THE UNITED REPUBLIC OF TANZANIA

THE NATIONAL PROSECUTIONS SERVICE

Criminal Prosecutions Case Manual

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FOREWORD

Prosecution is a complex activity which requires competent Prosecutors in order to arrive to fair and just decision. Such competent Prosecutors are expected to have sufficient legal skills and knowledge so that they may perform their duties diligently with high level of credibility, in order to attain Justice, Peace and Security for national development.

Article 59B of the Constitution of the United Republic of Tanzania and Section 9(1) of the National Prosecutions Service Act, vest powers to the DPP to prosecute criminal cases on behalf of the Republic. In such veins, the mandates includes making decision whether or not to prosecute, conduct and control prosecutions for any criminal offence other than a court martial, take over and conducts criminal cases on behalf of the United Republic of Tanzania, coordination and supervision of criminal investigation and to discontinue at any stage before judgment any criminal proceedings. In exercising such duties, State Attorneys and prosecutors who represent the DPP, are required to take every reasonable step to maintain and enhance their knowledge, professional skills and personal qualities necessary for proper performance of their duties, as well as keeping themselves well informed about important legal developments.

This Manual puts in place critical analysis of different current principles of law as interpreted by the Court of Appeal of Tanzania in several decisions and from other courts' jurisdictions. Moreover, it gives legal explanations of different reputable authors. It is therefore expected that prosecutors will make better use of it.

It is also intended to provide quick reference to prosecutors and other legal officers on basic steps to comply during criminal prosecution. It is my expectations that this manual will contribute to efficient and effective prosecution of cases that would accomplish our vision which is justice, peace and security for national development. I therefore, call upon prosecutors to read and use it for better prosecution.

Sylvester Anthony Mwakitalu
DIRECTOR OF PUBLIC PROSECUTIONS

ACKNOWLEDGEMENT

The Criminal Prosecutions Case Manual has been developed by NPS office for the purpose of imparting knowledge, professional skills and personal qualities necessary for proper performance of prosecutors' duties. It will keep them well informed about important legal developments.

The idea to develop this manual was brought forward by the Director of Public Prosecution, ***Mr. Sylvester Anthony Mwakitalu*** and subsequently acted upon. **I** therefore, express my appreciation to the DPP for his commitments of making his ideas to reality.

The Director of Case Management and Coordination of Investigation, *Ms. Neema Michael Mwanda* whose Division is mandated to provide expertise on case management and coordination of investigation among others, together with her technical team, have devoted their time and professional skills to develop this manual, the efforts which I sincerely appreciate.

It is the anticipation of the Director of Public Prosecutions that the Manual will be utilized effectively as guidance to the Prosecutors on daily discharge of their duties.

Joseph Sebastian Pande
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

ABBREVIATIONS

ACP	-	Assistant Commissioner of Police
CAP	-	Chapter
CAT	-	Court of Appeal of Tanzania
CECD	-	Corruption and Economic Crimes Division of the High Court
CPA	-	Criminal Procedure Act
DCEA	-	Drugs Control Enforcement Act
DCI	-	Director of Criminal Investigations
DPP	-	Director of Public Prosecutions
EA	-	East Africa
EACA	-	East African Court of Appeal
EOCCA	-	Economic and Organized Crimes Control Act
GN	-	Government Notice
HC	-	High Court
HCD	-	High Court Digest
IGP	-	Inspector General of Police
LRT	-	Law Reports of Tanzania
MCA	-	Magistrates Court Act
NPS	-	National Prosecutions Service
NPSA	-	National Prosecutions Services Act
PC	-	Primary Court/ Penal Code
PCCCPC	-	Primary Court Criminal Procedure Code
PH	-	Preliminary Hearing
R. E	-	Revised Edition
RM	-	Resident Magistrate
TLR	-	Tanzania Law Report

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PART I
INVESTIGATION

1.0 Introduction

Investigation means the collection and analysis of evidence;- it entails proceeding to the crime scene, ascertainment of the facts and circumstances of the case, discovery and arrest of suspected offender, collection of evidence related to the commission of the offence which may consist of examination of various persons including the accused and the reduction of the statement into writing, search of places or seizure of things considered necessary for the investigation and to be produced at the trial and formation of the opinion as to whether on the materials collected, there is a case to place the accused before the trial.[1] A well-investigated case ends with a successful prosecution.

The supervisions and coordination of criminal investigations in Tanzania is under the Director of Public Prosecutions as per Section 9(1) (c) of the NPSA.[2]

1.1 Crime reporting

Investigation begins once an investigative organ receives information that discloses the commission of an offence. Every person has a duty to report the commission of a crime under Section 7(1) of the CPA.[3] Once a crime has been reported to the investigative organ, the officer receiving such complaint/information must immediately record it in the report book and take action to start investigation. The rationale is to timely gather evidence on every fact of the case.[4] This will reduce risks of losing potential evidence and escape of suspects.

1.2 Arrest

Arresting a suspect is one of the earliest stages of investigation. It must be dealt with at the earliest possible manner in order to maximize possibility of recovery of evidence. Generally, during arrest, the arresting officer is required to inform the suspect about the offence for which he is arrested and record the responses the suspect makes.[5] However, in circumstances where during the arrest the suspect ought to know the substance of the offence for which he is arrested, or if he makes impracticable for the arresting officer to inform him of that offence, the arresting officer may arrest him without informing him about the offence for which he is arrested.[6]

1.3 Categories of arrest

Arrest is classified into two categories namely, arrested with warrant and arrest without warrant. Section 13 of the CPA, provides that, Magistrates, Ward Secretaries and Village Secretaries may issue warrants of arrest or summons for bringing the suspect

[1] Naser Bin Abu Bakr Yafai vs The State of Maharashtra & Anr, Criminal Appeal No.1166 of 2021, Supreme Court of India (unreported)
[2] [Cap. 430 R.E 2022]
[3] [Cap.20 R.E 2022].
[4] Police General Orders No.311 R.E 2021
[5] P.G.O 236 para 9
[6] Section 23 (3) of the CPA

to court after receiving under oath allegations that there are reasonable grounds that a person has committed an offence. Arrest without warrant is made in respect of offences stipulated under Sections 14, 16, 17, 18 and 28 of the CPA.

1.4 Persons empowered to arrest

Under the CPA, police officers, magistrates and private persons are empowered to effect an arrest. A police officer is empowered under Sections 14(1) of the CPA to arrest without warrant any person suspected to have committed or is about to commit an offence in his presence. He may also arrest with warrant issued pursuant to Section 13 of the CPA. Section 17 empowers the Magistrate at any time to arrest or issue a warrant of arrest directing the arrest of any person when he reasonably believes that such person has committed an offence.

Also, under Section 18 of the CPA, a Magistrate is empowered to arrest or direct any person to arrest a suspect when committed an offence in his presence provided that the power of the Magistrate to do so is within his jurisdiction. Section 16 of the CPA empowers a private person to arrest any person who in his presence commits an offence referred under Section 14 of the CPA. Section 31(1) of the CPA directs a person arresting another without a warrant, without unnecessary delay to hand him over to the police officer or to the nearest police station or, in the absence of either, to the Ward Secretary or the Secretary of the Village Council for the area where the arrest is made. That means private persons are legally permitted to arrest criminals but only as permitted by law. [7]

1.5 Interviewing suspects

An interview of a suspect is designed to ascertain whether the suspect committed the alleged offence or not. In order for the interview to be carried out to the suspect, the investigator has to take into consideration provisions of Sections 48, 50, 51, 52, 53, 54, 55, 56, 57 and 58 of the CPA. These provisions among other things impose obligations to investigators to accord rights to the suspect before and during interview.

1.5.1 Manner of Interview and recording of Statements

When a police officer is interviewing a person in order to ascertain whether he has committed an offence, he has to record or cause such interview to be recorded. This requirement is mandatory unless it is in all circumstances impracticable to do so. When the person interviewed makes a confession either orally or in writing relating to an offence, the police officer shall immediately during the interview or after the interview is completed make a record in writing.[8]

Two ways of recording cautioned statements are one under Section 58 which is a result of a volunteered and unsolicited statement of a suspect and two under Section 57 of CPA which is a result of either answers to questions asked or partly answers to questions asked and partly volunteered statements.[9]

[7] Grace Charles Omary vs Republic, Criminal Appeal No 13 of 2020(HC Musoma Unreported)

[8] Section 57 & 58 of the CPA

[9] Msafiri Benjamini v Republic, Criminal Appeal No.549 of 2020 CAT Dodoma (unreported), Flano Alphonce & 4 others, v Republic, Criminal Appeal NO.366 of 2018 CAT DSM (unreported)

1.5.2 Basic period to record the suspect's statement

Section 50 (1) (a) of the CPA requires cautioned statements of suspects to be recorded within four (4) hours after the suspect is under restraint. Non-compliance of Sections 50 and 51 of the CPA renders the cautioned statement inadmissible. Such period may be extended as per Section 51(a) (b) of the CPA.

In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence.[10] The following circumstances shall be excluded: -

(a) While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation.

(b) For the purpose of: -

(i) Enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer,

(ii) Enabling the police officer to communicate or attempt to communicate with any person whom he is required by Section 54 to communicate in connection with the investigation of the offence.

(iii) Enabling the person to communicate or attempt to communicate with any person with whom he is under the CPA, enticed to communicate, or

(iv) Arranging or attempting to arrange for the attendance of a person who, under the provisions of the CPA is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;-

(c) While awaiting the arrival of a person referred to in subparagraph(iv) of paragraph (b) or,

(d) While the person under restraint is consulting with a lawyer.

Along with that, it should be noted that, objections in respect of non-compliance with Section 50 of the CPA can be raised only during trial, not at the appellate level.[11]

[10] Ngasa Sita Mabundu vs Republic, Criminal Appeal No.254 of 2017 CAT (unreported), Anold Loishie @ Leshai vs Republic, Criminal Appeal No.249 of 2017 CAT (unreported), Aliyu Dauda Hassan and others vs Republic, Criminal Appeal No.282 of 2019 CAT (unreported), Roland Thomas@ Mwangamba vs Republic, Criminal Appeal No. 308 of 2007 CAT (unreported)., Ramadhani Mashaka vs. Republic, Criminal Appeal No. 311 of 2015 CAT (unreported), Yusufu Masalu@Jiduvi& 3 others vs Republic, Criminal Appeal No 163 of 2017 CAT (unreported), Michael Mgowole and Shadrack Mgowole vs Republic, Criminal Appeal No 205 of 2017 CAT (unreported), Msafiri Jumanne &2 others vs Republic, Criminal Appeal No. 187 of 2006 CAT (unreported).

[11] Nyerere Nyague v Republic, Criminal Appeal No.67 of 2010 CAT Arusha (unreported)

1.6 Search and Seizure

Search can be conducted in the ordinary course under Section 38 of the CPA or by emergence under Section 42 of the CPA. Section 38 (1) of the CPA expressly empowers any police officer in charge of a police station if he is satisfied that there is a reasonable ground for conducting a search into a building, vessel, carriage, box, receptacle or place without delay, either to search or to issue a written authority to any police officer under him to carry out the search. Section 2 of the CPA defines *"officer in charge of a police station "to* include any officer superior in rank to an OCS as well as any officer above the rank of constable standing or acting in the position of police officer in charge of a police station[12]. The officer conducting the search should comply with all requirements under Section 38 of CPA and his testimony should reveal such grounds.

The officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.[13] Furthermore, omission to comply with Section 38 is not fatal especially where there is no dispute of the suspect being found with the item the subject matter of the case and where he confesses to have been found with it.[14]

In Circumstances where search is carried pursuant to Section 40 of the CPA, a police officer or other person to whom addressed upon the issuance of search warrant by the Court may execute the search on any day between the hours of sunrise and sun set or the court may authorise to execute the warrant at any hour.

The distinction between search carried under Sections 38 and 40 of the CPA is that, the former is exercised by officer in charge of a police station or any police officer under him through a written authority issued by him(Search order) and it can be executed at any time, while the later can be exercised by the police officer or any person upon securing a search warrant dully issued by the court and it has to be executed between sunrise and sunset unless authorised by the court upon application to be executed at any hour.

1.7 Search in Emergencies

Generally, one of the demands under the provisions of Section 38 and 40 is that a Search order or search warrant should be issued to a police officer or any other person so authorized before such officer executes a search.

[12] Ayubu Mfaume Kiboko and another v Republic, Criminal Appeal No.694 of 2020 CAT DSM (unreported)
[13] Section 38 of the CPA
[14] Jamali Msombe & another vs Republic, Criminal Appeal No.28 of 2020 CAT Iringa (unreported), Hamis Muhibu Abdallah v Republic, Criminal Appeal No.288 of 2021 CAT Mtwara (unreported).

However, there is an exception to the general rule based on section 42 of the CPA under which in emergency circumstances a Police officer is permitted to search and seize anything relevant to the case without warrant[15]. However, upon seizure, the documentation of the seized items is of utmost importance. The officer conducting the search under Section 42 of the CPA should establish in his testimony the circumstances for executing search under emergency.

Apart from the procedure stipulated under the CPA, the procedure relating to search and seizure is also provided by other laws such as the Economic and Organized Crimes Control Act Section 22, the Wildlife Conservation Act Section 106(1), the Drug Control and Enforcement Act Section 48(2) (c) and the Cyber Crime Act Section 31.

1.8 Independent Witness

An independent witness may include any person who qualifies to be a competent witness and has no direct personal interest in the case in issue.[16] The issue of presence of independent witnesses during search depends on circumstances prevailing in each particular case. There are cases in which absence of independent witnesses is an incurable irregularity.[17] On the other hand, there are those which such absence is curable.[18]

[15] Seleman Nassoro Mpeli v Republic, Criminal Appeal No.3 of 2018 CAT (unreported), Moses Mwakasindile v Republic, Criminal Appeal No.15 of 2017 CAT (unreported), Slahi Maulid Jumanne vs Republic, Criminal Appeal No.292 of 2016 CAT (Unreported), Marceline Koivogui vs Republic Criminal Appeal No.469 of 2017 CAT (unreported), Stephen Jonas & another vs Republic, Criminal Appeal No.337 of 2018 CAT (unreported), Selemen Nassoro Mpeli vs Republic, Criminal Appeal No.03 of 2018 CAT (unreported), Allan Duller vs Republic, Criminal Appeal No.367 of 2019 CAT (unreported), Popart Emanuel vs Republic, Criminal Appeal No. 200 of 2010 CAT (unreported).

[16] G/L/Cpl Ekow Russel – Appellant vs. Republic, Criminal Appealno: J3/5/2014 In The Superior Court Of Judicature In The Supreme Court

[17] Pascal Mwinuka Vs Republic, Criminal Appeal NO. 258 of 2019, CAT Iringa(unreported) & Shabani Said Kindamba, Criminal Appeal No. 390 OF 2019, CAT (unreported)

[18] Sophia Seif Kingazi vs Republic, Criminal Appeal No.273 of 2016 CAT (unreported), Tongora Wambura vs DPP Criminal Appeal No.212 of 2006 CAT (unreported)

PART II
CHARGE

2.0 Meaning of a "charge"

A charge is a formal accusation of an offence as a preliminary step to prosecution.[19] It is a written notice of the precise and specific accusation which the accused person is required to plead. It must convey to the accused person with sufficient clearness and certainty that the prosecutions intend to prove against him which he would have to clear himself.[20] A charge is an essential legal instrument which helps the accused person to understand the nature of the case he is facing, the gravity of the sentence and ultimately how he should prepare his defence.[21]

2.1 Important aspects to consider when framing a charge

In framing a charge, the prosecutor has to avoid using ambiguous, unclear and vague words related to accusations made against the accused person. Words used in a charge should reflect a section of the enactment creating the offence. In framing a charge, the Section and the law of the said offence should be mentioned in the statement of offence. Furthermore, a charge should contain sufficient elements of the offence in its particulars.[22]

2.2 2.3 Alternative count

An alternative count is an additional count laid against the accused in the same charge where there are series of acts which constitute a series of the same offence committed. The accused person can only be charged with an alternative count if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts will prove. It suffices to say, if the first count is not proved, the evidence will prove the count in the alternative. A conviction on the alternative count can only be entered if the prosecution fails to prove the main count, but if the main count is proved the alternative count dies automatically.[23]

2.3 Contents of a charge/information

A charge being a foundation of criminal trial must be drawn in compliance with the provisions of law. Section 132 of the CPA requires the charge to contain statement and particulars of offence. The mode on which offences are to be charged is provided under 135 of the CPA. In drafting a charge, the prosecutor should abide with the above provisions of law. The statement of the offence must contain a specific Section of law incriminating the accused and punishment Section. Particulars must show the name of

[19] Black's law Dictionary 8th Edition, pg.248

[20] S.C Sarkar,The Code of Criminal Procedure, 10th Ed. LexisNexis Butterworths Wadhwa pg.1126

[21] Kassimu Mohamed Selemani vs. Republic, Criminal Appeal No. 157 of 2017 CAT (Unreported).

[22] Kassimu Mohamed Selemani vs. Republic(supra), Musa Mwaikunda vs republic [2006] T.L.R. 387, Angulile Jackson@Kasonya vs. DPP, Criminal Appeal No. 162 of 2019 CAT (unreported)

[23] Raymond Mwinuka vs Republic, Criminal Appeal No.366 of 2017 CAT (unreported), Derick Alphonce and Another vs Republic, Criminal Appeal No. 23 of 2015 CAT (unreported), Republic v Nasa Ginners Ltd [1955] 22 EACA 434

the accused, the date he committed the offence, the place the offence was committed, essential elements of offence, what he did and to whom the offence was committed. The five "Ws" rule should be observed when drafting charges [24](i.e. WHO, WHEN, WHERE, WHAT&TO WHOM).

2.4 Joinder of counts

According to Section 133 of the CPA, a charge may be joined in the same arraignment if the offences are originated from similar facts or form a sequence of the same or similar character. Each count exists as a distinct and separate complaint upon its own facts. The trial of several charges in one case will make the trial a quicker one.[25]

2.5 Joinder of accused persons

Under Section 134 of the CPA, joinder of accused persons refers to a situation where more than one accused persons are charged and prosecuted together for the same or different offences committed in the course of the same transactions.

2.6 Defective charge/information

A charge/information which does not meet the requirements of the law under Sections 132 and 135 of the CPA is termed as defective charge.[26] Generally, proceeding on with a defective charge will render it unproved even if witnesses are procured to testify for it.[27] In framing the charge, the prosecutor is duty bound to ensure that the charge discloses the offence known to the law. Section 129 of the CPA empowers the Magistrate, to reject a charge which in his opinion does not disclose any offence, by making an order refusing to admit the complaint or formal charge and record his reasons for such order.

The charge which does not conform to the law and which does not place the accused in a position to understand the nature of the offence facing him is said to prejudice him and renders a trial unfair and therefore a nullity.

2.7 Aspects which render a charge defective

2.7.1 Duplicity

A charge is said to be duplex if two or more dissimilar offences are confined in one count. Such a duplex charge places the accused in a position not to understand which of the two offences in a count he is required to answer or make his defence and that is what leads to a miscarriage of justice on his part.[28]

[24] Hebron Kasigala vs. Republic Criminal Appeal No. 03 of 2020 CAT (unreported), Obadia Daniel and another vs. Republic Criminal Appeal No. 492 of 2016 CAT Kigoma (unreported), Anold Elia fikiri vs. Republic, Criminal Appeal No. 333 of 2018 CAT (unreported), Republic v Loibori [1949]16 E.A.C.A. 86

[25] Mwinyi Jamal Kitalamba vs. Republic, Criminal Appeal No. 348 of 2018 CAT (unreported)

[26] Juma Charles @ Reuben & another vs Republic, Criminal Appeal No. 566 of 2017 CAT Arusha (unreported).

