, Mtswen, and their people to come to his compound, he ordered each side to sing and drum, and he would decide the winner, after both sides having sund and drum the village elders announced that Torgindi won the case but Mtswen had the better song, so both parties won and lost a little.

c) Trial by battle.

This is a method in which disputing parties get involved in actual physical fight. This method operates under similar assumption that God stands only for innocent persons. The important point to note is that a party may hire another person to stand him or her for reason of illness under the same assumption.

d) Trial by oath.

This method required a party to take an oath a guarantee of the truth of the testimony. The method was justified by a belief that having taken an oath one had to tell no lies for fear of supernatural punishment. After swearing the council believed the stories narrated by a party to be nothing but the truth. However, this method may not be effective where a party cares not about the consequences of oath.

e) **Trial by Jury.**

This is one of the oldest forms of legal proceedings in the ancient Greek society. A jury is a panel of adjudicators and in the common practice in the Greek society the jury consisted of elders. For example the trial of the great philosopher, Socrates consisted of 500 men. In the modern system jury entails by Judges or laymen assisting a Judge on points of fact hence a jury may make findings of fact leaving the judge to make decision on point of law. The Jury was impaneled to assist determination of factual issues and not legal issues.

The opinion of the jury is not dispositive but rather advisory to the Judge who made final determination of facts.⁷In the Common Law Jury is normally involved in serious criminal cases whereas in Civil Law System the use of Jury is common in all cases although focus is in criminal cases. The common practice in Tanzania is to impanel the court assessors who advise the Judge or Magistrate on factual issues and their opinion does not bind the Judge or Magistrate.

The danger is that the jurors may deliver verdict prompted by popular perception or emotion. Thus they are susceptible to the influence of media and general public opinion. Also juries may be biased especially when the matter has influence in the ideological, cultural or moral orientation of a juror.

The rule of practice did not require them to give reasons for decision hence it was abolished in some countries such as Malaysia, 1995 and India 1960 basing on a number of factors. Trial by Jury overemphasized on the number of witnesses for one to win the case. That is to say one with many witnesses had great likelihood to win the case as opposed to common law practice.

⁷Burnett, W, (1975), Introduction to Legal System of East Africa, Kenya Literature Bureau, Nairobi, p.128.

f) Mediation.

In this mode, parties refer their dispute to an impartial third party known as a mediator who has potentials to create ideal atmosphere for resolution of dispute. A mediator does not adjudicate the dispute but simply facilitates dispute settlement hence a mediator is also known as a facilitator. Settlement of the dispute falls squarely on the parties. The key role of mediator is to explore various courses available by pointing out the advantages and disadvantages of each course.

A mediator may conduct separate and joint sessions depending on the attitude and the reaction of each party towards one another but where the situation is so hard, it is advisable to commence with separate session and proceed to joint session even where the situation tense to accord a room for parties to escapeout grievances especially with a party who feels weak against the other. It is not strange to find a party to shading tears and airing out abusive words against them as a means of venting out grievances which is likely to be achieved through joint session.

2. MODERN DISPUTES SETTLEMENT.

Modern disputes resolution can be categorized into Litigation and Alternative Dispute Resolution (A.D.R). Litigation may fall under systems namely Common Law Systems and Civil Law System.

a) Litigation.

Litigation is involuntary, formal and structured and public process in which one has to observe factors such as limitation time and jurisdiction. It involves a set of legal procedures for channeling claims, for civil suits one has to commence with proceedings followed by other stages such as mention, preliminary hearing, hearing and others while criminal cases do normally commence with charge sheet but in either case it is incumbent for parties to observe each stage or procedure involved since abuse or failure of procedures may attract adverse consequences.

b) Alternative Disputes Resolution.

ADR is an acronym that entails an alternative course of disputes settlement which has been adopted in recent years to remedy the weaknesses of litigation which was expensive with results frequently unpredictable and normally occasioning undue delays. ADR consists of various methods such as mediation, Arbitration and negotiation.

- **Mediation.**

Mediation entails dispute settlement in which a neutral third party is involved. Basically it is a traditional mode of disputes settlement aiming at resolution of disputes as discussed above.

- **Arbitration.**

It is a submission to an impartial third party namely arbitrator, normally being a person with expertise in the subject matter for decision. Arbitration is not quite different from litigation in the sense that an arbitrator conducts hearing, admit exhibits and more important makes decision after hearing parties unlike a mediator who is merely a facilitator. However, it differs with litigation since it admits some procedural flexibility and basically less

formal and structured. Also this process may accords right to the parties to choose an Arbitrator unlike litigation.

c) Negotiation.

Normally attorney's may advise clients to resort to negotiation when there is likelihood of losing the case or undue delay is anticipated. Negotiation is a back and forth communication between the parties to the conflict geared towards resolution of the dispute. Successful negotiation requires calmness, open mind, capacity and good faith. However, being in a team one should have a bench mark of negotiation to avoid being swayed away by the adverse party, you should not go beyond your determination point of reference in such a way to completely compromise your interest.

Negotiation does not involve a third party in the real sense. However, the process may either be direct in the sense that parties have a direct communication or indirect whereas an Attorney or agent is involved not as a facilitator but as a substitute of the party.

- **Face to Face and Online Dispute Resolution.**

With technological transformation, disputes settlement may not necessarily involve a physical contact between parties and the facilitator. The process may be carried out online, either through teleconference, Cellular phones or Skype. Online Dispute Resolution (O.D.R) is very useful where face to face meeting leads to undue inconveniences. However, the big challenge is that ODR may not give opportunity for a facilitator to spot the demeanor and attitude of the parties. In fact, it departs from traditional approach where parties get time to shake hands.

CHAPTER FIVE.

LOGIC AND LEGAL REASONING.

Logic Reasoning.

This is a science of reasoning, proof, thinking or reference. Logic reasoning is primarily concern with internal thought and secondarily with language which express the thought.

- Logic reasoning also helps in analyzing an argument or a piece of reasoning in order to determine whether it is likely to be correct or not.
- Logic reasoning deals with principles and criteria of good reasoning, it is also plays an important part in legal reasoning. Logic reasoning is normally associated with deductive form of argument which is also known as **Syllogism**.

Syllogism is an argument which contains two things;

- **Premises**

- **Conclusion.**

- i) **Premises** are normally the assumptions upon which a person seeks to draw conclusion. The argument will normally contain what is known as major premises, minor premises and conclusion. The premises normally provide reasons for ascertaining conclusion as true.
- ii) **Conclusion** tries to establish or to prove the truth. In advising a client a lawyer will employ this type of reasoning and such case as a statute will act as a major premise and the lawyer will identify his case has fall within a statute and then, he will reduce has the conclusion the way it will apply to its client case.

METHODS OF LOGIC REASONING.

a) Deductive logic.

This is only applicable once a major premise has been established. Where the major premise is not the statute but case law, no major premise is likely to be clear from just one case in order to formulate the major premise from precedent one has to read several cases which are similar, in order to find the major premise which underlies all the cases. What the reader will be doing in its effect is ascertaining the ratio decidendi of the different cases in order to come up with proposition which will then act as the major premise.

b) Inductive logic.

