THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT ON THE REVIEW OF EVIDENCE LAW IN TANZANIA

Presented to the Minister for Constitutional and Legal Affairs, Dodoma

JUNE, 2019

THE UNITED REPUBLIC OF TANZANIA
LAW REFORM COMMISSION OF TANZANIA

Telegram: "TUMESHERIA ".
Telephone: 2111387/2123533/4
Fax No.: 2123534/2124793
Website: www.lrct.go.tz
E-Mail: lrct@lrct.go.tz
In Reply please quote:
Ref. No. CA.72/194/02/65

Haki House,
8 Luthuli Road,
P.O. Box 3580,
DAR ES SALAAM.

10th May, 2019

Honourable Dr. Augustine P. Mahiga (MP),
Minister for Constitutional and Legal Affairs,
P.0. Box 315,
DODOMA.

Hon. Minister,

RE: REPORT ON THE REVIEW OF EVIDENCE LAW IN TANZANIA

In terms of section 4(2) of the Law Reform Commission of Tanzania Act, Cap. 171 the Commission may, whether at its own instance or otherwise, review any law or branch of the law and propose measures necessary for:

i) bringing that law or branch of law into accord with current circumstances of Tanzania;

ii) eliminating anomalies or other defects in the laws; and

iii) proper codification and simplification of that law or branch of law.

By a letter with reference No. CAB 76/80/01/60 dated 4th September, 2014, the Judiciary of Tanzania requested the Commission to undertake a review of the evidence law of Tanzania by analyzing the Report and Proposed Code in order to advice on the way forward.

The Commission has completed the review of the evidence law in Tanzania after conducting wide literature review, consultative meetings and stakeholders' workshops for the purpose of collecting data, views and recommendations that have made it possible for the Commission to prepare this Report.

I wish to take this opportunity to thank all relevant stakeholders without whose contributions and recommendations it would not have been possible for us to prepare and make this Report. I wish to extend special thanks to the Judiciary of Tanzania for the cooperation, commitment and facilitation which made it possible to accomplish this task. However, the Commission remains responsible for both the form and content of the Report.

Honourable Minister, subject to section 14 (1) of the Law Reform Commission Act, Cap. 117, the Commission is pleased to submit the following documents, that is to say:

i) Report on the Review of the Evidence Law in Tanzania,

ii) A Matrix on Stakeholders' views and recommendations, and

iii) A Draft Bill on Evidence Act, 2019.

I remain,
Yours sincerely,

January Henry Msoffe, J.A (Rtd)

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CHAIRMAN

Mr. Julius Kalolo Bundala

.....

Commissioner

Mr. Idd Ramadhani Mandi

.....

Commissioner

c.c. The Attorney General,
Attorney General's Chambers,
P.0.Box 360,
DODOMA.

Chief Court Administrator,
High Court of Tanzania,
Kivukoni Front,
P.0. Box 9004,
DAR ES SALAAM.

PREAMBLE

"In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence[1]*''*

Sisya,J.

1 Hemedi Saidi V Mohamed Mbilu [1984]T.L.R 113 at p. 114.

THE COMMISSION

The Law Reform Commission of Tanzania ("the Commission"), is a permanent statutory body established by the Law Reform Commission, Cap.171. It has been in operation since 1983. Its functions include; taking and keeping under review all the laws of the United Republic of Tanzania with a view to its systematic development and reform. In the exercise of its powers, the Commission may review any law or branch of law and propose measures necessary for bringing that law or branch of law into accord with current circumstances. It may also consider such reforms of any laws or branch of laws of Tanzania as may from time to time be referred to it by the Attorney General, Ministries, Departments and Agencies, Private Institutions and individual persons.

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3.	Hon. Victoria T. Nongwa	Senior Resident Magistrate
4.	Mr. Cleophace K. Morris	Lecturer – University of DSM School of Law

ACKNOWLEDGEMENT

The Commission wishes to express its sincere appreciation to all stakeholders for their co-operation and invaluable contribution at all stages of the review and composing the report. Gratitude goes to all service providers, State Attorneys, Advocates, PCCB, the Judiciary of Tanzania, the Police Force, local government authorities, MDAs, NGOs, CBOs and the public at large.

The Commission is highly indebted to members of the Judiciary of Tanzania, staff of the University of Dar es Salaam School of Law who, in collaboration with their collegues from the Commission, blended well into a highly motivated team to prepare this Report.

