



THE OPEN UNIVERSITY OF TANZANIA
FACULTY OF LAW

OLW 102 CRIMINAL LAW AND PROCEDURE
PART TWO

SELECTED OFFENCES IN CRIMINAL LAW
(Advance Copy)

Ibrahim H. Juma Lecturer Faculty of Law, University of

Dar es Salaam

TABLE OF CONTENTS

1. Introduction.....	4
2. Offence.....	4
Theft.....	7
Other Forma of Theft	26
Doctrine of Recent Possession.....	27
Receiving and Retaining Stolen Property.....	31
Robbery.....	
Demanding With Menaces.....	40
Burglary and House Breaking	41
Entering Dwelling House.....	
Obtaining by False pretence.....	
Cheating.....	6
2	
3 Sexual Offences.....	66
Rape.....	67

Defilement of Girls Under fourteen.....	70
Defilement of Idiots.....	72
Indecent Assaults on Females.....	73
4. Offences against the Person.....	75
Homicides:	
.....	77
.....	78
Manslaughter.....	
...	
103Infanticide.....	
.....	117
Concealing Birth.....	120
Child Destruction.....	143
5. CONCLUSION.....	
123	

1. Introduction

CRIMINAL LAW of Tanzania has partly been codified in the PENAL CODE (Chapter 16 of the Laws of Tanzania} and in the CRIMINAL PROCEDURE ACT, 1985. PENAL CODE deals specifically with Crimes or Offences. The PENAL. CODE states what matters or acts or omissions constitute a Crime or an Offence to attract (he wrath of Criminal Law. PENAL CODE also prescribes and provides what matters will afford an excuse or a defence to a charge of any Offence or Crime,

When studying Criminal Law or Law of Crimes, you will be expected (to know that Law is as well about liability as it is about non-liability. In

criminal trials. Courts investigate both liability and non-liability of the accused person.

Codification of Criminal Law and Procedure implies that various provisions on Crimes which had previously been scattered into various pieces of legislation and case law, are all brought together and enacted under one piece of legislation: PENAL CODE (for Crimes, Offences and Omissions) and CRIMINAL PROCEDURE ACT, 1973 (for procedure to prosecute Crimes, Offences and Omissions). Most Crimes and Offences have therefore been codified in the PENAL CODE. You should always bear in mind that there are very many other Crimes and Offences that are still scattered into various pieces of legislation. Still many more are hidden under various pieces of Subsidiary Legislation. Parliament will also continue to enact new Penal Provisions as our society changes. As an upcoming lawyer you are expected to employ principles of law you will learn both as law student and as practicing lawyers, to open up and understand and apply new Penal Provisions.

This SECOND PART of your Study Manual builds up onto the knowledge you garnered in Part One of this Study Manual. This Part also applies the legal principles you learnt in other legal subjects you are currently learning. You should always bear in mind that although Law is studied in individual subjects like Law of Contract, Legal Method, Legal Systems, and so on, in real life situations, problems requiring legal solutions do not come along in so fine compartments. Legal Subjects are very much inter-related.

A good illustration of close inter-relationships amongst various law subjects is illustrated by Legal Method. In your Legal Method Study you will encounter Case Law Techniques and Principles of Statute Interpretation. The various techniques you will study in your Legal Method class will help you open up Criminal Statutes, and extract useful legal principles pertaining to Criminal Law from various provisions on Crimes and Offences, which had previously been scattered in various pieces of legislation and case law.

You may have noted that this Second Part of your Study Manual is titled: SELECTED OFFENCES. The title is used very deliberately to warn you that only a tiny fraction of Crimes and Offences are covered by this Study Manual. This Part of the Manual only helps you appreciate how to analyze provisions creating various Crimes and Offences. You are therefore expected to employ principles and tools obtained in various areas of Law subjects, to seek out, identify and understand various Crimes, whether actually studied or not. On the same score, important pieces of legislation (which create Offences) like Prevention of Corruption Act, 1971 and the Economic and Organized Crimes Act, 1984 will not be covered by this Study Manual. But this fact does not imply that you should ignore these and other Penal Statutes. This Part of your Study Manual instructs you how to deal with Penal provisions not actually studied.

2 PROPERTY OFFENCES

DIVISION V of the Penal Code creates several offences relating to property. These property offences are grouped into eight chapters of the Penal Code [xxvi-xxxi]. The eight Chapters respectively cover (I) Theft (sections 257-275), (ii) Offences Allied to Stealing (sections 276-284), (iii) Robbery and Extortion (sections 285-295), (iv) Burglary and House Breaking (sections 293-300), (v) False Pretences (sections 301), (vi) Receiving and Retaining Stolen property (sections 311-313), (vii) Frauds by Persons in a position of Trust (sections 314-318), and (viii) offences Against the safety of Aviation (section 318A)

You are aware by now that every crime must have two elements that is physical act and mental element [actus reus and mens rea, respectively]. You must identify all the Offences created by Division V of the Penal Code. You must also identify all the necessary ingredients constituting each offence, and, identify the mens rea and actus reus of each offence. Division V of the Penal Code create Property Offences, Property Offences illustrate the harm against property which the state is there to prevent and punish, Legal proceedings are undertaken to determine the guilt or Innocence of the accused person. Property Offences, attempt to state and to discuss the law and determine whether an act against property is a crime or not. Ingredients constituting each of the Offences Created under Division V of

the Penal Code must be understood both in scope and application. This understanding will enable you to appreciate whether an act is for example Theft, Robbery or demanding with menaces, to mention a few of Property Offences.

THEFT

This Offence Is provided for by sections 257-275 of the Penal Code, The facts amounting to Theft as outlined by the prosecuting side must disclose all the ingredients of Theft. To establish an Offence of Theft, the prosecution side is required to ensure that all statutory ingredients making up the Offence of Theft are present. These ingredients can be deduced from the statutory definition of Theft.

Section 258(1) of the Penal Code defines the Offence of Theft and in the process furnishes all important ingredients of this Offence.

Section 258(1) provides that:

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

Section 258(1) has two specific definitions of the Offence Theft,

(a) The first definition could be deduced In this way:

- (i) A person who fraudulently and
- (ii) Without claim of right
- (iii) takes

(iv) anything capable of being stolen
is said to steal the thing.

(b) The second definition extracted from section 258(1) of the Penal Code provides that:

- (i) A person who fraudulently and
- (ii) Without claim of right
- (iii) Convert to the use of any person other than the general or Special Owner
Thereof
- (iv) Anything capable of being stolen.

Is said to steal the thing.

It is a fundamental rule of statute interpretation that effect must be given every word used in a Statute. Words used in Section 258(1) of the Penal Code were not used in vain. Effect must be given each and every word used in the section defining Theft. You have noted that section 258(1) of the Penal Code has two types of definitions of the Offence Theft. The prosecution must always fit its facts or allegations within either of the two definitions.

Based on the definition section, we have simplified the two definitions of Theft for you in this way:

Definition I:

1. A person who fraudulently
2. Without Claim-of Right

3. Takes
4. Anything Capable of being stolen

Is said to steal the thing.

Definition II

1. A person who fraudulently
2. Without Claim of Right
3. Converts to the use of any person other than the owner
4. Anything capable of being stolen

Is said to steal the thing.

Let us now look at each of these four ingredients constituting the Offence of Theft.

Things capable of being stolen

This is one of the key elements which constitute the Offence of Theft. The Item stolen must be one which Criminal Law regards as being capable of being stolen. If It is an Item which is not "capable of being stolen," then an offence of Theft cannot be said to have been committed.

You must be asking yourself what are these things that are regarded by Criminal Law to be capable of being stolen. Section 257 of the Penal Code comes to your rescue. This provision describes the "things capable of being stolen."

Paragraph one to section 257 provides:

"Every inanimate thing whatever which is the property of any person and which is movable, is capable of being stolen."

This paragraph reminds you that in order to amount to stealing, the thing taken must be capable of being stolen, that is, It must have the qualities mentioned in Section 257:

(i) Must be inanimate thing - i.e. Not alive, especially the way humans and

Animals are - e.g. a chair is an inanimate object.

(ii) Must be a property of somebody

(iii) Must be movable:

Ownership of the thing stolen is very important. A thing which has no owner cannot be stolen. Thus, if you pick up a book which has been discarded OR thrown away by a bookstore, it has no owner and you will be regarded as "taking something which is capable of being stolen."

You must always remember that the subject matter of Theft must be somebody else's property. You will later learn that when framing a charge for Theft, you will always include the words "belonging to" to signify the importance of ownership."

The word "owner" must be appreciated with caution. The word is not restricted to the real (legal) owner only. You can steal your neighbour's bicycle from his friend who did not own it but only borrowed it. In this case you will be regarded to have stolen from this friend of your neighbour. The words "belonging to" therefore will imply either "legal owner" or "special owner." Legal owner implying real owner and Special owner implying interim owner or possessor. It is quite possible for a legal owner to steal from a special owner:

Juma lends his bicycle to John. John parks this bicycle near a shop. Juma comes quietly and takes the bicycle and hides it. Juma later asks John to pay him for the lost bicycle

In the foregoing example, Juma as a legal owner will be charged with an offence of Theft. The principle that a legal owner can steal also from a special owner was discussed in an English case of ROSE v. MATT (1951) 1 E.B 810 where It was held that owner of goods who entrusts them to another person in such. Circumstances that the latter has a special property in them, is guilty of larceny (theft) if he fraudulently takes them away again.

The principle enunciated by this English case is also applicable in Tanzanian Section 258(1) of the Penal Code defining the Offence of Theft.

Movability of Things Capable of being stolen

A thing to be stolen must be movable. You will note that the general rule drawn from, definition of theft is to the effect that immovable things like land, water and houses cannot be stolen. There are exceptions to this general rule that immovable things; like land aid houses cannot be stolen.

The second paragraph to Section 257 of the Penal Code envisage the exceptions to the foregoing general rule in a situation where fixtures Of an item which otherwise cannot be moved, are made movable for purpose, of stealing. The paragraph reads;

"Every Inanimate thing

Which is the property of any person and

This is capable of being made movable

is being capable of being stolen as soon as it becomes movable

Although it is made movable in order to steal it".

The main components of above second paragraph to Section 257 of the Penal Code are;

(i) Every inanimate things (like water, land, House, which strictly speaking

Cannot be moved.

(ii) Which is the property of any person[emphasizes ownership)

(iii) And which is capable of being made movable (Inanimate things, are
Somehow made to move)

(iv) Becomes capable of being stolen as soon as it becomes movable

This paragraph would, cover situations like when a person removes s door or window or roofs from a house in order to steal it. A door, window or roof is otherwise immovable because it is fixed to the house. But a thief makes them movable for the sole purpose of stealing it, for instance by physically removing a door and carrying It away for the purposes of stealing it.

It is instructive to note that the Second Paragraph to Section 257 of the Penal Code also covers situations where other intangible things like water, air and electricity are made movable for the purposes of stealing. The general rule is that intangible things are not capable of being stolen. This general rule has exceptions as provided for in the second paragraph to Section 257. It is possible to make water (intangible thing) movable for the purpose of stealing,!!. This was illustrated in one important case of R. vs. KDESARIO [1969] E.A 267:

...where the accused person (Ndesario) was charged with theft contrary to Section 265 of the Penal Code and Malicious Damage to Property contrary' to Section 362 (!) of the Penal Code. Ndesario was alleged to have stolen [water) from a furrow on the first count, and to have willfully damaged the furrow on the second count.

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

This case is important for it illustrates how an otherwise intangible thing like water can be made movable for the purposes of stealing.

This case of Ndesario applies the Second Paragraph to Section 257 of the Penal Code we have just examined

(Read this case and discover for yourself why the accused persons (Ndesario) was all the same set free by the High Court].

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

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

Section 283 of the Penal Code envisages a possibility of someone a person:

- (i) Fraudulently
- (ii) Abstracting or diverting, to his own use or to the use of another Person
- (iii) Any mechanical, illuminating or electrical power derived from any machine, apparatus or substance
- iv) the said, machine, apparatus or substance being the property of another person.

Examples fitting Into Section 283 of the Penal Code include:

- a) Juma secretly and fraudulently diverts to his family's use electric power derived from TANESCO's substation at Manzese; or where
- b) Juma secretly and fraudulently connects to his house electric power generated from his neighbour's generator: or where
- c) Juma has had his electricity disconnected by TANESCO for non-payment of bills. Juma reconnect the power secretly at night and disconnects during the day.

Read all the paragraphs making up Section 257 of the Penal! Code, You will note that the Third, Fourth, Fifth, and sixth paragraphs- to- Section 257 envisage situations where domesticated animals- like cattle, sheep, goats, dogs and tamed wild animals [like lions to cages} being moved away for the purposes of stealing. Third paragraph to Section 257 for example provides that:

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

The seventh paragraph to Section 257 emphasizes the fact that wild animals born and living free of captivity in their natural environment are not capable of being stolen. But their carcasses (dead bodies) are capable of being stolen. The paragraph reads;

"Wild animals In the enjoyment of their natural liberty arc not capable of being stolen, but their dead bodies are capable of being stolen."-

The last paragraph to Section 257 is a general provision, it emphasizes that everything produced by or forming part of the body of an animal capable of being stolen is else capable of feeling stolen. The items envisaged by this paragraph are many and may include hides and skins, manure and milk, of a cow which are capable of being' stolen!

Must the thing stolen have arty value?

In our every day understanding of Theft, we always assume that thieves steal valuable things. Others also assume that if the object stolen was valueless, then an Offence of Theft: is not committed.

You will note that there is no direct provision in the Penal Code to answer the question whether the thing stolen must have any value. Fraudulent taking is the key word. One may confidently state that the taking of the thing which the taker thought was valueless was motivated by fraudulence, the taker of the valueless thing, will still be liable for Theft. Several decided cases have discussed the question of the value of the Thing taken.

One such case is a Ugandan case of KYEWAWULA VS. UGANDA (1974) E.A. 293

in this case the accused person (Kyewawula) was employed by the Uganda Currency Board and her work schedule entailed counting of old currency notes which were to be destroyed later. She was convicted of stealing some of the old notes which were described in the charge sheet as "cash," Kyewawula appealed to the High Court of Uganda. Justice Nyamuchoncho, as he then was, held that the old notes were no longer money and could not be stolen. Justice Nyamuchoncho was quoted to have said this in his
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judgment:

The evidence adduced to prove that the stolen bank notes had some value did not prove any value of any single note at all. It did not relate to those stolen bank notes whose value had already been redeemed. To form a subject of Larceny the things stolen must; have some value. Only economic value is taken into account" [emphasis is mine]

This view of Justice Nyamuchoncho that the things stolen must have some value (economic value) did not follow an earlier Tanzanian Case of R.V. KAMBENGWA [1968]H.C.D n.333.

In this case the accused person (KAMBENGWA) was charged with Theft by Public Servant contrary to sections 265, 270 of the Penal Code. A bonnet stand was missing from a car and the accused person was seen some days later using it as a walking stick. In mitigation he said that he thought that the bonnet stand had no value and decided to use it as a walking stick. On appeal, it was held that it is Irrelevant that the property taken may be of no value or that the owner may intend no further use of it

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

The question of fraudulent taking in the case of Kambengwa was considered to be stolen has any value.

As a reminder, you must always remember to identify ingredient of Theft. Let us move on to yet another important ingredient 61 the Offence of Theft. 'This is fraudulent taking/conversion of the thing capable of being stolen. We have briefly touched this ingredient In the case of KYEWAWURA and In the case of KAMBENGWA

Fraudulent Taking / Conversion of the Thing

Section 208(1) of the Penal Code emphasizes that the taking or conversion -"something capable of being stolen must be done fraudulently.

Section 258(2) of the Penal Code identifies various types of takings or conversions which if proved, will be deemed to be done fraudulently. Fraudulence is regarded to be present "if he or she takes or converts with any of the following intents:

- (a) an intent permanently to deprive the general or special owner of the thing of it
- (b) An intent to use the thing as a pledge or security;
- (c) an intent to part with it on some condition as to its return which, the person taking or converting it may be unable to perform;
- (d) an Intent to deal with it in such manner that it cannot be returned in the condition in which it was at the time of the taking or conversion:
- (e) in the case of money, an Intent to use it at the will of the person who takes or convert it. Although he may Intend afterwards to repay the amount to owner.

If any of the above intents are shown to exist, thus the taking or converting is deemed to have been fraudulent. The word fraudulently-' often means "dishonestly."

The fraudulent intent necessary for Theft implies two things, namely, the taking without claim of right made in good faith; and knowledge that the thing taken or converted is the property of another and not your own. Generally, the necessary mental state of mind or 'Mens rea' required for an offence is often indicated by the use of certain words like "knowingly", "corruption"; "unlawfully" and so on.

Fraudulent is the word, used to denote the mens rea of theft. Where Intent is an ingredient of an offence that intent must be proved by the prosecution beyond reasonable doubt. definition of Theft shows that fraudulent taking is a fraudulent converting is an important ingredient of the Offence of Theft. You must always identify this ingredient when discussing Theft.

Let us now look more closely at the taking and conversions

Provided in Section 258(2) of the Penal Code which are deemed to justify fraudulence:

“an intent, permanently to deprive the general or special owner of the things of it.”

Examples fitting this provision will include:

Where X who is a friend of Y, walks into Y's room with an intention to borrow a pen. X does not find Y but still the same picks the pen; and sells it to Z!

An intention to permanently deprive Y of the pen is very clear here. One Z buys the pen. Y will be deprived of it permanently

.

This is Theft.

An intention to use the thing as pledge or security.

Where X upon, hiding, the pen in Y's room takes it to Z as security in return for 10,000/= loan from Z. Here X is using the pen as a security for loan from Z. it also means that if he (X) fails to repay the loan then Z will be allowed to sell

that pen and recover the loan result will be a loss to Y.

An intent to part with it on a condition as to the return which the person taking Or converting it may be unable to perform

Intent to deal with it in such manner that it cannot be returned in a condition in which it was at the time of the taking or conversion.

| X borrows Ys bicycle to transport cotton from his farm to a ginnery 10 kms

[away. After a few days, Y goes to X to nick his bicycle hack. Instead of handing

the bicycle back, X gives T a condition which Y cannot fulfill e.g. X tells Y to

[give him a piece of gold before the bicycle is returned and Y cannot fulfill. X

[here make the return of the bicycle to be an impossibility.

Example;

X borrows Y's bicycle ostensibly to transport cotton from his farm to a gunnery 10 km's away. It is discovered that the real intention of X was to (remove bicycle cross-bars and replace it. with an old one.

Here X cannot return Y's bicycle in its original condition.

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

The above provision is specifically meant to cover taking or converting of money. The provision specifically reiterates that in the case of money, any taking or converting, however temporary, is fraudulent.

For example, cashier working for a Co-operative Society takes some cash from the cash box knowing fully that he/she is going to refund that money back into the cash box the following hour

The above example amounts to theft according to Section 258(2)(e) of the Penal Code. Sub-sections 258(2) (a) - (d) above do not cover money. But subsection (e) covers money which has been entrusted on to another person, as in our example to a cashier of a Co-operative Society.

You may note that Section 258(2)(e) is very strict to so far as money is concerned. That is, any taking of money, however temporarily constitute Theft. Some decided cases have shown some leniency in construing this strict provision.

In the case of YUSUF SALIM MKALY v. R [1969] H.C.D n. 264 Yusuf was charged with stealing by servant contrary to Sections 265 and 270 of the Penal Code. It was alleged that being a person employed by TANU as a Regional Executive Secretary, he stole Tshs. 695 which came into his possession by virtue of his employment. Yusuf Mkaly had been given the money to pay for repairs to a Land Rover at Peramiho Mission. Peramiho Catholic Father in charge of the garage had refused to take the money before proper estimate had been prepared for the probable cost of repairs.

On his return to Songea Yusuf Mkaly received a message from TANU Headquarters authorising him to travel to Morogoro to see his sick relative. As there were no superior officer at Songea, he decided to use part of the vehicle repair money to pay his fare home and while home he used more money. He later reported to TANU Headquarters and informed the Head of

Accounts Section. Mr. Mkaly was told by the Account* Section, that deductions would be made from his salary. The deductions were actually made. Later en Mkaly was arrested, charged and convicted of stealing money which came Into his possession as a servant He appealed.

On appeal, Chief Justice Georges, as he then was-, referred to a number of cases (like *Jc. Vs., COCKBURK* (3.968)1 AtL Ejl 466- and *R t>. WHJJAK f* 1953/2 WLR 9\$Tj and held that theft must inevitably carry with 11 a connotation of fraud. The Chief Justice thought that It was Incredible to suppose that if one is handed a Tsh. 20/- note to take It somewhere and on the way uses St. but all the same on arrival hands over a different Tshs. 20/= note he should, be held to have stolen the money unless, argued the Chief Justice, it la-shown that a particular Tsh 20/ = note had some intrinsic value.