This is the process of reasoning from a particular case decision to a general preposition as opposed to deductive logic where the reasoning is from general preposition to the particular conclusion in the case itself.

A lawyer in advising on the application of case law the particular situation will first employ inductive reasoning in order to find the general preposition of law and then, the lawyer will apply deductive reasoning in determining how it applies to the facts of the particular case.

NB: In Inductive reasoning the analyst must know what is looking for, the analyst must have in mind the general conception which can be stated in general preposition. The analyst must categorize the issue and decide which previous decision are so closely analogous or similar to the issue in question that they can be used as the basis for inducing the relevant preposition of law.

Types of logic reasoning.

i) Syllogistic reasoning.

This is a type of reasoning which was developed by Socrates and Aristotle, and it is a type of reasoning which must always contain three premises such as major premise, minor premise and conclusion. In actually a form of deductive reasoning. It is categorized as reasoning from the whole part to the part or from the general to the particular.

For example, one may have a major premise stating that;

Major premise: *all fish are vertebrates.*

Minor premise: *Tilapia is a fish.*

Conclusion: *Tilapia are vertebrate.*

In syllogism, they have advantage of certainty(assurance of conclusion) where the premises are truth, then the conclusion cannot be false and this

is because the conclusion is contained in the premise, and it is a mere restatement of the premises.

NB: It is important to distinguish between the validity of form and truth of the content, because it is possible for a syllogism logically valid but false.

For example

Major premise: *all men are pigs.*

Minor premise: *Socrates is a man.*

Conclusion: *Socrates is a pig.*

Answer; the logical content of the argument it is valid but the conclusion it is not true(false), because the major premises is false, because all men are not pigs. It is also possible for a syllogism to be truth and valid yet based on false a premise.

For example, **Major premises:** *all men are Greek.*

Minor premise: *Socrates is a man.*

Conclusion: *Socrates is Greek.*

A logical form is correct but the major premise is wrong, however the conclusion is correct. The syllogistic form of reasoning if the premises are true, then the conclusion cannot be false in itself for it states nothing to the truth of the premises or the truth of a conclusion derived from them.

NB: Most of the times legal argument is about a truth of a particular premise rather than a validity of the logical form being operated.

ii) Deductive Reasoning.

This is a process of drawing out the conclusion from already existing premise. It is arguing from a general preposition to a particular case, one argues from established rule to a particular case. For example, any person

who drives a motor vehicle recklessly is liable to pay a fine or to be sentenced to a term of imprisonment, this provision Act as a general preposition of law, or where X who is insane drives a motor vehicle, X will not have committed an offence since he is insane and therefore X cannot be guilty of the offence of driving recklessly.

NB: Where there is an established principle deduction is used to solve a problem. The principle may either be contained in a statutory provision or it may be deduced from precedent.

iii) Inductive Reasoning.

This is an open system of reasoning and it is a process of reasoning from a particular case to a general principle, and in this type of reasoning one argues from experience where by a general rule is formed from particular case.

Most progressive Judges use this reasoning unlike Timolous souls who prefer deductive reasoning. One weakness of inductive reasoning it lacks certainty of conclusion which are normally reached by deduction although it may have a high degree of probability. Read case: **Heaven v. Pender.**

In inductive reasoning differs from deductive reasoning into two major respects:

- The conclusion reached is not simply a re-statement of what is already contained in a basic premise.
- It is less certain in its conclusions than deductive logic.

iv) Reasoning by analogy.

According to Edward Levi in his book *"An Introduction to Legal Reasoning"* he states that: "a basic pattern of legal reasoning is reasoning by example". This method involves making conclusion basing on the previous similar example. This is a type of reasoning from case to case and it is three step process describe the doctrine of precedent in which a proposition descriptive of a first case is made in the rule of law and then applied to a next similar situation.

NB: The later Judge may manipulate ratio decidendi such as;

- A Judge has to look for similarities between the pending case and the decided case that is about to be judiciary considered.
- Pronounce the rule inferring from the prior case.
- Use of precedent is a good example of reasoning by analogy.

The finding of similarity or difference is a key step in the legal process. It is a judge function to determine similarity or difference.

v) Judicial Hunch.

This involves use of extra legal examples to support judicial decisions. In formulation of rules and analyzing facts of case a judge may make use of slogans, maxims and extra legal standards to justify the conclusion. Having decided what is good or bad, a clever judge will invoke every faculty to justify his conclusion (all means of his disposal). The judge will examine all cases see the principles and select what is most useful to him and discard all rules and principles that block him on his way to his conclusion. One judge called Justice Franklin in his book called *"Law and the Modern Mind"* argues that: "usually the courts begin the results they desire to accomplish and then, they justify it i.e, the know who is liable".

NB: In judicial reasoning principles are always primary and precedents are only secondary.

STYLE OF JUDICIAL OPINION.

There are three types of judicial opinion:

- ✓ Grand style.
- ✓ Formal style.
- ✓ Realistic style.

a) **Grand style.**

In this style the judge is much concerned with providing guidance for the future. Therefore, a general preposition embodying a policy, only guides but does not control interpretation. normally used by judges who perceive legal principles as general preposition which contain policy.

According to one jurist called Karl Llewellyn argues that: "the grand style is based essentially on an appeal to reason and it does not involve adherence to precedent (not follow strict). Under this style policy comes in for explicitly examination. Before passing a law the parliament comes with a policy, there must be some problem in order for the parliament to enact the law.

Under the grand style, a judge is not a mere positive interpreter of the law but becomes an active interpreter meaning that in applying law under the grand style the judge does not only apply the black letter of the law but also takes into account the existing social economic circumstances over the society and it also looks the intention of parliament in enacting the law. Most Bold spirits prefer the grand style and mis-chief rule of interpretation.

b) **Formal style.**

Under the formal style, judges focus on principles, authorities and case, and the rule of law decide the case, and no attention is paid for a policy which is left for a legislature, and formal style is not concerned with social fact.

The main characteristic of formal style is that, judge will normally prefer plain meaning approach of statutory interpretation (applying a law as it is). Under the formal style, judges consider themselves as bound by principle established in previous cases.

The court under the formal style is only there to discover and declare the applicable rule, and apply to the facts of the particular case.

c) Realistic style.

It is most applied in Scandinavian countries, where the judge uses precedent by making distinction, the judge uses precedent which will assist him to justify its conclusion and cases that seem to contradict it desired result are distinguished on factual differences.

Therefore, precedent under realistic style only plays a secondary role, and they do not necessary dictate the outcome of case.

STYLE OF JUDICIAL OPINIONS IN EAST AFRICA.

One author Robert Seidman identifies three phases in evolution of judicial opinion in East Africa.

❖ From 0 to 1920.