The Commission is grateful to the World Bank, which through the Judiciary of Tanzania, financially supported our endeavurs in all stages. However, the Commission bears full and collective responsibility for both the form and content of this Report.

EXECUTIVE SUMMARY

In Tanzania, evidence is governed by various laws such as the Evidence Act, the Criminal Procedure Act, the Civil Procedure Code Act, the Land Disputes Courts Act, the Electronic Transactions Act, the Cybercrimes Act, and the Human DNA Regulation Act. These laws have not been able to adequately keep pace with the challenges that have emerged due to economic, scientific, social, technological and other societal changes. The review was conducted based on the study of various literature, laws, observations and recommendations of stakeholders. The findings reveal that despite recognition of the application of electronic devices in receiving evidence in courts, there are no rules to ensure authenticity of testimonies adduced through electronic devices. It is thus recommended for the Chief Justice to promulgate such rules.

Admissibility of illegally obtained evidence was among the issues which was raised and discussed during research. Findings reveal that, in Tanzania, as general rule, the illegally obtained evidence is not admissible except under conditions specified in the Criminal Procedure Act. It is thus recommended that the current state of the law on the admissibility of the illegally obtained evidence be retained.

There was an issue on reports of Government analysts that the law excludes experts who are working in private sector. It was found that the definition of "Government analyst" as provided under section 203(4) of the Criminal Procedure Act include any person appointed by the Minister responsible for health to perform the duties of Government analyst. The review recommends that the current position of the law be maintained because the definition of "Government analyst" accommodates the private sector as well.

Regarding proof of documents it was found that the Evidence Act provides for the proof of documentary evidence in sections 66, 69, 71 and 99. Section 66 provides for the proof of documents by

primary evidence, section 69 provides for the proof of signature or handwriting of the person alleged to have signed or written document while section 71 provides for the proof where no attesting witness is found. However, section 99 contradicts sections 66, 69 and 71 as it provides that documents of less than 21 years may be provided by presumption. It is thus recommended that section 99 of the Evidence Act be amended to require proof by presumption only to documents which are more than 20 years.

Findings also show that, under the current law on evidence, a party in a civil suit who discovers evidence which was outside his reach during hearing has to wait until delivery of judgment and apply for review, causing inconveniences to courts and parties. The review makes recommendation that room be opened to parties to bring discovered evidence without waiting for delivery of judgment.

On the issue that there are overlapping provisions on evidence rules from different pieces of legislation, findings have revealed that there is no conflict among the said legislation. It is thus recommended that the current state of the law be maintained. Regarding expanding the category of privileged information, the review found that it will imply shutting out doors for evidence which may affect the administration of justice. It was thus recommended for maintenance of the current state of the law.

The review further indicates that there are a number of important case law principles on circumstantial evidence, hostile witnesses, procedure for tendering evidence in court and how to conduct trial within a trial, which have not been codified. It is thus recommended for the codification be made and when the need arise on important decisions developed by the court.

As regards evidential weight of oral evidence as against documentary evidence, findings show that the law gives equal weight. It is thus recommended for legal awareness to both, the general public and the judicial officers. The review also found that there is no procedure for tendering and admitting real evidence.

It is thus recommended that the Evidence Act be amended to provide for procedure for tendering real evidence.

With regards to the status of printouts from electronic devices as documentary evidence, the review found that the Electronic Transactions Act has exhaustively addressed. It is thus recommended that the position of the law on the admissibility of printouts from electronic devices stipulated by the Electronic Transactions Act be maintained.

As regards the issue of inadequacy of the current four (4) hours time given for interviewing suspects, findings show that, the time provided under the law is adequate save that the procedure for the extension of time is not elaborate. It is therefore recommended for a simplified procedure on the extension of time to interview suspects.

On the competency of a child to testify, the review found that the law allows a child of tender age to give evidence without taking an oath or making an affirmation. The child needs to promise to tell the truth to the court. However, the law does not provide on how the court can know that the child understands the importance of telling the truth and promises to tell the truth. It is thus recommended that the Chief Justice make guidelines for courts to use in determining the ability of the child to promise to tell the truth and the effect of telling lies.

Regarding discovery of documents, the review found that it is well provided in the Civil Procedure Code Act. However, the Criminal Procedure Act does not have corresponding provisions on discovery of documents. It is thus recommended that the Criminal Procedure Act be amended to allow parties to apply for discovery of documents.