The Chief Justice decided that there was no "fraudulence" on the part of Yusuf Mkaly when he used the money originally meant fcr Land Rover repairs. The decision of the Chief Justice appears to be reading the word "fraudulence" into strict wording of Section 258(2Xe). Thereby showing some leniency in construing the strict provision pertaining to taking/converting money held on trust.

Read also: ALLI IDDI V. R [1969] H.C.D n. 263

Takes/Converts Something Capable of Being Stolen.

Another ingredient in so far as the offence of Theft is concerned.

Taking or converting is an important Ingredient of the Offence of Theft. This ingredient constitutes ACTUS REUS of Theft. To establish that Theft, has taken place, one must show that there was either the taking of something

capable of being stolen or there was a conversion of something capable of being stolen.

Conversion literally means using what does not belong to you. There are two categories of conversions in Criminal Law:

- a) Fraudulent Conversion and
- b) Conversion not amounting to theft

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

For instance X borrows V's car [lawful action] then sells it and informs Y that it is stolen. The second limb of X's action aims at depriving Y of his car permanently

Conversion not amounting to Theft is governed by Section 284 of the Penal Code and is restricted to draught or riding" animals* vehicles and vessels of various propellants. Section 284 provides;

S. 284 -Any person who unlawfully and, without color of right, but not so to be guilty of theft, takes or converts to his use or to the use of any! other person any draught or riding animal or any mechanically propelled cycle of any description or any vessel shall be guilty of an offence....."

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The late Justice Onyiuke in the case of MEEJKE v. R [1979] 12 LET n, 12 had the following observations on Conversion not

Amounting Theft;

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

Unlike simple conversion (where there is intention to deprive permanently), Conversion not Amounting to Theft lacks the desire to deprive the owner permanently (i.e. it lacks fraudulence) of the draught or riding animal or mechanically propelled cycle or vessel. In Conversion not amounting to Theft the converter just uses draught or riding animal or any mechanically propelled cycle against the wishes possibly instructions of the owner:

For example X asks Y to take his (X's) car to a nearby garage for repairs and to return it immediately after the repairs. Y drives the vehicle to Morogoro where his girl friend lives. He returns the vehicle the following day. Y did not deprive X permanently of his car but used it without any color of right for his own personal purposes

.

If Y in above example, sells: the car and tells X that the car was snatched, from him at gun-point, then, the intention to deprive X of his car will be formed and this will be a case of fraudulent. Conversion within the definition of theft. [i.e.. Section 256(1} and 258{2){a) of the Penal Code].

Read also: ODUNTU v. R[1970] H.C.D n. 32
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Taking (the Actus Reus) of Theft

It has been stated earlier that the "mens rea" or the guilty mind necessary to constitute the offence of Theft is fraudulent taking or fraudulent

conversion. [S. 258 (2) (a) - (e). You must always remember the fundamental principle in criminal law that in order to constitute a crime the proscribed (forbidden) intent and proscribed (forbidden) act or Omission must both concur. This principle implies that a crime of Theft must have both an actus reus' and mens rea.' The actus reus' is an outward manifestation of the crime and mens rea' is the state of mind, the guilty mind.

"Taking is the 'actus reus' of Theft and is technically known in Criminal law as ASPORTATION. Taking or asportation may be actual or constructive. A person who takes a thing through an innocent agent (for example X tells his infant child to go and steal an orange from a tree) is deemed to do so as by himself.

The taking Implies a bit of asportation i.e., must involve a movement of the thing stolen from its usual place.

So If a thief were to lift an orange from a market stall with an intent to steal but later drops it when the owner looks on his way, this will amount to either stealing or an attempt to steal even though he has not actually carried away that orange

Another example Is where s thief snatches an earring. The ring drops and Is stuck in the victim's hair. There is taking an asportation in this example.

The importance of taking or asportation to constitute a Crime of Theft is emphasized In Section 258(1) of the Penal Code where the word "take" is deliberately used and in Section 258(5) of the Penal Code where it is categorically stated that;

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

A "movement" or asportation /taking of the thing stolen as an aspect of Theft was discussed in the case of MAZENGO MAGALE v. R. 11969} H.C.D n. 156 :

Mazengo was charged with two counts of rattle theft and criminal trespass. He was found guilty of attempted theft and convicted. Evidence was led to show that at 3 am in one morning, herdsmen were awakened by the sound of cattle being outside their usual bomas They found out that the boma had been broken open and they spotted Mazengo and apprehended him as he was about to flee.

The main Issue on appeal by Mazengo was whether the act of driving the cattle out of the boma but within the compound of the owner was TAKING in the real sense of the word. Biron, J. as he then was. held that in this case there was more than sufficient asportation to constitute a taking within the definition of Theft. Asportation is always preteen* as long as anything has been moved from Its usual place. If taking is not complete, one will be charged with an attempt to steal.

Read section 380 of the Penal Code which covets Attempts. Refer back to your notes on ATTEMPTS in Part One of this Study Manual

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Without Claim of Right

Is another ingredient in the Offence of Theft.

The law is very categorical that in order for any taking or conversion to amount to Theft, the taking or converting must not have been done under genuine claim of right over the stolen article.

The phrase " Without Claim of Right is an application of one of general defences available in Criminal Law.

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

The phrase "AND WITHOUT CLAIM OF RIGHT" in Section 258(1) indicates that the defence of bonafide claim of right is a perfect defence which can negate the claim that the taking or conversion of a thing capable of being stolen was done fraudulently. You covered the defence of bonafide Claim of Right when discussing Section 9 of the Penal Code. Inclusion of the term "without Claim of Right" in the definition of Theft {Section 258(1)} implies that the defence of "bonafide" claim of right can be used by an accused person to negate the mens rea of theft (i.e. fraudulent taking or conversion).

Several cases have illustrated how "mens rea" of theft (fraudulent taking or fraudulent conversion) may be negated by a successful defence of "bonafide Claim of Right."

In MOHAMED HASSAN v. R [1969] H.C.D n. 71 the appellant (Mohamed) was convicted of burglary contrary to Section 294 (I) of the penal Code. At his trial, there was evidence that he had been employed as a house servant by the (employer) complainant. Mohamed admitted the charge contending

that his former employer had dismissed him without paying his 3 months' salary. The appellant after failing to get his salary for 3 months, decided to use a pole and fish the clothes of his employer as a way of recovering his wages. He was arrested, charged and convicted. Mohamed's appeal to the High Court succeeded on the basis of "bonafide" Claim of Right. Late Justice Biron allowed the appeal holding that the appellant, who was but a youth, thought he was acting under a "bona fide Claim of Right" over the clothes as a way of recovering his wage ..

You must note: that a claim of right mentioned in Section 258(1) of the penal code may be unfounded in law. but if honestly held by an accepted person and is not manifestly unreasonable, it can be a factor to be considered in the defence of bonafide claim of right. The question of reasonableness or otherwise of the belief is relevant to the question whether the accused held the belief honestly: See **Ramadhani Hamisi V. Rep.** (Dodoma High Court Registry) Criminal Appeal No 25/87 (unreported).. Successful defence of "bonafide" claim of right will negate a conclusion that the "taking" or conversion was done with fraudulent intentions.

Rend also :SALUM IBRAHIM v. R (1970 H.C.D a. 48) and MPEMBEE v. R (1969 H.C.D n. 222
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Other Forms of Thefts

General Punishment for theft is provided for by Section 265 of the Penal Code. So far we have been discussing the offence of simple Theft. There are also in existence other forms of Theft which are more specialised. These specialised Thefts Include :

Stealing by Persons in Public Service (Section 270 of Penal Code). Stealing

by Clerks and Servants (Sections 271 of the Penal Code). Stealing by Directors

or Officer of Companies (Section 272): Stealing by Agents [Section 273]: and

Stealing by Tenants or Lodgers (Section 274).

All these specialised types of Theft have common ingredients which are same as one of the Offence of Theft. For example, to prove a charge of Stealing by Persons in the Public Service, one has to show the following:

- a) that the- accused person was employed as a Public -Servant:
- b) that the thing stole:-, was the property of his employer or came into his possession by virtue of his employment
- c) that he (without claim of right) fraudulently took the thing (capable of being stolen) or he fraudulently converted the thing (capable of being stolen and amount to theft).

The first ingredient (a) will vary depending on whether the Offence is stealing by Clerks and Servants (Section 271 of the Penal Code) or Stealing by Directors (Section 272 of the Penal Code) or Stealing by Agents (Section 273 of the Penal Code). The important point is to indicate the fact of acting in the capacities identified by sections 270, 271, 273 etc.

Read the following cases:

- (i) YESAYA GWESEKO v. R [1970] E.A 607
- (ii) IBRAHIM v. R [1972] H.C.D n.

- (iii) RASHID v. R [1972] E.A 438;
- (iv) ABDULLAH VR. {I970J H.C.D n. 225

You should always' remember the main, ingredients constituting the Offence of Theft and those which differentiate Theft from other more specialised forms of Theft.

I would: like you to think, of a scenario where X is found with, a bicycle/which, three years earlier had been reported stolen. Will you charge X with the Offence of Theft. You may not be in a position to accumulate evidence to prove or establish the ingredients necessary to constitute Theft. This is when the doctrine of 'Recent Possession comes into play.

The doctrine of Recent Possession was developed by our courts under S. 114 of the Indian Evidence Act, 1872 now section 122 of the Evidence Act, 1967. The doctrine of "Recent Possession¹ means that where one is found with an article recently reported, stolen, that person may be held to have stolen it. This doctrine has been developed through case law. It is not provided for by the Penal Code. The possessor of the article recently reported stolen is regarded either as the actual thief or a guilty receive.

In the case of MICHAEL MHUTO v. R [1975] L.R.T n IS, Mhuto was charged with an offence of stealing a motor vehicle (Fiat. Saloon car) and was convicted of receiving it knowing it to have been stolen or unlawfully obtained. He was sentenced to 3 years imprisonment. The Fiat Saloon car was stolen near Avalon Cinema in Dar Es Salaam. Theft of the car was discovered at about 11.45 p.m. At 1 am one month later, Mhutto was found by the police driving the vehicle. Mhuto claimed that he was given the car by another person. Mhuto appealed to the High Court where late Justice Biron, dismissing the appeal, held that the doctrine of 'Recent Possession' is a rebuttable presumption of fact based upon finding of property recently stolen in the possession of the receiver. Where recently stolen property is

found in possession of a person the possessor of such property is deemed to have either stolen it himself or received it knowing it to have been stolen or unlawfully obtained unless he can give a reasonable explanation of how he came to possess the article.

"...Where as accused i.e. found in possession of stolen property shortly after the commission of the offence of house breaking, it can be presumed that in the absence of a probable explanation, he came into possession of it either through house-breaking and stealing or receiving it knowingly it to have been stolen: or unlawfully obtained,"

It was upon Mhuto to give a reasonable explanation of innocent possession of the saloon car.

In another case of SAIDI MKUYU v. R [1972] H.C.D n 41, it was alleged that the appellant (Saidi Mkuyu) and others broke into a house and made off with the radio. The radio was recovered 2_ hours after the theft. The radio was found in one Yahya's house. Yahya alleged to have bought the radio from the appellant. Justice EI-Kindy used the occasion provided by Mkuyu's appeal to elaborate From Justice EI-Kindy's dictum we can deduce the doctrine of Recent Possession in the following sequence.

- (i) An accused person is found in possession of an article recently reported stolen;
- (ii) A presumption is raised that the accused person came into possession of the article by stealing it or by receiving it knowing it to have been stolen.
- (iii) This presumption is rebuttable and it lies upon the accused person to give a probable explanation showing that he came by the article innocently.

You may be tempted to ask yourself "how recent is recent" for the purposes of the doctrine of "Recent Possession?" This is a subjective test which depends on the nature of stolen thing. For instance a stolen pen may be exchanged quicker than say a gun. Some guideline to determine the question how recent is recent was perhaps best furnished to the case of *NAFTALI NGALYA v. R.* [1976] 1 All E.R. 46 by Lord Diplock as he then was:

In this case Naftali Ngaiya and the others were jointly charged and convicted of the offence of cattle Theft contrary to Sections 265 and 2.68 of the Penal Code and were sentenced each to a 5 years term in prison. On their appeal, the main issue was whether the 4 months period between the theft of cattle and the finding of the appellants in possession of one of the stolen cattle was so recent as to entitle the court to invoke the doctrine of 'Recent Possession.'

The Court held that in deciding whether possession is recent, the court must have regard to the nature and value of the property. The period of 4 months entitled the court to invoke the doctrine of 'Recent Possession.' The Court went on to decide that conviction of receiving stolen property contrary to Section 311 of the Penal Code was more appropriate than the conviction for theft.

- a) If a person is in possession of stolen property recently stolen, it lies to him to give a reasonable explanation to account how he came to possess the property.
- b) If he fails to do so, he is presumed to have come by the property dishonestly, that is, he is presumed, to be either the actual thief or a receiver;

- c) The person found in possession of the property can rebut the presumption that he came by the property after stealing it or a guilty receiver;
- d) His explanation need not be convincing beyond reasonable doubt. It will be sufficient if his or her explanation is inconsistent with his guilt even if it is not believed.
- e) Whether he is to be found guilty of stealing the property or guilty of receiving it will depend on the circumstances

You must always bear in mind that the law on the subject of Recent Possession is this:

TABU JAO v. R [1976] LOUT n. 56 MAZES V. R [1972] H.CJD n 174 | MALAWI v. R [1969] K.C.D 172 RAMADHANI v, R [1969] H.C.D a. 218 K08A UAHAMBI v. R [1966] H.C.D n. 15, BAZIDI WEM v. R [1967] H.C.D a. 37 JOHN v. R [1966] K.C.B N. 443 SEMON ROBERT v. R [1967] H.C.D n. 41?

The case of John vs. [1971] HCD n. 232, decided on appeal by Mnzava Ag J, is also an important illustration of the doctrine of Recent Possession:

The appellant was charged with and convicted of house-breaking and stealing contrary to sections 294(1) and 265 of the Penal Code and was sentenced to 2 years Imprisonment and 24 strokes corporal punishment, it was established that the appellant had been found in possession of a banco bed and a handbag which were properly identified by the complainant and two other witnesses about six months after their disappearance from the complainant's house. It was argued that the doctrine of recent possession should be invoked because beds are not one of those items which easily change hands.

The explanation given by then Acting Justice of the High Court is worth reading:

"There are numerous authorities as to what period can be accepted as recent to bring an accused within the doctrine of recent possession. Four years have been held not recent enough when cattle theft was involved. One month has been held recent when stealing of a radio was in issue - MUSA ALL! vs. R (1888) H.C.D. case No. 157. In this case a banco bed was stolen and was found in the possession of the appellant six months after the theft. A bed is, I agree with the Republic, not so easily transferable as for example a shirt. Though I would be hesitant to do so if the theft- Involved a shirt. But in my view, a period of over six months cannot, without causing injustice to the accused, be said to be recent where the thing stolen is a bed. I feel that the better inference from the facts, of this case would be one of receiving stolen property knowing it to have been stolen."

The Acting Judge varied the convictions to one of receiving stolen property knowing it to have-been stolen c/s. 311(1) of the Penal Code, and also the sentence to 18 months imprisonment.

Receiving and Retaining Stolen Property

In Criminal law, Receiving connotes a reception of property. knowing or with, a belief that it is stolen or unlawfully obtained. Retaining on the other hand is construed to indicate that initial receiving is innocent; the receiver only learns later that the property was in fact stolen or unlawfully obtained. When he continues to retain the property he will be guilty of the offence of

These two Offences of Reserving and-Retailing; are of the same family and descended from a common ancestry with the Offence of Theft. In law we call such type of related offences to be cognate⁵ offences. Receiving and Retaining stolen, properties are created by Section 311 of the Penal Code.

“S. 311(1) Any person who receives or retains any chattels, money, valuables security or other property whatsoever, knowing or having reason to believe the same to have been unlawfully stolen, taken, extorted, obtained or disposed of, is guilty of an offence...”

The offences of Receiving or Retaining can be summarized in this manner:

Either: A

- (i) A person receiver or retains
- (ii) Chattel, money, Valuable Security or any property
- (iii) knowing the same Chattel, Money, Valuable Security or Property to have been unlawfully
 - (a) stolen, or
 - (b) taken, or
 - (c) extorted, or
 - (d) obtained

Guilty of as OFFENCE of RECEIVING or RETAINING.

- B
- i) A person receives or retains
 - (ii) Chattel, Money, Valuable Security or Property
 - (iii) Having reason to believe the same Chattel. Money, Valuable Security or Property to have been unlawfully:
 - (a) stolen, or
 - (b) taken, or
 - (c) extorted, or

(d) Obtained

IS guilty of an Offence of "RECEIVING or RETAINING

The Offence of Receiving and Retaining, though created by the same Section 311(1) of the Penal Code, are in fact distinct and separate offences. The offences of Receiving and Retaining can only be committed after the "principal offence (Theft) has been committed. The act of Receiving or Retaining" stolen property must be accompanied with the knowledge or reason to believe the same to have been unlawfully obtained. The "Mens rea" of the Offences of Receiving or Retaining- is either knowledge or reason to believe the property (Received or Retained) to have been, unlawfully obtained, stolen, taken or extorted

The doctrine of Recent Possession' we learnt shortly before, in fact separates the principal Offence (Theft) from its descendants cannot, in most cases, be invoked to convict the possessor of an article reported stolen with Theft, The doctrine depending on the facts, can be invoked to convict an accused person charged with Receiving or Retaining an item reported stolen, extorted, or unlawfully obtained.

- | |
|--|
| <ul style="list-style-type: none">a) Though the two offences are created by the same provision. (Section 311(1) of the Penal Code), they are distinct offences. One cannot be charged with Receiving and Retaining at the same time;b) To prove the offences of Receiving and Retaining, it must be shown that<ul style="list-style-type: none">(i) There was a chattel, money, valuable security or other property received or retained by accused person.(ii) The accused person knew or had reason to believe that it |
|--|

was stolen or unlawfully obtained.

- c) Possession by the accused person could be physical or he exercised control over the Article. This means that the article could be under the persons over whom the accused Persons exercises controls, e.g. his employee
- d) It does not necessarily mean the owner of the property should be identified or that there should be direct evidence of theft. Circumstances under which the accused received or Possessed the article may prove that it was stolen and that the accused knew this to be so
- e) Factors helping to establish that the accused person knew the property to be stolen include:
 - (i) When found with stolen article the accused offered explanation or
 - (ii) The accused took part in hiding the article:

Or

- (iii) The accused offered the articles for sale at very low prices.

The case of *IDDI WAZIRI V. R*[1961]E.A.146 illustrates some of the factors helping to establish that the accused person knew the property to be stolen:

The appellant (Iddi Waziri) was convicted of receiving 4 bags of Coffee. There was no direct evidence to prove conclusively the theft or ownership of the stolen bags of coffee. There was evidence that the appellant offered to sell the bags of coffee to a Police inspector at well below the market price. The appellant also showed the inspector where the bags were hidden in a maize garden. The appellate court held that the conviction was proper:

"Evidence that property is bought at a price very much below the market price is sometimes an indication of guilty knowledge in the buyer. The fact of a sale of property by a person at a price very much lower than the market price sometimes similarly tends to indicate inferentially that the latter person himself had acquired it illicitly and had guilty knowledge."

The case of Mopuyan s/o Olendotoo [1970] HCD n. 74 decided on Appeal by Justice Piatt.)

The six appellants were charged with offences of receiving .and retaining stolen property and were convicted, of those offences.

The charge read as follows:

"Offence section and Law; Receiving stolen property and retaining c/sec. 311(19 and (2) of the Penal Code Cap. 16 of the Laws,

Particulars of offence:- The persons charged on the 30th April, 1968 during the night at N.D.C. Ngarenanyuki Area, within the District of Arusha, did receive IS heads of cattle which were stolen and retained them in their bomas, being the property N.D.C of N'garenanyuki." (sic)

Held(1) "it will be seen at once that the charge was framed in a irregular fashion for two reasons. First, a charge of receiving stolen cattle is mutually distinct from a charge of retaining stolen cattle. Receiving stolen cattle implies that at the time the property stolen was received the receiver. (READ THIS CASE)

Robbery

Section 285 of the Penal codes defines the Offence of Robbery to this way

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

guilty of robbery”.

The Offence of Robbery, as you may observe from the above-definitional section, is related to the Offence of Theft. The offence of Robbery therefore consists of the following ingredients:

- a) stealing as we defined in Sections 257 and 258 of the Penal Code),
- b) Accompanied' with use or threat to use- violence f force}
- c) The use or threat of violence is directed to any person or property, Use of violence 'or threat .of violence is used in order to obtain the property to .be stolen or after obtaining it, to prevent It being taken back.