[27] Japhet Anael Temba vs Republic, criminal Appeal No. 78 of 2017 CAT Arusha (unreported)

[28] Stanley Murith Mwaura vs Republic, Criminal Appeal No.144 of 2019 CAT DSM (unreported), Director of Public Prosecutions v Pirbaksh and 10 others, Criminal Appeal No.345 of 2017 CAT Tabora (unreported), Kulwa Moses v Republic, Criminal Appeal No.491 of 2015 CAT Dodoma (unreported), Diaka Brama and another vs. Republic, Criminal Appeal No. 211 of 2017 CAT Dodoma (unreported), Raymond Mwinuka vs. Republic, Criminal Appeal No. 366 of 2017 CAT Iringa (unreported), Simon Kitalika and others vs Republic, Criminal Appeal No.468 of 2016 CAT Iringa (unreported)

2.7.2 Citing wrong or non-existing provision of law

A charge containing a wrong or non-existing provision of law is as good as no charge, although since each case may be decided according to its circumstances, some defectiveness may be tested by whether the accused did not understand the allegation facing him and whether it was prejudicial to him. If facts reveal that he understood the charge, the defectiveness may be curable, especially where the shortfalls are remedied by the particulars of the offence.[29]

2.7.3 Citing repealed or dead law

As a general rule, it is a fundamental principle that a criminal charge should not emanate from a dead law or a repealed one. Having such a charge is as equal to having no charge at all. Charging the accused person and prosecuting under the repealed law is incurably defective and the same vitiates the trial. However, depending on each case, a long-time position was maintained in our jurisdiction that charging on repealed law may be curable if the repealed Section is re-enacted in identical words with the current statute such that it cannot be said the accused has in any way been prejudiced.[30] The test of prejudice to the accused person has always been whether, despite defects, he understood the nature of the charges facing him.

2.7.4 Unspecified particulars of offence

The particulars of offence in the charge have to evidently specify clearly the conduct by the accused which constitutes an offence. This is so important because the prosecution side will during trial endeavour to prove it and the accused needs to be well informed of it in order to cross-examine witnesses as well as preparing for his defence**.** However, for the charge to be defective under this scenario, the accused must have been prejudiced. In circumstances where a certain fact does not come out clearly in the charge, the same can be deduced from the testimony of witnesses. That ailment is curable under the provisions of Section 388(1) of the CPA.[31]

2.7.5 Not specifying punishing Section

Criminal principles dictate that an accused person must know the consequences of the trial he is facing. Failure to indicate a punishing provision may render the trial unfair. In the event, a charge must indicate the punishing Section which in fact will knock the accused's head on how he should make his defence, having in mind the seriousness of sentence thereafter**.**

[29] Jumanne Mondelo vs Republic, Criminal Appeal No.10 of 2018 CAT DSM (unreported), Abdallah Nguchika vs Republic, Criminal Appeal No.182 of 2018 CAT DSM (unreported), Halfan Ndubashe vs R, Criminal Appeal No. 493 of 2017 CAT Tabora (unreported),

[30] Ernest Jackson @ Mwandikaupesi and another vs Republic,Criminal Appeal No.408 of 2019 CAT (unreported), Thomas Lugumba@ Chacha vs. republic, Criminal Appeal No.400 of 2017 CAT (unreported), Renatus Athanas @Kasongo vs. DPP, Criminal Appeal No. 310 of 2019 CAT (unreported), See R v Tuttle (1929) 45 TLR 357 and Matu Gichumu v R (1951) EACA 311.

[31] Kubezya John vs Republic, Criminal Appeal No.438 of 2015 CAT (unreported), Mohamed Clavery vs Republic, Criminal Appeal No.470 of 2017 CAT (unreported), Hamis Mohamed Mtou VS, Republic , Criminal Appeal No.228 of 2019 CAT (unreported), Anold Elia fikiri vs. Republic, Criminal Appeal No. 333 of 2018 CAT (unreported), Alexandris Athanansios vs Republic, Criminal Appeal No.362 of 2019 CAT (unreported)

However, in some circumstances this defect may be curable under Section 388 of the CPA.[32]

2.7.6 Not showing ingredients of the offence

A proper charge must show every ingredient of the offence. The ingredients of the offence are to be clearly shown in the particulars of the charge. Such particulars as may be are necessary for giving reasonable information as to the nature of offence the accused person is facing and hence martial his defence accordingly. In some circumstances, failure to indicate ingredients of the offence may be cured by the evidence.[33]

2.7.7 Not indicating the place where the offence was committed

Cases are instituted in the jurisdiction where the offence was committed. Likewise, a charge in all ways should indicate the place where the offence was committed. Showing a specific place will enable the accused person to know exactly the places where the offence was committed.[34]

2.7.8 Variance between a charge and evidence

It is important for a charge to indicate the date when the offence was committed and the same should be supported by the testimony of witnesses in Court. Some of the things that make variance between the charge and evidence includes but not limited to, date, place and the evidence itself. Evidence must support what is stated in the charge to avoid variance. In the process of the trial, should there occur any variance between the charge and testimony of witnesses, the prosecutor is required to amend or substitute the charge according to Section 234 of the CPA. However, depending on each case, the omissions may be cured by the evidence of witnesses.[35]

[32] Abdul Mohamed Namwaga Madodo vs Republic,Criminal Appeal No.257 of 2020 CAT Mtwara (unreported), Godfrey Simon and another vs Republic, Criminal Appeal No.296 of 2018 CAT Arusha (unreported), JAFARI Salum @Kikoti vs Republic, Criminal Appeal No.370 of 2017 CAT Dar Es Salaam (unreported), Elisha Mussa vs Republic Criminal Appeal No.282 of 2016 CAT Dar Es Salaam (unreported)

[33] Damian Luhele vs Republic, Criminal Appeal No.501 of 2007 CAT Mwanza (unreported), Masalu kayeye vs Republic, Criminal Appeal No.120 of 2017 CAT Mwanza (unreported), Hamis Mohamed Mtou vs Republic, Criminal Appeal No.228 of 2019 CAT DSM (unreported), Francis Paul vs Republic Criminal Appeal No.228 of 2019 CAT Arusha (unreported), George Senga Musa vs. Republic, Criminal Appeal No. 108 of 2018 CAT Arusha (unreported), Noah Paulo Gonde and another vs Republic, Criminal Appeal No.456 of 2017 CAT Mbeya (unreported)

[34] Shaban haruna@Dr Mwangilo vs Republic, Criminal Appeal No.396B of 2017 CAT Arusha (unreported), Magobo Njige Republic vs. Republic, Criminal Appeal No. 442 of 2017 CAT (unreported)

[35] Nkanga Daudi Nkanga vs Republic, Criminal Appeal No. 316 of 2013 CAT Mwanza (unreported), Mohamed Cladvery vs Republic, Criminal Appeal No.470 of 2017 CAT DSM (unreported), Shaban Haruna @ Dr Mwagilo vs Republic, Criminal Appeal No.396B of 2017 CAT Arusha (unreported), Damian Luhele vs Republic, Criminal Appeal No.501 of 2007 CAT Mwanza (unreported), Deus Josias@Deo vs. Republic Criminal Appeal No.191 of 2018 CAT DSM(unreported), Justine Mtelule vs Republic, Criminal Appeal No.482 of 2016 CAT Iringa (unreported), Japhet Anael Temba vs. Republic, Criminal Appeal No. 78 of 2017 CAT Arusha (unreported) ,Noah Paulo Gonde and another vs. Republic, Criminal Appeal No. 456 of 2017 CAT Mbeya (unreported), Ambros Elias vs. Republic, Criminal Appeal No. 368 of 2018 CAT Dar Es Salaam (unreported), George Mwanyingili vs. Republic, Criminal Appeal No. 335 of 2016 CAT Mbeya (unreported), Enock Matatala vs. Republic, Criminal Appeal No. 468 of 2019 CAT Iringa (unreported)

2.7.9 Charge of armed robbery not specifying who was threatened

It is a requirement of law that a charge of armed robbery must indicate the person to whom the threat was directed. Failure of that renders it defective.[36] This is so because one of the ingredients of the offence of armed robbery under Section 287A of the Penal Code [Cap.16 R.E 2022] is threatening or use of violence against any person. However, when the omission does not cause any prejudice to the accused person, the defect may be curable under Section 388 of the CPA.[37]

2.7.10 Unspecified date and time

There are circumstances where the prosecution puts a charge with unspecified date and time. For instance, the charge will have words like "during the period of September and December". If that is done, it is taken that the accused is made aware of the charge and a trial court is entitled to deal with the whole case on the basis if such period the offence was repeated more than once or there are a series of incidents. However, if the charge states that the offence was committed on unknown date and place, the same is taken to be defective.[38]

2.7.11 Improper jurisdiction of the court

A charge must be preferred to a proper court with jurisdiction. Jurisdiction must be categorised on the subject matter involved in the offence and territorial jurisdiction. Likewise, one court cannot entertain a charge with no jurisdiction to adjudicate.[39]

2.7.12 Remedy of a defective charge

Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice;- and all amendments shall be made upon such terms as to the Court shall seem just. This position is governed by Section 234 of the CPA in terms of a charge in Subordinate Courts, and 276 CPA for Information in the High Court. The altered charge or information must be endorsed and dated**,** and must be read over to the accused to plea.**[40]**

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[36] Masumbuko Mhoja & another v Republic, Criminal Appeal No. 435 of 2017 CAT Shinyanga (unreported),

[37] Peter Marco @ John v Republic, Criminal Appeal No. 258 of 2017 CAT Tabora (unreported)

[38] Japhet Anael Temba vs Republic, Criminal Appeal No. 78 of 2017 CAT Arusha (Unreported).

[39] Omary Athumani@Magari and others vs. Republic, Criminal Appeal No. 173 of 2016 CAT Dar Es Salaam (unreported).

[40] Director of Public Prosecutins vs Lawretta ani chiomaand 3 others vs Republic, Criminal Appeal No.540 of 2017 CAT DSM (unreported), Mande Manyanya vs Republic, Criminal Appeal No.55 of 2017 CAT Tabora (unreported), Remmy Gerald Sipuka vs Republic, Criminal Appeal No.67 of 2019 CAT DSM (unreported), Kali kulwa@nyangaka vs Republic, Criminal Appeal No. 6 of 2019 CAT Mbeya (unreported), Zebedayo Mtetema vs. Republic, Criminal Appeal No. 484 of 2015 CAT Mbeya (unreported), Albanus Aloyce and another vs Republic, Criminal Appeal No. 283 of 2015, CAT Arusha (unreported), Sumari Hau and four others vs Republic, Criminal Appeal No. 305 of 2007, CAT Arusha (unreported), Hassan Said Twalibu vs Republic, Criminal Appeal No. 91 of 2019, CAT Mtwara(unreported), Justine Masegula vs Republic, [1977] LRT 32

PART III
ACCUSED'S PLEA

3.0 Plea taking and its modality

A plea is an accused's formal response to a criminal charge; it may be a response of guilty, not guilty or no contest to a criminal charge.[41] Normally when the accused is taken before the court to answer the accusation facing him, the court is duty bound to explain the charge to him in ordinary language and assist, as required, the accused person by explaining the nature of the charge. After a charge has been read over, the court shall ask the accused whether the allegation is admitted or denied as provided for under Section 228(1) and 275 of the CPA. It is a trite principle of the law that in our criminal justice system, at the beginning of the criminal trial the accused must be arraigned, that is, the court has to put the charge or charges to him and to require him to plead. Non-compliance with the procedure renders the trial a nullity.[42]

3.1 Modality of recording plea

The plea of the accused has to be recorded as nearly as possible in the words he uses. Each accused's plea should be separately recorded in respect of each count to avoid him being prejudiced.[43]

3.2 Interpreters

In criminal proceedings, where it appears that an accused person does not understand the language used during the proceedings of the case, it is a requirement of Section 211 of the CPA for the Court to avail him with an interpreter in order to enable him understand the language spoken and follow proceedings.[44] The duty to arrange for the interpreter is vested to the court. The omission is fatal and vitiates the entire proceedings.[45]

3.3 Interpreters' oath/ affirmation

It is the position of the law that when an interpreter is engaged in criminal proceeding before he starts performing his duties, is required to take an oath or affirmation to the effect that he is going to truthfully and faithfully interpret ones' language into another. The rationale is to faithfully interpret the proceedings/evidence for the benefit of justice.[46]

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41 Bryan A Garner, Editor in Chief, Black's Law Dictionary, 8th Edition, pg.1189

42 Juma Gulaka and 2 others vs Republic, Criminal Appeal No. 585 of 2017, CAT (unreported), Yustine Robert vs Republic, Crimnal Appeal No. 329 of 2017, CAT (unreported).

43 Stanley Murithi Mwaura vs Republic, Criminal Appeal No. 144 of 2019, CAT, (unreported).

44 Bashirakandi Emmanuel vs Republic, Criminal Appeal No.167 of 2022 CAT (unreported)

45 Dastan Makwaya vs Republic, Criminal Appeal No. 179 0f 2017, CAT (unreported), Havyalimana Azaria and two others vs. Republic, Criminal appeal No. 539 2015, CAT (unreported)

46 Havyalimana Azaria and two others vs. Republic, cited supra, Marko Patrick Nzumila and another vs Republic, Criminal Appeal No. 141 of 2010, CAT, (unreported), Kigundu Francis Jackson Mussa vs Republic, Criminal Appeal No.314 of 2010 CAT Mwanza (unreported)

3.4 Categories of plea

There are two categories of plea which are supposed to be pleaded by the accused person when arraigned before the court of law that is, the "plea of guilty" and "plea of not guilty" under Sections 228, 282 and 275 of the CPA.

3.4.1 Plea of not guilty

This occurs where the accused person denies the truth of the charge. Following the denial of the truth of the charge, the court shall record the plea of not guilty and shall proceed to hear the case subject to Sections 228, 229, 279 and 283 (3) of the CPA. Where the accused person refuses to plea the Court shall order a plea of not guilty to be entered to him as per Section 228(4) of the CPA.

3.4.2 Plea of guilty

When the substance of the charge is stated to the accused person and he admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by the accused as a "plea of guilty" to the charge. The Magistrate or Judge shall then convict him and pass sentence unless there appears to be sufficient cause to the contrary.[47]

3.4.3 Equivocal plea of guilty

The plea of guilty is said to be equivocal in any of the following instances;- when the plea of guilty was taken of the charge which does not disclose all elements of the offence, when a plea of guilty is taken to have been induced by undue influence, when a plea is ambiguous, imperfect or unfinished and the charge discloses unknown offence. Equivocal plea of guilty cannot ground conviction because the accused did not understand the nature of the charge and the consequence of pleading guilty.[48]

3.4.4 Unequivocal plea of guilty

This refers to an unambiguous, finished, clear and an unmistaken plea of guilty which is properly taken and capable to ground conviction in line with the requirement of the law. Unequivocal plea of guilty justifies that, the accused person appreciated the nature of the charge and intended to plea.[49] This position has been emphasised by the Court of Appeal by laying down procedures on how an unequivocally plea of guilty has to be conducted that: -

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[47] See Section 228 and 282 of the CPA.

[48] Hyansit Nchimbi vs Republic, Criminal Appeal No. 109 of 2017, Court of Appeal of Tanzania,CAT Iringa (unreported), Josephat James vs Republic, Criminal Appeal No. 316 0f 2010, CAT Arusha (unreported), Jelada Chuma vs Republic, Criminal Appeal No.114 of 2016 CAT Mbeya (unreported), Michael Adrian Chaki vs Republic, Criminal Appeal No. 399 of 2019 CAT DSM (unreported), Ndaiyai Petro vs Republic, Criminal Appeal No.277 of 2012 CAT DSM (unreported), Deus Gendo vs Republic, Criminal Appeal No. 480 of 2015 CAT Iringa (unreported)

[49] Amos Lesilwa vs Republic, Criminal Appeal No.411 of 2015 CAT Dodoma (unreported), Clement Pancras vs Republic, Criminal Appeal No. 321 of 2013, Court of Appeal of Tanzania,CAT Mwanza (unreported), Khalid Athumani vs Republic (2006) TLR 79, Amos Masasi vs Republic, Criminal Appeal No. 280 of 2019, Court of Appeal of Tanzania, CAT Bukoba(unreported), Emmanuel Ambrous vs Republic, Criminal Appeal No. 555 of 2017, Court of Appeal of Tanzania, CAT Arusha(unreported).

(i) Every element of the charge should be explained to the accused,

(ii) The accused should admit or deny every element of the offence,

(iii) What he says should be recorded in the form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally

(iv) The words constituting the plea of guilty should come from the accused himself and not from the other part.

Moreover, in order to ensure that the accused person appreciated the nature of the charge, the court of appeal laid down procedures to be followed by the trial court while taking plea. Court must comply with the following procedures: -

(i) When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand.

(ii) The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty.

(iii) The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial.

(v) If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.

(vi) The statement of facts and the accused’s reply must be recorded,

3.5 Tendering of exhibits upon plea of guilty

Tendering and admitting exhibits after the accused person has unequivocally pleaded guilty to the charge, is not a legal requirement though it is desirable to do so, provided that the accused admitted the facts of the case that disclosed all the elements of the offence.[50]

[50] Laurence Mpinga vs Republic, (1983) TLR 166, Joel Mwangambako vs Republic, Criminal Appeal No. 516 of 2017, CAT Mbeya (unreported), Samson Bwire vs Republic, Criminal Appeal No. 91 of 2018 CAT Shinyanga (unreported)

3.6 Appeal on a plea of guilty

Generally, the accused person under Section 360 of the CPA is not allowed to appeal on a plea of guilty, except where the plea was imperfect, ambiguous, unfinished, he pleaded guilty as a result of mistake or misapprehension, that the charge disclosed no offence known to law and that upon the admitted facts he could not in law have been convicted of the offence charged. He can also appeal against sentence.[51]

3.7 Plea of autrefois acquit and autrefois convict

Plea of Autrefois acquit and autrefois convict happens where the accused person indicates that he has previously been tried and acquitted or convicted of the same offence. The plea is accorded under Sections 137, 228(5) (a) and 280(1)(a) of the CPA.[52]Generally, Section 137 of the CPA bars the prosecution against a person who has been previously acquitted or convicted by a court of competent jurisdiction on the same facts and for the same offence, unless the said previous conviction or acquittal has been reversed or set aside. Moreover, the provision discourages double jeopardy of an accused person to be tried on the same offence which he was previously acquitted or convicted.[53]

Plea of autrefois convict and autrefois acquit is supposed to be raised by the accused person at any stage of the proceedings before the closure of the case and the burden of proof lies on the accused person.

The court is required once a plea is raised to satisfy itself on what actually transpired therein and take judicial notice. Once the plea of autrefois convict and autrefois acquit is raised successfully, the effect is to nullify the charge, proceedings and judgment.[54]

3.8 Plea of pardon

Plea of pardon is where the accused person informs the Court that he has previously been tried and convicted of the same offence he is facing now but was pardoned. Once the court satisfies itself that a plea of pardon is nothing but true, the effect is to nullify the proceedings.

The court shall make enquiries as to the truth of that indication. If the court finds such a plea to be false, the person will be required to plead to the charge.[55]

3.9 Change of plea

Change of plea happens when the accused person has previously entered the plea of not guilty or guilty after the charge was read over and explained to him, then if he wishes

[51] Laurence Mpinga v. Republic [1983] TLR 166, Joel Mwangambako vs Republic, cited supra, Seleman Rajabu vs Republic, Criminal Appeal No. 149 of 2013, CAT, Mwanza (unreported).

[52] Twaha Hussein vs. Republic Criminal Appeal No.415 of 2017 CAT Mwanza (unreported) Maduhu Masele vs Republic [1991] TLR 143, Yasini Selemani vs Republic [1969] HCD 262

[53] Twaha Hussein vs. Republic, Criminal Appeal No. 415 of 2017 CAT Mwanza (unreported)

[54] Twaha Hussein vs. Republic, Criminal Appeal No. 415 of 2017 CAT Mwanza (unreported), Yasin Seleman vs Republic (1969) HCD 262, Maduhu Masele vs Republic, (1991) TLR 143, Godson Ndobho vs Republic [1993] TLR 287, Ally Hassan Mpapata vs Republic [1992] TLR 265, Republic vs Msusa Ally [1987] TLR 190

[55] See article 45(1) (a) of the Constitution of the United Republic of Tanzania (as amended), and Section 228(5) and 280 of the CPA.

to change his plea either from the "plea of not guilty" to the "plea of guilty". This can be done at any time before judgment. Once the accused changes his plea the followings need to be observed in compliance with Section 228 of the CPA: -

(i) The trial court should indicate that the accused has changed his previous plea i.e., from plea of not guilty to the plea of guilty and the vice versa.