Moreover, the review reveals that the Primary Courts' Rules of Evidence are not in tandem with the current socio-economic and technological development. It is thus recommended for updating

the primary court rules to address the current developments. The review also found that assessors are allowed to put questions to witnesses; however, they are not guided as to the type of questions and when to put the questions. It is recommended for the law to provide for the time and the type of questions to be asked by assessors.

Findings also reveal that, the law does not adequately protect witnesses appearing before courts to testify. It is thus recommended for establishment of institution responsible for providing programmes and initiatives for witness protection.

The review found that, there are no rules to regulate visitation of locus in quo by courts. It is thus recommended that rules be made to provide when to visit, who should be involved and who should bear the costs of visiting locus in quo.

It has also been found that, the law on evidence does not have elaborate procedures on the chain of custody. Hence, it is recommended that the chain of custody of exhibits be provided in the sectoral law and where the chain of custody is not provided, regulations on the chain of custody be made under the Criminal Procedure Act.

The review found that the requirement to issue a notice prior to the hearing of the case by the person intending to rely on a defence of plea of alibi is a barrier to justice to unrepresented persons. It is thus recommended that it should be the duty of the court, during preliminary hearing, to inform accused persons about the procedural requirement.

Finally, it has been found that the language used under the Evidence Act is too technical, complex and archaic The Commission is thus recommending for the re- writing of the Evidence Act by using literal and more simplified language.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AG	–	Attorney General
Cap	–	Chapter
CAT	–	Court of Appeal of Tanzania
CPA	–	Criminal Procedure Act
CPC	–	Civil Procedure Code
DLHT	–	District Land and Housing Tribunal
DNA	–	Deoxyribonucleic Acid
EACA	–	East African Court of Appeal
ICT	–	Information and Communication Technology
LRCT	–	Law Reform Commission of Tanzania
MDAs	–	Ministries Department Agencies
NGO	–	Non Governmental Organization
PCCB	–	Prevention and Combating Corruption Bureau
TEA	–	Tanzania Evidence Act
TLR	–	Tanzania Law Report
SCK	–	Supreme Court of Kenya

LEGISLATION

Tanzania Legislation

The Anti-money Laundering Act, Cap. 423

The Constitution of the United Republic of Tanzania, Cap. 2

The Costitution of the United Republic of TZ,Cap.2

The Civil Procedure Code Act, Cap. 33

The Cybercrimes Act, Cap. 443

The Criminal Procedure Act, Cap. 20

The Drugs Control and Enforcement Act, Act No. 5 of 2015

The Economic and Organized Crimes Act, Cap. 200

The Electronic Transactions Act, Cap. 442

The Evidence Act, Cap. 6The Human DNA Regulation Act, Cap. 73

The Inquests Act, Cap.24The Land Disputes Courts Act, Cap.216

The Law of Marriage Act, Cap.13

The Prevention and Combating Corruption Act, Cap. 329

The Prevention of Terrorism Act, Cap. 19

The Whistleblower and Witness Protection Act, Cap 446

The Written Laws (Miscellaneous amendments) Act No. 15, 2007

The Written Laws (Miscellaneous Amendments) Act No. 2, 2007

The Written Laws (Miscellaneous Amendments) Act No. 2, 2016

Foreign Legislation

The Criminal Justice Act 1967 (United Kingdom)

The Criminal Procedure Act No. 51 of 1977 (South Africa)

The Indian Evidence Act 1872

The Law of Evidence Dublin 1754

The Witness Protection Act No. 16 of 2006 (Kenya)

LIST OF CASES
Local Cases
Abanga Alias Onyango vs Republic, CR. Appeal No. 32 of 1990 (Unreported).

Abdallah Bazamiye & Another vs Republic, [1990] TLR 42

Amin Mohamed vs Republic, Criminal Appeal No. 170 of 2004 ((Unreported)

Amir Mohamed vs Republic [1994] TLR 138

Ben Zuberi Mwamba vs Republic [1984] TLR 172

Chacha Jeremiah Murimi and 3 others vs Republic, Criminal Appeal No. 551 of 2015, the Court of Appeal of Tanzania at Mwanza (Unreported)

Chitan Maganlal Kakkad vs Magdallena A. Orwa & Almaniah Heavy Equipment (EA) Limited, Land Case No. 381 of 2014 High Court Land Division (Unreported)
Emmanuel Saguda @ Sulukuka and another vs Republic, Criminal