Offence of Robbery as you have learnt is related to the. Offence of Theft and it has an extra element of (l) violence or forces or threat of violence or force which is directed to any person:

e.g. give me your wallet or I will cut your throat

Or directed to property

Give me your wallet or I will burn down your car

All the elements in the offence of **simple theft** must be contained in the Offence of Robbery. There must be specific Evidence to show that the alleged robber actually tosh or had physical control of the thing the subject matter of Robbery otherwise it will only amount to an attempt to rob The gist of the offence Robbery is the actual, taking of the property against the owner's with as a result of force or Intimidation causing tear in the mind of the owner.

Look for provisions creating¹ the punishments for Robbery and read the following

- | |
|---|
| <ol style="list-style-type: none">1. Sections 286, 287 of the penal codes2. Minimum sentence act, 1972 as amended from time to time.3. Written laws(miscellaneous Amendments) Act, 1989[Act no. 10 of 1989] |
|---|

The offence of Robbery is only complete when force or a threat to use force is used either to take possession /control of the item or to prevent the possessor/controller taking back the item. You must note that there is no degree of force which is specified to constitute the Offence of Robbery. Any force, however small or ineffectual will suffice to be necessary to constitute Robbery.

The law on robbery in Tanzania is different from what obtains under the common law of England. At common law no Robbery but theft is committed under the following scenarios:

- (a) If violence or force is used on to property for example where your dog is attacked in order to steal your wallet.
- (b) Once the article has been stolen the use of force immediately after stealing does not amount to robbery. It is simple theft.

Each of the two scenarios (a) and (b) would constitute the offence of robbery in Tanzania. The use of force immediately after stealing is enough to convict a person of Robbery.

The case of VENANCE NKAMA V. R [1970] H.C.D n.34 is illustrative of the force used after stealing:

The appellant (Venance Nkama) was convicted of Robbery. It was alleged that the complainant (a Police Constable) as- he was sitting la a bus, somebody from outside snatched his hat he was wearing (note that this snatching la a simple Theft). He managed to snatch it back (Note that the complainant had fully regained possession, of his hat On looking outside, the appellant slapped him (Kate the force i.e.. slapping is used not to steal or to prevent repossession of the hat).

On disembarking from the bus., the appellant slapped him again, and ran off. Complainant gave chase and arrested the appellant. The appellant was convicted of the Offence of Robbery. On appeal, the issue was whether the evidence supported the Offence of Robbery. Justice Mustafa (as he then was) held that the evidence adduced did not support the Offence of Robbery but was more consistent with the Offence of Then.. At the lime the appellant stole the hat, he did not use or threaten to use actual violence in order to obtain or retain the hat.

In another case of Jummanne Hassan Kaluwona vs. R [1970] H.C.D n. 36 decided try Justice Seaton;

The accused person (Jummanne Hassan Kaluwona) was convicted (inter alia) of Robbery. The following' facts appear from the evidence. The complainant who was selling ropes in Ujiji, met a small boy who told the complainant that-his (the boy's) father wanted to buy five of the ropes, and he invited the complainant to follow him to his father. The complainant agreed. On their way. the boy picked up a purse from the ground and he put it in his pocket After some distance accused told both the small boy- and the

complainant to stop, and he asked the complainant what he had seen. The complainant replied that he had seen a small boy pick up a purse. At the request of the accused the small boy handed the purse to the accused.

Then the accused, who at the time had a book and a pen, introduced himself as a police officer, and said that someone had lost Shs. 1,000/- and that police were investigating the matter. The accused then asked the complainant how much money the complainant had so that the accused could have some evidence and he then told the complainant that if the complainant had no evidence, he would be beaten up. The complainant then said he had Tsh, 205/- and he took out. Accused then demanded the money. Fearing he might be beaten up, the complainant handed over the money to the accused... Accused then put some of the money into his book, and he shoved some of it into the complainant's shirt pocket. Then the complainant asked the accused to return his money. Accused, however, told the complainant to remain there while he took the small boy to police station. The complainant told the accused that he would not remain there because the accused had taken his money. The complainant then followed the accused. After some distance, the complainant noticed that the accused was trying to run away.

So he dropped his ropes down and caught the accused. As the complainant held him, the accused threw the book, in which he had kept the money, to the small boy who disappeared with it. The complainant, however, held on to the accused and raised an alarm. Many people gathered there but no one intervened. While the two were fighting, a Primary Court Messenger came to the scene and caught accused.

Held: Violence is one ingredient of the offence of robbery- as defined by Section 285 the Penal Code. Was violence used by the appellant in connection with the stealing either immediately before or immediately afterward. On the above facts, the learned Resident Magistrate found that the appellant used violence to retain the complainant's money; I see no reason to differ from such finding, the appellant not having proceeded so far on his way without discovery to be a thief as the appellant had in the case of *Gathuri njuguna v. Rep.* (1965) E.A.583.

It seems to me that the conviction could also have been based upon an alternative ground, that is the appellant's acts immediately before the taking of the money amounted to the threat of violence. The appellant told the complainant that if he had no evidence, he would be beaten up; the complainant produced Sh. 205/- which the appellant then demanded and was given, because of the complainant's fear of being beaten up. In the English case of **Mertiman vs. Chippenham Hundred** (1766) 2 East P.C. 709 cited by Russell on Crime, 11th ed. Vol. 2 at p. 9-3S, the complainant had been stopped on the highway by the accused, who seized some cheeses she had in a cart, for want of a permit. This was mere pretence, no permit being necessary. After some altercation, the complainant agreed to go before a magistrate to determine the matter, and during complainant's absence, other persons in confederacy with the

seen; - - . for the purpose, carried away the goods. Herein, I leave the case to the

jury., two were of opinion that the accused's conduct, in insisting upon

the cheese for want of a permit, was a mere pretence for the purpose of

defrauding the complainant, and found that the offence was robbery; which was afterwards confirmed by the Court of King's bench "*

It is borne in mind that English precedents over 200 years old must be used with care, particularly regarding the offence of robbery for the common law crime, since made statutory, differs slightly from s. 285 of our Penal Code. The comment on Merriman's case in Russell (previously cited} is that the conclusion that the acts done amounted to robbery must have been grounded Upon the consideration that the first seizure of the cart and goods by the accused was by violence. From the evidence in the present case, there seems to be strong consideration for holding that the appellant obtained the complainant's money by the threat of violence. The fact that the complainant handed over the money does not make it any less a "stealing" because the handing over "was not voluntary but induced by fear." Conviction for robbery upheld.

Read also the following:

1: NJUGUNA V. R.[1965]E.A 583;

2. JUMA MKURASI V. R [1969] HCD n. 72: on greater punishment where Robbery is committed by more than one person acting together.

3. Attempted Robbery: Section 287 of the Penal Code (CAP. 16] read together with. WRITTEN

(LAWS MISCELLANEOUS AMENDMENTS)ACTC 1969 (ACT No. 10 of 1989];

4. Assault with Intent to Steal, Section 288 of the FSSAL CODE (CAP. 16J read with WRITTEN LAWS(MISCELLANEOUS AMENDMENTS) of 1989 (ACT No. 10 of 1989);

5. Demanding Property by Written Threats, Section 289 of the penal code[cap. 16]
6. Attempts- at extortion by threats,. Section 290 the penal code(Cap. 16)
7. Procuring 'Execution of deeds, etc. by threat, Section 291 of the COSE [CAP. 161.
8. Following the PENAL CODE (AMENDMENT) ACT, 1980 (ACT No. 14 of 1980] all distinctions between felonies and misdemeanors in the PENAL CODE and other written laws is abolished. Ml references to 'felony' or misdemeanors' are to be construed as- "offences";

DEMANDING WITH MENACES

This offence is created by Section 292 of the penal code. The Section provides:

"292. Any person who, with intent to steal any valuable thing, demands it from any person with menace or force is guilty of an offence.

To establish an offence under Section 292 of the Code there must be specific evidence to show that:

- (a) There was a demand by the accused person directed to the complainant;
- (b) that demand was accompanied with menaces or forces
- (c) with intent to steal any valuable things

The menaces could in a form of threats of any kind of injury, loss, disadvantage, or detriment, to be caused to the complainant by the accused person or someone else) if the demand was not complied with.

(Reed the cases of THE QUEEN v. TOMLISON[1895]QBD 706 and THE KING V. BOYLE(1914)3 K.B.D 333

For the purposes of establishing the offence under Section 292 of the PEBLM, CODE, once it is established that there:

- (a) Was a demands by the accused person directed to the complainant
- (b) That demand was accompanied with menace of forces
- (c) With intent to steal any valuable thing

It will not matter that the menace or forces had no effect on the mind of the complainant. It is quit sufficient if the menaces or threats by words or conduct of the accused were of such a nature as were likely to operate on the mind of the ordinary citizen so as to make him or her accede unwillingly to the demands.

Read: R v. CLEAR[1968] 1 All E.R 74

HOUSE BREAKING, BURGLARY AND RELATED OFFENCES

This group covers a closely related family of offences and is covered by section 293-300 of the PENAL CODE [CAP. 16]

BURGLARY AND HOUSE BREAKING

These offences are defined by section 293 of the PENAL CODE;

293 A person who breaks any part, whether external or internal or internal, or a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever, any door, window, shutter, cellar flap or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.

A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not Intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building:

If you look very closely, section 233 envisages two ways of breaking:

(i) Direct breaking and

(ii) Indirect breaking

Direct breaking is physical and actual. It involves breaking by unlocking, pulling, pushing, lifting any door, window, shutter, cellar or flap intended to cover an opening in a building. Once any part of breakers body (or any instrument he or she uses) is within the building, the process of breaking is deemed complete by law.

The first paragraph to Section 293 covers all aspects of direct breaking. Indirect breaking on the other hand, is constructive or more technical. Several forms of indirect breaking are envisaged by the second paragraph to Section 293 of the PENAL CODE:

(a) A person who enters after exercising some threat or artifice for that purpose: An obvious example where a child left in a building is tricked into opening the door: or a child being threatened that the building will be raised down if the door is not opened thereby facilitating access therein.

(b) By collusion with any person in the building: For example a person who is lawfully in a building arranges with another person outside the building to open a window at night to enable the person outside to enter the building;

(c) Entering through openings left purposely open by the builders to allow in fresh air or allow out smoke. These openings are not meant to be used as doors or windows. If any person uses these openings to gain access Into a building, this will be regarded as breaking.

Justice Makame, as he then was, discusses Breaking, Entering, House Breaking and constructive or technical entering in the case of PETER MUSA vs. R [1973] LRT 68:

1. An opening between the top of the wall of a room and the roof is in the circumstances of Tanzania is "by actual necessity permanently left open" Entry gained through such as opening amounts to constructive breaking.

2. Section 295 of the Penal Code creates the offence of entering with intent not house breaking with intent, [emphasis is mine]

Read carefully the following Judgment delivered by Justice Makame :

"The appellant in the case of Peter Musa was convicted for Entering and Stealing and sentenced to an imprisonment term of two years and was also ordered to suffer twenty four strokes of corpora; punishment. His appeal to the District Court Mwanza was entirely dismissed. He appealed to the High Court.

There was clear and convincing evidence by F.W.I, Angelo Munubi, that on 17/4/77 he padlocked his room and left to go to work. On the way he remembered he had forgotten his pen or pencil so he went back to the house. On arrival there he found that the main doors - both the front and the rear-were secured from inside. This was a house in which he occupied only one room, as a tenant, the other room or rooms being occupied by some other person or persons. One Joseph had a room in the house and the appellant, who was jobless, was putting up with him. P.W.I went to a neighbour, P.W.2, and asked him to come and assist him to force the doors open. They pressed open the front door and P.W. 1 was surprised to find that his door, with the padlock still on, was bolted from inside. They forced that door open and P.W, 1 found his radio missing. Under P.W. I's bed was the appellant, hiding, and clutching the radio.

P.W.2 materially corroborated this and the fact that the appellant emerged from under the bed, threw down the radio, and tried to escape. P.W. 1

grappled with him while P.W.2 raised an alarm. Several people came and among them was P.W.3, a cell leader, who told the trial Primary Court that he found the appellant's sandal inside P.W. 1's room.

On oath the appellant told the court that the truth was that he was still in bed in Joseph's room when P.W. 1 left. Because P.W. 1 had left both the main doors - the front and the rear - open, and as Joseph had told the appellant that dogs were in the habit of entering the house and making a nuisance, he decided to close the main doors. He went back to bed, and resumed sleep, and when he woke up he was surprised to hear P.W.1 talking in his (P.W. 1's) bedroom. Surprised because he knew he had bolted the doors so he wondered how P.W. 1 could have entered the house. The appellant opened his door and soon after he was in the vestibule P.W. 1 seized him and said he suspected he had stolen his radio. As they were struggling his sandal dropped near P.W. 1's door, and P.W.2 arrived then.

Both gentlemen assessors were satisfied that the Prosecution version was the true one and the trial magistrate agreed with them.

i am satisfied that the unanimous finding of both courts below was eminently sound. The facts were clearly established. The last matter is that the first count on the charge sheet is house-breaking stated to be contrary to section; 5 of the Penal Code. Section 295 does not create such an offence. That 1st for Entering with intent, an offence which does not attract punishment under the Minimum Sentences Act House-breaking with intent Is under section. 294. In the instant case the appellant could only have entered by either of the following two means: By undoing the padlock: on the door, or by balancing over the wall into the complainant's room, and there is evidence that the house had no ceiling, board. If the appellant employed the, first mode he "actually" broke into the room. If he used the latter method he "constructively" broke into it, and of course the fact that he was already legally in another part of the house is immaterial. In the present case there was a breaking even if the appellant merely clambered the wall, [emphasis is, mine].

This is my considered opinion, which is supported by a careful reading of Kenny: Outlines of Criminal Law "15th Edition Pages 398-200. Assuming in this case the breaking was constructive, the appellant gained ingress through an

opening which, I would submit "by actual necessity is permanently left open.* [emphasis is mine - see Section 293(c) of the Penal Code].

In our local conditions, which we must realistically take into account in a progressive interpretation of our laws, an opening between the top of a wall and the roof "by actual necessity is permanently left open. If, as in the case, going into a house by the chimney, which is not a typical feature in our houses, for constructive breaking, there seems to me to be no logical distinction why gaining ingress through an opening between the top of a wall and the roof, as in the present case, should not amount to constructive breaking. Such an opening has in common with a chimney, which has no magic, the fact that people do not usually and habitually use it to gain ingress, I am keenly aware of the view expressed by Seaton, J. as he then was, in *Petro Somsom v. Republic* (Mwanza Criminal Appeal No. 78S of 1969) which I would, with the utmost respect, submit, omitted to take into account the considerations above. Because of the foregoing, while I respectfully agree with Mr. Ntabaye, learned Attorney for the People, that entering is not a Minimum Sentence offence, the facts of this case support an offence of House-breaking under section 294. on the first count, which does attract the statutory minimum sentence. Accordingly substitute for the conviction for entering one for house-breaking, because the technical error committed did not have a prejudicial effect on the defence, considering the circumstances. As it is now not allowed to administer corporal punishment for such an offence the distinction of two years, the statutory minimum at the material time, as I did also the sentence of 6 months, on the second count, it was because of the reasons I have attempted to set out that when the appeal came up for hearing I dismissed it forthwith, save for the technical adjustment".

Other forms of indirect or technical breaking will definitely include using poles or long-sticks to fish out items from a building.

Section 293 of the penal Code defines breaking. These categories of breaking cover both the offences of House Breaking and Burglary. The difference between House Breaking and Burglary is very technical and hinges on time.

The offence of House Breaking is Committed if:

(a) "Any person breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein.

Co) "Any person, who have entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein, breaks out thereof: An example here is where a person lawfully enters the house to work, at the end of the work hides inside the house in order to steal a bale of clothes. After failing to steal X opens the doors and escapes.

(c) "Any person who having Committed an offence in any building, tent or vessel used as a human dwelling breaks out thereof

(Section 294(2):

An example here is where X visits a human dwelling with good intentions of visiting his relative. While inside the house X forms an intention to steal a bicycle he sees inside therefore takes. Steals the bicycle and opens the door from inside and cycles away. Here the original entry was not accompanied

with intention to steal, all the same, the offence of House breaking has been committed.

If the above incidence (a-c) of House Breaking are done at night, section 294 of the Penal Code provides that the offence will no longer be House Breaking but Burglary. An important question which you may ask yourself is the time to be regarded as "night" for the purposes of the transforming otherwise House-Breaking into a Burglary. Night or Night-time is defined by section 5 of the PENAL CODE (CAP. 16} to mean:

The interval between seven O'clock in the evening and six o'clock in the morning.

Any House Breaking done between seven O'clock in the evening and six O'clock to' the morning will be Burglary.

You must always remember the following ingredients whenever you discuss the offences of House Breaking and Burglary:

a) Dwelling house

The subject matter of House Breaking and Burglary. It could be an ordinary building a tent or even a vessel. The test here is the fact of being a dwelling house.

What constitute a dwelling house is defined by section 5 of the PENAL CODE.

b) **There must be a breaking.**

Breaking could be direct or indirect. Types of breaking are provided for by section 293 of the PENAL CODE

.

c) **Entry:**

The second paragraph to section 293 of the-PENAL CODE provides that a person is said to enter a building as soon as any part of his body or any part of any instrument used by him is within the building. The third paragraph to section 293 of the PENAL CODE envisages other forms of entry if obtained by means of trick,, artifice or threat. Entry is also envisaged where one uses openings (like chimneys) left permanently not for the purpose of entries and exits but for such human conveniences as fresh air and ejection of smoke and smells.

d) **Entry must be for the purpose of committing an offence therein:**

The accused person must on a balance of probability explain how he came to enter a dwelling house.

e) **Night:**

If entry is done between seven O'clock in the Evening at Six O'clock in the Morning, the Offence Committed is Burglary

OTHER ALLIED OR COGNATE OFFENCES TO HOUSEBREAKING AND BURGLARY

(i) Entering Dwelling House With Intent to Commit an Offence therein.

The Offence of House-Breaking and Burglary are closely related to another offence of Entering a Dwelling House with intent to commit an offence therein. Unlike, the Offences of House Breaking and Burglary, the offence of Entering Dwelling House with intent to commit an Offence thereto lacks the breaking element.

For instance, where the door of a dwelling house is negligently left ajar by the owner thereof and z enters without having to unlock it, this is Entering within section 295 of the PEMAL CODE:

Any person who enters or is In any building tent or vessel used as human [dwelling with intent to commit an offence therein, is guilt}' of an offence..."

Read the following cases on entering;

1. AMBARI SANGA vs. R. [1939] HOD n 175

Acting Justice MWAIOBETE, in the case of JOACHIM SHId vs. Rc 11875] let n 29 had this to say on entering:

'A person who breaks any part, whether' external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar flavor other thing intended to close or cover an opening giving passage from one part of building to another, is deemed to break the building. A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building. A person who obtains entrance into a building

by means of any threat or artifice used for that purpose or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.'

3. In the case of MOHAMED ISSA VS. R'.. [1962] EA. 392 (Sir Ralph Windham, CJ)

The appellant was convicted on two counts, firstly, of breaking and entering a dwelling-house with intent to commit a felony therein and, secondly, of committing theft therein. The appellant was staying in the house of the complainant with the consent of the latter, and he housebreaking of which he was convicted was breaking, not into the complainant's house from outside,. but into a room in the house which he had left the goods which were stolen. The appellant was found In possession of the stolen goods, but there was no evidence as to how the appellant effected an entrance from the rest of the house into the locked room, and in particular there was no evidence that the appellant did so by unlocking or opening in another way the door into the room, or by moving anything In order to gain entrance. On appeal.

Held

- (i) there was no direct evidence how the appellant entered the room, nor any circumstantial evidence to prove, and certainly not beyond reasonable doubt, that the appellant must have moved something In order to do so, or alternatively that he came through a hole or a space which was there of necessity and which was as much closed as the nature of things permitted.
- (ii) there was no breaking within s. 293 of the Penal Code, even assuming that the evidence established that the appellant climbed a partition wall;

Conviction of theft affirmed. Conviction for housebreaking set aside and conviction for being in a dwelling-house with intent to commit felon}' therein substituted. Sentence varied.