(ii) The statement of the accused should be recorded in the nearest words used by him.

(iii) The facts of the case need to be narrated by the prosecutor. It is trite law that a plea of guilty is revocable any time before passing a sentence.[56]

3.10 The Right of Representation

The right to be represented is automatic once an accused person is charged with capital offences which attract capital punishments. The right to be represented when the accused is charged with other offences is not automatic. The accused is at liberty to engage an advocate to defend him in non-capital offences or apply for legal aid upon fulfilment of the conditions set out under Section 33 of the Legal Aid Act, [CAP 21 RE 2019].[57]

3.11 Adjournments

The law requires, once an accused person has taken a plea of not guilty before the court with competent jurisdiction, investigation must be complete and procedure for hearing of the case has to commence before expiration of sixty days (60) pursuant to Section 225(4) of the CPA. However, according to section 225 (4) and (5) of CPA what is unlawful is not "to hear" a case after an aggregate of sixty days has expired but what shall not be lawful is "to adjourn" a case after the expiry of sixty days if the exceptional circumstances have not been complied with nowhere in the section is it implied or expressed that a hearing after the expiry of sixty days is a nullity otherwise subsection 225 (5) would be useless as it does not bar subsequent charges on the same facts If the prosecution is unable to proceed with the hearing for whatever reason, the Court should discharge the accused, but the omission to discharge the accused that does not affect the jurisdiction of the Court to try the case it has little or no consequence since discharging of the accused would not bar subsequent proceedings against him for the same offence. The purpose of section 225 generally, and subsection (4) and (5) in particular, is to expedite trials but not to clear accused persons from criminal liability.[58]

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[56] Masumbuko Josedph vs republic, Criminal Appeal No. 218 of 2014, CAT Mwanza (unreported), Ally Shabani @ Swalehe vs Republic, Criminal Appeal No. 351 of 2020, CAT, Dodoma(unreported), Shehe Ramadhani @ Idd vs Republic, Criminal Appeal No. 82 of 2020, CAT, Tanga (unreported), Chacha v Republic,[1953] EACA 339, Kamundi v Republic,[1953] EA 378, Joseph Mugola Pudha v Republic (1952)EACA 55

[57] Mashaka Marwa v Republic, Criminal Appeal No.138 of 2018 CAT Mwanza (unreported), Makenji Kamura vs Republic, Criminal Appeal No. 30 of 2018, Court of Appeal of Tanzania, Mwanza (unreported), Manyinyi Gabriel @ Gerisa vs Republic, Criminal Appeal No.594 of 2017 CAT Mwanza (unreported), Maganga Udugali vs Republic, Criminal Appeal No.144 of 2017 CAT,Tabora (unreported).

[58] Robinson Mwanjisi Versus The Republic, 2003 TLR 281

The law under Section 225(4) and (5) of the CPA, provides for exception by allowing adjournment of the case beyond statutory time limit of sixty (60) days. The referred exceptions include when a certificate for extension of time is filed by the Regional Crimes Officer, State Attorney and the Director of Public Prosecutions.

PART IV
BAIL

4.0 Bail

Bail is defined as a mechanism designed to ensure that a person who is subject to the strictures of the law stays out of confinement while the process of inquiry into his/her liability in the criminal process is being investigated, or if he has been charged in a court of law, his/her personal freedom is guaranteed before the end of the trial through him/her furnishing security as part of the undertaking to turn up whenever called up. The institution of bail, therefore, falls on the positive side of the principle of presumption of innocence. This principle can only be derogated from on public policy, and only when the public policy is backed by clear provisions of the law.[59]

The rationale behind bail is to enable the accused person to enjoy his personal freedom which emanates from the concept of presumption of innocence enshrined under Article 13(6) (b) and 15 of the Constitution of the United Republic of Tanzania of 1977.

4.1 Police bail

This refers to a temporary release of a suspect of a crime pending investigation or arraignment by the police or any other investigative agency to guarantee his appearance when needed.[60] Section 64(1) (c) of the CPA and Section 16 of the Primary Court Criminal Procedure Code (PCCPC) provide that, if no formal charge has been brought against a person within 24 hours after the person was arrested in connection with any serious offence and it appears that further inquiries must be conducted which cannot be completed within a short time, the police or any investigation organ must release the person to bail. Subjects to the aforementioned provisions of law, police bail should be issued only to bailable offence pursuant to Section 148 of the CPA.

However, it has to be noted that despite such a requirement, the judgment and proceedings of the trial court cannot be vitiated by the failure to release to bail a person under custody.[61]

4.2 Court bail

It means a temporary release of an accused person awaiting trial or appeal on conditions stipulated by the court to guarantee his appearance in court.[62]

When a charge has been instituted and an accused person is brought before the court to answer the accusation facing him, the court enjoys the power to admit an accused person to bail subject to the conditions provided for under Sections 148 of the CPA, 29(4) & 36 of EOCCA and Section 29 of DCEA. Bail under Section 29 of DCEA will depend on the weight of the substance/narcotic drug found with the accused person.

[59] DPP vs Bashiri Waziri and Another, Criminal Appeal No. 168 of 2012, CAT (unreported).
[60] The Judiciary Bail Guidelines of September, 2020
[61] Makenji Kamura v Republic, Criminal Appeal No.30 of 2018 CAT (unreported)
[62] The Judiciary Bail Guidelines (supra)

4.3 Bail in economic offences

Accused persons charged with economic offences can be admitted to bail depending on the value of the property involved.[63]

(i) The District and Resident Magistrate Court have powers to hear and determine bail application between the arraignment and the committal, if the value of any property involved in the offence charged is less than Three Hundred Million Shillings under Section 29(4) of EOCCA.[64]

(ii) After committal of the accused for trial but before commencement of the trial before the Court, is vested in the High Court regardless of the value of the property. See Section 29(4) of EOCCA.

(iii) After the commencement of the trial and regardless of the value of the property involved is vested to the court (Corruption and Economic Crimes Division of the High Court) under Section 29(4) of EOCCA.

(iv) Where the value of the property involved in the offence charged is three hundred million shillings or more at any stage before commencement of the trial in the High Court.[65]

4.4 Bail pending appeal

Where a person is convicted and sentenced to imprisonment, he may be admitted to bail by the Subordinate Court or High Court which convicted and sentenced him pending hearing of his appeal under Sections 24 of the MCA and 368 of the CPA.

The High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may, if it thinks fit, pending to the determination of an appeal from the High Court or the subordinate court concerned to the Court of Appeal, admit the appellant to bail in the same circumstances in which the court would have given bail under Section 368 of the Criminal Procedure Act.[66]

Bail pending appeal is quite different from those applicable to bail pending trial. In applications for the grant of bail pending trial, courts are guided by one fundamental principle that is to say right to presumption of innocence whereas in the bail pending appeal, the applicant who is a convict no longer enjoys that right. In considering whether or not bail should be granted pending appeal, the courts are guided by the following principles[67]:-

(1) That bail is a right applicable only to cases where the accused person has not yet been convicted,

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63 See Sections 29(4) and 36 of EOCCA

64 DPP vs Bashiri Waziri and Another, Criminal Appeal No. 168 of 2012, CAT (unreported).

65 Mwita Joseph Ikoh and Two Others vs Republic, Criminal Appeal No. 60 of 2018, CAT (unreported)

66 S.10 of Appellate Jurisdiction Act [Cap.141 R.E 2019] and rule 11(2) of the Tanzania Court of Appeal Rules 2009

67 Amon Mulotwa Mwalupindi vs DPP, Criminal Application No. 09/06 of 2020, Court of Appeal of Tanzania, CAT Mbeya (unreported), Lawrence Mateso vs Republic [1996] TLR 118

(2) Bail pending an appeal can be granted only where there are exceptional and unusual reasons or where there is an overwhelming probability that the appeal would succeed,

(3) Where an argument on the facts needs detailed references to the text of the evidence or the judgment to support it, it cannot be said that the appeal has overwhelming chances of success,

(4) Since no general principle exists that a person released on bail pending appeal will not be sent back to prison if his appeal fails, the court is reluctant to order that a convicted person be released on bail pending the outcome of the appeal;-

(5) Deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice."

4.5 Statutory restrictions on granting bail

Statutory provisions restricting police and court bail are found in Section 148(5) (a) to (e) of the CPA and Section 36(4) (a) to (f) of EOCCA. The restrictions referred to above fall under two categories one, offences declared by law to be non-bailable, two, offences ordinarily bailable against which bail is restricted under certain circumstances. In the first category, the police and the court are statutorily prohibited to grant bail.[68]

In the second category, the court or police bail may not be granted under the following circumstances, that is: **one**, where the accused person has a previous conviction and sentence exceeding three years, **two**, where an accused person has previously jumped bail or breached its conditions, **three**, where it is necessary to keep the accused in custody for his own protection or safety and seriousness of the charge, **four**, actual money or property whose value exceeds three hundred million shillings;- unless that person deposits cash or other property equivalent to half the amount involved.[69] The Director of Public Prosecutions may file a certificate under Section 36(2) of EOCCA objecting the accused to be granted bail on the ground that his/her release on bail would likely prejudice the interest of the public.[70]

4.6 Conditions for Bail

The conditions that may be imposed by the court also fall into two categories that's, mandatory conditions that must be imposed and discretionary conditions which may be imposed at the discretion of the court.[71]

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[68] DPP vs Bookeem Mohamed @ Ally, Criminal Appeal No. 217 of 2019, CAT,Mwanza (unreported), DPP vs Bashiri Waziri and Another, Criminal Appeal No. 168 of 2012, CAT Mwanza(unreported), The Attorney General vs Disckson Paulo Sanga, Criminal Appeal No.175 of 2020 CAT DSM (unreported).

[69] Edward Kambuga and Another Vs Republic (1990) TLR 84, Republic vs Hsu Chin Tai and 35 Others, Criminal Application No. 2 of 2011, High Court, DSM (unreported) page 19-20.

[70] DPP vs Li Ling-ling, Criminal Appeal No. 508 of 2015, CAT DSM (unreported), Emmanuel Simforian Massawe vs Republic, Criminal Appeal No. 252 of 2016, CAT DSM, (unreported).

[71] See Sections 148(6) (a) and (b) of the CPA, Section 36(5) and (6) of the EOCCA and Section 16(3) of the PCCPC.

The following are mandatory conditions, whenever a court admits a person to bail that is to surrender by the accused person to the police of his passport or any other travel document, restriction of the movement of the accused to certain area like towns, villages or other areas of his residence.[72]

In addition to the mandatory conditions prescribed under Section 148 (6), the Court may impose any other conditions which it deems fit for assuring appearance of the accused for trial or resumption of trial at the time and place required or as may be necessary in the interests of justice or for the prevention of crime as stipulated under Section 148(7).[73]

The subordinate court has no power to vary bail conditions set in the case before it such powers are enjoyed by the high court.[74]

4.7 Consequences of breach of bail conditions

Bail can be cancelled for various reasons, for example, if the police believe that the accused is absconding or planning to abscond and the accused breaches bail conditions, subject to Sections 68 and 69 of the CPA.

Where a person absconds while he is on bail or not being on bail, fails to appear before the court on the date fixed and conceals himself so that a warrant of arrest may not be executed;-

(i) Such of his property, movable or immovable, as is commensurate to the monetary value of any property involved in the case may be confiscated by attachment and,

(ii) The trial in respect of that person shall continue irrespective of the stage of the trial when the accused person absconds, after sufficient efforts have been made to trace him and compel his attendance.

If a person admitted to bail absconds, he may not be considered to bail in the same case. The accused person who absconds while on bail, the property of equivalent value may be confiscated by attachment and the trial shall continue in his absence.[75]

4.8 Discharge of Sureties

There are three situations in which a surety can be discharged, namely, one, on application to a magistrate to have his bond discharged, two, where the surety dies and three, when the case is finalized, subject to *Sections 155 and 156 of the CPA*.

[72] See Section 148 (6) CPA.

[73] Hamisi Masisi and Six Others vs. Republic [1985] T.L.R. 24, Freeman Aikael Mbowe and Another vs Republic, Criminal Appeal No. 344 of 2018 High Court (unreported), Republic vs. Georges Tumpes [1968] H.C.D 416.

[74] Silvester Hills Dawi and Another vs DPP, Criminal Appeal No. 250 of 2006, Court of Appeal of Tanzania, (unreported).

[75] See Section 158 and 159 CPA.

4.9 Forfeiture of Recognizance

When the accused person jumps bail or absconds, the court shall call upon the surety to show cause as to why the bond should not be forfeited and he may be ordered to pay the whole bond or a lesser sum as the court may deem fit and just. If he fails his movable property may be attached and sold to recover an amount equivalent to the value of the bond[76]. In practice, forfeiture should not be automatic;- the surety should be given a reasonable opportunity to explain to the court how he is prepared to trace the accused person after the case.[77]

[76] See Section 160 CPA.
[77] R. v. Abdallahamid s/o Daleyusufu, Crim. Rev. 74-D-67;- 23/6/67;- Georges, C.J.

PART V
PRELIMINARY HEARING

5.0 Introduction

Preliminary hearing is provided under Section 192 of the CPA read together with The Accelerated Trial and Disposal of Cases Rules, G.N. No.192 of 1988, Section 35 of the EOCCA and rule 15 of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) Rules 2016. Once a charge is read over to the accused person and he pleads not guilty, the Court shall hold a Preliminary hearing.

The main purpose of preliminary hearing is to accelerate trials or to promote expeditious trials and cost-effective disposal of criminal cases. It ascertains at the earliest stage in the proceedings matters which are not in dispute and those in dispute. Once undisputed matters are ascertained, the only evidence will be brought at trial on the disputed matters.[78]

5.1 Procedures of Preliminary Hearing

Procedures of conducting preliminary hearing are enshrined under Section 192 of the Criminal Procedure Act and The Accelerated Trial and Disposal of Cases Rule, G.N. No.192 of 1988.[79] These are: -

(i) The court to explain to the accused person if he is not represented the nature and purpose of the preliminary hearing.

(ii) The prosecution to read facts of the case constituting elements of the offence in question and tender any document(s) which the prosecution in its opinion thinks can be tendered at this stage.

(iii) The court to ask the accused ***or*** on the basis of facts read by the prosecution which matters are not in dispute.

(iv) The court shall list down all matters which are not in dispute on the basis of which a Memorandum of matters agreed shall be prepared, subject to CR Form No. 14 of the Criminal Procedure (Approved Forms) G.N 429 of 2017.

(v) The court to read over and explain to the accused in a language that he understands after which the Memorandum shall be signed by the accused and his advocate (if any) and the prosecutor as well as the Magistrate or Judge.

[78] Semburi Musa vs Republic, Criminal Appeal No. 236 of 2020 CAT Kigoma (unreported), Jackson Daudi vs Republic, Criminal Appeal No. 111 of 2002 CAT Mwanza (unreported), Joseph Munene and Ally Hassani VS. R Criminal Appeal No. 109 of 2002 CAT Arusha (unreported).

[79] G.9963 Rafael Paul @ Makongojo vs Republic, Criminal Appeal No. 250 of 2017,CAT Arusha (unreported), Republic vs. Abdallah Salum @ Haji, Criminal Revision No. 4 of 2019 CAT DSM (unreported), Republic vs Francis Lijenga Criminal Revision No. 3 of 2019 CAT DSM (unreported), Ally Chande @ Ally & Another vs Republic, Criminal Appeal No. 16 of 2006 CAT DSM (unreported).

5.2 Omission to conduct Preliminary hearing

Generally, preliminary hearing is a mandatory procedure in trial of criminal cases. However, failure by the Court to hold a preliminary hearing does not vitiate the proceedings of the trial if the accused person was not prejudiced.[80]

5.3 Status of facts and exhibits admitted during preliminary hearing

Facts and exhibits which are admitted during preliminary hearing are deemed to have been ascertained or proved.[81] However, if in the course of the trial, the court is of the opinion that the interest of justice so demand, it may direct that any fact or document admitted or agreed in a memorandum filed under this Section be formally proved.[82]

5.4 Requirements to list witnesses and exhibits

The law governing preliminary hearing both in the subordinate and the High Court does not provide for the requirement of listing or mentioning witnesses and exhibits at this stage.[83]

5.5 Complainant Statement

Complainant statement is guided by Section 9(3) of CPA, the defence has right to be availed with copy of complainant statement. However, failure to avail the complainant's statement to the accused does not vitiate trial it is curable under Section 388 of CPA.[84]

5.6 PH in the High Court the Corruption and Economic Crimes Division

At the High Court the Corruption and Economic Crimes Division, preliminary hearing is governed by Section 35 of the EOCCA and Rule 15 of the Economic and Organise Control (The Corruption and Economic Crimes Division) Rules, 2016.

In this court, it is mandatory for the prosecution and defence to provide the names of witnesses and a list of exhibits, under Rule 15 (Supra). Other procedures remain the same, except naming of witnesses and list of exhibits whether documentary or physical. Failure to do so, the witnesses and exhibits will not be accepted in Court.

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[80] Benard Masumbuko Shio and another vs. Republic, Criminal Appeal No. 213 of 2007 CAT. Arusha (Unreported), Director of Public Prosecutions vs Jaba John, Criminal case No. 206 of 2020 CAT Mwanza (unreported)

[81] See Section 192(4) CPA, Section 35(3) of the EOCCA.

[82] Mgonchori (Bonchori) Mwita Gesune vs Republic, Criminal Appeal No. 410 of 2017 CAT Mwanza (unreported).

[83] Tafifu Hassan @ Gumbe vs. Republic. Criminal Appeal No. 436 of 2017 CAT Shinyanga (unreported), Felix Lucas Kisinyila vs. Republic, Criminal Appeal No. 129 of 2002 CAT DSM (unreported), Jackson Daudi vs Republic, Criminal Appeal No.111 of 2002 CAT Mwanza (unreported), Yusuph Nchira vs Dpp, Criminal Appeal No. 174 of 2007 CAT Arusha (unreported).

[84] Daniel Kivati Monyalu vs Republic, Criminal Appeal No. 224 of 2019, CAT at Dar es Salaam (Unreported), Jilala Justine vs Republic, Criminal Appeal No. 441 of 2017 CAT at Shinyanga (unreported)

PART VI
HEARING

6.0 Introduction

Upon completion of preliminary hearing, the prosecutor shall open the case against the accused person and call witnesses to adduce evidence in support of the charge.[85] In criminal trials, the case for prosecution always begins.

6.1 Witnesses' Oaths/affirmation

The law requires that evidence of any witness must be given on oath or affirmations. Section 198(1) of CPA requires every witness in a criminal case or matter to be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act [Cap 34 R.E. 2019]. Non-compliance with the requirements of Section 198(1) of the CPA entails fatal consequences resulting to evidence being expunged.[86] However, the exception to this rule is under Section 127 (2) of TEA.

6.2 Examination -in-chief

Examination in chief is the first questioning of a witness in a trial or other proceeding conducted by a party who called the witness to testify. [87] It is during examination in chief when the party concerned is afforded with an opportunity to tell his/her side of the story and elicit his/her account of what transpired concerning the incidence and produce exhibits in his possession or power in accordance with the law.[88] It is governed by Sections 146 and 147 (1) and (2) of TEA. Leading questions shall not, if objected to by the adverse party, be asked in an examination in chief, or in re-examination, except with the permission of the court.[89] The prosecutor is required to examine the witnesses in their proper order so as to bring out facts in their logical sequence to prove the case.

6.3 Cross-examination

Is an examination of a witness by the adverse party. It is governed by Sections 146, 147 and 155 of TEA and Section 290 of the CPA. The cross examination follows immediately upon examination in chief. The essence of cross examination is that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his case or to discredit him.