The Tanganyika Order in Council was passed in 1920; it's during this time that he starts looking on this period. He said that the opinion of the court during this time was very short and judgment and judges real cited rear authority, the role of the court during this time was just to apply which law. In case of dispute issue the court justified decisions by formal style. Reason given to this short opinion was that, there were no enough material i.e. Cases and Textbooks (reference book system did not require the judge to justify the decision this is because the lower court were not manned by trained person and the role of the court was just to announce law.

❖ **From 1930 to onwards.**

From this period the court opinion became more sophisticated because of increasement of lawyers and trained people. Lawyers started citing authority extensively. The court were being manned by trained personnel and availability of material.

❖ **From 1961 to the abolition of appeals to the privy council.**

During this period which decisions of the court had to be meet expectations of newly independent state, English decisions were no longer binding English authorities and received laws only applicable which were conformity with local condition, they were merely persuasive as per section 2(2) of the Judicial and Application of Laws Act [CAP 358 Revised Edition, 2002].

LEGAL REASONING

The term “legal reasoning” is not easily defined but could mean three things;

- Reasoning to establish the existing content of the law on a given issue.
- It could be reasoning of the existing content of a law to do decision which the court should reach in a case in involving that issue which is in a court.
- Reasoning on existing decision which the court should reach in a case all things considered (extra-legal consideration).

The concept of legal reasoning is linked to interpretation and coherence. Interpretation aims at both conserving and creation and it is not merely and

attempt at producing but also to make something or bring something out of an original. The element of interpretation in legal reasoning is concern at striking the high balance between *conserving* and *creating* and the constraint, that should be operating upon the judges as they undertake the balancing act in interpreting the law, the judges applying the law as current (*conserve*) is and they supplement, modify or bring something new (*create*) in the law in the course of reasoning from the content of law to a decision to a particular case. Interpretation and legal reasoning play two major roles;

- Reasoning to establish the existing content of a law on given issue.
- It is reasoning from the existing content of law to decision that court will reach in a given case involving an issue.

Legal reasoning and justification.

In reaching a conclusion a judge will have to justify his decision, meaning that the decision reached must be well reasoned.

In justifying a decision a judge will appeal to the following:

- Authorities.
- Sources of law.
- Precedent.
- Statutory wording.

In justify decisions, two factors must be considered by judge as follows;

- The extent to which a proposed decision will cohere with existing principles and authorities. The greater they are consistent will exist principles and authorities the less likely it is to be.
- In justifying a decision a judge must consider the broader consequences of the decision for potential litigants.

The consequences on legal system and the general rule of law in society or put simply with the decision be in line with common sense and justice.

One jurists, professor John Wisdom he sum up the nature of legal reasoning by saying the following: *"it is not a chain of demonstrative reasoning.....a presenting and representing of those feature of the cases which severally co-operate in favor of the conclusion....the reasons are like the legs of a chair not the links of a chain"*.

Therefore, legal reasoning employs practical reasoning we all use in everyday life we tend to way a collection of reasons for or against to a particular reason rather than deductive logic.

TYPES OF CASES AND STYLE OF JUDICIAL OPINIONS.

There are several types of cases which may arise;

- ✓ Cases of first impression.
- ✓ Clear cases.
- ✓ Trouble cases.

a) Cases of first impression.

There is usually no precedent and in such circumstance the judge will be interested in providing guidance for the future and will bear in mind policy considerations will lay down the rule guided by grand style of judicial opinion.

b) Clear cases.

A clear case is a case which usually has a precedent covering the matter in issue. In such circumstances there is not controversy as to the rule. The agreed rule of the decision is derived from a previous decision. What the court does is just to discover and disclaimed the law. In clear case the formal style is preferred.

c) Trouble cases.

It will normally arise where the rule is not clear and agreed upon. The lack of clarity may be due to two reasons;

- Conflicting principles in different cases.
- Conflicting interpretation of the authorities in such situations, there's doubt as to which of the conflicting covenant the situation.

For example, the court of co-ordinate jurisdiction such as the High Court of Tanzania, where the High Court and none, is superior to the other, and such court may issue conflicting decision which will remain to be conflicting until by the court in judicial hierarchy such as the Court of Appeal of Tanzania. ***Bi.Hawa Mohammed v. Republic*** (1983) TLR, concern the interpretation of s.114 of the L.M.A, 197

CHAPTER SIX.

STARE DECISIS.

The common law doctrine of precedent is to the effect that each court is bound to their prior decisions. Prior decision of court above it in the hierarchy and some courts at least to some extent bind themselves. High Court of Tanzania and Zanzibar binding themselves. The doctrine of precedent is also called stare decisis. It means keep to the decisions of past cases i.e a latin maxim.

The doctrine of stare decisis or stare rationibus decidendi it means keep to decisions of past cases, this doctrine plays a vital role in common law legal system. However, in civil laws countries based on Roman law, precedent may be followed but there is no strictly requirement or strict rule that may be followed.

NB: The earlier decision is superior not because it comes from a higher court rather, the earlier decision becomes superior just because it is earlier. This obligation of a court to follow its own previous decisions is typically known as *stare decisis* latin for “stand by the thing decided”.

Subordinate courts are required to follow superior courts regardless to correctness. From the definition of common law about doctrine of stare decisis, the application to be bound which precedent is of two types such vertical obligation and horizontal obligation.

- **Vertical obligation.**

In the judicial hierarchy decisions of the superior court binds all lower courts, under vertical obligation, the judge is bound to apply principle laid down by which superior court, even if he think it's not correct. The authority which precedent depends on which court it proceed and court in which it's re-cited (concurrent jurisdiction). In addition, the courts following the decisions of a higher court.

- **Horizontal obligation.**

It refers to how some courts and courts of co-ordinate binds themselves, normally Appellate Courts are bound by their own previous decisions. It occurs mostly from High Courts or Court of Appeal. In addition to being obliged to follow the decisions of courts above them in the judicial hierarchy, courts are also, although less obviously and sometimes more controversially, expected to follow their own earlier decisions.

PRECEDENT.

The core principle of decision making according to precedent is that courts should follow previous decisions that they should give the same answers to legal questions that higher or earlier courts have given in the past.

Initially, understanding the idea of precedent requires appreciating the difference between *learning from the past*, on the one hand, and *following the past* just because of the fact of a past decision, on the other. With respect to the former, which is not really precedential reasoning at all, the instant court may *learn* from a previous case, or be *persuaded* by some decision in the past, but the decision to do what another court has done on an earlier occasion is not based on the previous case's status as a *precedent*. Instead the decision exemplifies the fundamental human capacity to learn from others and from the past. There are many instances in which the court will be persuaded by the reasoning of another court, but if the instant court is genuinely persuaded, then it is not relying on *obeying* precedent at all. For example, suppose I am boiling an egg. I boil it for six minutes, and am pleased to discover that it is cooked to precisely my preferred hardness. Consequently, the next time I boil an egg I do so, not surprisingly, for six minutes. I am not boiling it for six minutes because I boiled it for six minutes on the previous occasion. I am boiling it for six minutes because six minutes is the right time. I know this because I have learned from the previous action, but on subsequent occasions I make the decision because of what I then know.