Read: also;

SAIDI S/O ALT VS. R. [1973] LRT n 66

PAUL VS. R.. [1971] HCD n 135

MATHIIAS PIRMN VS. R.. [1969] HCD n 240

PASCHAL KSALAMKQ VS. R.. [1967] HCD n 3 66

DAR ES SALAAM LAW JOURNAL, [1978] VOL. 7 pg.. S3

Identify the ingredients and differences between the following offences

- (a) House Breaking (Section 283,294 of PENAL CODE)
- (b) Burglary (section 293. 294 PENAL CODE)
- (c) Breaking into a School house, ware house, store workshop, garage, office (sections 296.297 PENAL CODE]
- (d) Entering dwelling House {section 295, FERAL CODE);

OBTAINING BY FALSE PRETENCE

This Offence was created to punish those who induce and obtain something capable of being stolen on the strength of words or conduct. False pretence is defined by section 301 of the PENAL CODE to be:

Any representation made by words, writing or conduct of a matter of fact or of intention, which representation is false and the person making it knows to be false or does not believe to be true".

The above provision can be summarised to imply the following ingredients constituting obtaining by False Pretence:

- i) A representation (by words, writing or conduct)
- (ii) Made as a serious statement of fact or intention
- (iii) the said representation is either false or the maker does not believe to be true.

Definitional Section.301, of the Penal Code read together with section 302 (which actually creates the offences of Obtaining by False Pretence) could be summarised to imply the following:

- a) A representation (by words, writing or conduct is made in the form of a

serious statement of fact or intention e.g. Y tells Z that "X has sent me to pick his

Tshs 5.000/= from you".

- b) the representation is either known by the maker to be false or the maker

does not believe his representation to be true, e.g. Y knows that the representation that X sent him is false,

- (c) All the same, the person making the representation intends to use it to do any of

the following:

- (i) To defraud anything capable of being stolen from the person to whom representation is made, or
- (ii) To obtain anything capable of being stolen from the person to whom Representations is made; or
- (iii) To induce any other person to deliver to any person anything capable of being stolen.

You must have seen that some of the words and phrases used when discussing the Offence of Theft are also add up to constitute the Offence of Obtaining by False Pretence. Some of the words and phrases commonly used in Offences of Theft and in Obtaining by False Pretence include:

(a) **"The intent to defraud":**

Intent to defraud has been defined to imply intent to deceive in such a manner as to expose any person to loss or the risk of loss [see R.V. FIRLXNG 15 ENGLISH AND EMPIRE DIGEST, page 1006]. When discussing the Offence of Theft, you learnt [under section 258(2)] when is a person deemed to take or convert something being stolen fraudulently.

(b) **"Something Capable of being stolen":**

You will recall our discussion of section 257 of the PENAL CODE which defines and describes things capable of being stolen.

An Important conclusion which you must draw from above is the close inter-relationship amongst the several offences relating to property. They are cognate offences, sharing common ancestry and ingredients.

Representation by Conduct for purposes of Obtaining by False Pretence

Representation made by words or writing for the purposes of the Offence of obtaining by False pretence will pose no problem to appreciate. Here things capable of being stolen are obtained on strength of words or writings, for example x tells y that y that z has asked me to get his salary from you.

The Offence of Obtaining by False Pretences also envisages representations being made by conduct. An Illustration of representation by conduct for the purposes of obtaining by false pretence will include where :

in a country "Z" soldiers are allowed to get free bars of soap from the military

store. "X" is not a soldier and therefore not entitled to the free bars of soap.

Still X joins the queue and picks bars of soap without uttering a word. "X"

has presented himself by conduct to be a soldier. The representation by X has

been done by conduct (i.e. joining the queue). X' has obtained bars of soap

despite not being a soldier. He has in effect deceived and defrauded another person (the army)

"As A matter of Fact" for the purpose of obtaining by False Pretence

Section 301 defining False Pretence, uses the phrases that representation must have been made "as a matter of fact".

This phrase [as a matter of fact emphasizes-that representation envisaged must not be covering merely an opinion ~t but serious statement alleging specific fact to be t*ue. An example of a representation conveying merely an opinion and hence not a false pretence would be: "I THINK HE SHOULD BE PAID"

A phrase portraying a matter of fact would for example run: "I am a soldier Ko 28 give me my bars of soap".

You should also note that A matter of Fact' in section 301 of the PENAL CODE must be PRESENT or PAST but not FUTURE. Examples:

(i) Present: I am a son of Mr. X who wants you to hand over his Tshs 30007/

(ii) Past: I am the gentleman who washed your clothes. Please give me my laundry

cash

(iii) Future: Give me Tshs 10,000 and I will ask my 13 year old daughter to marry your son when she attains 15.

You should also note that if representation refers to the FUTURE but coupled with a PRESENT FACT which (the present fact) is false (e.g. negates the future) this will be false Pretence. In our example (iii) above if the person representing alleges that he had a 13 year Old daughter (which is false] and obtains Tshs 10,000/this will amount to False Pretence because the present False Statement (that he has a daughter, which Is not true) will negate the Future (Promise of marriage}'

In the case of ESMAYL VS. R. 11965) EA. 1, the appellant (Esmail) was convicted of obtaining two airline tickets by False Pretences. He got his hands on two tickets by presenting to one SALVES EN a worthless cheque for Shs 13,680/=. At the time of the transaction the appellant's bank balance had only Tshs 80/=. On appeal, it was held that when a person buys air tickets, or railway tickets. If the property passes to the person who puts the money down, picks up the tickets, and walks off with them tickets in this case may be regarded as chattels passing from the ownership of the seller on payment. Since an airline ticket can be obtained by False Pretence the court held that the appellant was properly convicted.

The false representation here was that the accused person's bank account had enough money to buy the tickets.

You must always bear in mind that in False Pretences, ownership passes by inducement of the owner to part with the thing capable of being stolen. The Offence of False Pretence is not Committed if the ownership does not pass. This was emphasised in the case of JUMA MASUDI VS. R. [1968] HCD n 109, where Juma Masudi posing as a Police Officer, induced the complainant to place Tshs 360/= in his custody by saying that it was subject of a police investigation. Juma Masudi disappeared with the money. He was subsequently arrested, charged and convicted, inter alia, of obtaining money by False Pretences contrary to section 302 of the PENAL CODE.

Justice Duff, as he then was held that the complainant who placed Tshs 360 for investigation had no intention of parting with his money permanently. -.For conviction under False Pretence to stand, there must be a permanent change of ownership not possession. Parting of ownership must come as a result of being induced by false representation of a matter of fact. Justice Duff concluded that in this case, the charge of Theft was more appropriate and not of obtaining by False Pretences.

It is also important to note that the nature of the False Pretence must be stated clearly. The fraudulent intent must also be shown. In EAGWA V. UGANDA, 11967] E.A. 468 the appellant (KAGWA) offered to sell to the complainant some "gold" which in fact was brass chipping. The complainant

was suspicious and reported the matter to the police. A trap was arranged in the course of which the complainant handed the appellant Tshs. 10/= as part of the price of gold. This hand over of Tshs 10/= was part of the trick to have the appellant arrested and not because he (Complainant) believed that the brass chipping was gold. The appellant was convicted of obtaining money by False Pretence. On appeal the then Chief Justice of Uganda, Mr. Udo Udoma held that the offence committed was only an attempt to obtain money by false pretence.

TABU OMAR 8 OTHERS VS. R.. f 19641 EA. 162

December 4 REIDE J.: 'Read the Judgment' : The appellants in this case. Yusuf Gmari and Mohamed Iddi Fusi, were charged on three counts in the alternative with:

- (1) obtaining a bus by false pretences contrary to s. 302 of the Penal Code, in that they obtained it by falsely pretending that Yusuf represented Upangwa Bus Service for the purpose of taking delivery of the said bus;
- (2) obtaining the bus by false pretences contrary to the same section, in that they induced the owner to deliver it to the Ubena Bus Service by falsely pretending that Yusuf represented the Upangwa Bus Service for the purpose of taking delivery: and
- (3) Theft of the said bus contrary to s. 265.

They were acquitted on counts 1 and 3 and convicted on count 2. Each was sentenced to eighteen months' imprisonment, and it is against those convictions that they now appeal.

This judgment is concerned only with a submission of law which has been argued before me in limine, that is, whether the offence of obtaining goods by false pretences contrary to s. 302 is committed by a person who by a false pretence, and with intent to defraud, induces any other person to deliver to any person anything capable of being stolen, but does so in circumstances in which the deliverer obtains a possession only of the thing, and not ownership.

The learned trial magistrate found, in effect, that an offence under the section was in this case so committed. I have already intimated that I propose in this judgment to find otherwise, and learned State Attorney having now informed me that the Attorney General does not intend to appeal against that finding it will not be necessary for me to consider or deal with the other grounds put forward in the petition of appeal.

It is common ground that the complainant delivered his bus to the Ubena Bus Service under a hire purchase agreement and that the bus company thereby acquired possession but not ownership. Further, it is well established and is not in question that obtaining in a charge of obtaining by false pretence means obtain ownership. And that to deliver here means to deliver possession or delivery is defined in the Sale of Goods Ordinance 'voluntary transfer of possession from one person to another', in JOWTTTS DICTIONARY OF ENGLISH LAW as "the actual transferring the possession of a movable thing from person to another", and in POLLOCK ON POSSESSION as "Voluntary dispossession in favour of another".

in his Judgment the learned trial magistrate said this:

"Mr. Dastur for accused 2 has pointed out that the accused persons most were trying to obtain the bus on hire purchase and that they could not be criminally "obtaining" since the property in the vehicle did not pass on delivery under Hire Purchase agreement, unless there was evidence of intent to deprive the owner of the goods. He referred me to 10 HALSBURYS LAWS (3rd Ed.) at p.828 in this respect and says there is no evidence of intent to deprive the owner of the vehicle. I will say that the evidence of intent in this respect is not sufficiently strong to sustain a conviction for obtaining by false pretences. I therefore acquit both accused on count 1.

Turning to count 2 which is a charge of false pretences by inducing Kent to deliver the bus, Mr. Dastur's submission cannot apply here as the word "obtaining" is not used.

I am satisfied that accused 1 by falsely pretending that he was still Upangwa's representative for delivery purposes, induced Kent to deliver the bust to him with intent to defraud Upangwa Bus Service of its 3800/- credit. I find accused 1 guilty on count 2 as charged. As to accused 2 His actions lead me to infer that he had aided or abetted the false pretence by accused 1. I therefore find him guilty on count 2 as a principal offender in terms of S. 22(c) of the Penal code

As counsel for both appellants, has pointed out, the learned magistrate's findings of fact do not correspond with the particulars of the charge, since the latter allege that the false pretence was made for the purpose of Inducing the delivery of the bust to the Ubena Bus Service, where as the magistrate has found that the first appellant induced Kent to deliver the bus (not to the bus company but) to himself. That matter, might have been a substantial point of appeal had the whole grounds of the appeal been before me for decision, but as I have explained, I need not now consider it.

Section 302 of the Penal Code provides that :-

"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen. Is guilty of a misdemeanor and is liable to imprisonment for three years."
--

The learned trial magistrate has construed the wording of s.302 as creating two distinct modes in which the offence of obtaining goods by false pretences may be committed, that is :

- (1) by a person who by a false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, and
- (2) by a person who, in similar circumstances induces any other person to deliver to any person any such thing.

Prima facie, the construction which the learned magistrate has put upon the wording of the section and which counsel for the Director of Public Prosecutions has invited me to support, appears both logically and grammatically correct. Counsel has further submitted, though the matter is not one on which a decision is required in the case, that the words "any person" at their second appearance in the section should be construed as "any person other than the person charged". For reasons to which I will advert later, I think that the words "any person" are wide enough to include the person charged.

The appellant's submission, however, and that which I find must prevail, is that s. 302 must be read as a whole, and that when it is so read it must be construed as creating an offence of one character only, that is, one whereby ownership of property is obtained; and that the words "or induces any other person to deliver to any person" are merely intended to provide for a situation where the person charged obtained the ownership of anything for a third party by contriving a delivery either to himself or to someone else. To put the matter in a different way, the appellant's submission is that the effect of the second part of the section is to provide that the offence of obtaining goods by false pretences may be committed when anything is delivered, to any person, and the property in it passes, not to the deliverer, but to someone else.

It is important to compare the wording of s. 302 with s.32 of the Larceny Act, 1916 the relevant portion of which is as follows:

"False pretences - Any person who by any false pretence -(1) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or

valuable security to be delivered to himself or to any other person for the use

or benefit or on account for himself or any other person shall be guilty

of a misdemeanor and on conviction thereof liable to Imprisonment for any term not exceeding five years."

It will be seen that s.302 of the Pens! Code is, as It were, a simplified version of that part of s.32 of the Larceny Act which I have quoted. The framework of the two sections is similar. The text of each section may be divided into two parts, the first being concerned with "obtaining" and the second with "delivery". There are of course differences of phrasing. Section 302 speaks of "inducing any other person to deliver to any person", while s.32 speaks of "any person causing or procuring any chattel to be delivered to himself or any other person", but I think it may be properly assumed that s. 302 has been modeled on the wording of e. 32, and accordingly that the wording and form of the two sections are so nearly alike that English decisions and authorities on the construction of s. 32 must be accorded great persuasive value in determining the correct construction of s. 302.

it is because of the phrase "to himself or any other person" in s. 32 that, as said earlier, I incline to think that the words "any person" on their second appearance in s. 302 should be construed as Including the person charged.

Now at first blush, as I have said, the wording of s. 302 would appear to support counsel for the respondent's submission. I attach no weight to the fact that the marginal note to s. 302 is "obtaining goods by false pretences" and that no mention is made there of delivery. The note is not a part of the section and should not be prayed in aid in interpreting it. One's first doubts whether Mr. Troop's submission can be supported arise however when one

considers the two modes in which he says the offence may be committed, and which appear to be curious company for each other in a single section. They seem quite distinct offences and only distantly related in

contemplation of law. one concerning the transfer of title and the other possession only.

I have not been able to find, and I have not been referred to any East African reported case where the question whether mere delivery can suffice to constitute an offence contrary to s. 302 has been canvassed, but the English authorities appear to be conclusive in favour of the appellant.

10 HALSBURYS LAWS (3rd Ed) says at p. 824, Para. 1592, that one of the four essential ingredients of the offence of obtaining by false pretences is that "there must be an obtaining". "Delivery" is not mentioned, at p.827 of the same volume it is said that "the indictment must allege and the evidence must

establish that the defendant unlawfully obtained either a chattel, money or a valuable security. Again no mention is made of "delivery".

KENNY'S OUTLINES OF CRIMINAL LAW (17th Edn.) has this to say at p. 325 :

"For the purpose of s. 32 (of the Larceny Act) the word 'obtains' means that the offender has induced the prosecutor to transfer not merely the article itself but also the full ownership of the article. A bailment is not enough. If a bailment is obtained by false pretences this misdemeanor is not committed. An example is where the prisoner by false pretences obtained from a livery stable keeper a horse on hire for a third person and rode it himself for the period of the hire, after which he returned it to the stables. What the prisoner has obtained was the ride and not ownership of the horse."

The learned editor of KENNY comments that a mere bailment obtained by false pretences (which are what appear to be the circumstances of the present case) is not crime at all unless the bailee permanently appropriates the thing so as to commit the crime of larceny. The authority for that proposition is R. V Schweller (I). The "livery stable" case Is R. V. Kilham (2), in which it was held that since under a hiring agreement the property does not pass there can be no obtaining, and It may be noted that the court in that case did not go on to consider whether the offence of obtaining goods by false pretences could have been committed by a mere delivery of possession, as one would certainly the offence.

KENNY continues:

'Yet In R. V. Boulton the prisoner was convicted of obtaining by false pretences from a servant of the railway company a railway ticket for a journey by one of their trains; POLLOCK, C. B. . said that the ticket, while in the hands of the party using it, was an article of value entitling him to travel without further payment, and the fact that it was to be returned at the end of the Journey did not affect the question.

This Judgment did not explain how the facts showed that the prisoner obtained the ownership of the ticket: and although it has been followed, the decision has been doubted, since it is plain that the real intent was to obtain the residue without paying for it It has been repeatedly laid down that in this crime It is essential that ownership be obtained and that possession alone is not enough"

The authority for the statement of the law contained in the final sentence of that extract is to be found in R. V. Ball (3) where LORD GODDARD. CJ.. said (35 cr. App. Rep. at p.27):

"There is not doubt that 'obtains' means obtaining the property and not merely possession."

BALL'S case (3) was followed in R.V Lurie (4). The facts in that case were that the appellant, with two other persons, was convicted of conspiring to cheat and defraud "such persons as might be induced to part with money and goods" to a limited company by false pretences, and also to obtain cheque by false pretence from one N. The three defendants represented that the company was financially sound and was carrying on a prosperous business although they knew it was on the verge of bankruptcy. The cheque obtained by the appellant as the result of these false representations were made out to the company. The court held in that case that in s. 32(1) of the Larceny Act the word "obtained" by false pretences meant "obtained the property and not merely the possession of the property".

Counsel for the respondent has. submitted that In none of the cases to which I have referred, "was the question, whether delivery of a chattel to a third party might constitute an offence contrary to s. 32 of the larceny Act, expressly before the court as an issue to be determined! and that therefore I am in a position to decide that question in this case, with reference to s. 302, free of persuasive authority. I am. quite satisfied that his is not so, and that the English courts having, as. KENNY puts it, repeatedly laid down that it is essential that ownership be obtained and not mere possession, the question whether something less than ownership would suffice to constitute the offence, has thereby been determined in the negative.

Those English cases are of great persuasive value, and by a parity of reasoning I respectfully follow them in the present case, and allow the appeal. I understand that the appellants have already been released from custody"

I. The cases of JAMAL V.R 22 (EACA.) SHANTILAH V.R (1937)E.A 570

2. Provision and case on Offences allied to the Offence of Obtaining by False Pretence:

(a) Obtaining the Execution Of a security by False Pretence, section 303 OF THE PENAL CODE

(b) Obtaining Credit by False Pretence, section 305 of the PENAL CODE

(c) Conspiracy to Defraud, section 305 Of the PENAL CODE

(d) Pretending to tell Fortunes, section 305 OF THE PENAL CODE

(e) Obtaining Registration by False Pretence, section 309 of the PENAL CODE

(f) False Declaration of passport, section 310 of the PENAL CODES

This offence is supposed to be same as the offence of obtaining by False Pretence. Case law has not been very clear about the real difference between obtaining by False Pretence and Cheating. The Offence of Cheating is created by section 304 of the PENAL CODE;

"Section 304. Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of an offence..."
--

A closer look at section 304 of the Penal Code implies the Offence of Cheating is committed:

(i) Where any person who by means of any fraudulent trick or fraudulent device obtains from any other person anything capable of being stolen; or

(ii) where any person who by means of any fraudulent trick or device induces any other person to deliver to any person anything capable of being stolen.

(iii) where any person who by means of any fraudulent trick or device induces any other person to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device.

The key ingredients of the offence of Cheating are:

- (a) By any fraudulent trick or device
- (b) Obtaining anything capable of being stolen..

The words which appear in the Offence of Cheating which in fact differentiate this offence from obtaining by False Pretence (s.301 and 302 of the Penal Code) are FRAUDULENT TRICK or DEVICE, In False Pretence, Inducement is perpetrated by the strength of false representation by words, writing or conduct. In

Cheating, Inducement Is perpetrated by a TRICK or DEVICE. All the same, case law has shown that it is not easy to tell the difference between offences of Cheating and Obtaining by False Pretence. These two Offences overlap quite considerably. What you should always remember are the important ingredients of CHEATING

- (i) Obtaining anything capable of being stolen
- (ii) by means of fraudulent trick or device.
- (iii) by means of fraudulent trick or device.

In the case of MOHAMED SALUM MZARAMO VS. R. [1969] HCD n 127, the accused person (Mohamed Salum Mzaramo) sold a tin of sand to the complainant with the pretence that it was sugar. A layer of sugar was spread over the sand and presented to the complainant as sugar. The then Acting Chief Justice Saidi held that the facts of the case disclosed the Offence of Cheating.

The High Court decision in MOHAMED SALUM MZARAMO VS. R. [1969] HCD n 127 was not followed by other cases. In the case of JOHN JOSEPH VS. R. [1969] HCD n 172,

The appellant was convicted of cheating and sentenced. On appeal the issue was whether the offence disclosed by the evidence was one of Cheating or one of Obtaining Money by False Pretences. The appellant had put turbid water into a sealed tin then approached one Ndesiotaw at the bus station and explained that he was in difficulty. He asked: Ndesiotaw to advance him Shs 30/= in return for the said tin which he claimed contained groundnut oil valued at Shs 60/ = . The tin infact had a few drops of groundnut oil on the top. As the money was changing hands, the police, who had been watching the scene, arrested the appellant. Justice Piatt, as he then was held that Cheating is perpetrated by a trick or device-while obtaining by False Pretences depends on a false statement of existing fact. Justice Piatt was of the opinion that the distinction between Cheating and Obtaining by False Pretence can be very fine if not non-existent. While the manufacture of the tin with water in it might be seen as a trick or device it was the appellant's statement that was the mare deception. Justice Piatt argued that had the appellant merely produced the tin Without, saying anything, Ndeslalow would not have been deceived. Justice Piatt maintained that where money is obtained on the strength of a statement as tc the contents or quality of some objects. It is the false statement concerning the contents or quality, rather than the presence of the thing that is immaterial

'Read the following Case:

(1) Blasiufi VS. R. [1973] EA. 510.