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85 Section 229 of the Criminal Procedure Act [Cap. 20 R.E 2022]

86 David Livingstone Simkwai and eight (8) others vs Republic, Criminal Appeal No. 146 of 2016 CAT Mbeya (Unreported), Abas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017 CAT DSM (unreported), Mawazo Mohamed Nyoni and two (2) others vs Republic, Criminal Appeal No, 184 of 2018 CAT DSM (unreported), Amos Seleman vs Republic, Criminal Appeal No. 267 of. 2015, CAT Dodoma (unreported), Janeroza d/o Petro vs Republic, Criminal Appeal No. 269 of 2016, CAT Tabora (unreported)

87 Black's Law Dictionary, 8th Edition Edited by Bryan A. Garner, at page 492]

88 Kassim Salimu Mnyukwa vs Republic, Criminal Appeal 405 of 2019, CAT DSM (unreported)

89 Section 151(1) of the Evidence Act [Cap. 6 R.E 2022]

Cross examination is the most effective of all means for extracting truth and exposing falsehood.[90] The objectives of cross-examination are;- [91]

(i) To elicit from the witness evidence supporting the cross-examination party's version of the facts in issue,

(ii) To weaken or cast doubt upon the accuracy of the evidence given by the witness in chief, and,

(iii) In appropriate circumstances to impeach the witness's credibility.

In essence, the prosecutor when cross-examining a witness is argued to direct his questions to the three above objectives.

6.4 Impeachment of witnesses' credit using previous statements

The procedure for impeaching a witness by using his previous statements under Section 154 and 164 of TEA, requires the following to be done. [92]

1. The previous statement must be read to the witness.
2. The attention of the witness must be drawn to those parts which are intended to demonstrate contradictions.
3. The Statement should be tendered in evidence.

6.5 Failure to cross-examine on important facts

It is trite law that the decision not to cross-examine the witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate and will be estopped from asking the trial court to disbelieve what the witness said.[93]

6.6 Re-Examination

Re-examination is the examination of a witness by a party who called him, subsequent to the cross-examination[94]. The re-examination shall be directed to the explanation of matters referred to in cross-examination;- and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

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[90] Sarkar Law of Evidence, 16th Ed. Wadhwa Nagpur Vol.2

[91] DPP vs Justice Lumina Katiti &3 others, Criminal Appeal No. 15 of 2018 CAT DSM (unreported).

[92] Hatari Masharubu @ Babu Ayubu v. R, Criminal Appeal No.590 of 2017, CAT at Mwanza (Unreported), Lilian Jesus Fortes vs Republic, Criminal Appeal No. 151 of 2018, CAT DSM (Unreported), Waisiko Ruchere @ Mwita vs Republic, Criminal Appeal No. 348 of 2013, CAT Mwanza (unreported), R. v. Donatus Dominic @ Ishengoma & 6 others, Criminal Appeal No.262 of 2018, CAT Bukoba (Unreported), Marwa Wang'iti Mwita and another v. R [2002] TLR 39

[93] DPP vs Justice Lumina Katiti &3 others, Criminal Appeal No. 15 of 2018 CAT DSM (unreported), Rashid Sarufu vs Republic, Criminal Appeal No. 467 of 2019, CAT Iringa (unreported), Kadili Ally vs Republic, Criminal Appeal No. 99 of 2020, CAT DSM (unreported), Frank Julius Ndege vs Republic, Criminal Appeal No. 359 of 2019, CAT DSM (unreported), Simon Shauri Awaki @Dawi vs Republic, Criminal Appeal No. 62 of 2020, CAT Arusha (unreported).

[94] Section 146(3) of the CPA

The rationale of re-examination is to give an opportunity to reconcile the discrepancies between the statements in examination in chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination.[95]

6.7 Questions by the Court

The trial magistrate has the duty to put questions for clarification, if need be after the witness has finished testifying, though he may as well interrupt and seek clarification when the witness is testifying.[96]

6.8 Hostile Witness

A hostile witness is a witness who manifests hostility or prejudice under examination in chief to the party who has called him.[97]

When a person who called a witness to put any question to him, having made up his mind to treat the witness as ''hostile'', he, after showing a copy of the witness's previous statement to the court, formally apply to the court for leave to do so. The Court should then hear the opposite party, if he has any objection to the application. Then after comparing and contrasting the evidence of the witness and the contents of his statement, and after considering the witness demeanor in the witness box, as well as the objections, if any, from the opposite party, the court should make its ruling on the application. If the court grants it, the applicant should then proceed to attempt to discredit the evidence of the witness by way of cross-examination.[98] A witness who turns hostile can be prosecuted for perjury.[99]

6.9 Statements of persons who cannot be called as witnesses

In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the provision of Section 34B (1) of Evidence Act, be admissible in evidence as proof of the relevant fact contained in lieu of direct oral evidence. On the other hand, for the written or electronic statement to be admissible in court it is a mandatory requirement of the law that all conditions stipulated under Section 34B (2) (a) – (f) must cumulatively be complied with.

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95 Sarkar Law of Evidence, 16th Ed. Wadhwa Nagpur Vol.2

96 Kassim Salum Mnyukwa v Republic, Criminal Appeal No. 405 of 2019 CAT DSM (unreported)

97 See Section 163 of TEA.

98 R. v. Donatus Dominic @ Ishengoma & 6 others, Criminal Appeal No.262 of 2018, CAT Bukoba (Unreported), Nathaniel Alphonce Mapunda and Benjamian Alphonce, Mapunda V R [2006] T.L.R. 396, Inspector Baraka Hongoli and two (2) others Vs. Republic, Criminal Appeal No. 238 of 2014, CAT Tabora (Unreported), Republic vs Fabian Paul, Criminal Appeal No. 14 of 199, CAT Mbeya (unreported), Jumanne Mketo v R [1982] TLR 232

99 Amiri Mohamed v R [1994] TLR 12

6.10 Weight of the statement tendered under Section 34B of TEA

Statement admitted under Section 34B of TEA is competent evidence capable of grounding conviction without necessarily being corroborated. It does not require corroboration in order to be relied upon.[100]

It is another position of the Court of Appeal that the statement of a person who never appeared in court to testify, so as to be cross-examined by the accused and his demeanour assessed by the trial court;- could not without corroboration, ground conviction against the accused.[101] However the later position seems to wipe away the objective behind the enactment of Section 34B of TEA.

6.11 Competence and compellability of witnesses

Every person is competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause. [102]

Section 130(1) of TEA provides that, where a person charged with an offence is the husband or the wife of another person that other person shall be a competent but not a compellable witness on behalf of the prosecution. Spouse can give evidence after she or he is informed by the court of the effect of him giving evidence. The evidence of that person shall not be admissible unless the court has recorded in the proceedings the compliance.

Section 130(2) of TEA provides that, spouses are competent and compellable witnesses in any case where the person is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act or in any case where the person is charged in respect of an act or omission affecting the person or property of the wife or husband, or any of the wives of a polygamous marriage of that person or the children of either or any of them.[103]

6.12 Witness of tender age

Section 127 (2) of TEA provides that, “a child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies.” The child of tender age is defined under subsection (4) of Section 127 to mean “a child whose apparent age is not more than fourteen years.”[104]

[100] Omary Mohamed China Vs Republic, Criminal Appeal No. 230 of 2004, CAT DSM (unreported)

[101] William Onyango Nganyi @ Dadii and 5others vs Republic, Criminal Appeal No. 9 of 2016, CAT DSM (unreported)

[102] See Section 127(1) of TEA.

[103] Alex Minani and two others vs Republic, Criminal Appeal No. 275 of 2019, CAT Bukoba (unreported), Manyanda Ncheya vs Republic, Criminal Appeal No. 437 of 2017, CAT Shinyanga(unreported), Zamir Rahimu vs Republic, Criminal Appeal No. 418 of 2018, CAT Dar es Salaam(unreported), Matei Joseph vs R [1993] TLR 152

[104] Wambura Kiginga v Republic, Criminal Appeal No. 301 of 2018 CAT Mwanza (unreported), Menald Wenela vs The Director of Prosecutions, Criminal Appeal No. 336 of 2018, CAT at Mbeya (Unreported), Shaban Said Likubu vs Republic, Criminal Appeal No. 228 of 2020, CAT at Mtwara (unreported), Bashiru Salumu Sudi vs Republic, Criminal Appeal No. 379 of 2018, CAT at Mtwara (Unreported)

6.13 Refractory witnesses

A refractory witness is a witness who, without sufficient excuse, refuses to be sworn or affirmed, having been sworn or affirmed refuses to answer any question put to him, refuses or neglects to produce any document or thing which he is required to produce or refuses to sign his deposition.[105]

Where a witness manifests refractory behaviours as aforementioned, the court may adjourn the case for a period not exceeding eight days and may in the meantime commit him to prison, unless he sooner consents to do what is required of him. Where such witness, upon being brought before the court at or before an adjourned hearing, again refuses to do what is required of him, the court may, if it sees fit, again adjourn the case and commit him for the like period and so again from time to time until he consents to do what is so required of him.[106]

6.14 Non-appearance of the Complainant

If the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complaint, having had notice of the time and place appointed for the hearing of the charge does not appear, the court shall dismiss the charge and discharge the accused person, unless, for some reason, it shall think it proper to adjourn the hearing of the case until some other date and, pending the adjourned hearing, either admit the accused person to bail or remand him to prison or take such security for his appearance as the court thinks fit.[107]

Where the court dismisses the charge and discharges an accused person under Section 222 or 226 of the CPA, the complainant may, within thirty days from the date of dismissal, file an application for re-institution of the charge. The court may, upon being satisfied that the complainant's absence was due to reasons to which the complainant had no control or could not within the circumstance have control, grant, application for re-institution of the charge and proceedings, if any.[108]

6.15 None appearance of accused person

After adjournment of the case if on the date of hearing the accused does not appear, it is lawful for the court to proceed with hearing in his absence. The hearing will proceed to its finality, and if the accused is convicted and sentence, he will have to be arrested and sent to prison to serve his sentence. However, before he is sent to prison, he must be brought before the trial Court to be heard as to why he should not proceed to serve the sentence entered in his absence.[109] Where the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control and had a probable defence on merit.

[105] Section 199 of the CPA
[106] ibid
[107] Section 226(1) of the CPA
[108] See Section 226 (5) and (6) of the CPA.
[109] See Section 226(1), 226(2) and 227 of CPA.

The accused person should be brought to court after his re-arrest and be given a chance to explain his absence as to why he has absconded himself during the trial. Failure to comply with that requirement will vitiates sentence entered against him.[110]

6.16 Trial before the High Court

The High Court may inquire into and try any offence subject to its jurisdiction in any place where it has power to hold sittings and, except as provided under Section 93, no criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate court and the accused person has been committed for trial before the High Court.[111]

6.16.1 Committal Proceeding

"*Committal proceedings*" means proceedings held by a subordinate court with a view to commit the accused person to the High Court.

The law requires the Director of Public Prosecutions upon completion of investigation, to study the investigation file and make findings whether the evidence available is sufficient to warrant institution of a criminal case or not. In case he finds out that the evidence warrants putting the suspect on trial, he shall file an information before the High Court. In case he finds that the evidence available is insufficient to warrant institution of a criminal case he may either remit the file back for further instigation or enter a *nolle prosequi*.[112] Information filed under Section 245 of the CPA shall include three copies of the statement of witnesses and any document containing the substance of the evidence.

After the information is filed in the High Court, the Registrar shall cause a copy of it to be delivered to the Subordinate Court where the accused person was first presented or within the local limits of which the accused person resides. Upon receipt of that copy and the notice, the subordinate court shall commit the accused person to the High Court for trial pursuant to Section 246 of the CPA.[113]

In committal proceedings, the committing court is required to read or cause to be read to the accused person the information brought against him as well as the statements and documents containing the substance of evidence that the Director Public Prosecutions intends to call at the trial.[114]

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[110] Adam Angelius Mpondi vs Republic, Criminal Appeal No. 180 of 2018, CAT DSM(unreported), Tagara Makongoro and two another vs. Republic, Criminal Appeal No. 126 of 2015, CAT Mwanza (unreported), Severine Kimatare vs Republic, Criminal Appeal No. 279 of 2006, CAT Bukoba(unreported), Loningo Sangau vs Republic, Criminal Appeal No. 396 of 2013, CAT Arusha (unreported), Olonyo Lemuna and Lekitoni Lemuna v Republic [1994] TLR 54 (CA), Mrisho Salum v Republic 1991 TLR 158 (HC), Shija Juma vs Republic, Criminal Appeal No. 383 of 2015, CAT Bukoba (Unreported), Marwa Mahende v Republic (1998) TLR 249, Magoiga Magutu@Wansima vs Republic, Crimnal Appeal No. 65 of 2015 CAT Mwanza (unreported)

[111] Section 178 of the CPA

[112] Section 245 of the Criminal Procedure Act.

[113] Republic vs Ibrat makombe, Criminal Revision No. 6 of 2017 CAT Iringa (unreported), Republic vs Christian Mhapa, Criminal Revision No. 7 of 2017 CAT Iringa (unreported)

[114] Daud Jeremiah v R Criminal Appeal No. 359 of 2015 CAT (unreported), Jumanne Mohamed & 2 Others v R Criminal Appeal No. 534 of 2015 CAT (unreported), Hamis Meure Vs. Republic, [1993]

It should also be disclosed to the accused person any physical exhibit intended to be tendered against him during trial.[115]

Pursuant to Section 289 of the CPA, a witness whose statement or substance of evidence was not read at committal proceedings shall not be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.[116] The same applies to exhibits which were not disclosed to him during committal.[117]

6.16.2 Requirement to involve assessors

In trials before the High Court, vide the Written Laws (Miscellaneous Amendments) Act, 2022 Act No. 1 of 2022, it is no longer mandatory for trials before the High Court to be conducted with the aid of assessors.[118]

6.16.3 Selection of Assessors

The High Court may where it considers necessary for the interest of justice, sit with not less than two assessors provided that in deciding the matter the Judge shall not be bound by the opinion of the assessors, pursuant to Section 265(1) of the CPA. Assessors form part of the bench, and will be given opportunity to ask questions for clarification after re-examination of witnesses as per Section 177 of the TEA.[119] Pursuant to Section 266(1) of the CPA, all persons between the ages of twenty-one and sixty years may be selected to serve as an assessor. Before hearing proceeds, in case the Court opts to use assessors in the trial, it is required to ask the accused whether he objects any assessor to participate in the trial, and the accused may give any reason to that effect.

Thus, in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsels who are the officers of the court have a duty to remind the Judge of it.[120]

TLR 213, Samwel Henry Juma VS Republic, Criminal Appeal No. 211 of 2011 CAT DSM (Unreported), Simon Shauri Awaki@DAWI vs.Republic Criminal Appeal 62 of 2020 (unreported), Hamisi Meure V R [1993] TLR 213, Paschal Maganga & another vs R Criminal Appeal No.268 of 2016 CAT (unreported)

115 Grace Teta Gbatu vs Republic, Criminal Appeal No.84 of 2019 CAT (unreported), Said Shabani Malikita vs Republic, Criminal Appeal No.523 of 2020 CAT (unreported), Remina Omary Abdul v. Republic, Criminal Appeal No. 189 of 2020 (unreported),

116 Masamba Musiba@Musiba Masai Masamba vs R, criminal Appeal No. 138 of 2019 CAT DSM (unreported)

117 Grace Teta Gbatu (supra)

118 Msigwa Matonya and 4 others v Republic, Criminal Appeal No. 492 of 2020 CAT DSM (unreported)

119 Hilda Innocent vs Republic, Criminal Appeal No.181 of 2017 CAT Bukoba (unreported), Apolinary Matheo&2 Others vs Republic, Criminal Appeal No. 436 of 2016 CAT Mbeya (unreported)

120 Andrea Bernardo &Another vs Republic, Criminal Appeal NO.128 of 2015, CAT Mwanza (unreported), Chacha Matiko Magige vs Republic, Criminal Appeal No.562 of 2015 CAT Mwanza (unreported), Yohana Mussa Makubi&Another vs Republic, Criminal Appeal No.556 of 2015 CAT (unreported), Chacha Matiko Magige vs Republic, Criminal Appeal No. 562 of 2015 CAT (unreported), Tongeni Naata v R (1991) TLR 59, Fadhil Yussuf Hamid vs Director of Public Prosecutions, Criminal Appeal No.129 of 2016 CAT Zanzibar (Unreported), Apolinary Matheo &2 Others vs Republic, Criminal Appeal No.436 of 2017 CAT Mbeya (unreported), Laurent Salu and Five Others V Republic, Criminal Appeal No.176 of 1993 (Unreported).

6.16.4 Explaining roles to assessors

Assessors being lay persons need to have explained about the role they are supposed to play in the trial.[121]

6.17 Court proceedings

6.17.1 Compliance of Section 210 of the CPA

Recording of the witness evidence has a specific prescribed manner. Failure to do so is an irregularity that goes to the root of the case under Section 210 (1) of the CPA. The provision strictly requires the recording to be in a narrative form or first person and not in the reported speech.[122]

6.17.2 Compliance of Section 210(3) of CPA

The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence. To ensure that every testimony is properly recorded and that it guarantees against distortion, perversion and suppression of evidence.[123]

6.17.3 Authentication of proceedings

It is trite law that failure by the Judge/magistrate to append his/her signature after taking down the evidence of every witness including defence is an incurable irregularity in the proper administration of criminal justice. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. This emulates the spirit contained in Section 210 (1) (a) of the CPA. However, applying this rule every case should be dealt with in its own circumstances.[124]

6.17.4 Use of Abbreviations in proceedings

It is a good practice to record proceedings in full sentences instead of abbreviations although using them does not vitiate the trial.[125]

6.18 Closure of prosecution's case

The law under Section 229 (1) of CPA indicates that the prosecutor shall open the case against the accused and call witnesses to prove the charge. There is no specific provision stating that the prosecutor shall close the prosecution case against the

[121] Hilda Innocent vs. R Criminal Appeal No. 181 of 2017 CAT Bukoba (unreported)

[122] Fredy Sichembe vs Republic, Criminal Appeal No. 148 of 2018, CAT (unreported).

[123] William Kisanga vs Republic, Criminal Appeal No. 90 of 2017, CAT (unreported), Flano Alphonce Masalu@Singu and 4 others vs Republic (supra), Yuda John vs Republic, Criminal Appeal No.238 of 2017 CAT (unreported), Amani Bwire Kilunga vs Republic, Criminal Appeal No.372 of 2019 CAT (unreported).

[124] Mohamed Nuru Adamu and six others vs Republic, Criminal Appeal No. 130 of 2019, CAT (unreported), Hando Dawido vs Republic, Criminal Case No. 107 of 2018, CAT Arusha(unreported), Robert Majendo vs Republic, Criminal Appeal No. 428 of 2017, CAT (unreported)

[125] Amani Bwire Kilunga vs Republic, Criminal Appeal No. 372 of 2019, CAT (unreported), Peter Sagadege Kashuma vs Republic, Criminal Appeal No. 219 of 2019, CAT (unreported), Onesmo Alex Ngimba vs Republic, Criminal Appeal No. 157 of 2019, CAT (unreported)

accused. However, it is now a well-established principle of law under provisions of Section 229 and 230 of CPA indicating that the prosecutor who opens the case against the accused is obliged to close the case for the prosecution upon being satisfied that the witnesses called to give evidence in support of the charge have duly discharged that duty. The number of witnesses and substance of their evidence is determined by the prosecutor who calls such witnesses[126]

The prosecution has control over all aspects of Criminal prosecutions and proceedings. It is not therefore either for the court or the defence to determine when the prosecution should close its case, or in respect of the court to make an order for such closure. The position is now settled that a magistrate or judge has no power, under our laws, to close the prosecution case.[127] The closure of the prosecution case by the trial magistrate or a judge, is not only a breach of natural justice but also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6) (a) of the Constitution.[128]

6.19 Accused to be informed of his rights under Section 231 of the CPA

Section 231 (1) and (2) and 293(2) of the CPA requires a trial Judge or Magistrate at the end of the prosecution's case to address the accused on his right to give evidence on oath or not and to call witnesses if any.[129] Failure by a trial court to comply with this mandatory provision is a fatal irregularity and vitiates subsequent proceedings[130] However, in certain circumstances the omission can be cured by overriding objective if the accused was not prejudiced[131]

6.20 Prima facie Case

It may not be easy to define what is meant by prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. The issue of credibility and weight are matters that ought to be determined at the end of the trial but not at the stage of determining whether an accused has a case to answer.[132]

[126] Abdallah Kondo vs Republic, Criminal Appeal No. 322 of 2015, CAT (unreported

[127] Matimo Sagala and another vs Republic, Criminal Appeal No. 7 of 2015, CAT (unreported),

[128] Abdallah Kondo vs Republic, Criminal Appeal No. 322 of 2015, CAT (unreported), Anosisye Tubuke Mwamkinga vs Republic, Criminal Appeal No. 331 of 2016, CAT Mbeya (unreported), Abdallah Kondo vs Republic Criminal Appeal no 322 of 2015 unreported. The Director of Public Prosecutions vs Joseph s/o Mseti @ Super Dingi and three others criminal appeals no. 549 of 2019 (unreported

[129] Charles Yona vs Republic, Criminal Appeal No. 79 of 2019, CAT (unreported

[130] Ulilo Hassan v. Republic, Criminal Appeal No.196 of 2018 (unreported)

[131] Salum Said Matangwa <G> Pangadufu Vs Republic, Criminal Appeal No. 292 Of 2018 CAT (Unreported)

[132] The Director of Public Prosecutions vs Philipo Joseph Ntonda, CAT Zanzibar, (unreported)

PART VII
EXHIBITS AND THEIR ADMISIBILITY

7.0 Meaning of exhibits

An exhibit refers to a document, record or any other tangible object formally admitted in court as evidence.[133] Or an exhibit can be anything which is connected to the case and which can be introduced before the court as evidence. The intended prosecution exhibits must be gathered in the course of investigation.