Rationale to the doctrine of precedent.

One of the great virtues of law is certainty. The doctrine ensures the element of predictability and uniformity which is essential in legal system. The doctrine also promotes *consistency*, *stability* and *efficiency*. It also serves the court time should similar dispute arise the consequences will be known and also desirable, that similar cases should be decided in a manner.

Types of precedents.

- **Declaratory precedent**, is an application of an already existing rule of law and used in clear cases.

- **Creative precedent**, this create and apply new rule in applying a rule of law it involve making of choices between alternative, none is conclusive on the other, this alternative may consist of conflicting principle contained in different cases or conflicting interpreters of one among authoritative cases. This relate to the failure to recognize and accommodate trouble case. This creative process is normally outcome of the court exercise of developing and applying which law.

The binding nature of precedents.

Decisions of superior courts binding lower court in the hierarchy. This decision may either be **binding** or **persuasive**.

➤ **Binding decisions.**

This refer to the pronounce by the High Court in judicial hierarchy in a given legal system. A decision is binding on a later court when the relationship between two court under the doctrine require court to apply decision. The binding force stems from which relative position of the two courts on which hierarchy. In the theory it has nothing to do with the merits of which the principle by the court.

➤ **Persuasive decisions.**

When a precedent is pronounced by a foreign court then that court can not binding in the next because is not binding. For example, High Court of Kenya is not binding on Tanzania Court because these are not court of the same judicial hierarchy. A decision may be binding upon a latter court because it pronounces outside the judicial hierarchy. However, this precedent are not binding nevertheless they may carry great weight this is because such a decision may be adopted by latter court and this adoption may depend on several factors;

- It may depend on the judges' evidence or the court which pronounce that decision.
- It may depend on which circumstance and decisions treated by other court.
- It may depend on which relevance of their decision of the case question on in hand.

Evasion Techniques.

The English doctrine of precedent is to be strictly observed by the court within judicial pronounced all subordinate courts follows that decision of the higher court is to be strictly followed because of that rigidity, the court have come with what know as *Evasion Technique* in order to circumvent. Due to this rigidity court have developed a principle of the technique;

- ✓ Overruling.
- ✓ Disregarding.
- ✓ Distinguishing.

i) Overruling.

This occurs when a precedent is denied of its authority. This is an act of a court of superior jurisdiction to deprive a precedent of all its authority. This occurs when a precedent is not merely wrong, but so clearly and seriously wrong that its reversal is demanded in the interest of sound administration of justice.

In effect, a court denies that the supposed rule of law has ever existed. The effect of overruling can either be prospective or retrospective.

NB: The effect of overruling is retrospective, except that it does not unsettle matters which have already been settled between parties (*res judicata*) and accounts stated. In our jurisdiction, it is only the Court of Appeal that may overrule its own earlier decision.

ii) **Disregarding.**

This is the refusal to follow a decision of a court of coordinate jurisdiction. This is because the two courts have equal authority and none can overrule the decision of the other. For example, the High Court of Tanzania and the High Court of Zanzibar. Each court has coordinate jurisdiction and none can overrule the others decision. In such a case, either of the two courts can refuse to follow the others decision.

NB: If precedent is not followed, it does not altogether disappear; it exists side by side with the latter authority conflicting with each other until it is set aside by a higher court.

iii) **Distinguishing/explaining.**

This is the process of cutting down the express *ratio decidendi*. This process involves the identification of factual differences and using it as a justification of for departing from the ruling in the earlier case. Distinguishing can either be restrictive or non restrictive.

In this approach a Judge avoids being bound by precedent by simply saying the case is irrelevant to the present case. This technique is not basically concerned with correctness of previous case or its principle but on the relevance. This happens there are some material distinction between the earlier decision and the instant decision. For example, in the case of **Bridge v. Hawkesworth (1851) QB 75**, the customer was held to be entitled to keep money which he had found on the floor of the shop but in Staffordshire.

Types of Distinguishing.

a) Restrictive distinguishing.

This may happen when the distinction between the two cases is just few aspects. In this approach the previous case has limited utility. A restrictive approach always cut down ratio decidendi of the earlier decision.

It may even go to the extent of treating as material of some facts which were disregarded in the earlier decision for being immaterial. For example in **Anns v. Merton London Borough (1978) AC 728**, the court made proposition that the municipality was liable for negligence resulting from failure to properly inspect building plan. However, in **Peabody Fund V. Sir.Lindsay Parkison Ltd (1984) 2WLR 953**, limited liability of municipality to possibility of safety or health as opposed to general liability.

b) Non Restrictive distinguishing.

Material facts of the instant case may have a total departure from the previous one in which hence the decided case may have no utility at all. Non restrictive approach occurs where the court finds the case does not fall within the purview of the instant case because of material divergence of the facts.

iv) Doctrine of Changed Circumstances.

The doctrine of precedent is founded not only on the similarities of facts but also on rationale or reason. Cessation of circumstance or reason for the rule (*cessante ratione Cessate ipsa lex*) makes a subsisting precedent defunct. For example, a precedent adopted before the entrenchment of the Bill of right denying the right of a wife to retain after marriage will certainly cease after entrenching the Bill of rights on this account.

v) **Per incuriam.**

Normally the court is at liberty to avoid an erroneous precedent. The precedent is said to be *per incuriam* under the following circumstances;

- Where the decision is given in ignorance or forgetfulness of relevant law or binding authority as it was in the case of ***Morelle v. Wakeling (1979) QB 546***.
- Misconstruction of statute may also render the precedent an un useful for example in *Dixon v. British Broadcasting corporation* the construction of the statute did not take into account relevant words.

APPLICATION OF THE DOCTRINE OF PRECEDENT IN ENGLAND.

1. The House of Lords(The old rule).

Under the old rule, the House of Lords was absolutely bound by its own previous decisions. Such decisions were also binding on all lower courts. This was established in the case of ***Beamish v. Beamish*** (1861) 9HLC 274. The matter was finally settled by Lord Halsbury in the case of ***London Tramways v. London County Council*** [1898] AC 375 where he stated that: "there must be a final Court of Appeal. For it is in the interests of the public that there should be an end in litigation. i.e. a *finis litium*."

Exceptions to the old rule:

- o Where a decision was given *per incuriam*. i.e. in forgetfulness or inadvertence of an of a statutory provision or another earlier decision binding on them.
- o Where there were conflicting decisions of the House of Lords, then it was not bound. Conflicting decisions could either be due to:
 - Inadvertence/forgetfulness of the existence of an earlier decision.

- The binding force of the precedent was not recognized.
- o Public policy.
A decision based on some public policy, particularly commercial policy was not binding if social conditions had changed. i.e. the changed circumstances doctrine.⁸

The New Rule

On the 26th July, 1966, Lord Gardiner, the Lord Chancellor read the famous practice statement⁹ that the *House of Lords would regard itself as free to depart from its own previous decisions where it appeared to do so.*

In a Press Release issued in connection with the practice statement stated that:

- o The House of Lords would be free to depart from its previous decisions where there were changed conditions.
- o The new power would enable the House of Lords to take account of the decisions of other superior courts in the commonwealth.
- o This would allow the growth of the law.