SEXUAL OFFENCES

Every society has its own conception of what is wrong and what is right. Catalogues of what are good morals and bad morals are always long and unexhaustive. Not all morals regarded by a society to be bad are punished through criminal law. Criminal law punishes only a couple of morals that are regarded as bad by the criminal law. For example, adultery and pre-marital sex may be regarded as bad or immoral in some societies. Some societies have criminalised adultery and pre-marital sex. Tanzania, is one of the countries where adultery or pre-marital sex is not a criminal offence.

Chapter XV in Division II of the PENAL CODE is devoted to Offences deemed by the Tanzania Society to be against Morality. Offences against morality envisaged by the Penal Code include:

- (i) Rape, sections 130, 131
- (ii) Attempt to Commit Rape, section. 132
- (iii) I Abduction, section 133(iv) Abduction of girls under sixteen, section 134 (v) indecent Assaults on Females, Section 135 (vi) Insisting the Modesty of a woman, section 135 (vii) Defilement of girls under fourteen years of age,, section. 137
- (iv) Defilement of Idiot or Imbeciles, section 138
- (v) Defilement by Husband of wife under twelve, section 131
- (vi) Unnatural Offences section 154
- (vii) Indecent practices between males, section 157
- (viii) Incest by males, section 188
- (ix) Incest by Females, section 160

- (x) Indecent Assault of boy under fourteen, section 156 OF THE PENAL CODE.
- (xi) Keeping of Brothels, section 148
- (xii) To procure one's own miscarriage, section 161 OF THE PENAL CODE
- (xiii) Attempts to procure abortion, section 150
- (xiv) Conspiracy to defile, section 148
- (xv) Male living on earning- of prostitution, section 145
- (xvi) Women; Living on earning: of prostitution Section 146:

RAPE

The Offence of Rape is defined by section 130 of the PENAL CODE

"130-Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent,, if the consent is obtained by force or by means of threats or Intimidation of any kind, or by fear of bodily harm, or by means- of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence termed rape".

A closer look at the definition of rape, you will observe the following possibilities of proving rape cases:

- (i) A person unlawfully having carnal knowledge of a woman or girl, without her consent: or
- (11) A person unlawfully having Carnal Knowledge of a woman or girl with a consent that Is obtained by force or by threats or intimidation: or fear of bodily harm;

(HI) A person having an unlawful carnal knowledge of a woman or girl with

her consent, but that consent being obtained by means of false representations as to the nature of the act. (Read: R.V. WILLIAMS [1923] 1KB 340)

(tv) A person having an unlawful Carnal Knowledge of a married woman by

personating her husband.

You will note that all the above four possibilities of rape lack the consent on the part of the woman, girl or married woman. It goes therefore without saying that consent, if available must be free from any form of force, threats, intimidation, fear of oneself, false representations and impersonation. Consent is a very important ingredient in the offence of rape. The essence of the offence of rape is the absence of real consent by a woman or girl. The consent must never be present throughout the incriminating act of rape. Thus, an accused person can not be heard to claim that though when the act of rape began there was no consent, consent was granted during the course of rape.

If a woman yields under fear or coercion, this is not consent as was shown in MTUNDU CHILE AND 3 OTHERS VS. R. 11970]

ECD n 304. The appellants were convicted of burglary, stealing and rape and were sentenced to 3 years imprisonment and 24 strokes. There was evidence that the appellants broke into a house, stole several articles and demanded sexual intercourse with a daughter who was in an advanced stage of pregnancy. The 50 year old mother of the pregnant daughter, fearing the consequences to her pregnant daughter, offered herself in the daughter's stead. On appeal, the issue was whether there was a consent to have carnal knowledge with the 50 year-old. The High Court held that there was no consent. Here consent was obtained under fear of her daughter's safety.

We have also emphasised that the consent must be free of any-false representations. In the case of William [1923] .1 K.B 340, the victim of rape was a school girl and was a member of the school choir. She wanted to excel in the choir but her voice failed her. She approached the choir master for advice. She was told that sexual intercourse would improve her voice. This was held to be rape since consent was obtained by false pretence.

In another older English Case of R.V. MAYERS [1872] 12 COX CC 311a man climbed into the bed of a sleeping woman and had carnal knowledge of her while she was asleep. In his defence he maintained that since she did not resist consent was implied. This defence that there an implied consent was rejected.

These English cases are important to illustrate the application of the offence of rape to Tanzania.

Penetration

Penetration is an important ingredient of the offence of rape though not stated in so many words in section 130 of the Penal Code. Full or partial penetration ?HI suffice. Late Justice Onyuke in FUNDI QMASI MADEGE VS. R., [1972] HCD n 8S* said that in a charge of rape there must be evidence of penis penetrating into vagina.

Once penetration is established, there will be no need to prove the emission of semen or even the rupture of hymen.

The need to prove penetration was dramatized. In the case of R.V. SALXM ABDALLAH [1970] HCD n 38 where the accused was charged and convicted by a subordinate court and convicted of rape. The complainant was a sleep. She woke up to find someone on top of her. She found semen

on her thighs and vagina and suspected that the accused had raped her. On appeal against rape conviction. Justice Mustafa, as he then was, held that evidence adduced in subordinate court did not point to the fact of penetration. Conviction was as a result substituted for indecent assault.

Rape Committed by Juveniles

When discussing the General Rules governing Criminal responsibility you covered how immaturity in terms of age could affect one's criminal liability. The law in Tanzania is categorical that a person under the age of seven is not criminally responsible for any act or omission (section 15 Penal Code). The law in Tanzania also is categorical that a male person under the age of twelve is presumed to be incapable of having carnal knowledge. This presumption is irrebuttable and it will stand even if there is evidence that the under 12 year old youth had capacity to know that he ought not to do the act of rape (Section 15 of the Penal Code).

Corroboration in Rape

In the case of rape and some other sexual offences the complainant, on grounds of expediency, is regarded as an accomplice and so as a matter of practice her evidence needs to be corroborated by some other evidence that is independent, extrinsic and material, [page 74, The Nigerian Criminal Code Companion by Emmanuel Oiauwuyi Fakayode, Ethiopia Publishing Corporation].

Read the following cases:

1. **NGOBI VS. R. 20 EACA 154; R. V. KASSAPA MASEFU (1973} 3LRT n. 70**
2. **ELIAKIMU NICOLAS VS. R.[1959] HCD n. 33/**

The essential ingredients of Rape were best summarised in Legal and Commercial Dictionary* Edited, by A.N SAHA (5th Edition, Eastern Law House, 1990, Calcutta): consequences of that to which she gives her consent.

- (1) The act of Rape is done against the will of the woman or girl in question or
- 2) Consent may be obtained by putting her or any person in whom she is interested in fear of death or of hurt.
- (3) Consent obtained when the accused person makes her believe him to be her lawful husband.
- (4) Consent obtained, when at the time of giving such consent by reason of unsoundness of mind or intoxication or the administration by him personally or through another any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives her consent.

Defilement of girls under fourteen

The seriousness with which this offence is viewed is illustrated in the form of punishment provided. The minimum sentence for anyone convicted of the Offence of Defilement of a girl under fourteen is twenty years in prison (see section 136(4) of the PENAL CODE). Section 136(1) creates the Offence of Defilement of girls while section 136(2) covers attempts to rape:

"136(1) Any person who carnal knows any girl under the age of fourteen years is guilty of an offence and is- liable to imprisonment for life,- with or without corporal punishment".

For the purposes of Defilement, the slightest penetration of the penis will be enough, even if no semen is emitted. Unlike the offence of Rape where consent is an important ingredient thereof, lack of consent is not an ingredient of the offence of Defilement of girls under fourteen. The law maintains that a girl under the age of fourteen cannot in law consent to be carnally known. The only possible defence is implied into a proviso to section 136(2) of the PENAL CODEs

"PROVIDED that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fourteen years".

The above-mentioned proviso to section 136(2) recognizes it as a defence that an accused person charged with an offence of Defiling a girl under the age of fourteen had reasonable cause to believe, and did in fact believe that the girl in question was of the age of fourteen or above. In such a case, the accused person may wish to bring evidence that the girl had an outward appearance of a girl of or above fourteen years of age.

There are some communities in Tanzania which marry off their daughters at an age far below fourteen. Section 136 of the IAL CODE which punishes Defilement of a girl under fourteen does not apply if the accused person was in fact married to a girl under the age of fourteen (section 136(4)). Defilement by husband of wife is covered by section 138(1) of the PENAL CODEs

"138-(1) Any person who, being married to a girl under the age of twelve years, has or attempts to have carnal knowledge of the girl, whether with or without her consent, before she has attained -the age of twelve years, is guilty of an offence..."

Under the PENAL CODE of Tanzania, a husband who has carnal Knowledge of his twelve year old (and below) wife will not be committing an Offence of Defilement of a girl under fourteen (Section 138(1) read together with 136(3) of the PENAL CODE. You should ail the same bear in mind that in Tanzania, a girl of age below fifteen cannot be married. The Law of Marriage Act, 1971 [Act No 5 of 1971} in no uncertain terms provides that age is one of the factors that can prevent, marriages taking place. Section 13(1} of the Law of Marriage Act, 1971 provides that no man is allowed to contract a marriage if he has not attained the age of eighteen. Likewise no woman can to Tanzania contract a valid marriage if she has not attained the age of fifteen years of age. Any marriage ceremony made in violation of the respective minimum, ages for marriage {eighteen years for men, fifteen years for women) will be punishable under section 148 of the Law of Marriage Act, 1971. Under the laws of Tanzania a husband cannot carnally know his thirteen year old wife without offending section 148 of the'Law of Marriage Act, 1871.

Read. :

1. Attempts to have carnal knowledge (section 136(2) of the PKKAL CODE)
2. Definition of Attempt {Sections 380, 381 and 382 of the FEKAF, CODE)

DEFILEMENT OF IDIOTS AN IMBECILES

When a person is destitute of strength, either of body or mind, he is called an imbecile. In criminal, law, an Imbecile is presumed to be incapable of consenting to carnal knowledge. The same presumption applies to an Idiot.

An idiot is a person born without a mind. Idiocy is a congenital condition due to defective development of the mental faculties. While an idiot is a person who is born without a mind, a lunatic is born with his full mental faculties but loses it later. [Mitra's Legal & Commercial Dictionary]

The Offence of Defilement of Idiots and imbeciles is created by section 137 of the PEMAL CODE:

"137 Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an Idiot or Imbecile, Is guilty of an offence.

The provision creating the offence of Defiling of Idiots or imbeciles has the following key words which prosecution will have to prove beyond reasonable doubt. These include:

- (i) Knowing a woman or girl to be an idiot or imbecile;
- (ii) Have or attempt to have unlawful carnal knowledge of her
- (iii) In circumstances not amounting to rape, but which prove that the offender knew at the time that the woman or girl was an idiot or an imbecile.

The "Mens rea" of the Offence of Defilement of Idiots or Imbeciles is "Knowing" a woman or girl the accused is having or attempting to have sex with is an imbecile or an idiot. Once there is an act of carnal knowledge or an attempt is made to have sex with the idiot or imbecile, the next question you should ask yourself is whether the offender knew at the time of commission of the offence that the woman or girl in question was an idiot or

an imbecile. If you answer the question in affirmative, the offence of Defilement under section 137 will be deemed to be established.

The phrase "circumstances amounting to rape" in section 137 is there to indicate that an idiot or an Imbecile, because of her state of mind cannot in law consent to a sexual intercourse. Section 137 of the PENAL CODE was enacted to protect idiots and imbeciles from sexual exploitation. Idiots and Imbeciles like any girl under fourteen are deemed to be incapable of consenting to sex..

INDECENT ASSAULTS OF FEMALES

It is a punishable offence under section 135(1) of the PENAL CODE to commit an unlawful indecent assault on any woman or girl:

135 - "Any person who unlawfully and indecently assaults any woman or girl is guilty of an offence...."

Essential elements constituting an offence under this section are; unlawful assault and the accompanying act of Indecency. The two must go together and proceed from the accused to the complainants [See Emmanuel Olawuyi Fakayode's The Nigerian Criminal Code].

An act is deemed to be indecent if it is unbecoming, unseemly or is morally offensive or offend against the recognized standard of propriety. Amongst the acts that may be regarded as being indecent include exposing male organs in public, making love in public and playing with one's private parts in public. So where a man unlawfully touches a woman's private parts much to her protest and disagreement, the act would be Indecent Assault within the meaning of section 135(1) of the PENAL CODE. Though section 135(1) is headed to indicate it as covering Indecent Assaults on Females it does

not mean that only men are envisaged to be potential offenders under this provision. Women can also indecently assault other women. The phrase "ANY PERSON in section 135(1) should be construed to include "Women".

Read also:-

1. Attempts to have carnal knowledge (section 136(2} of the PENAL CODE]
2. Definitions of Attempt (sections 380, 381 and 382 PENAL CODE]
3. A parent of a girl under the age of twelve parts with her in order to allow another man have sexual Intercourse with her (Section 138(2} PENAL CODE].
4. To procure a girl of 11 who is Incidentally married to be carnally known, [section 138 (3) PENAL CODE]
5. A person having sexual inter course with a 10 year old girl whose figure could be mistaken for that of an eighteen year old. (Sections 136(2), 138(5), 141. 142 of the PENAL CODE]:
6. Do you know of any community to Tanzania which marries off its S year old daughters with an explicit order that no consummation of the marriage should take place till the girl attains an age of 18? [Section 138(6) PENAL CODE].
7. What do you think will be the fate of a landlord who improves his beer sales by allowing his customers to have sex with 10 year girls locked In his secret rooms? [Section 141. PENAL CODE).
8. What is the fate of a businessman who detains a woman in his mansion and allows his friend who had tried unsuccessfully to befriend the

woman to have sex with the detainee [section 143. PENAL CODE]. What if the woman detained refuses sex and could not be forced, but the businessman and his friend hide all her clothing? [section 143 PENAL CODE].

9. What would be an offence committed by a bar owner who has several dark rooms where women could sell their bodies for sex. [section 148, PENAL CODE].

10. Procuring Abortions [sections 150 and 151 PENAL CODE],

11. A rich tycoon takes a 10 year Old girl with her consent promising to marry her. Girls parents report the incident to the police. The tycoon is quickly arrested-before having carnal knowledge of the girl. [Sections 134 and 133 PENAL CODE]

12. Insulting the Modesty of a Woman [Section 135(3), PENAL CODE].

13. What would be the fate of someone who has sex with his granddaughter, or daughter, or sister or mother? [Sections 158, 161 and 162, PENAL CODE]:

14. A female permitting her grandfather or father or brother or son to have sex with her [sections 160. 161 and 162 PENAL CODE].

15. Unnatural Offence has been defined to be a voluntary act of having carnal intercourse against the order of nature with any man, woman or animal:

(a) John and Hawa are blamed for having had anal sex.

(b) John has on several occasions had carnal knowledge with his goat.

[Section 154 PENAL CODE]

4. OFFENCES AGAINST THE PERSON

Division IV of the Penal Code [CAP 16] is devoted to the Offences Considered to be Against the Person. This division

creates several offences which attempt to state and discuss the law pertaining to Right to Life and Sustenance of Life. Offences created under this Division forbid, or prevent conduct or any threatening harm to an individual or public at large. The provisions constituting Offences Against the Person also safeguard conduct that is regarded to be without fault (innocence), while punishing conducts that are considered to be criminal. The aim of the State here through this Division IV of the Penal Code is to Identify harm brought about by human being which the state is there to prevent.

Offences against the Person are grouped into seven chapters which together constitute Division IV of the Penal Code. You are expected to cover all the offences created under this Division and also read all the cases that have discussed provisions of law created under Division IV of the Penal Code. Offences of Murder and Manslaughter are provided for by Chapter XIX A of the Penal Code. Other Offences and their respective chapters are:

- (i) Duties Relating to the Preservation of Life and Health, Chapter
- (ii) Offences connected with Murder and Suicide, Chapter XXI
- (iii) Offences Endangering Life or Health, Chapter XXII
- (iv) Criminal Recklessness and Negligence, Chapter XXXIII
- (v) Assaults. Chapter XXIV and
- (vi) Offences against Liberty, Chapter XXV

Some of Special Crimes Created by Division IV of the Penal Code [CAP. 16] include:

- (i) Murder and Manslaughter (sections 196, 195);
 - (ii) Infanticide (section 199);
 - (iii) Attempted Murder (section 211);
 - (iv) Accessory After the Fact to Murder (section 213);
 - (v) Conspiracy to Murder (Section 215);
 - (vi) Aiding Suicide (section 216);
 - (vii) Attempting Suicide (section 217);
 - (viii) Concealing the birth of Children (section 218);
 - (ix) Written Threats to Murder (section 214);
 - (x) Duties Relating to the Preservation of Life and Health (sections 206,207, 208,209,210);
- Offences Endangering Life or Health (sections 220-232)

HOMICIDE;

Homicide simply means the killing of any human being by another human being. The term includes both lawful killings and unlawful killings. Unlawful Homicide covers:

- (i) intentional killing - (Murder);
- (ii) Unlawful killing (not intentional). (Infanticide, manslaughter);
- (iii) Reckless driving resulting in death.

There are numerous examples of lawful killings (Homicides). Lawful Homicide would include the following examples:

- (i) An Executioner lawfully executing a death sentence passed by a competent court;
- (ii) Where a Police Officer employs a reasonable force which results in death while effecting an arrest; and
- (iii) Where a person is accidentally killed, for example where soccer player is accidentally killed by a stray ball during a football match.

Let us now discuss some of the Offences regarded to be Offences Against the Person. We will first discuss Homicidal Offences:

(i) **MURDER**

Classical definition of the offence "murder" is provided for by-section 196 of the Penal Code. This section provides that,

“S.196. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

Definition of Murder has the following key ingredients which you must always be borne In mind:

- a) Of malice aforethought
- b) Causation of death
- c) By an unlawful act or by an unlawful omission.

The presence of these ingredients is essential to establish the offence of murder. When faced with a question whether any death is murder or not murder you must always show that the three ingredients shown above are

present. Let us look more closely at each of the three Ingredients (a) (b) and (c).

(a) "MALICE AFORETHOUGHT"

The phrase of malice aforethought' in section 196 of the Penal Code emphasizes the fact that the crime of murder is established if the prosecution shows that act of Killing was accompanied with mental element of intention technically known as "malice aforethought. In Criminal Law, Intention simply means the purpose or design of doing an act forbidden by the law. It Is one of the basic principles of Criminal Law that a crime is not committed if the mind of the person doing the act in question is innocent (unless of course a provision is framed In such a way as to dispense away with this "intent" requirement). For the Crime of Murder, this guilty mind ("mens rea") is known as "malice

The requisite guilty mind (i.e.. "mens rea" or "malice aforethought) of murder is regarded to have existed for the purposes of the Offence of Murder if conditions provided for by section 200 of the Penal Code are satisfied. Section 200 of the Penal Code provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An Intention to cause the death of. or to do grievous harm to any person, whether such person Is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not. although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) an intent to commit an offence

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

Malice aforethought shall be deemed to be established by evidence proving any of the elements mentioned to section 200 of the PENAL CODE;

(a) "that the accused person, when doing an act complained of had either the Intention to cause death or had the Intention to do grievous harm to any person. It does not matter that the intention was not directed to the person who was actually killed" (section 200(a))

The last sentence In section 200 (a) providing :It does matter that the intention was not directed to the person who wnm actually killed.

can be illustrated where for example Juma has formed an intention to kill or cause grievous harm to John. Juma carries out his intention. All dies instead. Here the intent against John is transferred to All and the accused person Juma will be held liable
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The case of Rex V. CHIKOKONYA [1938] 3.R. 122 illustrates further the application of transferred intent:

In this case the accused person went to in-laws with the intention of killing Yns. "Wife Yyj poisoning, drinking, water In a pot. He wanted to kill his wife because she would no longer allow him to have sexual intercourse with her. Unfortunately another visitor, one Makachi died after drinking the water

which had been poisoned and having also had some meat which had been cooked with poisoned water. Accused was found guilty of murder despite the fact that he did not intend to kill the deceased but his wife.