7.1 Types of exhibits

There are two major categories of exhibits; real exhibits and documentary exhibits.

1) Real exhibit is a thing whose characteristics are relevant and material. It is a thing that is directly involved in some event in the case.[134] These are tangible objects which may connect a person with an offence or incident, such as articles bearing fingerprints, footprints particles of dust, blood-stained clothing, hairs and fibres Instruments which used or facilitated in committing an offence, such as car, guns, knives, arrows etc.

2) Documentary exhibit are exhibits which are in a written form.[135] They must be relevant and directly involved in some events of the case. Some of these documentary exhibits gathered in course of investigation include (Government Analyst report, Fingerprint expert report, handwriting expert report, Medical Reports etc), Bank statement, cybercrime expert report, caution and extra judicial statement etc.

7.2 Chain of custody

Chain of custody is the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime rather than for instance, having been planted fraudulently to make someone appeal guilty. The chain of custody requires that from the moment the evidence is collected its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.[136] The position is reflected in Section 38 of CPA, Section 35 of the Police Force and Auxiliary Services Act, and Police General Orders (PGO) No. 229;-

[133] The Judiciary of Tanzania, Exhibit Management Guidelines, September 2020.pg 3

[134] The Director of Public Prosecutions Vs Sharrif s/o Mohamed@ Athuman and Six Others Criminal Appeal No. 74 of 2016, CAT at Arusha (unreported)

[135] The Judiciary of Tanzania, Exhibit Management Guidelines, September 2020.pg 3

[136] Paulo Maduka & 4 Others v. Republic, Criminal Appeal No. 110 of 2007, CAT (unreported), Albert Mendes vs Republic, Criminal Appeal No. 473 of 2017 CAT (unreported), Azimio Machibya Matonge vs Republic, Criminal Appeal No.35 of 2016 CAT (unreported), Kaenge Christopher vs Republic, Criminal Appeal No.187 of 2016 CAT (unreported).

The law requires that all procedures in respect of the chain of custody be adhered to as it is the cardinal principle that courts of law have enormous duty to scrutinize and re-evaluate the evidence, this duty includes ensuring the authenticity of the tendered evidence. This duty is exceeded by the principle of chain of custody whereas the court has to assess how the exhibit found its way to the courtroom from the time it was seized to its tendering in Court.

7.3 Relaxation of the principles of chain of custody

It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. This will depend on the prevailing circumstance.[137] Where there is a confession by the accused person chain of custody becomes less significant.[138]

7.4 Objection as to chain of custody

Chain of custody in whatever circumstance can conveniently be established upon closure of prosecution's case and not otherwise. Under such circumstance, it cannot be a base of objection during admissibility of an exhibit.[139]

7.5 Disposal of exhibits

During investigation, police officers may get involved in making applications for orders of disposal before commencement of the trial depending on the nature of the exhibits. Section 353(2) of the CPA allows such applications for disposal of exhibits that are subject to speedy and natural decay. The order of disposal from the magistrate must be obtained and the inventory be filled. The law requires that the order of disposal must be issued in the presence of the accused person.

It is further provided under Section 353(1) of the CPA, that where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto, within a period of twelve months after the final disposal of the proceedings or if any appeal is entered in respect thereof, the thing may be sold, destroyed or otherwise disposed of in such manner as the court may by order direct and the proceeds of its sale be paid into the general revenues of the Republic.

Normally, the exhibits may be disposed of and an inventory be tendered in court the

[137] Issa Hassan Uki v Republic, Criminal Appeal No.129 of 2017 CAT (unreported), Kadiria Said Kimaro vs Republic, Criminal Appeal No. 301 of 2017, CAT (unreported), Anania Clavery Betela vs Republic, Criminal Appeal No.355 of 2017 CAT (unreported).

[138] Kileo Bakari Kileo and Four Others vs Republic, Consolidated Criminal Appeal No. 82 0f 2013 and 330 of 2015, CAT(unreported) & Slahi Jumanne Maulid vs Republic, Criminal Appeal No.292 of 2016 CAT (unreported).

[139] The Director of Public of Prosecutions vs Christina Biskasevskaja, Criminal Appeal No. 76 of 2016, CAT (unreported), Charles Abel Gasirabo@Charles Gazilabo and 3 others vs Republic, Criminal Appeal No.358 of 2019 CAT (unreported)

case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person. That is in accordance with paragraph 25 of the PGO No. 229

7.6 Admissibility of exhibits

Admissibility of exhibit is a point of law. The basic prerequisites of admissibility of evidence in a court of law are relevance, materiality, and competence. The general rule is that, unless it is barred by any rule or statute any evidence which is relevant, material and competent is admissible. On the contrary, any evidence which is irrelevant is inadmissible[140]

7.7 Who can tender exhibits?

Exhibits cannot speak for themselves. They have to be produced before the court by a competent witness who is able to give relevant, material and competent evidence.[141] However a prosecutor cannot assume the role of a prosecutor and a witness at the same time. It is only a witness who can tender an exhibit because he is capable of an examination upon oath or affirmation in terms of Section 198(1) of the CPA[142]

An exhibit therefore, can be tendered in court by any of the following persons: -

(a) Author or recipient or custodian),

(b) Owner,

(c) Addressee

(d) Seizing officer or arresting or investigation officer

(e) Any other persons who possessed or took part in possession of the exhibit albeit temporarily.

(f) An officer from a corporate entity to which an exhibit relates.

(g) Any person with information or knowledge of the exhibit.

7.8 Procedures for tendering exhibits

7.8.1 Laying Foundation

[140] The Director of Public Prosecutions vs Sharrif s/o Mohamed@ Athuman and Six Others Criminal Appeal No. 74 of 2016, CAT (unreported)

[141] Mirzai Pirbakhshi @ Hadji and 3 Others vs Republic Criminal Appeal No. 493 of 2016, CAT (unreported), The Director of Public of Prosecutions vs Christina Biskasevskaja, Criminal Appeal No. 76 of 2016, CAT (unreported), The Director of Public Prosecutions vs Shariff Mohamed @Athuman and six other, Criminal Appeal No. 74 of 2016, CAT Arusha(unreported), Jaffray Saidi Mwalimu vs Republic, Criminal Appeal No. 497 of 2019, CAT (unreported)

[142] Said Salum vs Republic, Criminal Appeal No. 499 of 2016, CAT DSM (unreported), Athuman Almas Rajabu vs Republic, Criminal Appeal No. 416 of 2019, CAT DSM (unreported), Msengi Selemani @ MC vs Republic, Criminal Appeal No.504 of 2019 CAT Dodoma (unreported), Shabani Rulabisa vs Republic, Criminal Appeal No. 88 of 2018 CAT Shinyanga (unreported), DPP vs Mienda Said Miaratu (1978) LRT 64

On admissibility of exhibits in courts of law, the law is well established that a witness seeking to tender any evidence must first lay a foundation by identifying it.[143] The witness should make a description of special mark on an item before it is shown to him and allowed to be tendered as an exhibit. Identification of the item should be established to the court beyond reasonable doubt.[144]

7.8.2 Right to comment on admissibility of an exhibit

Before admission of an exhibit, the accused person should be availed with right to comment on admissibility. The denial of the right to comment denies a right of fair hearing, occasions failure of justice and renders the exhibit to be discounted.[145]

7.8.3 Status of Exhibit admitted for Identification (ID)

The law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit, does not form part of the evidence and has no evidential value.[146]

7.8.4 Documents to be read after admission

A document should be actually admitted before it can be read out. Failure to read out documentary exhibits after its admission is fatal as it denies the accused person an opportunity to know or understand its contents. Each party to a trial must have opportunity to have knowledge of and comment on all evidence adduced or observations filed or made to influence the court's decision.[147] However, the exception to this long-established rule depends on the circumstance of each case.[148]

7.8.5 Admissibility of Electronic Evidence

Section 64A of TEA and Section 18 of Electronic Transactions Act, 2015 provides for criteria for admissibility of electronic evidence. For computer-generated information or another similar device to be admitted in evidence, the following conditions must be complied with.[149]

1. The reliability of how the data message/information was generated stored and communicated.

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[143] Christian Ugbechi Vs Republic, Criminal Appeal No. 274 of 2019, CAT (unreported) m, Robinson Mwanjisi & 3 others vs Republic (2003) TLR 218

[144] Huang Qin and Another Vs Republic, Criminal Appeal No. 173 of 2018, CAT(unreported)

[145] Joseph Maganga Mlezi and another Vs Republic, Criminal Appeal No. 536 & 537, CAT Tabora (unreported).

[146] Alex Mwalupulage @ Mamba vs Republic, Criminal Appeal No. 25 of 2020, CAT Iringa(unreported)

[147] Chrizant John vs Republic, Criminal Appeal No. 313 of 2015, CAT Bukoba (unreported) Ernest Jackson @ Mwandikaupesi and Hamza Said Remadhani vs Republic, Criminal Appeal No. 408 of 2019,CAT DSM (Unreported

[148] Shaban Hussein @ Makoba and another vs Republic, Criminal Appeal No. 287 of 2019, CAT Bukoba (unreported), Sebastian Michael and another vs Republic, Criminal Appeal No. 145 of 2018, CAT Mbeya (unreported), Hassan Said Twalib vs Republic, Criminal Appeal No. 95 of 2019, CAT Mtwara (unreported),),

[149] William Joseph Mungai vs COSATO David Chumi and two others, Misc. Civil Cause (Election Petition) No. 8 of 2015, HC Iringa (Unreported), Emmanuel Godfrey Masonga vs Edward France Mwalongo and two others, Misc. Civil Cause No. 6 of 2015, HC Njombe (Unreported).

2. The reliability of how the integrity of the data message was maintained, i.e., the innocence of the computer system or similar device where the said information was generated, stored, and preserved.

3. The manner in which the original was identified.

7.8.6 Proof of authenticity of electronic documents

The testimony of a witness on how electronic data message was generated, stored, communicated and maintained is of utmost importance. The witness must show how the original was identified prior to tendering. There is no requirement of law under Section 18 of ETA that before an electronic record is admitted, an affidavit testifying as to its authenticity must be filed.[150] The prosecutor has a duty to lead the witness to prove authenticity of electronic document set out under 18(3) of ETA.[151]

7.8.7 Admissibility of Banker's Book

Sections 78A and 79 of TEA provide prerequisite conditions admissibility of an electronic banker's book. These conditions are;--

1. The witness has to show while testifying that the Entry and Retrieval was made in the usual ordinary course of business.

2. Custody. The witness must show that the banker's book is in the bank's control, and by their position, they are the custodian of the system, etc.

3. The witness has to show how the retrieval of the document was done, showing the accuracy of the printout

4. Verification of copy. The witness has to show that the print-out statements or documents were examined with the original entry and is correct. The proof under Section 79(1) of TEA shall be given by person who has examined the copy with the original entry, and may be given either orally or by an affidavit.[152]

7.9 Confession

A confession is an unequivocal admission by an accused person of having committed an act that in law amounts to a crime. It is also an admission to facts which substantially constitute the offence. Under Section, 3(1) (a) (b) (c) and (d), of TEA a confession to a crime may be oral, written, by conduct, and/or a combination of all of these or some of these. In short, a confession need not be in writing and can be made to anybody provided it is voluntarily made.[153] Written confession includes extra judicial statement and Caution statement.

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[150] Freeman Aikael Mbowe and 7others vs. Republic, Criminal Appeal No. 76 of 2020 (Unreported)

[151] Stanley Murith Mwaura vs Republic, Criminal Appeal No.144 of 2019 CAT (unreported).

[152] Exim Bank (T) Ltd vs Kilimanjaro Coffee Company Limited;- Commercial Case No. 29 of 2011 (High Court Commercial Division), Nyangarika, J at pages 9 -12.

[153] Patrick Sanga vs Republic, Criminal Appeal No.213 of 2008 CAT (unreported), Ally Mohammed Mkupa vs Republic, Criminal Appeal No.2 of 2008 CAT Mtwara (unreported), Umalo Mussa vs Republic, Criminal Appeal No.150 of 2005 CAT (unreported).

7.9.8 Ways to determine truthfulness of the confession

There are several ways in which a court can determine whether or not what is contained in a statement is true. First, if the confession leads to the discovery of some other incriminating evidence. Second if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details but the maker. Third, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, and evidence generally - especially with regard to the central story (and not in every detail) and the chronology of events. Lastly, the facts narrated in the confession must be plausible.[154]

7.9.9 Extra-judicial statement

Extra judicial statement is a statement freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrates' Courts Act, or a Justice of the Peace. The procedures of recording extra judicial statement are provided by "***A Guide for Justice of the Peace**' which* requires the Justice of the Peace to observe, among other things, the followings;-

(a) The time and date of his arrest

(b) The place he was arrested

(c) The place he slept before the date he was brought to him

(d) Whether any person by threat or promise or violence has persuaded him to give the statement

(e) Whether he wishes to make the statement of his own free will.

(f) If he makes a statement, the same may be used as evidence against him.

No law prescribes the time limit within which an accused person may be taken before a Justice of the Peace to record his extrajudicial statement.[155]

7.9.10 Cautioned statement

When a police officer is interviewing a person in order to ascertain whether he has committed an offence, he has to record or cause such interview to be recorded. This requirement is mandatory unless it is in all circumstances impracticable to do so. When the person interviewed makes a confession either orally or in writing relating to an

[154] Michael Mgowole and Another vs Republic, Criminal Appeal No 205 of 2017, CAT (Unreported).

[155] Mpemba Mashenene vs Republic, Criminal Appeal No.557 of 2015 CAT (unreported), Joseph Stephen Kimaro & Robert Raphael Kimaro vs Republic, Criminal Appeal No. 340 Of 2015, CAT (unreported), Japhet Thadei Msigwa vs Republic, Criminal Appeal No. 367 of 2008 (unreported), Andius George Songoloka and two (2) others vs Republic, Criminal Appeal No. 373. of 2017, CAT (Unreported), Geofrey Sichizya vs D.P.P, Criminal Appeal No. 167 of 2017 CAT (unreported), Vicent Ilomo vs Republic, Criminal Appeal No 337 of 2017 CAT (unreported), Sylvester Fulgence and Vedastus Sylvester vs Republic, Criminal Appeal No. 507 Of 2016 CAT (unreported), Khalid Mohamed Kiwanga and another vs Republic, Criminal Appeal No. 223 of 2019, CAT (Unreported), Maige Nkuba vs Republic, Criminal Appeal No. 551 of 2016, CAT (Unreported)

offence, the police officer shall either immediately during the interview or immediately after the interview is completed make a record in writing.

The manner of recording such cautioned statements is regulated by Sections 57& 58 of the CPA. The circumstances in which the two kinds of cautioned statements are taken are different. The one taken under Section 57 may be as a result either of answers to questions asked by the police officer or partly as answers to questions asked and partly volunteered statements. The statement under Section 58 is a result of wholly volunteered and unsolicited statement by the suspect.[156].

Section 50 (1) (a) of the CPA requires cautioned statements of suspects to be recorded within four (4) hours after the suspect is under restraint. Non-compliance of Sections 50 and 51 of the CPA renders the cautioned statement inadmissible. Such period may be extended as per Section 51(a) (b) of the CPA.

However, there are exceptions to the four hours rule in respect of recording cautioned statements which are stipulated under Section 50(1)(b) and (2) of the CPA.[157] Lack of certification in the cautioned statement is a procedural matter which does not affect the weight attached to the substance in the cautioned statement.[158] Cautioning the accused with an offence without citing the relevant law contravened is not fatal. The law governing interviewing of persons under restraint is Sections 52, 53, 56, 57, and 58 of the CPA. Section 57 and 58 of the CPA do not require mentioning the provision of law contravened.[159]

7.9.11 Weight of Repudiated statements or Retracted statement

The basic difference between retracted and repudiated confessions is that, a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant on the ground that he had been forced or induced to make the statement. On the other hand, a repudiated statement is one which the accused person avers that he never made it.[160]

The court can enter a conviction based on a repudiated or retracted statement even if it is not corroborated so long as it is satisfied that such confession is nothing but the truth. In exceptional circumstances, the law is that where an accused person retracts

[156] Ramadhan Salum v.Republic, Criminal Appeal No. 5 of 2004 (unreported),

[157] Mpemba Mashenene vs Republic, Criminal Appeal No.557 of 2015 CAT (unreported), Joseph Stephen Kimaro & Robert Raphael Kimaro vs Republic, Criminal Appeal No. 340 Of 2015, CAT (unreported), Japhet Thadei Msigwa vs Republic, Criminal Appeal No. 367 of 2008 (unreported), Andius George Songoloka and two (2) others vs Republic, Criminal Appeal No. 373. of 2017, CAT (Unreported), Geofrey Sichizya vs D.P.P, Criminal Appeal No. 167 of 2017 CAT (unreported), Vicent Ilomo vs Republic, Criminal Appeal No 337 of 2017 CAT (unreported), Sylvester Fulgence and Vedastus Sylvester vs Republic, Criminal Appeal No. 507 Of 2016 CAT Tabora (unreported), Khalid Mohamed Kiwanga and another vs Republic, Criminal Appeal No. 223 of 2019, CAT (Unreported), Maige Nkuba vs Republic, Criminal Appeal No. 551 of 2016, CAT (Unreported)

[158] Chacha Jeremia Murimi and 3 others vs Republic, Criminal Appeal No. 551 of 2015, CAT (Unreported), DPP vs James Msumule Jembe &4 others, Criminal Appeal No.397 of 2018 CAT (unreported), Mohamed Hamis @Sakisi vs Republic, Criminal Appeal No.97 of 2008 CAT (unreported).

[159] Andius George Songoloka and two (2) others vs Republic, Criminal Appeal No. 373. of 2017, CAT (Unreported), Issa James vs Republic, Criminal Appeal No. 110 of 2020 CAT Musoma (unreported).

[160] Tuwamoi V, Uganda [1967] E.A 84

his confession, the court can convict him on the uncorroborated confession provided that it warns itself of the dangers of acting solely on such confession and if it is fully satisfied that the confession cannot be but true.[161]

7.9.12 Trial within trial vis-à-vis Inquiry

It is a trite law that there is no single point in time the courts conduct trial within trial or inquiry except when the voluntariness of the accused's confession is examined.[162] Once an objection has been raised on voluntariness of the cautioned statement, the trial magistrate or Judge is enjoined to conduct trial within trial or inquiry to establish the voluntariness of the cautioned statements. It is elementary principle that the common practice is that during the trial within a trial or inquiry, the statements at that stage are marked only for identification purpose.[163] Trial within Trial is applicable in the High Court, while an inquiry is for subordinate courts. If the accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted and not during cross-examination or defence.[164]

Procedure (modus operandi) to be followed by a subordinate court in determining the voluntariness of such statement should be the same as in High Court.[165]

The procedure entails the followings: -

(a) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.