Appeal No. 422 'B1 of 2013 (CAT at Tabora) (Unreported)

Ezekia vs Republic [1972] EA 427

Hamidu M. Timotheo vs Republic [1993] TLR 125

Ilanda Kisongo vs Republic [1960] EA 780

Issa Hassan Uki vs Republic, Criminal Appeal No. 129 of 2017 (Unreported)

Janta Joseph Komba and 3 others vs Republic, Criminal Appeal No.95 of 2006 CAT (Unreported)J

enesia Philemon vs The Republic, Criminal Appeal No.179 of 2009 (Unreported)

John Magula Ndongo vs Republic, criminal Appeal No. 18 of 2004 (Unreported)

Joseph Leornard Manyota vs Republic Criminal Appeal No.485 of 2015 (unreported)

Josephat Somisha Maziku vs Republic, [1992] TLR 227

Kinyori s/o Karuditu vs Republic [1956] 23 EACA 480

Magendo Paul and another vs Republic [1993] TLR 219

Mapuji Mtogwashinge vs Republic, Criminal Appeal No. 162 of 2015 (Unreported)

Masasila s/o Mtoba vs Republic [1982] TLR 131

Matei Joseph vs Republic [1993] TLR 152

Mbewa & 3 others vs Republic [1971] HCD No. 310

Sospeter Kahindi vs Mbeshi Mashini Civil Appeal No. 56 of 2017

Vodacom (T) Limited, the National Micro-finance Bank (NMB) vs Mwansa Jonas Consolidated, Civil Appeals No.1 and 2 of 2016, High Court at Mbeya (Unreported).

Foreign Cases

Cooks vs Carrol (1945) I.R. 515

Jordan vs Lewis (1728)14 EAST 306

Ladd vs Marshall (4) (1954)3 All E.R 745

Maghanda vs R [1986] KLR 255 at pg. 257

Omychund v Barker (1744) 125 ER 13010

Raila Odinga & 5 others vs IEBC & 3 Others SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] Eklr

Republic vs Wray [1971] SCR 272

S. T. Paryani vs Choitram and Others (1963) EA 462

Shiguye and another vs Republic [1975] 1 EA 191

Simon Musoke vs Republic [1958] EA, 75

Tarmohamed and another vs. Lakhani & Co (3) [1958] EA 567(CA).

Trammel vs United States, 445 U.S. 40, 51 [1980]

Twentieth Century Fox Film Corporation vs NRI Film Production Association Private Limited (AIR 2003 Kant 148)

Uganda vs Lwasa [1968] EA 363

CHAPTER ONE
GENERAL INTRODUCTION

1.0 Mandate

The Law Reform Commission Act[2] established the Law Reform Commission of Tanzania (hereinafter referred to as the Commission) as an independent government institution. Its main function is to take and keep under review all the laws of the United Republic of Tanzania with a view to its systematic development and reform.[3]

The Commission has the mandate to review any law or branch of the law and propose measures necessary for bringing that law or branch of the law into accord with the prevailing socio-economic circumstances of the country. Its mandate extends to proposing the necessary measures to eliminate anomalies or other defects in the law, repealing obsolete or unnecessary laws, reducing the numbers of separate enactments and codifying and simplifying the existing laws.[4]

The are two ways of initiating the Commission's reviews First, on a reference from the Minister, the Attorney General or any other Department or Institutions of the Government. The Commission would normally examine the matter referred to it and make recommendations thereof.[5] Second, on its own initiative and subject to informing the Attorney General, the Commission may undertake the examination of any matter for the purpose of reform.[6]

1.2 Background to the Project

The Commission received a letter with Ref. No. CAB.76/80/01/60 from the Judiciary of Tanzania, requesting for a review of the Evidence Act by analysing Report and Proposed Evidence Code (Bill on the Evidence Act). The Judiciary's intructions to the Commision were to advice on the way forward regarding the Report and

2 Cap. 171.
3 *Ibid*., section 4(1).
4 *Ibid*., section 4 (2) (a) (1).
5 Section 8 Cap.171.
6 Section 9 Cap.171.

Proposed Bill which were prepared by a Consultant, Prof. Ronald J. Allen[7] under the auspices of the PCCB and subsequently submitted to the Judiciary of Tanzania. In collaboration with the Judiciary of Tanzania, the Commission convened stakeholders' workshop to deliberate on the Report and proposed Bill.