NB: it is worth that the practice statement makes **no mention of overruling but merely departing from its own previous decision.** This poses a bit of confusion, for overruling and departing from a previous have different or distinct implication. E.g. when a decision is overruled, its ratio ceases to have any binding effect, and when a decision is departed from, thereafter there are two mutually inconsistent decisions. This means theoretically that a future court may choose between the two decisions.

The Practice Statement in Action.

One of the earliest cases in which the practice statement was put into effect was the case of ***British Railways Board v Herrington [1972] 1 ALL ER***

⁸ Ian Macleod (2005) *Legal Method*, 5th ed, Palgrave Macmillan Law Masters: London p.145.

⁹ Practice Statement (judicial Precedent) [1966] 1 WLR 1234/[1966] 3 ALL ER 77

749. The House of Lords softened its 1929¹⁰ ruling that an occupier owed virtually no duty of care to a trespasser even when he was a child. The reason appears to have been a change of opinion as to the acceptable distribution of risks between occupiers and those injured on their premises. One Law Lord, **Lord Pearson** said that the previous decisions formulation of the duty of occupier to trespasser is plainly inadequate for modern conditions. Another Law Lord, **Lord Diplock**, explained the decision as reflecting 'the general development of legal concepts since 1929 as to the source of one man's duty to take steps for the duty of another.' In **Herrington's case**, a six year old boy who was trespassing on the appellant's railway line was burnt. It was held that the rule in Addie's case had been rendered obsolete by changed physical and social conditions.

2. The English Court of Appeal.

The Court of Appeal consists of two divisions;

- The Criminal Division.
- The Civil Division.

Is the Court of Appeal bound by the decisions of the House of Lords? (Civil Division).

Theoretically, the English Court of Appeal is **absolutely bound** by the decisions of the House of Lords. One author¹¹ contends that until recently there had never been any doubt the fact that the Court of Appeal was bound by the decisions of the House of Lords. However, in the case of **Broome v. Cassell** [1971] 2 QB 354, the Court of Appeal held that the House of Lords had been wrong in its view in **Rookes v. Barnard** [1964] AC 1129, on the circumstances in which exemplary damages could be awarded. In the case

¹⁰ **Addle (Robert) and sons (Collieries) Ltd v. Dumbreck** [1929] AC 358, a four year old boy was killed by a terminal wheel of a haulage system belonging to the company. The boy was a trespasser on the company's premises. The company was not held liable as it owed no duty of care to trespassers.

¹¹ Michael Zander (1999), *The Law Making Process*, 4thed, Butterworths: London, p.199

of *Rookes v. Barnard*, Lord Devlin had laid down that exemplary damages could only be awarded in three types of circumstances. The trial Judge in the case of ***Cassell v. Broome*** regarded himself as bound by this ruling.

Is the Court of Appeal bound by its own decision?

In the case of ***Young v. Bristol Aeroplane Company Ltd*** [1944] 2 All ER 293, the Court of Appeal is generally bound by its previous decisions in Civil cases as well as those of courts of coordinate jurisdiction. In the Bristol case, the plaintiff claimed damages for injuries at work. The defendant argued that his claim was bad since according to the Court of Appeal decision in ***Perkins v. Hugh Stevenson and Sons Ltd*** [1940] 1 KB 56, a claim for common law damages was barred where the injured workman had received compensation under the Workmen's Compensation Acts.

Exceptions.

i) Where there are two conflicting decisions.

- Two conflicting decisions were reached were both reached before Young's case in 1944 established that the Court of Appeal was bound by its own decisions.
- Is when the Court of Appeal discovers a conflict where previously it had thought that none existed.

ii) Inconsistent House of Lord's decisions.

Where a Court of Appeal decision, though not expressly overruled, could not stand with a decision of the House of Lords. Where the House of Lords decision is subsequent to that of the Court of Appeal this exception creates no problem. This is simply a case of implied overruling.

iii) Where the decision was reached per incuriam.

As a general rule, a decision given in ignorance or in forgetfulness of some statutory provision or of some binding authority on the court concerned. In the case of ***Boys v. Chaplin***

(1968) 2 QB 1, it was held that the Court of Appeal is not bound by its earlier decisions dealing with interlocutory matters i.e an application on a preliminary point. Again in the case of **Worcester Works Finance Ltd v. Cooden Engineering Co. Ltd** [1972] 1 QB at 217, Lord Denning was of the view that a decision of the Court of Appeal which was disapproved or doubted by the Privy Council then the Court of Appeal was at liberty to depart from such a previous.

The Court of Appeal, Criminal Division.

The basic rule has been that stare decisis is applied without any rigid endorsed and several examples were refused to follow an earlier decision. As it was stated in the case of **R v. Taylor** [1950] 2 KB 368, in this case the appellant had pleaded guilty to a charge of bigamy. He had been advised to do so because the facts of the case were virtually identical to those of **R v. Treanor**, a previous decision given by three Judges of the Court of Criminal Appeal. The Court was of the opinion that since criminal cases dealt with the liberty of the individual, and it was felt that the law had either been misapplied or misunderstood in a decision previously given, and that on the strength of the wrongly decided case an accused person had been sentenced and imprisoned, then it was the duty of the court to reconsider the earlier decision that was binding on it. It was further stated by Lord Goddard CJ that:

*The exception which applies in civil cases ought not to be the only ones applied in such a case as the present, and in this particular instance the full court of seven Judges is unanimously of opinion that the decision in **Rex v. Treanor** was wrong.*

However, some recent decisions show that the Court of Appeal, Criminal Division is bound by its own decisions in the same way as the Civil division (and subject to the same exceptions). In **Spencer** [1985] 1 All ER 673, the

Criminal Division of the Court of Appeal said that there was no difference between it and the Civil Division in regard to precedent save that when the liberty of the subject was at stake it might decline to follow one of its own decisions.

THE DOCTRINE OF PRECEDENT IN EAST AFRICA.

Origin of the doctrine of Precedent in East Africa.

The superior courts of East Africa followed the doctrine of precedent as it was applied in England. Courts of East Africa have accorded authority to their earlier decisions and especially cases heard by the courts of England.¹² This was due to three major factors:

a) The Colonial Context.

The three East Africa countries were former British colonies. It was natural that England the colonizers should provide leadership and inspiration for all the colonies in the law and other spheres of life.

b) Professional training and countries of origin of the Judges.

Most of the Judges in Colonial East Africa English men drawn from the English Bar. Their English origin and training influenced them, thus influenced English decisions, practice and decisions.

c) The Reception clause.

The doctrine of precedent was also received by the Reception Clause, which is contained in section 2(3) of the Judicature and Application of Laws Acts [CAP 358 R.E 2002].

APPLICATION OF THE DOCTRINE OF EAST AFRICA.