(b) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of that aspect of voluntariness. The witness must be sworn or affirmed as mandated by Section 198 of the CPA.

(c) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.

(d) Then the prosecution to re-examine its witness.

(e) When all witnesses had testified, the prosecution shall close its case.

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[161] Geofrey Kitundu @ Nalogwa and another vs Republic, Criminal Appeal No. 96 of 2018, CAT (Unreported), Dickson Elia Shapwata and another vs Republic, Criminal Appeal No.92 of 2007 CAT (unreported), Hamisi Juma Chaupepo @Chau vs Republic, Criminal Appeal No. 95 of 2008 CAT (unreported), Kulwa Athumani @ Mpunguti, and three others vs Republic, Criminal Appeal No. 29 of 2005- CAT (unreported), Flano Alphonce Masalu @Singu and fours (4) others vs Republic, Criminal Appeal No. 366 of 2018, CAT (unreported), Michael Mgowole and Shadrack Mgowole vs Republic, Criminal Appeal No. 205 of 2017, CAT (Unreported).

[162] Saganda Saganda Kasazu vs Republic, Criminal Appeal No.53 of 2019 CAT (unreported).

[163] Ausi Mamu and two others vs Republic, Criminal Appeal No. 232 of 2004, CAT, (Unreported)

[164] Nyerere Nyague vs Republic, Criminal Appeal No.67 of 2010 CAT Arusha (unreported), Hatibu Ghandi & Others v. Republic [1996] TLR 12

[165] Shihobe Seni and Another v. Republic (1992) TLR 330, Andius George Songoloka and two (2) others vs Republic, Criminal Appeal No. 373. of 2017, CAT (Unreported), Emanuel Asajile and Davida Mayaula vs Republic, Criminal No.507 of 2017, CAT (unreported)

(f) Then the court is to call upon the accused to give his evidence and call witness, if any. They should be sworn or affirmed as in the prosecution side.

(g) Whenever a witness finishes the prosecution to be given opportunity to ask questions.

(h) The accused or his advocate to be given opportunity to re-examine his witnesses

(i) After all witnesses have testified, the accused or his advocate should close his case.

(j) Then a ruling to follow

(k) In case the court finds out that the statement was voluntarily made (after reading the ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. The court should accept and mark it as an exhibit. The contents should be read in court.

If the court finds out that the statement was not made voluntarily, it should reject it.[166]

7.9.13 Dying Declaration

A dying declaration is a statement made by a dying person as to the facts and circumstances which is likely to cause his death. Such statement is admissible in evidence in any proceedings in which the cause of death of the person making the statement comes into question and is admissible whether the person was or was not at the time the statement was made, in expectation of death.[167] The Court has defined it as a statement made by a deceased person as to the cause of his death.[168] It can either be written or oral.[169]

7.9.14 Weight of Dying Declaration

It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinised, and to be acted on, corroboration is highly desirable.[170] But where circumstances exist showing that deceased could not have been mistaken in identification of the accused, a conviction can result even though such was the only evidence against an accused person.[171]

[166] Chamuhiro Kirenge@Chamuhiro Julias vs Republic, Criminal Appeal No. 597 of 2017, CAT (unreported), Patrick Sanga vs Republic, Criminal Appeal No. 213. of 2008, CAT (Unreported)

[167] Police General Orders no 228 para 1.

[168] Onael Dausonmacha Vs. Republic Criminal Appealno. 214 Of 2007, Cat (Unreported)

[169] Crospery Ntagalinda @ Koro vs Republic, Criminal Appeal No. 312 of. 2015, CAT (unreported).

[170] Onael Dauson Macha Vs Republic, Criminal Appeal No. 214 Of 2007, CAT (Unreported), Emmanuel Mrefu @ Bilinje vs Republic, Criminal Appeal No. 271 OF 2007, CAT (Unreported), Ghati Mwita vs Republic, Criminal Appeal No. 240 OF 2011, CAT (Unreported), Crospery Ntagalinda @ Koro vs Republic, Criminal Appeal No. 312 of. 2015, CAT (unreported).

[171] R v. Marwa (1971) HCD 473 Uttam Vs The State of Maharashtra, Criminal Appeal No. 485 of 2012, Supreme Court of India.

7.9.15 Admissibility of expert evidence

Expert evidence is evidence about a scientific, technical, professional, or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field.[172] The position of the law is that expert evidence is admissible in cases where specialized knowledge is required. It is also a position that for an expert to be believed by the court, he must furnish it with necessary scientific criteria for testing the accuracy of his conclusion to enable the Court to form its independent judgment by applying these criteria to the facts proved in the evidence.[173] The court laid down three requirements for expert witnesses to be credible.[174] These are;-

(1) That the expert must be within a recognised field of expertise

(2) That the evidence must be based on reliable principles, and

(3) That the expert must be qualified in the discipline.

7.9.16 Handwriting

Evidence of the identity of a handwriting expert receives treatment under Sections 47, 49 and 75 of TEA. Generally, handwriting or signatures may be proved on admission by the writer or by the evidence of a witness or witnesses in whose presence the document was written or signed. This is conveniently called direct evidence which offers the best means of proof. With such evidence, the prosecution needs not to waste its resources on the other methods. More often than not, such direct evidence has not always been readily available. To fill in the lacuna, the Evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts and evidence of persons who are familiar with the writing of a person who is said to have written a particular document. The third mode of proof under Section 75 of TEA is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the accused person.

7.9.17 Ballistic expert

Ballistic is the field of study of a weapon's firing characteristics especially used in criminal cases to determine a gun's firing capacity and whether a particular gun fired a given bullet.[175] Evidence of ballistic expert is guided by Section 205A of the CPA. Ballistic expertise is not a developed science where there can be regular course or training to be undergone in any institute and given the degree or diploma in regard thereto. One becomes an expert in ballistic by training and experience and constant observation.[176]

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[172] Bryan A, Garner, Black Law Dictionary 8 Ed.

[173] Tizo Makazi vs Republic, Criminal Appeal No. 532 of 2017 CAT (unreported), D.P.P vs Bashiru Rashid Omar vs DPP, Criminal Appeal No.309 of 2017 CAT Zanzibar (unreported).

[174] The DPP vs Shida Manyama @ Seleman Mabuba, Criminal Appeal No. 285 of 2012, CAT (Unreported),

[175] Bryan A, Garner, Black Law Dictionary 8 Ed.

[176] Ahmed Shilla Mkumbo vs Director of Public of Prosecutions, Criminal Appeal No. 235 of 2010, CAT Zanzibar (unreported)

7.9.18 Finger Prints comparison

Fingerprint comparison is the process of comparing two friction ridge impressions to determine if they come from the same source. Finger print examiners compare unknown fingerprints from crime scene or other items of evidence to know finger prints and make a determination as to the source of the prints.

It is common ground that no two persons including twins have ever been found to have the same fingerprints. It is also scientifically proven that fingerprints also vary between one's own fingers. Putting its uniqueness aside, fingerprints are good source of evidence because for centuries forensic scientists have used fingerprints in criminal investigations as a means of scientific identification. Fingerprint identification is one of the most important criminal Investigation tools due to their persistence and their uniqueness. A person's fingerprints do not change over time. The friction ridges which create fingerprints are formed while inside the womb and grow proportionally as the baby grows.[177] Evidence of fingerprint is governed by Section 47 of TEA and Sections 59 and 204 of CPA.

7.9.19 Human DNA

Deoxyribonucleic Acid or DNA is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. [178]

Collection and analysis of samples for Human DNA is governed by the *Human DNA Regulation Act 2009*. The Process should be clearly followed to ensure reliability and maintaining chain of custody. Scientists must explain in court what is Human DNA, the process of Human DNA, and the characteristics of an individual band of Human DNA.[179]

7.9.20 Medical Report by a Medical Practitioner

"Medical practitioner" means a person holding a degree, advanced diploma, diploma or certificate in medicine or dentistry from an institution recognized by the Council, with his level of competency and registered, enrolled or enlisted to practice as such under this Act.[180]

[177] Muganyizi Peter Michael & 3 others v Republic, Criminal Appeal No.144 of 2020 CAT (unreported).

[178] Anil @ Anthony Arikswamy Joseph .. Appellant Vs State of Maharashtra, Criminal Appeal Nos.1419-1420 Of 2012,Supreme Court of India

[179] Mboje Mawe and four others vs Republic, Criminal Appeal No. 86 of 2010, CAT (unreported), Lameck Bazil and another vs Republic, Criminal Appeal 476 of 2016, CAT (unreported), Hamis Shaban @ Hamis (Ustadhi) vs. Republic, Criminal Appeal No. 259 of 2010, CAT (unreported)

[180] The medical, dental and allied health professionals act, 2017

It includes a clinical officer who is defined to mean a licensed practitioner of medicine in East Africa and parts of Southern Africa, who is trained and authorized to perform general or specialized medical duties such as diagnosis 'and treatment of disease and injury, ordering and interpreting medical tests performing routine medical practice.[181]

Medical report applicable in Subordinate and the High Court respectively is covered by Sections 240 and 291 of the CPA. The provisions state that; - firstly, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter shall be receivable in evidence. Secondly questions as to the authenticity of signature of the medical witness appended on the document as well as the witness' qualification are matters of evidence as opposed to the matters of admissibility. Thirdly once the medical document is received in evidence the medical witness may be called by the court if it deems necessary or shall be so called if required by the accused or his advocate for examination or cross examination.[182]

7.9.21 Trophy valuation certificate

Under Section 86 (4) of the WCA, a trophy valuation certificate can only be issued by the Director or a wildlife officer from the rank of wildlife officer. Although the WCA does not define who is a "game ranger" but "A game ranger, also known as a game warden or conservation officer, is a member of law enforcement. This person is charged with protecting wildlife in specified area to ensure that population levels of certain types of wildlife are kept at biologically successful level.

A game warden, wildlife officer, wildlife ranger and a game ranger are same persons whose main task is to protect the wildlife. Therefore, there is no difference between a "wildlife officer" a "wildlife ranger", a "game ranger" or a "wildlife ranger". The terms are just a matter of semantics to mean a wildlife officer, designated officer within Section 86 (4) of the WCA, to assess, value and issue the trophy valuation certificate.[183]

[181] Charles Bode vs Republic, Criminal Appeal No. 46 of 2016, CAT (unreported) Filbert Gadson @Posco vs Republic, Criminal Appeal No. 267 of 2019, CAT (unreported)

[182] The Director of Public Prosecution Vs Emmanuel Erasto Kibwana, Criminal Appeal No. 576 of 2015, CAT at (Unreported)

[183] Jamal Msombe and another vs Republic, Criminal Appeal No. 28 of 2020, CAT (Unreported)

PART VIII
DEFENCE

8.0 Introduction

After closure of the prosecution case at subordinate court pursuant to Section 231 of the CPA, if it appears the case is made to the accused person sufficiently to require him to make a defence either in relation to the offence charged or minor and cognate offence is liable to be convicted, the court shall explain the substance of the charge to the accused person and inform him of his rights. Then the Court shall call on the accused person to enter his defence save where the accused person does not wish to exercise any of those rights.

At the High Court the procedure is that, the accused person or his advocate may open the case stating the fact or law on which he intends to rely upon, and make such comments as he thinks necessary on the evidence for the prosecution pursuant to Section **294** of the CPA. The accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses, if any, and after re-examination of such witnesses he may close his case**.**

A magistrate or judge has no power, under our laws, to close the defence case. The defence side is at liberty to close its case after being satisfied that the evidence adduced is sufficient as was intended to be adduced.[184]

It is common knowledge that although the accused has no duty to prove his innocence, he is expected to make the theme of his defence known so as to make the trial fair even to the prosecution, and the theme may be deduced from the line of cross examinations or notices ".[185]

8.1 Lies of an accused person in his defence

Lies of an accused person may corroborate the prosecution case although the same cannot be the basis for convicting him. Such lies if material will be taken into account in determining the guilt of the accused. People sometimes lie for a just cause or out of shame or just to conceal a disgraceful behaviour. For a lie to be corroborative of the prosecution case it must be material to the issue.[186]

8.1.1 Co-accused evidence

It is well established that where an accused person gives evidence, that evidence may be taken into consideration against a co-accused, just like any other evidence.

[184] Anosye Tubuke Mwankinga vs Republic, criminal appeal no. 331 of 2016, CAT (unreported), Abdallah Kondo vs Republic, criminal appeal no 32 of 2015, CAT (unreported).

[185] John Madata Vs Republic, criminal appeal no. 453 of 2017, CAT, (unreported), Mohamed Katindi Vs Republic [1986] TLR 134, Hatibu Gandhi Vs Republic [1996] T.L.R 12

[186] Felix Lucas Kisinyila vs Republic, Criminal appeal no. 129 of 2002 CAT (unreported), Nkanga Daudi Nkanga vs Republic, Criminal appeal no. 316 of 2013, CAT (unreported), William Onyango Nganyi @ Dadii 5 Others vs Republic, criminal appeal no. 9 of 2016 CAT (unreported), Paschal Mwita And 2 Others v R (1993) TLR 295, Amitabachan Machaga @ Gorong'ondo vs Republic, criminal appeal no. 271 of 2017, CAT (unreported).

Evidence which is inconsistent with that of the co-accused may be just as injurious to his case as evidence that expressly seeks to implicate him.[187]

8.1.2 Defence advancing prosecution case

If the accused person in the course of his defence gives evidence that advances the prosecution case further, the court will be entitled to take into account such evidence in deciding on the question of his guilt.[188]

8.2 Possible defences

There are several defences that can be raised by accused persons during trial. They include: -

8.2.1 Defence of alibi

Alibi" is a Latin adverb, meaning" elsewhere' or '*at another place*". Thus, if an accused person alleged that he was not present at a place at the time an offence was committed' and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi[189]

A genuine alibi is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one[190].The Legal framework for alibi is enshrined under Section 194 of the CPA and Section 42 of the EOCA.

8.2.2 Proof of alibi

Generally, the accused person has to prove his alibi on balance of probabilities.[191] If the person charged with a serious offence alleges that at the time when it was committed, he was in some other place where he is well known and yet he makes no effort to prove that fact, which if true, could easily be proved, the court must necessarily attach little weight to his allegation.[192]

Under Section 194(4) of the CPA, the law requires the notice to be furnished, no form of the notice envisage by this provision has been prescribed, but the notice must furnish sufficient particulars of the alibi so as to enable the prosecution to verify the truth of those particulars and if necessary, assemble the evidence in rebuttal, and that the notice should be given before the main hearing. In absence of notice the court has the discretion of according no weight.[193]

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[187] Gift Mariki 2 Other vs Republic, criminal appeal no. 289 of 2015, CAT (unreported), Mattaka and Others V. R [1971] E. A 495

[188] Hamis Chuma @ Hando Mhoja. vs Republic, criminal appeal no. 36 of 2018 CAT (unreported), Muhsin Mfaume vs Republic, criminal appeal no. 99 of 2012, CAT (unreported).

[189] Msafiri Benjamini Vs Republic, Criminal Appeal No 549 of 2020, CAT (unreported).

[190] Kubezya John Vs Republic, criminal appeal No. 488 of 2015, CAT (unreported).

[191] Kubezya John Vs Republic, Criminal Appeal No.488 of 2015 CAT (unreported).

[192] Maramo Slaa Hofu And 3 Others vs Republic, criminal appeal No. 246 of 2011, CAT (unreported), Kubezya John Vs Republic , Criminal Appeal No.488 of 2015 CAT (unreported).

[193] Director Of Public Prosecutions Vs Nyangeta Somba And Twelve Others [1993] T.L.R 69, Kubezya John Vs Republic, Criminal Appeal No.488 of 2015 CAT (unreported).

8.2.3 Defence of Insanity

In terms of Section 12 of the Penal Code, every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. However, that rule is not without exceptions. Under Section 13 of the Penal Code, a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is suffering from any disease affecting his mind hence making him incapable of understanding what he is doing, incapable of appreciating that he ought not to do the act or omission or does not have control of the act or omission.

Insanity is raised so as to show that the accused lacked the culpable mental state required as an element of the offence charged. It is relied on as defence from criminal culpability. Various jurisdictions have adopted means or ways to conduct an incapacity test which examines whether an accused person was able to appreciate what he was doing when he committed an offence or that his illness left him unable to distinguish right from wrong. With respect to his criminal conduct in our jurisdiction, the defence of insanity is governed by Sections 216, 219 and 220 of the CPA.[194] These provisions apply in three different circumstances;- -

Firstly, on circumstances under Section 220(1) of the CPA the court has the discretion to adjourn the proceedings and order the accused person to be examined in a mental hospital. In exercising the discretion, it is necessary first to lay a ground upon which the court could find that the accused person may have been insane at the time of committing the offence.[195]

Secondly, on circumstances under Section 216 to 218 of the CPA it arises where it is noted that an accused person cannot follow the proceedings at his trial. The concern here is with the accused's mental status at the time of trial not during the commission of the offence. The accused's ability to stand trial becomes the major concern of the court, its invocation and its distinction with the procedure under Sections 219 and 220 of the CPA.[196]

Thirdly, on circumstances under Section 219 of the CPA, where insanity is pleaded

as a defence, the issue, would be as to the state of mind of the accused at the time of the commission of the allege act.[197]

8.2.4 Defence of Intoxication

According to ***Section 14(2) (a) and (b) of the CPA***, intoxication can be a defence under the following circumstances;-[198]

(1) if by reason thereof, the person charged at the time of the act or omission

[194] Thomas Pius Vs Republic, Criminal Appeal No. 145 Of 2019, CAT (Unreported)
[195] Majuto Samson vs Republic, Criminal Appeal No. 61 of 2002 CAT (unreported)
[196] Thomas Pius Vs Republic, Criminal Appeal No. 145 Of 2019, CAT (Unreported)
[197] Francis Siza Rwanda vs Republic, Criminal Appeal No. 17 of 2019 CAT (unreported).
[198] Mwale Mwansanu vs Director of Public of Prosecution, criminal appeal No. 105 of 2018, CAT (unreported

complained of, did not understand what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person, or

(2) If the person charged, at the time of the act or omission complained of did not understand what he was doing and was by reason of intoxication insane temporarily or otherwise.

There is no other avenue for intoxication to be considered a defence, other than these.

8.2.5 Defence of person or property

Self-defence is availed under Section 18 of the Penal Code. For the accused to bring himself within the ambit of the provision of the law, as opposed to mere denials and lamentations, he is bound to lead evidence showing, albeit on a balance of probability that, he acted in good faith, with an honest belief, based on reasonable ground that his acts were necessary for the preservation of his own life or limb, in the circumstances. It is raised where the unlawful act being or about to be committed by the deceased, was of such a nature as could reasonably cause fear that will cause his own death, or grievous harm to his body could be the result of that unlawful act which was being or was about to be committed by the deceased.[199]

In exercising the right of self-defence or defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence. A person shall be criminally liable for any offence, resulting from excessive force used in self-defence or in defence of another or in defence of property. Any person, who causes the death of another as a result of excessive force used in defence, shall be guilty of manslaughter.[200]

8.2.6 Defence of Provocation to murder

Under Section 202 of the Penal Code, for an act or insult or conduct to constitute provocation in law, at least the following conditions must be established;[201]

(1) the act or insult must be wrongful, lawful act or conduct cannot constitute provocation,

(2) the person assaulted because of the provocation must be one who offered the provocative act, insult or conduct,

(3) the provocative act, insult or conduct must have been directed to the person committing the assault or a person who stands to him in the relationship,

(4) The provocative act or insult must have been done or offered in the presence of the person committing the insult,

[199] Magumudu Hamisi Chupa @ Mbavu vs Republic, Criminal Appeal No. 287 of 2021, CAT (unreported).
[200] Section 18B(1)(2)(3) of the CPA.
[201] Hamis Chuma @ Hando Mhoja vs Republic, criminal appeal no. 36 of 2018, CAT at (unreported), Mashaka Mbezi vs Republic Criminal appeal no. 162 of 2017unreported, CAT (unreported).

(5) The test is the ordinary person in society. This is to say, peculiar or eccentric qualities of the person committing the assault are not relevant when considering whether a person would be provoked by the act or insult and,

(6) The person provoked must have been deprived of the power of self-control.