The workshop was conducted on 7th and 8th May, 2015 at the Julius Nyerere International Convention Centre, Dar es Salaam. The workshop aimed at collecting more views from stakeholders on the modalities and best way of dealing with reforms on the evidence law. The workshop also aimed at establishing whether or not the Evidence Act needed thorough reforms by overhauling the whole enactment and come up with a new law as proposed in the Consultant's Report.

The workshop drew stakeholders from the Government, academic institutions, legal professional bodies, NGOs and the private sector. Representatives at the workshop came from the Judiciary of Tanzania, the Law Reform Commission of Tanzania, the Prevention of Combating of Corruption Bureau, Ministry of Constitutional and Legal Affairs, Attorney General's Chambers, National Prosecutions Service, Police Force, Law School of Tanzania, Tanganyika Law Society, Law Review Commission of Zanzibar, University of Dar es Salaam School of Law, Tumaini University, Mzumbe University, NGOs and selected individuals.

Stakeholders recommended that a further study be undertaken covering other laws relating to evidence other than the Evidence Act. It was also recommended that a small team of local experts comprising of members from the Judiciary of Tanzania, University of Dar es Salaam, Law Reform Commission, Attorney General's Chambers and National Prosecutions Services be formed to consider Consultant's Report in line with comments obtained during the workshop. The Law Reform Commission was directed to spearhead the process.

7 John Henry Wigmore Professor of Law, Northwestern University, USA.

1.3 Statement of the Problem

Since its enactment, the Evidence Act[8] and other laws governing evidence have undergone several amendments for purposes of addressing developments which posed challenges in both criminal and civil prosecutions. Despite all the amendments made, these laws have not been adequately able to keep pace economic, scientific, technological and other social changes. The Act has been cited as a barrier to the successful prosecution of cases for lack of recognition and reflection on emerging legal knowledge about evidence, specifically, the nature of technological advancement for attainment of accurate fact findings which are the bedrock of fair trial and justice.

Some stakeholders have seen the Evidence Act as long, complicated, prolix, contradictory, confusing and outdated legislation. They argued that TEA acts as a barrier to the bringing of legal actions to an end since only those with skilled counsel could effectively use it. There have been views that TEA cannot effectively govern the interaction between parties and evidence in courts if the parties cannot understand the evidence in the first place, and, therefore, frustrating the efficient exercise of justice.

Court decisions have, to a large extent, influenced the law of evidence and it seems, this is an opportune time to codify rules established by courts through case laws. Also, conflicting decisions by courts have necessitated the review with a view to harmonizing the rules through legislation.

There is no doubt that the Evidence Act needs reforms to cope with the current socio-economic changes. Generally, the society tends to change and evolve over time, so too are the views, expectations and values of the people. The law needs to be flexible and receptive to changes so that it is fair and up-to-date. The law needs to serve the emerging needs of the people. A law that is based on outdated or irrelevant values is letting down those it is intended to serve and protect. The law needs also to be able

8 Cap 6.

to respond to the various situations and scenarios that are thrown up by a changing society, such as new forms of criminal activity and evidential matters.

1.4 Historical Background of Evidence Law in Tanzania

During the British rule in Tanzania, British law and the Indian Evidence Act were introduced to both Tanganyika and Zanzibar. These are pre-independence predecessor regions of modern Tanzania.

The Africa Order in Council, a British colonial legislative body, promulgated the Foreign Jurisdiction Acts in 1889, which provided for the establishment of consular courts in Africa. These enactments granted jurisdiction upon the principles of, and in conformity with, the substance of the law for the time being in force in England. In 1920, Tanganyika adopted the India Evidence Act and other Indian laws. Thus, the India Evidence Act was applicable in Tanganyika as the main legislation evidence. The most important amendment during the British rule came after a 1936 House of Lords' decision, which changed sections relating to burdens of proof. The changes gave an accused person the benefit of reasonable doubt.

The Evidence Act being the principal legislation on the law of evidence, was enacted in 1967 by Parliament of Tanzania based on the Indian Evidence Act 1872.[9] The Evidence Act applies in both criminal and civil proceedings. It applies to all ranks of courts in Mainland Tanzania, except for primary courts. The Act codifies the common law rules of evidence such as relevance, admissibility, authentication, hearsay, the best evidence and corroboration. The Evidence Act is, however, not exhaustive. This means that where any other statute or law specifically regulates certain type of evidence, that other statute of law would prevail.