Malice aforethought is also deemed to exist if the accused intended to inflict grievous harm but death resulted instead of the grievous harm intended.

Case law has elaborated on how malice aforethought is established if there is evidence showing that an accused person intended "to kill" or "cause grievous harm.'

In the case of (1) TOMASI ENYAJU S/o Eguruto, (2) Elasu s/o EJURU VS. R.. VOL. 12 EJLCA 42,

An Intention to kill or cause grievous harm (I.e. 'malice aforethought') was inferred from the Infliction of a fatal injury by the accused persons. In this case, during a tribal dance the first accused gave the deceased a violent poke on the head with the sharper end of his heavy dancing stick. This pierced the skull and caused the brain of the deceased to protrude. Almost immediately, while the deceased was on the ground but still alive, the second accused beat the deceased violently on the other side of the head fracturing the skull. Each injury was sufficient to cause death.

The accused persons were both convicted of murder. They appealed. The Court of appeal of Eastern Africa had to decide whether there was "malice aforethought" (i.e. intention to kill or cause grievous harm). The Court of Appeal dismissed the appeal saying, every person who "inflicts on a living person an inevitably fatal injury with the intention to kill or to cause grievous harm is guilty of murder."

Malice aforethought is rarely proved by direct evidence. It can be inferred from the circumstances viewed as a whole. The nature of the weapon used and the manner in which the blow is inflicted are factors to be considered when seeking to establish Malice aforethought. By using a lethal weapon the accused may be presumed to have formed either an intention to kill or cause grievous harm, This was authoritatively stated by Justice Mnzavas, as he then was in the case of Republic v. Mohamed Mite I1974J.LRT n 36:'

The accused, Mohamed Nite, stands charged with murder contrary to section 196 of the Penal Code.

It is the prosecution case that the accused on or about the 15th day of November 1972, at Zuga village, Kwamtero Division, in Kondoa District, Dodoma Region, murdered one, Bakari Homani.

From the evidence of the doctor (PW1), and that of Juma Masudi (PW10) there can be no doubt that a man by the name of Bakari s/o Homani has died. Equally there can be no doubt that Bakari Homani died a violent death. The only dispute to be resolved is: Who was the perpetrator of this crime?

The prosecution argued that It is the accused who with malice aforethought, killed the deceased. The accused denied killing the deceased. Ten prosecution witnesses gave evidence in support of the charge.

The doctor (PW1) told the court that he performed postmortem examination on deceased's body and that he found two stab wounds on the right side of deceased's chest and that one of the wounds penetrated the right lung. According to his testimony he also found a wound four inches long, penetrating the left lung and a wound on the right side of the neck, three inches deep. Internally he found that both lungs were pierced and that the right carotid and jugular veins were severed. It was his opinion that the cause of death was shock resulting from profuse bleeding from the wounds.

Mwasiti (PW2) related to the court that one day in November 1972 she left her house to a pombe party at the house of one, Iyambc. Mwasiti is the wife

of the deceased. While she was at the pombe party her husband, the deceased, was grazing his cattle. According to her evidence she met the accused at lyambo's house and that she started drinking pombe with him. She drank pombe with the accused who she said is her cousin as well as her paramour.

This witness also told the court that at night time she left accompanied by the accused to accused's house. It was her evidence that as they were near accused's house, the accused went aside for a short call and that as he was coming back she heard the accused raising an alarm and that she turned round and saw the accused fighting with the deceased and that the accused fell the deceased on the ground and stabbed him many times. It was her testimony that when she saw what was happening she ran away. When cross examined by the learned defence counsel the witness said that she heard the accused raising an alarm saying that the deceased was killing him. It was her evidence that the accused stabbed the deceased with deceased's knife.

Tatu (PW4), step-daughter of the accused testified to the court that one night in November 1972 she accompanied her mother to a place where an alarm was coming from and that on arrival they saw a dead body lying on the ground and that they met the accused standing near the dead body. According to her evidence from the scene she. Accompanied by the accused and her mother returned home. She told the court that when they reached home the accused gave to his wife a gourd full of millet and ordered her to take the gourd Of millet

to where the body was lying and break it so as to create an impression to the people who came to the scene that the deceased had been murdered by robbers who wanted to steal his millet. It was her evidence that the accused warned her not to divulge to anyone that it was he who had killed the deceased. According to her evidence on the same night the accused gave her his. shirt and asked her to wash it. The witness said that the shirt was not dirty but that it had blood-stains on it.

Simba (PW5) related to the court that one night in November 1972 the accused accompanied by his wife, visited him and that accused's wife told him that there was a dead-body lying near their house and asked him. to go and see it. The witness went to where the body was lying and identified it as that of his son Bakari Homani. He asked the accused whether he knew who had killed the deceased and that the accused did not answer. It was also his evidence that Mwasiti (PW2) told him and other villagers who came to the scene that it was the accused who had killed the deceased. The witness also testified that he saw a broken gourd with millet scattered near deceased's body.

Bakari (PW6), and Dona (PW7) also told the court that they visited the scene of crime and that Mwasiti (PW25) told them that the deceased was killed by the accused.

In his unsworn evidence the accused denied killing the deceased, he told the court that on the material night he was returning home from a pombe-party when he saw dead-body lying on the ground near his compound. He said that he reported what he had seen to his neighbour and that later the police was contacted and came to the scene. According to his defence while at the scene deceased's wife (PW2) told the police that it was he while at the scene deceased's wife (PW2) told the police that it was he who had killed the deceased. But that he denied killing him.

After my summing up to the gentlemen assessors they were of the opinion that it is a lethal weapon as a knife and the fact that he inflicted several injuries on him he must have intended to kill the deceased. On this evidence it was argued that the killing amounted to murder.

The learned defence counsel on the other hand argued that even if the court was to accept the prosecution evidence that it was the accused who inflicted the fatal Injuries on the deceased, the killing, it was argued, could not amount to murder. In support of this argument the court was referred to the evidence of Mwasiti (FW2). From the evidence of Mwasiti and that of Tatu (FW4) there can be no doubt that it is the accused who unlawfully attacked the deceased on the material night. And, from the doctor's evidence there

can be no doubt at all that It is the wounds inflicted on the deceased by the accused that caused the death of the deceased. The vital question to be decided is however whether this unlawful killing amounts to murder.

As it has repeatedly been pronounced by this court and the court of Appeal malice aforethought is rarely proved by direct evidence, it can often be inferred from the circumstances viewed as a whole. The nature of the weapon used and the manner motive is known.

In the present case I totally agree with the learned State Attorney that the accused used a lethal weapon, a knife, in inflicting the wounds on the deceased. He directed the knife on such vulnerable parts of the body as the chest and neck, and he inflicted the wounds with such force as to pierce both lungs and several vital blood vessels In the neck. This being the evidence there can be no doubt that at the time he inflicted- the fatal wounds the accused had either formed an intention to kill the deceased or he had at at least formed an intention to cause him grievous bodily harm.

Had it not been for the other evidence by Mwasiti (PW2) which in some ways speaks in favour of the accused, I would have no alternative but to agree with the unanimous opinion of the assessors and find him guilty of the offence of murder as charged.

Mwasiti's evidence in chief is that as the accused was returning from, where hi had gone for a call of nature she heard him Crying out, "someone is killing me".

When cross-examined by the court she said that the accused cried out sayinji - "Bakari you are killing me". There was the evidence that the knife the accused stabbed the deceased with belonged to the deceased. From the evidence tin deceased always used to fasten if round tils loin. Mwasiti also told the court In her evidence In chief "I turned round to see what was the matter and I saw Mohamad fighting with my husband Bakari.

This evidence added to the fact that the deceased was near accused's house at the time makes the court to believe the defence argument that the deceased who knew that the accused was having an affair with his wife (PW2) the accused on the material night And the fact that the accused cried out saying that the deceased was killing him may very well mean that the deceased was about to, attack him, possibly with his knife, when the accused snatched it and inflicted the injuries on him instead. On the circumstances of this case, and looking at the evidence in the light of Mwasiti's testimony, it would appear that there was a fight between the deceased and the accused before the later inflicted the fatal injuries on the formed.

When death occurs as a result of a fight, the person, who causes death will normally, unless there are special reasons to the contrary be found guilty of manslaughter and not murder R.V John Wimaana (1968) HCD 49. This is a difficult case. It is with great reluctance and only after considerable reflection that I have decided to differ from the assessors. I have a doubt in my mind as to the question of malice aforethought and the law requires me' to resolve the doubt in favour of the accused [**R.V Joseph s/o Byarushengo and Another**, {1946) EACA 187; **R.V Kibia Arap Serem**, (1940) EACA 73). On the evidence I find the accused not guilty of murder but guilty of manslaughter c/s 195 of the Penal Code".

The case of OKUTE EALIEBI and Another Vs. R. (1841) EACA 76 discusses Malice Aforethought where there were Joint intents to cause grievous harm. Appellants were appealing in the Eastern Court of Appeal against convictions of murder:

The deceased died from shock resulting from injuries received In two separate and independent assaults. The first assault was made by the first appellant and the others who were convicted of manslaughter but did not appeal. The trial Court held that in this assault the first appellant intended to cause grievous harm but that the other assailants had not so serious an intention. Although the injuries inflicted in this assault were serious there

was no evidence that they were sufficient of themselves to cause death. After the first assault and independently of it the second appellant at the least committed a second and independent assault upon the deceased who was in a weakened condition as a result of his prior beating and caused a fracture of his breast bone which was one of the injuries from the cumulative effect of which the deceased had died.

Held (29-8-41) -

(1) The second appellant having with intent to cause grievous bodily harm inflicted an Injury on one who was already in a weak state was properly convicted of murder since death resulted from this injury supervening upon the weakness of the victim even though that injury would not by itself have killed a healthy person.

(2) That since on the evidence it should have been held that the injuries caused by the first appellant and the other parties to the first assault might possibly have caused death only by reason of the further injury inflicted subsequently by the second appellant and in the absence of any evidence of a subsisting intent In common with the second appellant in the second .assault, the first appellant and the other parties to the firs- assault ought no to have been convicted of murder or manslaughter. Appeal of the first appellant allowed. Appeal of the second appellant dismissed.

Convictions of manslaughter against the other parties to the first assault set aside under section 315 and 320 of the Uganda Penal Code notwithstanding the fact that they had not appealed.

Appellants absent unrepresented Spurling, Crown Counsel for the Crown

JUDGMENT in the case of OEUTE was delivered by Sir HENRY WEBBV C.J. and it ran as follows:

This is difficult case turning mainly on the question of common intent. Unfortunately this aspect of the case does not appear to have been fully appreciated by the prosecution, and several questions the answers to which might have made the position much clearer were never put to the witnesses.

The appellants with four others (one of whom was acquitted) were charged with the murder of Kaliebi s/o Kirya. It was proved that two sons of the deceased had been arrested upon the charge of stealing a cow; the first appellant, with the accused Erika, Firipo, Farasi and Okurie took the deceased to a place where meat had been buried and ordered him to dig It up. When he refused the first appellant struck him three times with a heavy stick, according to two of the witnesses on the back, shoulder and neck, according to another on the back, shoulder and chest, and according to another on the back, neck and arm: the blows are described as having been very hard. Erika, Farasi and Ukurie also beat him but not severely.

The deceased was then made to dig up the meat and was taken to the Muruka Chiefs place, and it said that when he got there he was in a weak condition. There was no evidence of the distance of this place from the scene of the beating, or of the time taken to cover It. At this stage the second appellant came up carrying a heavy knobbed stick and, according to one witness, poked the deceased in the small of the back and in the chest, and kicked him in the stomach: according to another poked him in the chest and stomach: according to a third struck him on the chest and high and kicked him in the stomach, and according to a fourth, struck him three times on the back, poked him in the chest and then knocked him in the stomach. It seems hardly possible that there was no some conversation between the second appellant and the first party, but no question was asked about this, and so fax as the evidence goes this assault was committed without a single word being said by anyone. The second appellant then went away: the others proceeded to take the deceased to the Gombolola Chief, but he became unable to walk, and was tied to a pole and carried to the Gombolola prison and thence to the dispensary. When the party reached the dispensary he was found to be dead. According to the medical evidence the cause of death was shock due to (1) a fracture of the right ulna (2) a

transverse fracture of the breast bone, and (3) the fracture of six ribs, on the left side, probably caused by more than one blow.

The learned trial Judge accepted the evidence as to the assaults by the first appellant Erika,. Farasi and Okurie and the subsequent assault by the second appellant as being substantially correct. He said, "I will consider the case of accused. I, Okute, first This man struck certainly three blows with a heavy club; his intention must have been at the very least to cause grievous harm, and if death ensued -he must be guilty of murder, death did result from the effect of this and other assaults, and therefore, I must find this accused guilty of murder." With regard to Erika. Farasi and Okuri he said, n... none of these persons used weapons likely to cause death or grievous harm and it is a not unreasonable assumption that none of these accused anticipated or had reason to anticipate that death or grievous harm would result. However, death having ensued they must at the least be guilty of manslaughter as they were committing an unlawful act" and with regard to the second appellant, "Gadimba used his stick on a man who was already obviously in a bad state: the stick must have been a heavy and dangerous weapon. Again ! must find that the use of such a dangerous weapon presupposes an Intention to cause at the least grievous harm, and if death ensues the assailant Is guilty of murder."

In our opinion no difficulty arises in the case of the second appellant. From the evidence it seems certain that it was he who caused the fracture of the deceased's breast bone, which was one of the injuries from the cumulative effect of which death resulted, and, as the learned Judge rightly held, a person who inflicts injuries upon someone who is in a weak state, whether by reason of illness or a previous assault by another. Is guilty of murder If death results from such Injury supervening upon the weakness of the victim, even though the last injury would not by itself have killed a healthy person.

But the case of the first appellant, as also the cases of Erika. Farasi and Okurie, present a difficult problem. It was not proved that the injuries which they inflicted would, of themselves, have caused the death of the deceased,

without the further injury inflicted by the second appellant and the learned Judge has found that as between the first appellant and Erika; Farasi and Okurie. though there was a common intention to beat the deceased, there was not a common intention to cause him grievous harm (a view which was certainly extremely favourable to the last three) that latter intention he found by inference from the weapons that they used, to have existed only in the minds of the first and second appellants. But if the injuries caused by the first appellant may possibly have caused death only by reason of the further injuries inflicted by the second appellant which we think must be taken to be the effect of the medical evidence then the first appellant can only be convicted of murder If it be held that he and the second appellant had a common intention to cause grievous harm to the deceased.

The learned Judge rightly found that each of them had an intention to cause grievous harm, but in our opinion the fact that two people have the same intention does not necessarily mean that they have a common intention, for the circumstances may be such as to show that each has acted independently of the other. Where several persons together beat another, then, though each may have a different that all have what the law calls a "common intention", which does not necessarily connote any previous concerted agreement between them. But where, as in the present case, first a party of four beat the victim, and then, after some interval of time and in a different place, another person comes up and beats him, then, even though his reason may have been the same as theirs, it seems to us to be impossible to say on the evidence of such facts alone, that the first party, whose acts are finished, the purpose for which they were done accomplished, are necessarily to be deemed to have had a common intention with the new-comer so as to be guilty of murder If the combined result of the two beatings to cause death of the victim. How, In such circumstances, can the first party be said to have had a common intention with a person whose Intervention in the affair they (so far as the evidence in this case goes) can have had no reason to anticipate.

We must not be taken to lay it down as a universal rule that there can be no common intention unless the first assailants had reason to anticipate that others would or might come and continue the assault; if the proper

inference from the evidence was that the first party approved of and associated themselves with the action of the new-comer, that might well be taken to indicate the existence of a common intention then arising between them. If It were established that the members of tribe A had a practice of beating any member of tribe B whom they found in their lands, then indeed there would be such a common intention as might make those who first beat a member of tribe B responsible in law if that beating, combined with a second beating by other members of tribe A. cause his death.

But there were nothing to show that when the first appellant and his party beat the deceased they had any reason to suppose that the second appellant would meet them and the deceased, or, if he did, that he would beat him, they have beaten him to make him dig up the meat, and he had done so, and had carried it to the Chiefs place, when as the learned Judge correctly puts, it, Gadimba,... committed "a violent and unprovoked independent assault" upon him. Nor. on the evidence given, is there anything to show that the first appellant and his party associated themselves with the assault committed by the second appellant or even if they had an opportunity of doing so: in the circumstances of this case such an association cannot be inferred from their presence on the scene, for they were there for the purpose of taking the deceased to the Gombolola Chief, and. as we have already pointed out, the evidence does not reveal whether or not anything was said which would have tended to- show that they approved of the second assault, or perhaps even suggested it, or, on the other hand, that they disapproved of it and protested against it.

We are therefore of opinion that the first appellant was wrongly convicted of murder, and we set aside his conviction. For the same reasons as apply in his case, Erika, Farasi and Okurie should not have been convicted of manslaughter, and, although they have repealed, by virtue of the power conferred upon this Court by section 320 and 314(1) (a) (ii) of the Criminal Procedure Code we set aside the conviction for manslaughter in the case of each of them. It will be open to the Crown to take such proceedings against the first appellant, Okute, and against Erika, Farasi and Okurie as may be deemed proper. The appeal of the second appellant, Gadimba s/o Oumo,, is dismissed.

Read also the following cases on intention to kill or cause grievous harm:

R.V. YAKOBO r*JAMB0 NAMBIO VOL. 11 BACA 97

R.V. MWAGAMBO S/o GI8HODI VOL. 8 BACA 2& OLSKJA V.R. (1973} EA 546

R.V. GWEGERE SIKYA NGWDRE VOL. 2 EACA 133

(b) Another possibility where malice aforethought shall also be deemed to be established is where it is shown that the accused person knew that the act he was embarking on or the omission he was omitting will probably cause the death of or grievous harm to someone [section 200(b)].

An example here is where a person buys a gun and goes with it in a playing field to shoot-practice. If the field is frequented by people and the person knows it, he will be guilty of murder if a stray bullet kills a passer-by.

Another example is where X has been warned several times to avoid leaving his loaded gun in his living room where children frequent. X does not heed the advice claiming that his children are intelligent enough. One day one of his children plays with the gun which goes off and the child is killed.

(C) Malice aforethought is also established if it is shown that the accused person knew that the act or omission in question will probably cause death or grievous harm but he does not care whether death or grievous harm will result, [section 200 (b)].

An example here is where John Jokingly shoots his arrows into a Crowd.

(d) Malice aforethought will also be considered established that there were an intent on the part of the accused person to commit an offence [section 200 (c)].

The true construction to be put on paragraphs (a), (b) and (c) of section 200 is that where the essence of the offence is the intention to inflict bodily injury to the, deceased (e.g.. death results from the action of accused striking the deceased with a club to Injure him} In those cases paragraph (a)s (b) will be relevant.

Where, on the other hand, there is intent to commit an offence which does not involve personal injury, and then paragraph (c) of section 200 will apply.

[Read "Some Aspects of Murder in East Africa", by James S. Read in East Africa Law Journal (Dec. 1965) pg.37 which discusses this fine distinction between section 200 (a) (b) and 200 (c) of the Penal Code.

(e) Paragraph (d) of section 200 presupposes a situation, where one has been convicted or is otherwise Is in lawful custody, helped to escape and another person dies in the process of escape or facilitation of the escape.

Malice aforethought will be deemed established where an accused person dies following an act or omission which results his death feisty was tlse or omitted to be done in order to facilitate the flight or escape from custody of any person who have committed or attempted to commit an offence.

To establish malice aforethought as an essential, element in the offence of murder, It must be shown in evidence that there was any of circumstances provided for by paragraphs (a), (b){ (c) and (d of section 200 of the Penal Code.

"CAUSES THE DEATH OF ANOTHER"

This is a second important ingredient of the Offence of Murder. Causation of death Is a very important issue whenever death occur. When a person dies, the first question asked is who caused the death. At this early stage, it is immaterial whether the killing is lawful or n'ot. An important condition required to establish Offence of Murder is that the act of the accused must be the direct cause of the death of the deceased. There are cases where the question of who caused the death [for example by actually killing or poisoning] is not at all in dispute. For example where an accused person admits that he/she actually killed the deceased. Occasionally, the question who caused the death becomes problematic and the law here is forced to draw presumptions as to who actually caused the death. Penal Code provides for situations where a person is deemed to have caused the death of another person although the act of the accused person may not be the immediate or the sole cause of death (section 203):

(i) " Section 203(a)-if he inflicts bodily injury on person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if It was employed in good faith and with common knowledge and skill".

Section 203(a) implies that the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was sc employed without common knowledge or skill".