¹² It is worthwhile to note that this was before most East African States gained independence from Britain and abolished appeals to the Privy Council.

i) **The Privy Council.**

This was the ultimate court of appeal of the British Colonies and those countries of the Commonwealth which have not abolished the right of appeal to that court. During the colonial time, it constituted the apex of the judicial pyramid in East Africa as in other British colonies and dependencies. Decisions of the Privy Council do not bind English courts or Privy Council itself. However, its decisions have great persuasive authority. The decisions carry a lot of persuasive authority because most of the law Lords who are members of the House of Lords decide cases in the Privy Council. Prior to the independence of the East Africa states under British rule, the Privy Council was the highest organ in East Africa judicial hierarchy. The Privy Council was an advisory organ.

Before Abolition of Appeals to the Privy Council.

Appeals from the East Africa Court of Appeal went to the Privy Council. The decisions of the Privy Council were binding on the East Africa Court of Appeal regardless of the origin of the appeal. According to the case of **Wambura v. R** [1950] 20 EACA 339, the decisions of the Privy Council were considered as settling:

- General point of law especially the Common Law and Equity and interpretation of English statutes.
- Pronouncements on Mohamedan law. The Privy Council's pronouncements of Islamic law, especially of India were held to determine the Mohamedan law of Eastern African Muslim communities as per the case of **Shallo v. Maryam** [1967 EA 409].
- Interpretation of a colonial statute or other statute, its decision was binding on the East Africa courts in the interpretation of local statutes in pari material as per the case of **Abdillah JamaAwaleh v. R** [1958] EA 20.

After Abolition of Appeals to the Privy Council.

After independence from the British, most East African countries abolished appeals to the Privy Council. Tanzania abolished appeals to the Privy Council in 1962. Kenya in 1965 and Uganda in 1966. The Court of Appeal for Eastern Africa becomes the highest appellate court in East Africa after abolition of appeals to the Privy Council. However, after the independence of the three East Africa countries, there was some confusion as to the effect of the decisions of the Privy Council on the East African courts. There were two views:

- According to Spry, J.A in the case of ***Rashid Moledina v. Hoima Ginneries*** [1967] E.A 645, he was of the opinion that since the legislature had expressly maintained “existing law” it also included decisions of the Privy Council and as such, they were still binding.
- However, the matter was finally settled by Newbold, VP in the case of ***Dodhia v. National and Grindlays Bank*** [1970] E.A 195, where he stated that no decision of the Privy Council or any English court or any foreign court was binding on the Eastern Africa Court of Appeal (E.A.C.A). The E.A.C.A being the final court in East Africa could depart from its own previous decision.

ii) English Decision.

East African courts were not structurally connected to the courts in England. Therefore, under strict doctrine of precedent, English decisions were not binding East African Courts. However, such decisions influenced East African Courts because:

- The National Origin and training of the judicial and legal personnel in East Africa was English.
- The reception of English Common Law and doctrines of equity formed the basis of the legal system in East Africa.

A. General Reception.

By virtue of the reception clause in the orders in council of the three East Africa countries, the Supreme Courts and Subordinate Courts were required to administer justice according to principles of English law. By virtue of the reception clause, the courts in East Africa were allowed to look to the law as developed by the Courts of England.

Before Independence.

In Tanganyika, the Common Law, Doctrines of Equity and Statute of General Application as applied in England on the 22nd July, 1920 were received into the territory. The issue was whether binding doctrines were those decided after or before the Reception Clause? In the case of ***Kiriri Cotton Co. Ltd v. Dawani*** [1958] E.A 239, O'Connor, P was of the view that, established decisions on the Common Law or Doctrines of Equity of Superior Courts ***given before the Reception date were binding***. An established decision was:

- A single decision of the English High Court of Appeal or the House of Lords, standing unreserved at the Reception Date, unless overruled by a decision subsequent to that date.
- A Single decision of the English High Court, not binding, unless approved by an Appellate Court or generally accepted as correct by English Courts.
- A post reception decision disestablishing pre-reception cases.

NB: However, in practice the E.A.C.A never paid attention to the Reception Date when applying English decisions.

After Independence.

English decisions given after independence were no longer binding on East African Courts per Spry, J.A in the ***Rashid Moledina*** case (supra).

B. Special Reception.

A special reception is a reception of **specific aspects** of English law in provisions in a number of local laws. Special reception provisions are of two types:

- Those specifying the law as it stood at a **Specific Date**, (subsequent or after the date of General Reception), e.g. The Tanganyika (Law of Property and Conveyance) Ordinance, Cap. 114 of the Laws of Tanganyika (now repealed) which provided for the application of the law relating to real and personal property, mortgagor and mortgagee, Landlord and Tenant in force in England on the 1st July, 1920.

NB: It was arguable that pre 1922 English decisions were binding and post 1922 decisions were not binding but merely persuasive.

- Those that mention no date, the classic example often quoted is the Ugandan Contract Act, 1964 which under section 3(1) provided for the application of English contract law as modified by doctrines of equity and General Statutes in England on the 11th August, 1902 and **specified recent statutes**. In effect, Ugandan courts were compelled to keep abreast with developments in the English law of contract as per the case of ***Jupiter General Insurance Co. v. Kasanda Cotton Co.*** [1966] E.A 252.

After Independence.

No decision of any English Court or any Foreign Court was binding on the E.A.C.A per Newbold, VP **Dodhia's Case**.

Decisions on Statutes in *pari materia*.

Statutes in pari materia were model statutes in force in East Africa during the British period derived either from England or through India. In the interpretation of such statutes in East Africa, regard was to be had to the interpretation given of those statutes in the country of origin or other countries with similar statutes.

Before the Independence.

English decisions in the interpretation of local statutes in pari materia. The first view was that such decisions were binding on East Africa, regard was to be had to local conditions. Such interpretation were aimed at preserving the unity of English law throughout the Empire.

After Independence.

There were two views in relation to English decisions interpreting statutes in pari material.

- **Binding.**

The first view was that such decisions were **binding** as per Spry, JA in Rashid Moledina case (supra) where the matter involved the interpretation of the Arbitration Act of Kenya that was derived from the English Arbitration Act, 1889. He stated that respect should be given to the English decisions on the Act as the Kenya Act was passed with knowledge of those English decisions.

- **Not Binding.**

The other view was that such decisions were **not binding**. In the case of *National and Grindlays Bank v. Vallabhji [1966] E.A 186*, the Court of Appeal in interpreting a Kenya Act of 1930 which was in pari materia with a New Zealand Act of 1924 state that, "it was unsafe to assume that when the Kenyan Act of 1930 was originally made, it intended to import into Kenya

the case law of New Zealand. Such decisions from the country of origin are only important authorities and no more.

DECISIONS OF THE EASTERN AFRICA COURT OF APPEAL.

Before Abolition of Appeals to the Privy Council.