In terms of Section 201 of the Penal Code, when the defence of provocation is successfully established pursuant to Section 202 of the Act, the accused person shall be convicted of manslaughter.

PART IX
JUDGMENT AND SENTENCES

9.0 Composition of judgment

The manner on contents of the judgment is availed under Section 312 of the CPA. The law requires the judgment to contain the point(s) for determination, the decision, and the reasons for that decision and shall be dated and signed by the presiding officer as of the date on which it was pronounced in open court.

A good judgment is clear, systematic, and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable the appellate court to know what were the facts and findings of the trial court. A judgment must convey some indications that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored.[202]

For a judgment of any court of justice to be a reasoned one, it must contain an objective evaluation of the entire evidence. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution, in order to find out which case is more cogent. In short, such evaluation should be a conscious process of analysing the entire evidence dispassionately in order to have an informed opinion as to its quality before a formal conclusion is arrived at.[203] However in case of omission by the trial court, the appellate court can step into shoes of the trial court and address the omission.[204]

9.3 Prohibition of extraneous matters

In every criminal trial a conviction can only be based on the weight of actual evidence adduced and it is dangerous and inadvisable for the trial judge to put forward a theory not canvassed in evidence or in counsel's speech.[205]

9.4 Conviction

In view of the clear mandatory language under Sections 235 (1) and 312 (2) of the CPA, there is no valid judgment when no conviction is entered. A valid judgment must contain a conviction. However, in case of omission has been made by failure to

[202] Hamis Rajab Dibagula vs Republic, Criminal Appeal No. 53 of 2001, CAT (unreported

[203] Michael s/o Joseph vs Republic, Criminal Appeal No. 506 of 2016, CAT (unreported), Seleman Nassoro Mpeli vs Republic, Criminal Appeal No. 3 of 2018, CAT DSM (unreported), Emmanuel Aloyce Daffa vs Republic, Criminal Appeal No. 131 of 2021, CAT (unreported).

[204] Hussein Idd and Another vs Republic, [1986] TLR 166, Joseph Leonard Manyota vs Republic, Criminal Appeal No. 485 of 2015 CAT (unreported), Ramadhani Abdala @ Namtule vs Republic Criminal Appeal No. 341 of 2019, CAT (unreported).

[205] Geoffrey Ntapanya And Another vs Dpp Criminal Appeal No. 232 of 2019 CAT (unreported), Augustino S/O Nandi vs D.P.P. Criminal Appeal No. 388 of 2017, CAT (unreported), Richard Otieno @ Gullo vs Republic, Criminal Appeal No. 367 of 2018, CAT (unreported).

pronounce a conviction, it may be cured by the rule of Maxims of Equity that "***Equity treats as done that which ought to have been done***". That means, the sentencing of an accused person implies conviction by the trial court.[206]

9.5 Substitution of conviction in minor and cognate offences

The requirements for substitution for minor and cognate offences are availed under Section 300 of the CPA. For a court to resort to this Section, the particulars of the offence sought to be substituted must be a combination of at least some particulars which in themselves constitute a minor offence. The word "cognate" is defined in the 1966 impression of Chamber of Twentieth Century dictionary to mean "***of the same family, kind or nature, related or allied***".

Though a magistrate or Judge has power under Section 300 of the CPA to convict the accused of a different offence from what he was originally accused of, still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy, the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence**.**[207]

9.6 Sentencing

Section 320 of the CPA requires the Court before passing the sentence to receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.[208] Sentencing comes after the conviction of an accused person, either after his own plea of guilty or after a full trial in a court of law. So, in law, a person is said to have been sentenced if he is charged under a law that creates a specific offense that can be judicially ascertained and which prescribes a specific punishment for the offense.[209]

9.7 Imposing maximum or minimum penalties

One effect which a maximum penalty may have, on occasion, is to lower the scale of punishment which courts might otherwise set for an offence. This flows from the off-repeated principle that the maximum sentence should be reserved for the worst examples of the kind of offence in question.

It is to be presumed that in fixing a maximum penalty the legislature must have had in mind the most aggravated circumstances which should be connected with commission of the offence. The maximum penalty should be imposed only rarely and in particularly shocking cases, otherwise, it is impropriate.[210]

[206] Musa Mohamed vs Republic Criminal Appeal No. 216 Of 2005, CAT (unreported), Jafari Ally Appellant vs Republic Criminal Appeal No. 170 of 2015, CAT (unreported), Aloyce Thomas @ Mabelee vs Republic, Criminal Appeal No. 8 of 2016, CAT (unreported).

[207] Kulwa Nassoro Mohamed vs Republic, Criminal Appeal No. 183 Of 2018, CAT (unreported), Richard Estomihi Kimei And Another vs Republic, Criminal Appeal No. 375 Of 2016. CAT (unreported), Director of Public Prosecution vs ACP Abdallah Zombe 8 Others, Criminal Appeal No. 358 of 2013, CAT (unreported), Emma Ngwada vs Republic, Criminal Appeal No. 406 Of 2013 Cat (unreported).

[208] Matiko S/O Chandruku @ Kehu Vs Republic, Criminal Appeal No. 139 Of 2020, CAT (Unreported

[209] Tanzania Sentencing Manual for Judicial Officers

[210] Hassani Charles vs Republic Criminal Appeal No. 329 of 2016, CAT (unreported).

However, in imposing the sentence the hands of the courts are tied when the sentence is couched in mandatory terms hence giving no room for judges to incorporate the sentence ought to be pronounced as prescribed.[211]

9.8 The use of the word "liable" in sentencing

The term 'liable' when used gives flexibility to the presiding Judge or Magistrate to exercise his discretion in sentencing depending on the circumstances of each case, after considering both the aggravating and mitigating factors. Words shall be liable to, do not in their ordinary meaning require that imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the Court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.[212]

9.9 Pre-conviction period spent by accused under Custody

The pre-conviction period spent by the accused person in custody cannot be counted or deducted as time served from the sentence to be imposed. The time spent by the accused under custody before being found guilty, convicted and sentenced, can be used as a mitigating factor in imposing sentence.[213]

9.10 Concurrent and consecutive sentence

Under Section 168(2) of the CPA, where a person commits more than one offence at the same time and in the same series of transactions, save in very exceptional circumstances, it is proper to impose concurrent sentences.[214] Concurrent sentence is defined as two or more sentences of jail time served simultaneously whereas consecutive sentence means two or more sentences of jail time to be served in sequence.[215]

When an accused person is convicted of two or more offences, separate sentences must be imposed for each count. It is a general practice that sentences shall run concurrently. A trial court only awards consecutive sentences in exceptional circumstances, such as the extreme gravity of a particular offence.[216]

9.11 Punishment for a first offender

Where the first offender is convicted, the emphasis should always be on the reformative aspect of punishment unless the offence is one of such serious nature that an exemplary punishment is required or unless the offence is so widespread that severe punishment is needed as shock deterrence.[217]

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[211] DPP, vs Ally Abdallah Pashua @ Kipevu Criminal Appeal No. 191 of 2014, CAT (unreported)
[212] Bahati John VsRepublic ,Criminal Appeal No. 114 Of 2019, Cat(Unreported
[213] Vuyo Jack vs Director of Public Prosecutions, Criminal Appeal No. 334 of 2016, CAT (unreported), Khamis Said Bakari vs Republic, Criminal Appeal No. 359 of 2017, CAT (unreported),).
[214] Stanley Murithi Mwaura vs Republic. Criminal Appeal No. 144 of 2019 CAT (unreported).
[215] Brian A. Garner, Blacks Law Dictionary , 8th Ed.
[216] Tanzania Sentencing Manual For Judicial Officers
[217] Yeremia @ Jonas Tehani vs Republic. Criminal Appeal No. 100 of 2017, CAT (unreported).

9.12 Sentence in murder case for a minor

The requirement of Section 26 (2) of the Penal Code is that, the sentence of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in lieu of the sentence of death, the court shall sentence that person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affair may direct, and whilst so detained shall be deemed to be in legal custody.[218]

9.13 Sentencing where the offender murdered several persons

In case the accused person is convicted on several counts of murder, sentence of death should be passed on one count. The logic encapsulated in this position is not far to seek; once a sentence in respect of the first count is executed, there will be no person against whom to execute the sentences in respect of the other counts.[219]

9.14 When appellate court can interfere with a sentence

The appellate court can interfere with the sentence of the trial court in the following circumstances;[220]

(i) Where the sentence is manifestly excessive or it is so excessive as to shock,

(ii) Where the sentence is manifestly inadequate,

(iii) Where the sentence is based upon a wrong principle of sentence,

(iv) Where a trial court overlooked a material factor,

(v) Where the sentence has been based on irrelevant considerations such as the race or religion of the offender,

(vi) Where the sentence is plainly illegal, as for example, corporal punishment is imposed for the offence of receiving stolen property; and

(vii) Where the trial court did not consider the time spent in remand by an accused person.

[218] Hamis Chuma @ Hando Mhoja vs Republic, Criminal Appeal No. 36 Of 2018 CAT (unreported), Wallii Abbdallah Kibutwa & 2 others v. Republic, Criminal Appeal No. 127 of 2003, CAT (unreported).

[219] Yustine Robert vs Republic, Criminal Appeal No. 329 of 20l7 CAT (unreported), Aliyu Dauda @ Hassan and 2 Other vs Republic, Criminal Appeal No. 282 Of 2019 CAT (unreported).

[220] Bahati John vs Republic, Criminal Appeal No.114 of 2019 CAT (unreported)

PART X
POST TRIAL PROCEEDINGS

10.0 Appeals

A person aggrieved by any finding, sentence or order made or passed by a trial court may appeal to the High Court by virtue of Sections 359,360,361,362 and 362 of the CPA. In accordance with Section 6(1) of AJA the person convicted on a trial or appeals held by the High Court or by a subordinate court exercising extended powers, may appeal to the Court of Appeal. The appeal process is initiated by filling a notice of appeal.

10.15 Notice of appeal to the High Court

In terms of Section 361(1) (a) and 379(1) (a) of CPA, an appeal is initiated by filling notice of appeal. Notice of appeal by a person other than the DPP should be filled within ten (10) days from the date of judgment. Notice by the DPP should be filed within 30 days after acquittal, finding, sentence or order against which he wishes to appeal against. Notice should be lodged in the trial court. Failure to file notice within the prescribed time deprives the High Court power to entertain the appeal.[221]

10.16 Notice of appeal to the Court of Appeal

Rule 68 of The Court of Appeal Rules, requires any person who desires to appeal to the Court of Appeal to give notice in writing, within thirty day from the date of that decision, and the notice of appeal shall institute the appeal the notice should be in triplicate lodged with the Registrar of the High Court where the decision against which it is desired to appeal was given.

10.17 Petition of appeal to the High Court

Sections 361(1) (b) and 379(1) (b) of the CPA requires the petition of appeal to be filed within 45 days from date of the finding, sentence or order. In computing the 45 days to file the petition of appeal, the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.[222] Notice of time and place shall hearing. Section 381(1) of the CPA the High Court has an obligation to cause notice to be given to the respondent or to his advocate. In circumstances where notice of time, place and hearing cannot be served on the respondent because he cannot be found through his address obtained by the court under Section 228 and 275, the notice shall be brought to his attention through publication in a newspaper three times, and at the end of that service the court shall proceed with the appeal in the absence of the respondent pursuant to Section 381 (2) of the, CPA.[223]

[221] Reverend Ernest K. Mrema vs Alex Mrema 6 Others Criminal Appeal No 387 Of 2017, CAT (unreported) and Rafael Chagula vs Director of Public Prosecutions (Dpp) Criminal Appeal No. 307 Of 2019, CAT (unreported).

[222] Lazaro Mpigachai vs Republic, Criminal Appeal No. 75 of 2018, CAT (unreported).

[223] Said Bakari vs Republic, Criminal Appeal No. 295 of 2021, CAT (unreported).

Notice of intention to appeal from subordinate court to High Court should have a specific prescribed format and title **"In the High Court of Tanzania"** although it should be filed in the District Court as per section 379(1) (a) of the CPA. This should also be the case for notice of appeal lodged under section 361(1) of the CPA by other appellants.[224]

10.18 Summary rejection of the Appeal

Summary dismissal is an exception to the general principle of Criminal law and Criminal Jurisprudence. When the power is exercised, the following should be taken into consideration;[225]

(i) The powers have to be exercised sparingly and with great circumspection,

(ii) The section does not require reasons to be given when dismissing an appeal summarily. However, it is highly advisable to do so,

(iii) It is imperative that before invoking the powers of summary dismissal a Judge or Magistrate should read thoroughly the record of appeal and the memorandum of appeal and should indicate he/she has done so in the order summarily dismissing the appeal,

(iv) An appeal may only be summarily dismissed if the grounds are that the conviction is against the weight of the evidence or that the sentence is excessive,

(v) Where important or complicated question of fact and/or law are involved or where the sentence is severe the Court should not summarily dismiss an appeal but should hear it,

(vi) Where there is a ground of appeal, which does not challenge the weight or evidence or allege that the sentence is excessive, the Court should not summarily dismiss the appeal but should hear it even if that ground appears to have little merit.

10.19 Determinations of grounds of appeal

In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is however, expected to address the grounds of appeal before it, though it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive grounds of appeal only or discuss each ground separately".[226]

[224] The Director of Public Prosecutions vs Sendi Wambura, Criminal Appeal No 480 of 2016 CAT (unreported). Farijala Shabani Hussein and Another vs Republic, Criminal Appeal No. 274 of 2012, (unreported).

[225] Popart Emanuel vs Republic, Criminal Appeal No. 200 of 2010, CAT (unreported).

[226] Nyakwama On Dare @ Okware vs Republic, Criminal Appeal No. 507 Of 2019, CAT (unreported).

10.20 Matters not raised at the first appellate court

Matters not raised by parties and canvassed by the first appellate court cannot be raised at second appellate court. However, the principle does not apply when the matter involves a point of law.[227]

10.21 Concurrent finding of the lower court

The Court sitting as a second appellate court has no power to interfere with the concurrent finding of fact by the two courts below. The Court can only do so where it is evident that such concurrent findings resulted from misapprehension, misdirection and non-direction of the evidence or omission to consider available evidence.[228]

10.22 Revision

The provisions for Revision are provided by Sections 372,373,374, 375 and 376 of the CPA. The High Court is empowered to call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. Revisional powers conferred to the Court are not meant to be used as an alternative to the appellate jurisdiction of the Court. Therefore, the Court cannot be moved to use its revisional jurisdiction where an applicant may invoke his/her right of appeal to the Court.[229]

Moreover, a revisional order under Section 373 of the CPA may be invoked without prejudice to an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence. It should be noted that although pursuant to Section 374 of the CPA the High Court may, in its absolute discretion, conduct revisional proceedings, in certain cases, in the absence of the parties, the said Section expressly stresses the peremptory requirement to hear the affected party in terms of Section 373 of the CPA.[230]

10.23 Interlocutory Orders

Under Section 359(3) and 372 of the CPA, it is provided that an interlocutory order is neither appealable nor revisable. However, an interlocutory decision can be revised or appealed against only if has determined the rights of the parties to finality, thus, there must be a finding, order or sentence passed by the subordinate court for the High Court to review. [231]

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[227] Eliah Bariki vs Republic, Criminal Appeal No. 321 of 2016, CAT Arusha (unreported)., Frank Kanani vs Republic Criminal Appeal No. 425 of 2018, CAT (unreported), George Mwanyingili vs Republic Criminal Appeal No. 335 of 2016, CAT (unreported).

[228] Asajile Henry Katule And Another vs Republic, Criminal Appeal No. 30 Of 2019, CAT (unreported), Julius Josephat vs Republic, Criminal Appeal No. 03 of 2017, CAT (unreported).

[229] John Lazaro vs Republic Criminal Application No.1 Of 2018, CAT (unreported).

[230] Dpp vs Bookeem Mohamed @ Ally And 6 Others, Criminal Appeal No. 217 Of 2019, CAT (unreported

[231] 1Freeman Aikael Mbowe 8 others vs Republic, Misc. Criminal Application No. 126 of 2018, HC DSM (unreported).

10.24 Review

Review is not to challenge the merits of decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party.[232] In the Court of Appeal the power of review is provided by Section 4 (4) of the AJA and the grounds of review are stipulated under Rule 66 of the Tanzania Court of Appeal Rules, 2019.

The principles laid for review are as follows;[233]

(i) The principle underlying a review is that the Court would not have acted as it had, if all the circumstances had been known,

(ii) A judgment of the final court is final and review of such judgment is an exception,

(iii) In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review,

(iv) The review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case,

(v) The power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law.

10.24.7Review is not an appeals in disguise

A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The principle underlying review is that the court would have not acted as it did, if all the circumstances had been known. In a properly functioning legal system, litigation must have finality, thus the Latin maxim of *debet esse finis litum* requires.[234]

10.24.8What amounts to manifest error on face of records

An error apparent on the face of the records must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably two opinions. A mere error of law is not a ground for review under this rule.

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[232] Maulid Fakhi Mohamed @Mashauri vs Republic, Criminal Application No. 120/7 of 2018, CAT (unreported).

[233] Sabato Thabit and another vs Republic, Criminal Application No. 17/04 of 2020 CAT(unreported), Mirumbe Elias@Mwita vs Republic, Criminal Application No.04 of 2015,CAT(Unreported)

[234] Ex F. 5842 D/C Maduhu vs Director Of Public Prosecutions, Criminal Application No. 46/06 Of 2019, CAT (unreported), Benedict Buyobe @ Bene vs Republic, Criminal Application No. 01 of 2019, CAT (Unreported), Muhsin Mfaume vs Republic, Criminal Application, No 43/01 of 2020, CAT (Unreported)

The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obviously and self-evident and does not require elaborate argument to be established.[235]

[235] Chandrakant Joshubhai Patel v. Republic, [2004] TLR 218, Seif Mohamed El-Abadan vs Republic, Criminal Application No. 8/12 Of 2020, CAT (unreported), SP Christopher Bageni Vs Director of Public Prosecutions, Criminal Aplication No. 63/01 of 2016, CAT (unreported), Andrew Shayo @ Bangimoto Vs Republic, Criminal Application No. 37/01 of 2019, CAT (Unreported)

PART XI
MISCELLANEOUS MATTERS

11.0 Doctrine of recent possession

The doctrine of recent possession can be applied where it is established that the accused person was found in possession of a recently stolen property and did not give a plausible explanation on how he came to possess it. For the doctrine to apply as a basis for conviction, the following must be proved;[236]

(i) The property was found with the suspect,

(ii) The property is positively proved to be the property of the complainant,

(iii) The property was recently stolen from the complainant,

(iv) The stolen thing constitutes the subject of the charge against the accused.