Practical application of paragraph (a) of section 203 will be where for example:

X inflicts a bodily injury on Y in consequence of which Y goes to hospital and undergoes surgical or medical treatment and dies. If the medical treatment Y received was done in good faith and in accordance with prevailing procedures on the injury, X will be still held to have caused the death of Y.

If on the other hand, it is shown that the medical treatment received by Y was not employed to good faith or was so employed without common knowledge or skill, X will not be held to have caused the death of Y.

What can be deduced from paragraph (a) of section 203 of the Penal Code is that medical treatment given to Y in good faith even if mistaken will not absolve X who injured Y from liability. Death resulting from treatment of a wound unlawfully inflicted does not, however inadequate such treatment may have been, exonerate the person who inflicted the wound from responsibility in law for the consequences of his act, of unlawful wounding unless the treatment itself amounts to murder or manslaughter.

In the case of [R.V. BASARE [1954] G.L.R. 3211, the factor of wrongful treatment was discussed:

Kofi and his son Kojo were returning from their farming to their house early in the morning, when they saw accused carrying away a bag of cocoa from their verandah. They shouted to him twice to put it down before he did so; having done so. he began to walk away. Kofi followed, after noticing that another bag of cocoa was missing. Accused went in the direction of palm tree, took up a gun that was leaning against it. and shot at Kofi, wounding him with pellets in the lower part of the abdomen on the left side. Kofi was taken to the hospital at Hohoe, and died there three weeks later.

The cause of death was generalised peritonitis resulting from perforation of the gut by a foreign body. The doctor who treated Kofi and performed the postmortem gave as his opinion that death had resulted from Injury by gunshot. Accused was convicted of murder, and appealed. GRANVILLE 8KARF JA delivered the judgment of the court:

"Realising the vanity of any attempt complain about the summing up of the learned judge in relation to the evidence as to the appellant's responsibility for a wounding which was followed by the death of his victim, counsel for the appellant took refuge in an additional ground of appeal, which we gave him leave to file. This was as follows: "The learned judge erred in failing to consider whether the treatment given to the deceased in hospital may have been responsible for his death.

As to this, it is enough to say that death resulting from treatment of a wound unlawfully inflicted does not, however inadequate such treatment may have been, exonerate the person who inflicted the wound from responsibility in law for the consequences of his act, unless the treatment itself amounts to murder or manslaughter. The evidence in this case shows that in fact, every available means of treatment was used, and that the deceased was tended with anxious care in an attempt to allow the effects of his wounds, and to save his life. There was no substance whatever in the appeal and we accordingly dismissed it".

In the case of R.V. MWAGAMBO GISHODI 8 EACA 28:

Mwagambo inflicted two deep wounds upon the deceased, who died as a result of sepsis from these wounds. The wounds had been stitched by a medical dresser. The medical evidence was to the effect that the wound should have been drained instead of being stitched but even if it had been drained there would still have been risk of sepsis setting in. Mwagambo had argued that death was not caused by the wound but unskilled treatment. It was held that death was caused by the wounds. The Court of Appeal for Eastern Africa held that the dresser did what was reasonable under the circumstances when stitching up the wound.

In R.V. NJARURA S/ONDUGO 11 EACA 59;

the deceased received a wound which was not of itself dangerous, but the deceased, who suffered from fatty degeneration of the heart, died under an anesthetic administered for the purpose of stitching the wound. The medical evidence was that all usual precautions were taken before the anesthetic was administered. The first issue facing the appeal court was whether if the appellant is responsible for the wound sustained by the deceased, he is also legally responsible for his death. It was held here that, in the absence of any evidence to the contrary, the trial court was justified in presuming that a qualified medical practitioner would not perform an operation unless it was in his opinion necessary or advisable. Here the appellant was held not have caused the death of the deceased.

ii. S. 203(b)-If he inflict bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living".

An example fitting paragraph (b) of section 203 will be where :

X injures Y , Y is taken to hospital treated and advised to have a complete 1 month bed rest without any movement. Y does not follow the advice and as a result Y dies or;

X unlawfully breaks Ys leg. Y refuses to go to hospital for treatment and as a result dies; or

X injures Y and breaks Y's leg. Y is taken to hospital and advised to rest for 1 month. Y cannot take up a rest because he is a businessman and would not like his business to stop. Y dies as a result of failure to rest.

In all the three examples X will be deemed to have caused the death of despite the fact that he is not the immediate cause of Y's death.

iii. "Sections 203(c)-If by actual or threatened violence he causes that other person to perform an act which causes the death of that person, such act being a means of avoiding such violence which in circumstances would appear natural to the person whose death is so caused".

Section 203(c) underlies the principle that if a person is running away under an apprehension of violence it is not an unreasonable consequence that the person might fall down and if, in the course of falling down, that person becomes injured, the person who caused him or her to run away will be responsible for the fall. It follows that if the person dies as a result of that fall the accused person is responsible for the death, even though the death may be a somewhat unlikely consequence of her running away and falling. Section 203 (c) of the Penal Code is illustrated in the following case of *REX V. 8IKONA* [1937] SJL 54e

HUDSON J.: "We find in this case on the facts, in accordance with the medical evidence that the deceased woman, Chinungwa, met her death as the result of dislocation of her neck. At the time just prior to the dislocation of the neck the woman had been running away to escape an assault by the accused. We have no evidence from which we could find that the accused was entitled to assault his wife to justify an assault on her. We have evidence that he was suspicious after relations with another man but there

is no evidence as to her guilty relations with that man. The accused acted on suspicions only and on, he says, a report which he got. We cannot believe his statement that the deceased woman admitted her guilt, therefore, his act in assaulting the woman was an unlawful act. As I say, on the medical evidence there is no doubt that the woman died as the result of a dislocated neck but the doctor is unable to say definitely whether the neck was dislocated when she fell or whether it became dislocated when the accused jumped on her we accept the evidence that he did jump on her. It is our duty to give the accused the benefit of any reasonable doubt and as, on the evidence, there is doubt as to whether she met her death as the result of the fall or whether it was due to the direct action of the accused, we find as fact, and must accept as a fact, in his favour, that she died as a result of the fall.

On those facts we have to decide, as a matter of law, whether the accused is responsible for her death. The law on the point has been laid down in Archbold at page 878. where he says: 'If one, under a well-grounded Apprehension of personal violence, does an act which causes his death, as for instance, jumps out of a window-, or into a river, he who threatened is answerable for the consequences.'

It was put in a slightly different way by Mr. Justice Erskine as quoted in Russell on Crime, pages 351 -352, as follows: A man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step, but the apprehension must be of immediate violence, and well-grounded from the circumstances by which the deceased was surrounded; and that the jury must be satisfied not that there was no other way of escape, but that it was such a step as a reasonable man might take.

In this particular case, of course, there was no threat of death, as we see the case, and if, as the result of the accused's assault on this deceased woman she had deliberately jumped down a steep precipice, we would not necessarily have held him responsible for that act. But unlawfully assaulted

as she was, she was entitled to run away In order to escape. If a person Is running away under an apprehension of violence It Is not an Unreasonable consequence that person might fall down and If, In the course of failing down, that person becomes injured, that is the guilty act of the person who caused her to run away. That is the manner in which as I see It, he law must be applied. If this woman had fallen down and become Injured men the accused then the accused would have been guilty of an assault, even if the accused had not directly touched her body. It follows that if she died as a result of that fall the somewhat unlikely consequence of her running away and falling. But the law is clear, that if a person assaults another unlawfully and death results from the assault, then the person who commits the assault is guilty of homicide. The result Is that we find the accused guilty of culpable homicide.

In the ordinary way if a deceased person met his death in this manner we would consider it almost technical offence and the punishment would be very light, but every case has to be considered on the circumstances of" that particular case. And in this case we have fovnd. as a fact, that the accused after the woman was lying on the ground dance i on her body, and there Is no question that he Intended to do her grievous bodily harm and he intended that harm, as I previous pointed out without any legal justification. This is not, therefore, a case which we can regard as merely a technical assault and the accused must be comparatively severely punished. He will be Imprisoned with hard labour for two years."

So if X threatens Y with a gun, Y runs and as a result knocked down by a speeding car, X will be regarded to have caused the death within section 203(c) of the Penal Code.

"Section 203(d), if by any act or omission he hastens the death of a person suffering under any diseases or injury which apart from such act or omission would have caused death".

This paragraph(d) of section 203 envisages a situation where a person hastens the death of an already injured person or one who is already dying of any disease or injury.

An example here is where:

X Knocks Y on the head draining Y's brain through the wound Inflicted. It is the fact that X will die shortly. But if Z comes and knocks Y again on the head, fracturing the already fragile skull and Y dies, Z will be deemed to have caused the death of Y even though his act is not the safe cause of Y's death.

[Read the case of R.V. EGURUTO ft EJURU 12 EACA 42.]

S.203(e)-If his act or omission would not have caused death unless, it had been accompanied by an act or omission of the person killed or of other person"

Section 203(e) of the Penal Code can be applied where for example X sets fire to a hut with the intention of causing either death or grievous harm to its occupants one of the occupants returns into the burning hut and is overwhelmed by fire:

Z, Y. and four children were in the burning hut at the time. Z with the help of Y evacuated the children. Then Z under the mistaken impression that a child was still in the burning hut re-entered it and sustained injuries from which he died on the following day. X will be deemed to have caused the death of Z if he intentionally set the hut ablaze in the first place.

In the above example, malice aforethought having been established the fact that the act of Z in re-entering the hut intervened between the unlawful act of X and fatal burning is of no consequence. X will still be deemed to have caused the death of Z

TIME OF DEATH

Allied to the question of the person who caused the death is equally an Important question of the time connecting the unlawful act or omission and death. The law in Tanzania as provided for by section 205 of the PENAL CODE is that no one can be held liable for death of another if that death occurs after one year and a day following the act or omission of the accused person. A person therefore is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death. In computing a year and a day for the purposes of this provision, the day on which the last unlawful act contributing to the cause of death was done is included. When the cause of death is an omission to perform a duty, the day omission began is Included in computing the one year and a day.

"BY AN UNLAWFUL ACT"

The word "by an unlawful act" is deliberately used in section 196 of the Penal Code to underscore unlawfulness as an important element of the Crime of Murder. By an unlawful act" is "actus reus" of the Offence of Murder* The phrase "By an Unlawful Act' means that a person may have the required "means rea" for either murder or manslaughter, but escapes liability for murder or manslaughter, if the killing was lawful (for .example where an executioner executes a death sentence).The act causing death must be unlawful act of the accused. The acts causing death here may include the act of shooting to kill, poisoning, beating etc.

A killing is not unlawful in the following cases [Read: HARRIS, 21st Edition. Chapter 30, p. 430];

1. where the lawful sentence of a competent court Is being executed in a lawful manner by a person whose duty It is to carry out the sentence:

2. where an officer of justice is forcibly resisted in the lawful execution of a duty to arrest, detain, seize property or make a search as part of criminal or civil process, provided that he uses no more force than is reasonably necessary to protect himself and execute his duty;
3. where a person is preventing the commission of a crime provided that he uses no more force than is reasonably necessary;
4. where a person accidentally kills another In circumstances where some harm Is foreseen, for example the harm Is not unlawful because the
 - (i) victim was being operated on lawfully; or
 - (ii) the harm was Inflicted during the course of argument by voluntarily laying the game the victim consented to, and by law was able to consent to, the infliction of that kind of harm.

It is essential to show that an accused person killed or took part in the killing of the deceased and, that the accused person had no lawful reason to kill. Lawful killings are all those killings that are justified by the law. An obvious example is where an executioner executes a person sentenced to death by a competent court.

"PREY UNLAWFUL OMISSION"

Causing death by an unlawful omission is, yet another example of 'actus reus' of Crime® of Murder and manslaughter. There are some instances where the law confers duties on certain person© for the purposes of preservation of life and health of other human being

Sections 206 to 210 of the Penal Code provides the instances of the Penal Code imposing on certain persons active duty to act In order to preserve life and health of others. Where an accused person is obliged by any of the sections 206-210 of the Penal Code to perform some active duty and he or

she intentionally omits to perform such legal duty with intent to kill then he is guilty of murder. This is causing of death by an UNLAWFUL

OMISSION envisaged by section 196 of the Penal Code. Unlawful omissions causing injury to life or health include:

(i) neglect to supply the necessities of life to persons under one's charge who, because of old age or infancy, unsoundness of mind, detention etc., are unable to provide for themselves thereby creating duty situation, (section 206 of the PENAL CODE) A person in charge of an infant, for example, is under a legal obligation to provide the necessities of life to the infant. A person detaining another person, is also obliged to provide the person under his detention the necessities of life (read also sections 207, 208, of the PENAL CODE)

(ii) failure to exercise care in performing acts which are by their nature dangerous to life and health. Examples here include act of driving and acts of surgeons performing lawful operations (section 209 PENAL CODE) (also discussed by Emmanuel Olawuyi Fakayode: The Nigerian Criminal Code Companion, Ethiopia Publishing Corporation, Benin, Nigeria). Driving involves a lot of risk to life and health of other drivers and users of the roads. Failure to exercise care while driving could be dangerous to life and health.

(iii) failure to exercise reasonable care in controlling things that are dangerous to human life, health or safety e.g. keeper of a zoo negligently allowing escape of a lion which runs amok and kill (section 210 PENAL CODE) [Read: Emmanuel Olawuyi Fakayode: The Nigerian Criminal Code Companion}.

We have been discussing the ingredients which add up to constitute an offence of Murder. These ingredients must be understood both in their respective scopes and their respective practical application.

You must always remember to establish all the necessary ingredients constituting the Offence of Murder. These are:

- (i) Casing death of malice aforethought
- (ii) by an unlawful act or by unlawful omission
- (iii) death taking place within one year and a day of the commission or omission.

(ii) **MANSLAUGHTER**

Manslaughter is yet another Homicidal Offence created by the Penal Code. Lord Justice Widgery in R.V. LIPMAN [1970] 1 152 at p. 159 has correctly stated that:

“Manslaughter remains a most difficult offence to define because It arises in so many different ways and, as the mental element (if any required to establish it varies so widely, any general reference to MEANS REA is apt to mislead”

You must always bear Lord Justice Widgery's statement in mind wherever you discuss the offence of Manslaughter. It Is a very difficult offence to define. Mental elements required to establish Manslaughter varies very widely. Penal Code provides for manslaughter in Section 195:

"S. 195. Any person who by an unlawful act or omission causes the death of another person is guilty of an offence termed "manslaughter*. An unlawful omission is an omission amounting to culpable negligence to discharge a

duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm".

Section 198 of the Penal Code provides for punishment for manslaughter

s. 198. Any person who committed the offence of manslaughter is liable to imprisonment for life".

A section 195 and 198 of the PENAL summarizes the offence of Manslaughter to be:

- (i) an unlawful act or omission causing the death of another person,
- (ii) unlawful omission being an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health; [refer to these duties in Chapter XX of the Penal Code.
- (iii) It does not matter whether the mentioned omission lacks the intention to cause death, i.e. it does not matter that the mother • who denied an infant the necessities of life did not intend to cause the death of the infant. For example the mother could have been just negligent enough to forget her infant.
- (iv) A person found guilty of the offence of manslaughter is liable to a maximum punishment of life in prison. The courts could mete out lesser punishment than life in prison.

As opposed to the offence of murder you have just covered, the offence of manslaughter involves causing the death without malice aforethought. Therefore a person who unlawfully kills another in such circumstances as not to constitute murder, will be guilty of manslaughter. [Emmanuel Olawuyi Fakayode, The Nigerian Criminal Code Companion}.

Professor James So Read, In "Some Aspects of Manslaughter in East Africa" Vol. 1 No 4, East African Law Journal 1965, describes manslaughter to be a

residual category of miscellaneous killings a junk-room of those types of culpable homicide which do not, for one of several varied reasons, amount to murder.

MENS REA IN MANSLAUGHTER

There is no section defining mens rea in manslaughter. Murder and Manslaughter share the same ACTUS REUS. Because of this sharing of ACTUS REUS, in cases where death occurs the usual practice is to institute murder charge and if evidence of murder falls short of establishing the of murder, the Offence of Manslaughter comes in. It is small wonder that Manslaughter has thus been termed as residual category of miscellaneous killings.

Manslaughter is either voluntary or involuntary. Voluntary manslaughter takes place:

(i) Where "A" Kill "B "during a sudden quarrel. In the case of R JOHN WIMAANA[1966] HCD n 48 Justice Mustafa, as he then was, held that when death occurs as a result of a fight, unless there are very exceptional circumstances, persons who cause death are. guilty of manslaughter and not murder. [Read also the case of RVs Mohamed Nite (1973 LRT n 36}).

(ii) Where A kills B due to provocation which reduces murder to

manslaughter: "Section. 201. When a person who unlawfully

kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter

Involuntary Manslaughter

Takes place; for example

- (i) When "A", in doing an unlawful act and without intention to kill or do grievous harm, causes the death of "B". Compare this with murder where unlawful act is accompanied with intention to kill or cause grievous harm.
- (ii) Where "A", through criminal negligence, causes the death of "B"

Case law has established that Manslaughter may be committed in one of the following ways:

- i. Where the offence of murder is reduced to manslaughter following a successful plea that the accused person acted under provocation; or
- ii. Where an accused person caused the death of another by an excess of justifiable force; or
- iii. Where an accused person caused the death of another unintentionally but through an unlawful act or omission

In all the above three examples except (ij, manslaughter is distinguished from murder by the absence of malice aforethought. In the first example [(i)], a person kills in circumstances amounting to murder, but pleads successfully that he was provoked into causing murder.

It is important to emphasize that a successful defence of provocation can reduce the offence of Murder to Manslaughter where the accused person does the act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool.

Provocation is covered by sections 201 and 202 of the Penal Code:

"201 - When a person who unlawfully kills another under circumstances which, but for the provision of this section would constitute murder, does the act which causes death IN THE HEAT OF PASSION CAUSED BY SUDDEN PROVOCATION as hereinafter defined, and BEFORE THERE IS TIME FOR HIS PASSION TO COOL, he is guilty of manslaughter only", [emphasis mine).

Section 201 of the Penal Code emphasises that the act causing death must be done in the heat of passion. The heat of passion must have been caused by sudden provocation as defined by the following section 202 of the PENAL CODE to mean and include.

" Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

A lawful act is not provocation to any person for an assault. An Act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocative for an assault, but it may be evidence of provocation to a person who knows of illegality.

For the purposes of this section the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belongs.

Section 201 of the PENAL CODE therefore provides for circumstances in which provocation may be a defence to a charge of murder, reducing even an intentional killing to fee manslaughters

Where the accused lost his power of self-control in the heat of passion and there was no time for passion to cool.

Let us now see the practical application of the defence of provocation. In the case of KAJUNA s/o MBAKE, V. R. (1945} • MCA 104, the Eastern Africa Court of Appeal had to decide whether belief in witchcraft could be a possible element of provocation:

. JUDGMENT (delivered by SIR JOSEPH SHERIDAN, CJ.) The accused was convicted of the murder of his father Mbake and sentenced to death. He has-appealed to this Court. There is no doubt whatever that he deliberately killed his .father, having set out on a long journey for the purpose of doing so. The conviction in our opinion was correct. In favour of the accused the learned trial' Judge stated: "In my opinion in this case the accused had an honest, though no doubt mistaken, belief at the time he killed his father that he letter was at that moment killing his child by supernatural means as surely as if he had seen him in the act of using a lethal weapon. The East African Court of Appeal has never, so far ads I know, decided this point, though it arises in one form or another in many cases in this Territory, the inhabitants of which over large areas are soaked in witchcraft and imbued with a firm belief in evil spirits. No doubt if the point is put up on appeal it will be decided. It would seem to turn on whether the accused's belief in his father's malevolent invocation of evil spirits in order to injure the child was not only honest but reasonable, taking into account the fact that he is primitive African. That is a difficult question bordering on metaphysics, which I do not propose to discuss here. I shall merely make a finding that such a belief is not reasonable and leave it to the court of Appeal to upset my decision if I am wrong. I would add on the general question of provocation that, apart from any provocation which might be found to be constitute by the father's course of conduct to which I have referred, the

accused received no immediate provocation of any kind from his father before he stabbed him to death on the night in question.

In the case of **Rex Fablano and others**, 8 E.A.C.A. 96, the Question of belief in witchcraft as a defence was fully discussed. At page 101 we expressed the following view: "We think that if the facts proved establish that the victim was performing in the actual presence of the accused some act which the accused did genuinely believe, and which an ordinary person of the community to which the accused belongs would genuinely believe to be an act of witchcraft against him or another person under his immediate care (which act would be a criminal offence under the criminal Law (Witchcraft) Ordinance of Uganda and similar legislation in the other East African territories) he might be angered to such a extent as to be deprived of the power of self-control and Induced to assault the person doing the act of witchcraft And if this be the case a defence of grave and sudden provocation Is open to him.