The E.A.C.A was modeled on the English Court of Appeal and followed the rules of precedent as contained in the case of *Youngv. Bristol Aeroplane* case (supra). The general rule was that the Court of Appeal was bound by its own previous decisions except:

- Where there prior conflict decisions, the court was to choose which to follow.
- It was not bound to follow a decision of its own if it could not stand with the decision of the Privy Council.
- It was not bound to follow a decision of its own if it was given per incuriam.

After Abolition of Appeals to the Privy Council.

In the case of *Dodhia v. National and Grindlays Bank Ltd [1970] E.A 195*, Newbold, VP was of the view that the E.A.C.A had worn the shoes of the Privy Council. Therefore, it being the final court of appeal, it was free to depart from its previous decisions where it appeared right to do so. After the collapse of the East African Community in 1977, an ad hoc East African Court of Appeal was established and it operated until 1979.

THE COURT OF APPEAL OF TANZANIA.

The Court was established in 1979 by the Appellate Jurisdiction Act, 1979. In 1984, the Constitution of the United Republic of Tanzania, 1977 was amended to make provisions for the establishment of the Court of Appeal of

Tanzania. It is the Final Court of Appeal and it hears all appeals from Tanzania mainland and Zanzibar except:

- Islamic matters (appeals from Zanzibar on Islamic matters end in the High Court of Zanzibar).
- Disputes between the government of Mainland Tanzania and the Revolutionary Government of Zanzibar on the interpretation of the Union Constitution. (a Special Constitutional Court is established under Article 126).

The Court of Appeal is not bound to follow its own previous decisions and can depart from them when it appears right to do so, per Nyalali, CJ (as he then was) in the case of ***Jumuiya ya Wafanyakazi Tanzania (JUWATA) v. Kiwanda cha Uchapishaji (KIUTA) [1988] TLR 146*** (C.A), in which the Court of Appeal overruled its own previous decision in the case of ***Zambia Tanzania Road Services Ltd v. J.K Pallangyo, Civil Appeal no. 9/1982*** (unreported) which was given per incuriam. In JUWATA case, it was stated that:

- All courts and tribunals below the Court of Appeal are bound by decisions of the Court of Appeal regardless of their correctness.
- The Court of Appeal should be free in both Civil and Criminal Cases to depart from such decisions when it appears right to do so.
- The Court of Appeal is not bound to follow a decision of its own given pre incuriam.

CHAPTER SEVEN.

STATUTORY INTERPRETATION.

Meaning of Statutory Interpretation.

This is the process by which the courts determined the meaning of a stating provision for the purpose of applying to the statute before it, sometimes known as ***Statutory Construction***. Interpretation will depend on customs and usage and interpretation is general problem of the communication.

The term “*Construction*” includes two things;

- The meaning of the words is always the matter of facts.
- The legal effect of the meaning is matter of question of law.

Questions of Interpretation are divided into two broad categories:

- Questions that arise from the terms of the statutes alone. Sometimes even before the question arise, the statute may have inherent due to grammatical errors or some ambiguous words.
- Those questions which arise from the application of a statutes to a particular set of facts. This will arise where there is a dispute before a court as to how the provisions apply dispute before a court.

WHY SHOULD WE HAVE INTERPRETATION.

- a) **Complexity of legal documents which brings about ambiguity.**

Legal documents are normally drafted using a mixture of ordinary language and technical jargons and they are normally drafted by more than one person.

b) Legal documents speak for the present and future.

People who draft legislation known as *draftsmen*, they try to think all eventualities and drafts very complex legislation. They cover all eventualities and drafting complex documents. Later on drafts may lead to words which have confusion and become redundancies.

c) Singular words of legal documents to reflect solution to problems and conflict of interest.

To draft a contract to protect or benefit the clients or some may amend so everyone wants to come with their own interest or conflicting interests and therefore drafting becomes confusion.

INTENTION OF THE PARLIAMENT.

This is a phrase that is often used but it is difficult to define. Courts in interpreting statutes normally say they are giving effect to the intention of the parliament.

In as much as the phrase is used whenever courts establish the intention of the parliament in a statute, the intention must determine in the words used in the statute and the test to be applied is objective (not based on personal interest) and not subjective (personal interest). As it was stated in the case of ***R v. Secretary for the state for Environment Transport & Royal & Another, Exp. Spath Home Ltd [2000] 2 AC 349***, the court held that intention of parliament is an objective and not subjective of the Minister in draftsmen or majority of the Members of the parliament who voted for the Act.

NB: Intention of parliament regarding to particular statutes cannot mean intention of all members of which parliament when the Act is passed, likewise it cannot be intention of the majority who vote for the statute, again not all who voted for the Act had the intention.

Why is the notion of Intention of Parliament still retained?

- a) **It expresses subordinate of the judiciary to the parliament (supreme of the parliament of making laws).**

It reminds the Judge deals with statutes that operated with the statutes in the field of law in which they are free to define public policy simply according to their own judgment, the court simply to get instruction from parliament. As it was stated in the case of Heydon's case, it was held that, the duty of the court is to interpret the words that the legislature has been used.

- b) **Desire of the Judiciary to discover large create role in the interpretation of statutes.**

In the case of *Magor & St. Mellons v. Newport Corporation [1950] 2 All E.R 1266*, The Court of Appeal agreed with Lord Denning was of the view that, the Judge has the duty to find the intention of parliament and in doing so Judge could "fill the gap" as appeal to the House of Lords, Lord Denning attempt of fill in the gap was strongly rebuked and termed as naked usurpation/takeover of the legislative function under the thin interpretation. However, the words may be ambiguous but the court are strictly limited and if the court discovered the intention of parliament and of Ministers too, must proceed to fill in the gaps.

PRINCIPLE OF STATUTORY INTERPRETATION.

There are two types of interpretation;

- Strictly Interpretation.

- Liberal Interpretation.

a) **Strictly Interpretation.**

The interpreter consider what the legislature was thinking when making a particular law. The interpreter gives the statutory provision in exactly meaning which literally appear to be intended by the legislature without change. In the case of *Augustino v. Republic [1991] TLR no, 97*, the court held that, the Judge gave the section a strictly interpretation saying that because there is no amendment to the Minimum Sentence Act, then its provision had to be interpretation of section 172(2)(c) of 1985 was that; the period of remand custody shall be considered together with other mitigating factor.

b) **Liberal Interpretation.**

In Liberal Interpretation this attributes to the legislature done necessary reflect was really entertain at the time the law was made and it was divided into two;

- Extensive Liberal Interpretation, a provision (section) is extended to a case which is not covered by liberal meaning of the statute, meaning is extended to accommodate other factual situation.
- Restrictive Liberal Interpretation, a provision is not applied to a case falling within it

CANONS OF STATUTORY INTERPRETATION.

Inherent technical nature of statutory interpretation made it necessary for Judges to develop various canons or rules of statutory interpretation. Among the basic canons of statutory interpretation include literal rule, golden rule and mischief rule, each having distinctive salient feature.