"The doctrine of recent possession can be sufficiently invoked upon proof of the unexplained possession of recently stolen property. This doctrine can be drawn even if there is no other evidence connecting the accused to the more serious offence. It will not apply where an explanation is offered which might reasonably be true.[237]

11.1 Doctrine of issue estoppels in Criminal Matters

The principle applies where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different and distinct offence. But as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law.[238]

In order to invoke the doctrine of issue of estoppel the parties in the two trials must be the same and the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be re-agitated in the subsequent trial. The difference between issue estoppel and the autrefois principle is that while the latter prevents the prosecution from impugning the validity of the verdict as a whole, the former prevents it from raising again any of the separate issues of fact which have been decided. There is no provision in the Criminal Procedure Act or the Evidence Act, 1967, which embodies the principle of issue estoppel. What is embodied in Sections 137 and 280 of the former Act is, as already pointed out, the autrefois principle, and what is embodied in

[236] Augustino Mgimba vs Republic, Criminal Appeal No.436 of 2019, CAT(unreported), Ndugulile Mandago vs Republic, Criminal Appeal No.58 of 2019 CAT (unreported), Dickson Kamala vs Republic, Criminal Appeal No.422 of 2018 CAT (unreported), Salum Rajabu Abdul @Usowambuzi vs Republic, Criminal Appeal No.219 of 2017 CAT (unreported)

[237] John Nkwabi @ Kakunguru Vs Republic, Criminal Appeal No. 443 'A' Of 2019, Cat (Unreported)

[238] Issa Athumani Tojo v R [2003] TLR 199. Julius Michael and others vs Republic, Criminal Appeal No.264 of 2014 CAT(unreported), DPP vs Ashamu Maulid Hassan and others Criminal Appeal No.37 of 2015 CAT (unreported)

s.123 of the latter Act (the Evidence Act) is estoppel by declaration, act or omission.[239]

The purposes of Doctrine of *issue of estoppel* are the following;[240]

1) Fairness to the accused who should not be called upon to answer questions already determined in his or her favour;-

2) The integrity and coherency of the criminal law

3) The institutional values of judicial findings and economy

11.2 Functus officio

It is trite law that when a court finally disposes of a case, it ceases to have jurisdiction over it. The court becomes *functus officio* when it disposes of a case by a verdict of not guilty or passing sentence or some orders finally disposing of the case.[241]

11.3 Contradictions of witnesses and discrepancy

Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case.[242] It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter.[243] When assessing the credibility of a witness, all the evidence, both oral and documentary (if any) must be considered and assessed, not just selected portions of the evidence. The third observation is that, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to the lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Therefore, contradictions, inconsistencies etc on trivial matters which do not affect the case of the prosecution case should not be made ground on which the evidence can be rejected in it's entirely.[244]

11.4 Consent and certificate of the DPP in economic offences

Under Section 3 of the EOCCA, the jurisdiction to try economic crimes is solely vested with the High Court sitting as an economic crimes court upon the Consent of the

[239] Issa Athumani Tojo (supra)

[240] Julius Michael and others vs Republic, Criminal Appeal No.264 of 2014 CAT (unreported), DPP vs Ashamu Maulid Hassan and others Criminal Appeal No.37 of 2015 CAT (unreported).

[241] Karori Chogoro vs Waitihache Marengo Civil Appeal No.164 of 2018, Miburo Cosmas Versu Republic Criminal Appeal No. 519 Of 2016, CAT (Unreported)

[242] Armand Guehi vs Republic, Criminal Appeal No. 242 of 2010 CAT(Unreported), Eliah Bariki Vs Republic, Criminal Appeal No. 321 Of 2016, CAT (Unreported)

[243] Dickson Elia Nsamba Shapwata &. Another V. Republic, CriminalAppeal No 92 of 2007 CAT (Unreported)

[244] Deus Josias Kilala@Deo vs Republic, Criminal Appeal No. 191 of 2018 CAT (unreported), Marmo Slaa Hofu and others vs Republic, Criminal Appeal No. 246 of 2011 CAT (unreported), Christian Ugbechi vs Republic, Criminal Appeal NO. 274 of 2019 CAT (unreported), Shabani Haruna@Dr. Mwagilo vs Republic, Criminal Appeal No. 396B of 2017 CAT (unreported), Abiola Mohamed @ Simba vs Republic, Criminal Appeal No.291 of 2017 CAT (unreported), Mohamed Said Matula [1995] TLR

Director of Public Prosecution pursuant to Section 26(1) of the EOCCA. Subordinates' courts have no jurisdiction to hear the case unless the Director of Public Prosecutions has issued consent to prosecute the accused and a certificate of transfer of a case to a subordinate Court pursuant to Section 12(3) and (4) of the EOCCA. Through the power vested in him under 26(2) of EOCCA the DPP has issued a notice.[245] Authorizing Directors, Regional Prosecution Officers, District Prosecutions Officer and Prosecutions Attorney In-Charge to exercise powers vested in him under Section 26(1) of the EOCCA. However subject to the said notice their powers are limited to the nature of offences and value of the subject matter.

The consent and certificate should reflect or match with the provisions of offences of which the accused stand charged, otherwise would seize the jurisdiction of trial court to try the accused[246]. After filling, the consent and certificate should be endorsed.[247]

11.5 Retrial principles

It is settled principle of law that, a retrial will be ordered only if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice so requires.[248]

11.6 The Principle of Common intention

This principle entails that, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. A member of the group would escape being implicated only if there is evidence that he dissociated himself before the offence was committed, from the act constituting the offence.[249]

To constitute common intention to prosecute an unlawful purpose, it is not necessary that there should be any concerted agreement between the accused persons prior to the commission of the unlawful act. It may be inferred from their presence, their actions and the omission of any of them to dissociate themselves from the act or may develop it in the course of the act depending on the nature of the act.[250]

Furthermore, for the principle of common intention to be invoked, the role of each accused must be described ie. What he did, how he did it and in what manner. Practically, for homicide offences for example where an attack on the deceased was administered by a group of people, the witness pointing a finger against any of the accused persons must describe the role of each individual how he took part like the

[245] Economic Offences (Specification of Offences for Consent) Notice, 2021 GOVERNMENT NOTICE NO. 496H published on 30/6/2021

[246] Dilipkumar Maganbai Patel..Vs Republic Criminal Appeal No. 270 Of 2019, CAT (Unreported

[247] Adam Selemani Njalamoto Vs Republic Criminal Appeal No. 196 Of 2016, CAT (Unreported)

[248] Fataheli Manji v. Republic (1966) EA 341, Nestor Simchimba vs Republic, Criminal Appeal No.454 of 2017 CAT Mbeya (Unreported) PG.13

[249] Mhina Mndolwa @ Mhina vs Republic, Criminal Appeal No. 49 of 2007 CAT Tanga (unreported) pg. 9

[250] Wanjiro Waimath V.R (1955) EACA 116, GodfreyJames Ihuya V.R (1980) TRL 197

type of weapon used, the area of the body afflicted, the number of blows. The witness has to assure the court that he really identified such person.[251]

11.7 Asset Recovery and Forfeiture

Asset recovery refers to the forfeiture of properties/assets generated from crime or used in the commission of the crime. The Proceeds of Crime Act, Cap 256 terms these properties as "**tainted properties**". The targeted properties under this regime are instrumentalities and proceeds of crime.

11.8 Rationale behind Asset Forfeiture and Recovery

The traditional responses to crime, which focuses on taking offenders to jail while leaving them to enjoy their ill-gotten wealth and use the same wealth to finance other crimes is not effective in the fight against crime. It is now widely accepted in the international community that effective action in the fight against crime must include measures to deprive criminals of their assets either representing proceeds or instrumentalities of crime. Criminals are more hurt when they are deprived of their ill-gotten properties than being sent to prison. It was for this reason that, asset recovery and forfeiture of proceeds and instrumentalities of crime has been globally identified and adopted as an effective strategy in the fight against crimes. This is reflected in several regional and international instruments and legislations enacted by many countries around the world.

To this end, international and regional instruments require member states including Tanzania to adopt, to the greatest extent possible within their domestic legal system, such measures as may be necessary to enable confiscation of proceeds and instrumentalities of crime.[252]

In compliance with international requirements, the United Republic of Tanzania has devoted to asset forfeiture of the proceeds and instrumentalities of crime as a major weapon to fight against crime. The fight is by using the following domestic legislations:-

(1) Section 12 of the National Prosecutions Service Act, Cap.430 which empowers the Director of Public Prosecutions to take any further proceedings or step that may be required to recover the amount of money payable to the Government under a court order or enforce the forfeiture order against the property forfeited to the Government,

(2) the Proceeds of Crime Act, Cap 256 which is the major procedural legislation on asset forfeiture and recovery,

(3) Section 60 of the Economic and Organized Crime Control Act, Cap 200,

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251 Director of Public Prosecutions vs Elias Laurent Mkoba and another (1990) TLR 115 (CA), Jumanne Salum Pazi v Republic, [1981] TLR 246

252 The United Nations Convention Against Transnational Organized Crime, 2000 (Article 12), the United Nations Convention Against Corruption, 2003 (the whole Chapter V), the Financial Action Task Force, 2012 (Article 4), the African Union Convention on Preventing Corruption, 2003 (Article 12) and the Southern African Development Community Protocol on Mutual Assistance in Criminal Matters, 2002 (Articles 20 and 21).

(4) the whole part VI of the Mutual Assistance in Criminal Matters Act, Cap. 254,

(5) Section 351(1)-(4) of the Criminal Procedure Act, Cap 20,

(6) Section 30 of the Penal Code,Cap.16

(7) Section 38 and the whole part IV of the Prevention and Combating of Corruption Act,Cap.329

(8) Sections 49 and 49A of the Drug Control and Enforcement Act, Cap 95,

(9) Section 111(1),(2), (3) and (4) of the Wildlife and Conservation Act, Act No.5 of 2009);-

(10) Section 97(1) and (2), the Forest Act, No.14 of 2002, and

(11) The Anti-Money Laundering Act, Cap.423.

11.9 Benefits of asset forfeiture and recovery

The benefits of Asset forfeiture and Recovery can be summarized as follows: -

(i) To deprive the proceeds and instrumentalities and other benefit of crime from criminals thereby sending a strong message and in fact making criminals accept that “Crime does not pay.”

(ii) To remove incentives of crime.

(iii) Forfeiture like other punishments serves as a deterrent to criminals to further commit crimes of his nature and other benefit generating crimes will dramatically decrease or even cease.

(iv) Attacks criminal’s economic base by removing source of finance from criminals for continued operation and expansion of criminal enterprises in the wildlife and forest sector (prevent re-investment of proceeds of crime) after they have lost funding and assets.

(v) Disruption of criminal organizations - Denies criminals financial capability to commit or fund commission of other crimes (Incapacitate criminals by denying them financial strength).

(vi) Restoration of properties to rightful owners: a means of recovering property that has been taken from victim and restoring it him.

(vii) Forfeiture is used to protect the community and to demonstrate to the community that law enforcement is working in its interest.

(viii) Asset Forfeiture and Recovery signifies the presence of the State by redressing the unjust enrichment of those few who illegally benefit from public fund, natural wealth and natural resources thereby engendering public confidence in the government by demonstrating that nobody is left to enjoy illicit enrichments.

Instrumentalities are properties used to facilitate the commission of the crime for instance a motor vehicle carrying illegal immigrants or drugs, it is an instrumentality of the offence and can be forfeited outright on application under Section 351(1)(a) of the CPA. This is normally done when advancing aggravating factors but it can also be done in a separate application under the Proceeds of Crime Act, Cap 256. The law allows for persons with interest in the property used in the commission of the offence to apply to the court for exclusion of their interest where they believe that they are innocent owners meaning that that they had no knowledge neither did they consent their properties being used in the commission of the offence.[253]

Proceeds of crime are those properties generated from the commission of crimes. A criminal commits a certain serious offence and generates money which in turn is used to buy properties. These properties are subject to forfeiture by the court. Properties are forfeited to the government upon the court's satisfaction that there is no evidence produced to cast doubt on the application for forfeiture and that the properties were proceeds of crime. The standard of proof is on the balance of probabilities.[254]

Where there is an identified victim restorative justice should take place and the forfeited property be given to the victim. Restoration to the victims may be done directly by giving the forfeited property to him or depending on the nature of the case where there is monetary compensation order of restitution can be done under Section 328 of the CPA through a warrant of the levy.

Forfeiture in our jurisdiction is conviction-based forfeiture; this means a person must first be convicted of an offence in an independent criminal trial then asset forfeiture proceedings should follow see Section 9 POCA, 60 EOCCA and 49 of DCEA.

POCA allows asset forfeiture on persons who have died before the completion of the investigation or who have been charged but died before conviction, see Sections 13A. What is supposed to be proved on the balance of probability is that a confiscation order would have been made shall the accused not die.[255]

Section 30 (1) of POCA, forfeiture application can be made where the DPP for any reason believes that is not possible to bring the person to court.

11.10 Preservation of assets pending confiscation order

In order to preserve the value of the property so as to satisfy the confiscation order, interim orders like restraining orders may be applied and granted. Section 38(7) of POCA allows disposal of any property under restraint that is subject to natural decay, wear and tear, depreciation or whose maintenance may cause substantial expenses. In granting the restraining order, the test is whether the applicant has met the threshold

[253] The Director of Public Prosecutions vs Nikula Mandungu, Criminal Appeal No. 47 of 1989, CAT (Unreported), The Attorney General vs Mugesi Anthony and 2 Others, Criminal Appeal No. 220 of 2011 CAT (unreported)

[254] Magoiga Mnanka vs Republic, Criminal Appeal No. 105 of 1998 CAT (unreported), Director of Public Prosecutions vs Jackson Sifael Mtares and 3 Others, Criminal Application No. 42 of 2019, CAT (unreported) page. 39. and Section 75 of the POCA, Jackson Sifael Mtares and 3 Others vs The Director of Public Prosecutions, Civil Appeal No.180 of 2019, CAT (unreported)

[255] The Director of Public Prosecution vs Julieth Simon Peleka (The Administratrix of the Estate of the late Gebu Ichoma Sayi), Criminal Appeal No.94 of 2019 CAT (unreported) at page 18

under Section 38 (1) (2) of the POCA rather than who will benefit from the order.[256]

Some interim orders do not need to be permitted by the court via the court application. The same is referred to as administrative restraint. Here, IGP or DCI may authorize a police officer of or above the rank of ASP to freeze a bank account and take any document whatsoever related therein. The point to note is that this order is valid only for 14 days, and after the expiration of those days then extension should be sought in Court.

The DPP under POCA can apply for a pecuniary penalty order against a person who derived benefit from the commission of the offence as stated under Sections 21&22 of POCA, this is done when the suspect has accrued some benefits from the commission of the offence. The application should be done within six months from the date of conviction.

Foreign restraint and forfeiture orders may be registered and enforced in Tanzania as per Sections 18 and 54 of POCA read together with Section 32 of Mutual Assistance in Criminal Matters Act, Cap 254. Here the order given outside our jurisdiction for the properties situated within our jurisdiction can be registered by the High Court and acquire a status as the Decree of the High court.

S.24 of the POCA, Part VI of the Mutual Assistance in Criminal Matters Act Cap.254 R.E 2002] applies. Where any person aggrieved by the order made under POCA may appeal against it. The procedure for appeal shall be as in the Criminal Procedure Act.

11.11 Money Laundering

Money laundering refers to the concealment of the identity of the illegally obtained money, so that it appears to have come from a legitimate source.[257] The Offence is accommodated by the Anti-Money Laundering Act "AMLA".[258]

Section 12 of the AMLA is a criminalizing provision of Money Laundering with respect to proceeds of predicate offence. The Section provides several modes (*actus reus*) of committing money laundering offence which include engagement, concealment, transfer, conversion, transmission and transportation.

For the offence of money laundering under Section 12 of the AMLA to be proved, the prosecution need not necessarily prove the process of laundering the money so to speak that is placement, layering and integration. It suffices to prove that the suspect dealt with the proceeds of a predicate offence by engaging in a transaction involving such proceeds". [259]

[256] Samo Ally Issack and 4 Others vs Republic, Criminal Appeal No. 136 of 2021 CAT (unreported)
[257] Tim Bennet, A practitioner's guide to Money Laundering Compliance, Totel Publishing Ltd,2017 pg.1
[258] Stanley Murtthi Mwaura Vs Republic, Criminal Appeal No. 144 Of 2019 CAT, TZCA, DPP Vs Harry Msamire Kitilya, Shose Sinare, and Sioi Solomon, Criminal Appeal No.105/2016 HC, Yusuph NdaturuYegera @ Mbunge Hilter vs Republic, Criminal Appeal No.195 of 2017, CAT (unreported)
[259] Stanley Murithi Mwaura versus Republic, Criminal Appeal No. 144/2019, CAT (unreported).

The money laundering offence is committed under Section 12 (of the Anti-Money Laundering Act) when a person involves himself in any of the acts stated under paragraph (a) – (e) of that Section.[260]

11.12 Juvenile Cases

Section 98 (1) (a) of the Law of the Child Act, Cap.13 provides that a child shall be tried by a Juvenile Court and Section 97 of the same establishes a Juvenile Court for purposes of determining matters relating to children.[261]

A social welfare officer is required in proceedings in the Juvenile Courts established under Section 97 (1) of the Law of the Child Act. The provisions of Section 99 (1) (d) of the same Act mandatory require a social welfare officer to be present during the proceedings in the Juvenile Courts. The presence of the social welfare officer does not envisage situations when the child is a witness it envisages situations when the child is in conflict with the law that is when the child is an accused person.[262]

11.13 Identification

11.13.1 Visual Identification

Evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. The Court has set out guidelines on visual identification which the courts in this jurisdiction have repeatedly followed. These are, the time the witness had the accused under observation the distance at which he observed him the conditions in which such observation occurred, for instance, whether it was day or night time whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not. [263]

11.13.2 Voice Identification

Voice identification is the weakest and most unreliable evidence which require great care to be taken before acting on it.[264] The rationale for that is not hard to find. There is always a possibility that a person may imitate another's voice so as to disguise his identity.[265] Familiarity with the voice in question is of essence before acting on it.[266]

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260 Yusuph Ndaturu Yegera @ Mbunge Hitler vs Republic, Criminal Appeal No.195/2017 CAT (unreported).

261 Amosi Robare @ James vs Republic, Criminal Appeal No. 401 of 2017, CAT (unreported), Furaha Johnson vs Republic, Criminal Appeal No. 452 of 2015, CAT (unreported)

262 Medson Manga vs Republic, Criminal Appeal No. 259 of 2019, CAT (unreported)

263 Faraji Ally Likenge Vs Republic, Criminal Appeal No. 381 Of 2016, Cat (Unreported

264 (See Nuhu Selemani v. Republic [1984] 93, and Stuart Erasto Yakobo v. Republic, Criminal Appeal No. 202 of 2004 CAT (unreported).

265 (See Stuart Erasto Yakobo v. Republic (supra).

266 See Kaganja Ally and Another v. Republic [1980] TLR 270).

It is also of essence that the identifying witness must have properly heard the suspect talking at the scene of crime, Strength of the voice and the duration the suspect had taken in talking.[267] The ability of a witness to name a suspect at earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry.[268]

11.13.3 Identification by recognition

Identification by recognition may be more reliable than the identification of a stranger. Still, even when the witness purports to recognise someone he knows, the Court should always be aware that mistakes in recognising his relatives and friends are sometimes made.[269]

11.13.4 Dock Identification

It is a well-established rule that dock identification of an accused person by a witness who is a stranger to an accused has value only where there has been an identification parade at which the witness successfully identified the accused person before he was called to give evidence at the trial. The dock identification not preceded by an identification parade is of little value, if at all not corroborated.[270]

11.13.5 Identification parade

The legal framework for identification parade is echoed through Section 60 of CPA and Section 38 of Police Force and Auxiliary Services Act [Cap 322. R.E. 2002] the procedures to adhere when conducting identification parade are accorded by PGO no. 232. It is settled law that for any identification parade to be of any value, the identifying witnesses must have given a detailed description of the suspects earlier.[271] An identification Parade has no value when the witness knew the accused before.[272]

[267] Hekima Madawa Mbunda And Another Vs Republic, Criminal Appeal No. 566 Of 2019, Cat (Unreported

[268] Marwa Wangiti and Another Vs Republic [2002] TLR 39

[269] Shamir s/o John vs Republic, Criminal Appeal No.166 of 2004, CAT (unreported), Lidumula S/O Luhusa @ Kasuga Vs Republic, Criminal Appeal No. 352 of 2020, Cat at Dodoma (Unreported), Musa Saguda vs Republic, Criminal Appeal No. 440 of 2017. CAT (Unreported)

[270] Emanuel Lazaro and two others vs Republic, Criminal Appeal No. 395 of 2005, CAT(unreported), Hepa John Ibrahim vs Republic, Crimnal Appeal 105 of 2020, CAT (Unreported), Halfan Mwinshehe vs Republic, Criminal Appeal no 54 of 2018, CAT (Unreported)

[271] Godfrey Richard vs Republic, Criminal Appeal No. 365 of 2008, CAT (unreported), Rashid George @ Mvungi and another vs Republic, Criminal Appeal No.424 of 2016, CAT (Unreported), Gwisu Nkonoli and three others, Criminal Appeal No. 359 of 2014, CAT (unreported), Omary Hussein Ludanga and another vs Republic, Criminal Appeal No. 547 of 2017, CAT (unreported)Rex vs Mwango Manaa [1936] 3 EACA 29

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(11) The Legal Aid Act [Cap 21 R.E 2019]

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