It must always be a question of fact as to whether he is in all the circumstances of the particular case acting in the heat OR passion caused by grave and sudden provocation and of course on such an issue he must be given the benefit of any reasonable doubt*. At page 102 the following passage occurs: ^Finally we would say that in coming to the conclusion we have arrived at In this case that conclusion we have arrived at in this case we in no way mean to suggest that belief in witchcraft per se will constitute a circumstance of excuse for killing a person when there is no immediate provocative act This case is to be distinguished from Mawalwa's case In which there was no wrongful act preceding the killing such as was present here in the in the highly suspicious actions of the deceased to which we have referred".

Our view is that In order to reduce an act of killing from murder to manslaughter because of a belief in witchcraft the case must come within the principle laid down in Fablano's case. A mere belief, founded on something metaphysical as opposed to something physical that a person is causing the death of another by supernatural means however honest that belief may be

has not so far as we are aware been regarded by this court as a mitigating circumstance in law though it is a matter which we believe is always considered by the Executive.

In short we should not be "justified" in accepting it as a reasonable belief. The appeal is dismissed.

When a person who unlawfully kills another person in the heat of passion caused by sudden provocation and before there is time for his passion to cool, the person will be guilty of an offence of manslaughter and not murder.

The provocative act must be a wrongful act or insult. A lawful act can never be a ground for provocation. It must be of such gravity as would deprive a reasonable man of his power of self control. Murder must be done in the heat of passion and the means of retaliation adopted must be proportionate to the degree of provocation committed.*

There has been a development from a very strict Interpretation to a more liberal interpretation on provocation by witchcraft, In *KAJUMA MBAKE V.* [1945]

EACA. 104 the appellant killed his father in the honest though no doubt mistaken belief, that the father was causing the death of appellant's child by supernatural means. It was held that 'a mere belief founded on something metaphysical as opposed to something physical, that a person is causing the death of another by supernatural means however honest, that, belief does not constitute in law an excuse for killing a person when there is no provocative act- So, there has to be more than a mere belief for an act to be considered provocative.

There was more than mere belief in the case of *FABIANO KINANE OTHERS V..R.* 8 EACA 96 to amount to provocation in a witchcraft case. The appellants had forcibly inserted into the Dowel anus of the deceased unripe bananas. The deceased, died, of shock. The deceased had been, caught

crawling about naked In their compound. It was believed that the deceased was a wizard who had caused the death of their relative by witchcraft They had punished the deceased as in their olden time. It was held that the appellants were entitled to be held to have acted under grave and sudden provocation. Convictions for Murder were reduced to manslaughter.

In order for Murder to be reduced to manslaughter on ground of provocation, provocation must be sudden and at the heat of the moment. In **ERIA GALIKUWA V.R.** (1951} EACA 175 the appellant was convicted by the High Court of Uganda of murder. He admitted that having been threatened with death unless he paid the witch-doctor Sh.1000 and being unable to obtain the sum, he killed the deceased (the witch doctor) in order to save his own life. It was held that the act of causing the death must 'JC proved to be done in the heat of passion. A belief in witchcraft per se did not constitute an excuse for killing a person believed to be a witch or wizard when there is no immediate provocative act. The provocative act must amount to a criminal offence under the criminal law.

Practical application of the defence of provocation was also discussed in the Ugandan of R. V. EGAKU (1950) ULR 247:

EDWARDS, C. «J: "I consider that I ought to accept the accused's version of the affair as given by him in his unsworn statement from the dock. Briefly, it is that he was punched in the eye by his brother and so severe was the blow that he was deprived of self-control and accordingly hit his brother on the head with the hoe

which he (the accused) was carrying, (it is not suggested that he was carrying the hoe for aggressive purposes). The blow caused an injury which proved fatal.

Mr. Walther pointed to the words in section 188: "induces him to commit an assault of the kind which the person charged committed upon the person by whom the act is done, in short, the argument is that, if one is struck with a fist, one should retaliate with the fist only. And it is difficult to understand what a person who happens to be carrying a weapon is supposed to do when he receives a stinging blow with his fist. I think that some differentiation should be made between the case of a person who happens to be carrying a weapon and one who goes and looks for and picks up a weapon. I say, that he should pause and make up his mind to put away his weapon and retaliate only with the fist, if he wishes later to avail himself of the "provocation" section. I doubt whether the draftsman, Or even the Legislature, ever contemplated the strange results which might follow. How can a man who has lost his self-control be expected to hurt himself. "Ah! as my assailant has only used his stick I must now put away my stick or my knife, and, having put it away, I must only retaliate with my fist." if his passion has not had time to cool, I do not see how his case be expected to deliberate in the manner which I have mentioned? I realise that, as stated in Archbold (32nd Edition), page 902, the mode of resentment must bear a reasonable proportion to the provocation to reduce the offence to manslaughter.

I quote from Archbold at page 397: "Upon an indictment for murder, if the prosecutor fails in proving the malice presence, the prisoner may be convicted of manslaughter."

Taking everything into consideration, I think that this is a case in which I may well acquit the accused of murder and convict him of manslaughter. Each case must, of course, depend on its own facts.

I accordingly convict him of manslaughter contrary to section 182 and punishable by section 185. Penal Code. 1950".

III

Flagrante Delicto as provocation,

Through case law, it is now an established principle of law that provocation is deemed, to exist where it is established that an accused person found his or her spouse in flagrante delicto, that is being found in a situation where intercourse is about to take place or where the intercourse is actually taking place or where intercourse has just taken place. [Read the case of R.V. S2HTUNDE MATHEW [1970] HCD n. 143].

It is instructive to note that the phrase "sudden provocation" is deliberately used in section 201 of the Penal Code. Discovery of one's spouse, in flagrante delicto must be sudden. For instance If the accused person had on previous occasions caught his or her spouse in flagrante delicto, he or she can not in later occasions say there was "sudden discovery" to warrant reduction of murder to manslaughter on account of provocation.

Last Straw Doctrine of Provocation

This doctrine is not found in the PENAL CODE. Last Straw Doctrine of Provocation means the cumulative (snapping) result of provocation. The courts look at the last act prior to an offence being committed, if the act would be strong, the defence of provocation will stand and vice versa. Two cases illustrate the application of the last straw doctrine of provocation

In the case of LAMECK RITEEA V. R. [1972] H.C.D. 207:

MNZAVAS, J. - 'The accused Lameck Kiteka is charged with murdering his wife by stabbing her with a knife in free and voluntary statement to a justice of the peace and in an unsworn statement from the dock, the accused has admitted having stabbed his wife and so caused her death, and, from the nature and location of the injuries inflicted, together with the rebuttable presumption that a man intends the natural and probable consequences of his acts, the only reasonable acceptable conclusion is that, at the moment when he stabbed her the accused probably intended to kill his wife or he at least intended to cause her grievous bodily harm. No question of self defence arises in this case but the defence has argued that at the time the accused Inflicted the fatal blow he was drunk. The defence also brought forward a defence of provocation.

From the evidence there can be no doubt that the accused was under the influence of alcohol when he fatally stabbed the deceased. But the evidence clearly shows that the accused was not under such intoxication as to excuse him from criminal liability. Coming to the defence of provocation the defence argument Is that notwithstanding that the accused killed the deceased with malice aforethought, he did. so while acting under grave and sudden provocation, In the heat of passion, and while deprived of his self control. It is common ground in this case that the marriage between the accused and the deceased was not altogether a very happy one. From the evidence it can be said with some certainty that of the two the deceased shared greater blame for their domestic misunderstandings. More than two times she left the matrimonial home and went to live with neighbour or with her mother. When she left the matrimonial home and went to live with her mother the accused followed her and persuaded her to return to him. She became violent and assaulted the accused. She was charged with assault and was convicted and Imprisoned for six months.

Apart from the above previous misunderstandings the only evidence of what happened, and how and why the accused came to kill his wife, is his own

long extra-judicial statement, corroborated by his very brief unsworn statement from the dock.

I may say at once that this extra-judicial statement, has, to my mind a ring of truth and attempts to conceal nothing. In it the accused, after relating to the antecedent history which I have already referred to above, he told the justice of the peace how he experienced domestic quarrels with the deceased, how on the fateful night he came back home at about mid-night and how he was served with cold stiff-porridge by his wife. He related to the Justice of the Peace that he asked the deceased to prepare fresh ugali for him as the one she had given him was already very cold. To this request the deceased is said to have told the accused that she was not going to cook fresh ugali for him and told the accused to cook himself or find another person to cook for him, After saying this the deceased left the house and went to one, Jackson's house where she forced the door open and got In.

The accused followed her and. according to his extra-Judicial statement, got into the house of Jackson and held the deceased by her arm and asked her to follow him home. As he was doing so the deceased violently pushed him and he hit his head against the wall and was injured, It was at this Juncture that the accused pulled his knife and stabbed the deceased once in her chest.

After summing up to the assessors all of them were of the opinion that the refusal by the deceased to cook "OgaM" for the accused could not under Nyiramba customs amount to provocation and they found the accused guilty of murder as charged.

I tend to agree with the gentlemen assessors that the refusal by the deceased to cook food for the accused could not, by itself, amount to legal provocation. But In my view whether an act can be mid to constitute sufficiently gram and sudden a provocation for that purpose contrary to section 201 and 202 of the Penal Codes should always be considered In the tight of antecedent aggravating act over a period, if such exist so that a

culminating "last straw" may be considered as reasons for sufficiently grave, which might not have been so considered If it has been the act of Its kind.

So here the deceased's refusal to cook for her husband, her running away from the house to Jackson's house and her pushing the accused and thereby causing him to suffer injury on his head, being the last of many such wrongful acts were in my view sufficiently grave and sudden provocation to a wronged husband in the accused's walk of life to make him lose his self control and attack her.

Clearly this is not a very easy case to decide and it is with great reluctance that I have decided to differ with the unanimous opinion of the assessors. I however have doubts as to whether the facts warrant a conviction of murder. I at least entertain reasonable doubt. The accused is entitled to the benefit of that doubt. I therefore hold that the accused killed the deceased with malice aforethought but while acting under such grave and sudden provocation as to reduce his offence from murder to manslaughter. I find him guilty of the lesser offence of manslaughter. The Accused sentenced for 12 years imprisonment!.

Manslaughter by an act of self defence

There are circumstances in which the infliction of some physical force is justified by law for example, when a man is defending himself or his property against attack, or where he is endeavouring to effect a lawful arrest. (Read generally, James S. Read, "Some Aspects of Manslaughter in East Africa", Vol. 1 No. 4 East African Law Journal (Dec. 1965) P. 37

The law which the courts have propounded is contained in the simple rule that the force used in defence of person or property must be reasonable in relationship (in proportionate) to the attack. The reasonableness of it is a question of fact to be determined in the light of all the circumstances, and in assessing the nature of the attack the court should take into account of

what the accused person reasonably apprehended the attack to be at that time. (James S. Read, "Some Aspects of Manslaughter in East Africa").

Manslaughter by an unlawful act

"S. 195 ANY PERSON WHO BY AN UNLAWFUL ACT Causes the death of another person is guilty of an offence termed "manslaughter". (Emphasis Is mine]

The law in Tanzania is that death caused by any offence involving considerable risk to the person is manslaughter.

In R.V. OLBNDITO 7 BACA 61 the accused beat their sister for refusing to return to her husband; she died of, shock. 7 he conviction for murder was reduced to manslaughter on appeal because, the unlawful act of beating the deceased was not accompanied with an Intent to cause death or grievous harm.

In R.V. MANGONGO S/o EATWA [1944)11 EACA 100:

the accused had chased away some children who were herding cattle near his shamba: most of the children got away, but he caught up with one and pushed him. This child later died of pneumonia. The conviction of murder was reduced on appeal to manslaughter for the reason that though there was an unlawful act of pushing, it could not be said beyond doubt that the accused knew that his act would probably cause the death of the child.

These cases illustrate unlawful acts of accused persons which lack the malice aforethought to amount to murder and hence regarded to be manslaughter.

Manslaughter by an unlawful Omission

"8.195. Any person who by ... or an unlawful omission causes the death of another person is guilty of the Offence termed "manslaughter".

An unlawful omission is further defined by the same section 195 of the Penal Code:

to be an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Culpable negligence indicates the high degree of negligence which the courts in England have required to sustain convictions of manslaughter. [James S. Read, "Some Aspects of Manslaughter in East Africa"].

It is important to note that there are several degrees of negligence recognised by the courts of East Africa:

- (1) There are types of negligence which give rise to civil liability.
- (ii) There is also the high degree of negligence required in manslaughter.
- (iii) There are also an intermediate degree of negligence which occurs in offences defined sections 233-239 of the PENAL CODE. On Criminal Recklessness and Negligence.
- (iv) Traffic accidents may also give rise to charges of manslaughter by negligence.
- (v) sections 206-210 of the PEKAL CODE combine to provide several duties tending to the preservation of life or health.

INFANTICIDE

The Offence of Infanticide is created by section 199 of the PENAL CODE. Section 199 provides that:

"Where a women by any willful act or omission causes the death of her child, being a child under the age of twelve month®, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of an offence known as infanticide."

The woman in question will be punished as If she had been guilty of the offence of manslaughter of the child.

Section 199 of the Penal Code Indicates that the killing' of a child by its mother is murder but the offence is reduced to manslaughter If It is established:

- (I) that the deceased child was under the age of twelve months:
- (II) that the child death was due to an act or omission on the port of Its mother; and
- (iii) that at the time of the fatal act or omission on the mother's part, the mother was mentally disturbed due to the effect; (a) of her having birth to the child: or
- (b) Of lactation consequent upon the child of the child.

Section 199 of the Penal Code creating an Offence of Infanticide should be read in conjunction with section 204 of the Penal Code. Section 199

describes the killing of a child of under the age of twelve months by its mother. Section 204 goes a step further and describes when a child envisaged by Section 199 or any provision becomes a person capable of being killed:

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of the mother.

If a child is still-born and hence proceeds from its mother's body whilst dead, that child will not be regarded to be capable of being killed. Section 204 of the Penal Code provides that:

"A child becomes capable of being killed when It has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not, and whether the navel-string is severed or not."

In the case of R.V. ESTHER KUMBOKA [1967] HCD n 447,

the accused was charged with an offence of infanticide contrary to section 199 of the Penal Code. The child's body had been buried for 10 days. Decomposition had begun when body was examined by a doctor. A green cloth had been tightly bed about Us neck, and Its lungs were expanded. It was not possible to establish whether the child was born alive or dead. At the accused person's trial, she stated that she had at Brat thought that the child was alive.

and that she had buried It only when she discovered it was dead. Chief Justice Georges (as he then was) held that considering that she may well have been in a general state of confusion, and in the absence of direct medical evidence supporting either account, (i.e. whether the child, was born alive or not} It was not safe to convict her Infanticide. Georges found her guilty of Concealing the Birth of a Child (contravening Season 218 of

the Penal Code) and imposed on her suspended sentence of 12 months in prison.

In R V. EVELYKE MATHIAS [1868] HCD n 446

The accused was charged with Infanticide c/s 199 of the Penal Code In that allegedly she win-fully threw her new-born child into the latrine of her father's house, while the balance of her mind was disturbed. Apparently no one knew of the birth of the child, who was only discovered in the latrine when <t was heard crying. The accused's parents, with whom she lived, denied any knowledge of her pregnancy or of any child-birth. Medical evidence however showed that the accused, when examined shortly after the discovery of the child, had recently delivered a child and the placenta and membranes were still in her body.

Held {1) "Having in mind the views expressed In YOWANA NAMATAJA v. R (1953) 20 EACA 204 the prosecution had to prove that the accused had caused the child's death by a willful act which, but for the balance of her mind being disturbed would have been murder." (2) "The prosecutors has to prove that the accused had not simply abandoned the child but had Intended to cause Its death by throwing it into the latrine. An investigation should have been mounted to discover where the child had been born or at least to disprove that the birth had taken place involuntarily in the latrine and the child had passed into the pit being mistakenly thought to be faces. The father had destroyed the latrine and reliance could not be placed on witnesses' recollection of the size of the hole or whether there was any blood etc. in or within vicinity of latrine". (3) "Altogether the evidence for the prosecution rested upon evidence which did not rule out certainly that the accused could not have been caught at the latrine for the purpose of passing faces and involuntarily gave birth to her child. On this point the medical evidence was strong in her favour that she could well have thought it necessary to relieve herself in the ordinary way, being unaware that her hour was nigh. It is said to be a common experience in

hospital deliveries. The accused was thought to be a prima Para and there was nothing to suggest that this was not the case. If that is so then it was

said that she might well have been taken off guard and delivered the child... If then the accused gave birth involuntarily, there remains the question why she did not call out for help or report the matter. The view was accepted by the Court of Appeal in Yowanina's case that in circumstances such as these, a woman tends rather to design the abandonment of her child than its destruction, especially in cases of panic, fear or despair. It is a matter of inference from all the circumstances and possibly the prosecution in this case may have attempted to avoid this difficulty by postulating the willful act of discarding the child. But however one looks at this case, I venture to think that the evidence is too uncertain to accept the facts relied on, and the facts which are clear, do not lend support to a conviction beyond reasonable doubt on the charge as framed." (4) Accused acquitted.

(iv) CONCEALING THE BIRTH OF CHILDREN (Section 218)

This is one of the offences related to the Offence of Infanticide. The other relative of Infanticide is the Offence of Child Destruction (section 219). The Offence of Concealing the Birth of a Child is committed where:

any person who, When a woman is delivered of a child, endeavours, by any secret disposition of the dead body of the child, to conceal the birth.

The offence of concealing the birth of a child is committed even If the child died before birth or died soon thereafter. This offence consists in the attempt to dispose secretly (e.g. burying, throwing away or even burning):

- (a) Of the dead body of a child; and
- (b) With intent to conceal the fact of the birth of the child.

It is essential to prove the birth and death of the child and that a secret disposition of the dead body had been done by the accused in order to conceal the fact of the child's birth.

(v) **CHILD DESTRUCTION**

This Offence is related to the Offence of Infanticide and is created by section 219 of the PENAL CODE:

Any person who with intent to destroy the life of a child capable of being born alive, willfully causes the child to die before it attains an independent existence of its mother shall be guilty of an offence of Child Destruction.

A child capable of being born alive for the purposes of this Offence is statutorily defined by subsection (2) of section 219 to mean:

any pregnancy for a period of twenty-eight weeks or more is capable of giving birth to a child capable of being born alive.

For an offence of Child Destruction to be sustained, there must be proof:

- (i) that the woman was about twenty-eight or more weeks pregnant; and
- (ii) the accused, by a deliberate unlawful act or omission prevented the child from being born alive; and
- (iii) The accused person's deliberate act was not done in good faith for the purpose only of preserving the life of the mother.

[see the proviso to section 219(1) of the PENAL CODE].

It is Important to observe that any action In good faith for the purpose only of preserving the life of the mother will not be Child Destruction if the result therewith will prevent the child from being born alive. The gist of the offence of child destruction is the willful Infliction of ante-natal injuries on a child In order to cause Its death before it attains an independent existence of its mother.

1. Assault, section 240 PSHAL CODS
2. Battery section 241 Penal Code
 - R.V. REV. RWECHUNGWA 11972) HCDn 168
 - R. V MSUNQ WE 119681 BA 203
3. What constitutes a lawful assault
 - AZARiA MBUYA V.R. {19681 HCD n 33
 - SAID! ABDALLAH V.R. [19671 HCD n 266
4. Aggravated Assault
 - NZIQE JUMA V.R. 119641 EA 107
 - WAERA MADOYA 6 OTHERS V.R. 119621
5. Grievous Harm, section 5. 222, 225 and 228. Of the penal code,
 - JUMA LUBENGA V.R. 11972} HCD n 225
 - MPAKA V.R. 119751LRT n 28
6. What are cognate offences

CONCLUSION

The end of this Part of your Study & manual does not imply that 'Offences, Crimes and Omissions have been' exhausted. Majority of Offences are defined and regulated by Acts of parliament and Subsidiary Legislation, An Act of Parliament or a piece of Subsidiary Legislation may create an entirely new Offence, You should always bear this fact in mind. You should be prepared to identify new Offences whenever they are created by a piece of legislation,

Even within the Penal Code, we have managed to cover very few of the many Offences created, by the Code. Penal Code has 390 sections that create Offences. It is next to Impossible to cover all the Offences created by this Code, let alone Offences created by other Laws, The few Offences we have covered in this Part of your Study Manual are not more important than other Offences, They were selected to help you appreciate how provisions are construed to discover the intentions of the Legislature. You should make it a point of going through all the 390 sections of the Penal Code and identify all Offences created.