1. **LITERAL RULE.**

This rule is geared/mechanisms to obtain clear meaning of the language of the statute. In the literal rule words of statute should be given their ordinary meaning. The court should interpret the words according to the literal or plain meaning regardless of whether the result is sensible or not. Lord Esher in ***R v. Judge of the City of London Court [1982] 1 QB at 290***, said that, *"If the words of an acts are clear you must follow them even though they lead to manifest absurdity/ambiguity. The court has nothing to do with the question whether the legislature commits absurdity."*

Do words have always have plain meaning?

No, and words are capable of having more than a single meaning. Meaning of words may not be identified in isolation but rather by reference to the context in which they are used. In the case of ***Whitely v. Chappel (1868) L.R 4 QB 147***, the court said that:

- The Judge may read-in words which he considers being necessary implied by words which are already in the statute. However, he has a limited power to add or to change or ignore statutory words.
- In applying the above rule, the Judge may resort to the aid to construction and presumption.

a) Context rule.

A statute must be construed in its context and the statute as to be read as a whole. Words or phases of a doubtful meaning may be better understood by looking at the context in which they are used. In applying the context rule, the latin maxim of ***"noscitur ascociis"*** by this phrase *words are known by their association when one has to establish the meaning of the words one has to look on the surrounding words and phrases.*

In the case of **Muir v. Keay [1875]**, it was stated that words of a doubtful meaning may be better understood from the nature of words and phrases from words of surrounding and they are associated with. *One has to look on how the same words is used in the provision and the whole Act, one may also look on how words is used in other legislation on the same subject matter.*

b) Express direction on Interpretation of statutes.

These are statutes of General Application what known as *Interpretation of Laws Act* defines different words in a statute, by then/previous it was called Interpretation of Laws and General Clause Act of 1972 but now is called The Interpretation of Laws Act, 2002. In the case of **Sheikh Mohammed Nassoro Abdallah v. R.P.C of Dar es salaam and Two others (1985) T.L.R no.1**, the applicant a religious leader was arrested in this house in Mabibo Dar es salaam in 1993. He was taken to Police Custody and his family did not know he was. They applied for application of Habeus Corpus to be brought. In the Deportation Ordinance provided that it was an offence to imprison any person entitled to vote at a election, the defendant had imprisoned a person who has already dead. The issue was whether dead men entitled to vote. The court held that dead men are not entitled to vote and therefore not guilty.

Criticism of the Literal Rule.

- It based on false assumption that words have plain ordinary meaning apart from their context.
- Those who apply the literal approach talk of using dictionary meaning of words in question but dictionary provide a number of alternative meaning.
- Plain meaning approach cannot be used for general words which are capable of bearing several meaning.

Why Literalism?

One view was that court adhere to literalism because of the basic constitution supremacy such as legislative supremacy, separation of power and rule of law.

2. GOLDEN RULE.

According to the Golden Rule, the court is supposed to follow the literal approach unless it produces absurdity in which case it should find some other meaning. In the case of ***Grey v. Pearson [1867] Vol. 6 HLC p. 61***, Parke B. said that, in construing a statute the grammatical in ordinary sense, the words has to be followed. It is only when the literal approach produces absurdity or repugnancy or inconsistency that the Golden rule will come into plain and the purpose of a Golden rule is to avoid absurdity and inconsistency.

The Golden rule is not much better than the literal rule as it entails the Judge to follow the literal rule unless it result into absurdity in which case a Judge has to find another solution.

Reason for Golden Rule.

Golden rule is usually when the plain meaning defeats the legislative intent. Among the reasons for opting this rule includes absurdity, unreasonableness and variance with the legislative policy. This rule requires the court to go beyond the plain meaning of words. For example in one occasion the Dean of the Faculty told students to wear any clothes of their choice during a public talk led by the Chief Justice of Tanzania. Literary “any clothes” would mean even underpants or night dress. However in this context the phrase must be construed any decent clothes suited to the occasion.

3. MISCHIEF RULE.

It also known as a ***Rule in Heydon's case (1584) 3 Co. Rep. 7a***, and according to this rule four questions must be considered in interpreting a statute.

- What was the Common Law before the making of the Act?
- What was the mischief and defect for which the Common Law did not provide?
- What remedy has the parliament resolved and appointed to secure the disease of the Common Law?
- What is the true reason of the remedy?

Statute are always to make such interpretation as shall suppress the mischief and advance the remedy.

NB: With mischief rule, a Judge will not confine himself on the label or what the statute expressly because the legislative intent lies on the mischief and not the actual label. However, the court may not adopt such rule when dealing with subsidiary legislation. In respect to subsidiary legislation the court will always interpret the wording strictly without paying attention on the underlying mischief. Perhaps this lies on the logic that in subsidiary legislation the maker is assumed to have had sufficient opportunity to feed all the details.

What was the spirit of the law. In interpreting the statutes in addition to the rules use other approaches to the interpretation of statute this include Internal Aids of Construction, External Aids of Construction, logical Aids to construction and presumption to the interpretation.

INTERNAL AIDS TO CONSTRUCTION.

This refers to matters that are found within the statute itself. For example, long title, short title, marginal notes, schedule, preambles, and punctuation.

- **Preambles.**

These are normally contained in olden statutes and normally sets out the reasons for the statutes and statutory interpretation. It is that general principle that the preamble is not part of the statute. However, in the case of *Thabit Ngaka v. Regional Officer (1973) LRT no. 24*, in this case even though preamble do not consider to the statute, this case played a role in constitution.

- **Long title.**

This seeks to set out the purpose and objectives of the Act. These are parts of the statute and may therefore be used as a legitimacy aid to construction of constitution. The long title will normally shade light on the objective and purpose of the Act and in applying the Mischief rule, the courts may look at the long title to determine the defects which the law seeks to cure and give an interpretation which suppress the Mischief and advances remedies.

- **Short title.**

These are found at the beginning of the Act. For example, this Act may be cited as Penal Code or the Law of Contract Act. A short title is part of a statute and basically short titles are used for identification and not

prescription. They only save as a short identifying level but there is no reason why they should not be used as internal aids to construction.

- **Heading.**

Acts are normally divided into sections and sections normally have headings and marginal notes. Headings normally appear before a group of section. Headings form part of a statute and they may be considered in interpreting section.

- **Marginal Notes.**

These are found on the sides of sections and they may also be used as the Internal Aids to Construction even though they may be used as aids to construction, they should not restrict the plain meaning of enacting words and normally summarize the effect of the section.

- **Punctuation.**

Before 1850 punctuation in England was not considered to be part of a statute because they were inserted after enactment. Now punctuation may be used as a part of a statute which nowadays plays an important role.

- **Interpretation sections.**

The words and phrases are usually in two forms:

- They usually say what the particular words or phrase meaning.
 - It normally says what the particular includes. When the Acts use the word "includes" it indicates that an extension of ordinary meaning continues to be used.
- **Proviso.**

This is qualification of the generality of the main provision and proviso is frequently not an aid to construction even though the terms of the provision to which it is a proviso are usually of considerable aid to construction. A proviso usually begin with words like provided that, notwithstanding and a proviso never stands alone, they must be a provided section or forms part to the main section.

LEGAL METHOD