As noted, the law of evidence has been changing overtime to keep pace with social, economic and technological

9 The Indian Evidence Act 1872 was a modified version of the English common law rules of evidence that was transported by Britain to its colonies during colonial rule.

developments. In 1985, following the Constitutional Amendment of 1984 that incorporated the Bill of Rights[10] in the Constitution of the United Republic of Tanzania, the Criminal Procedure Act[11] was consequently in anacted and their by introduced rules that limited admissibility of illegally obtained evidence.

In order to accommodate developments in technology, in 2007 Parliament amended the Evidence Act.[12] The amendments provided rules for the reception of electronic evidence in courts. The amendment made it admissible in evidence information retrieved from computer systems, networks or servers; or records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities; the audio or video recording of acts or behaviours or conversation by persons charged.

In 2011, the Evidence Act[13], was further amended whereby sections 4(b) and section 3 re-construed oral evidence to include making statements by use of other means of communication such as telecommunication or video conference.

1.5 Methodology

In conducting the review, the Commission used two methods to collect primary and secondary data. These methods include the desk review and field research.

1.5.1 Desk Review

Under desk review various material were consulted and analysed. These include policies, legislation, articles, publications and reports on evidence law from other jurisdiction and consultation of various websites and database.

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10 Act No.15 of 1984 introducing the basic rights in Articles 12-24 in the Constitution of the United Republic of Tanzania, Cap.2.

11 Cap.20.

12 The Written Laws (Miscellaneous Amendments) Act (No. 2) of 2007.

13 Cap.6.

1.5.2 Field Research

In terms of field research, research was conducted in six regions, namely, Dar es Salaam, Mwanza, Mbeya, Arusha, Dodoma, Iringa and Tanga. Among the stakeholders consulted included Judges, High Court Registrars, Magistrates, Advocates, State Attorneys, Legal Officers, Court Assessors, Police Officers and representatives from non-government organisations dealing with access to justice. The review was done through focused group discussion.

The interview geared towards acquiring knowledge or information on the effectiveness of the legal framework governing evidence law in Tanzania.

1.5.3 Stakeholders Validation Workshops

The Commission conducted stakeholders' validation workshops in Mwanza, Mbeya, Arusha, Dodoma and Dar es Salaam in order to validate research findings.

CHAPTER TWO
LAWS GOVERNING THE ADMISSIBILITY OF EVIDENCE IN TANZANIA

2.1 Introduction
This Chapter analyses applicable rules on admissibility of evidence in Mainland Tanzania. The rules are generally applied by courts, tribunals and other judicial bodies. The rules are contained in various statutory enactments which are under the discussion.

2.2 Applicable Rules of Evidence
The rules of evidence govern what items can or cannot be admitted in court to build a case. They govern what evidence the fact-finder can see, when, where, how, and why the fact-finder can see it. Several rules of evidence are applicable in different jurisdictions depending on the set-up of the law of evidence of a particular country.

In legal terms, evidential rules covers the burden of proof, admissibility, relevance, weight and sufficiency of what should be admitted into the record of legal proceedings. The law also includes the principles for the assessment of evidence. Evidence is crucial in both civil and criminal proceedings and may include samples of blood or hair, video surveillance recordings or witness testimony.[14]

2.2.1 General Rules of Admissibility

The basic prerequisites of admissibility are relevance, materiality, and competence. In general, if evidence is shown to be relevant, material, and competent, and is not barred by any exclusionary rule, it would be admissible.

Evidence is relevant when it has a tendency or reason to make the fact that it is offered to prove or disprove either more or less probable. To be relevant, a particular item of evidence need not

14 www.corporate.summary of the rules of evidence, accessed on 20/10/2017.

make certain the fact for which it is offered, or even more probable than not. All that is required is that it has some tendency to increase the likelihood of the fact for which it is offered. Weighing the evidence is for the finder of fact, and although a particular piece of evidence, standing by itself, may be weak, it will be admitted unless it is otherwise incompetent or it runs afoul of an exclusionary rule.[15]

Evidence is competent if the proof that is being offered meets certain traditional requirements of reliability. The preliminary showing that the evidence meets those tests, and any other prerequisites of admissibility, is called the foundational evidence. In general, if competent evidence is offered to prove a relevant and material fact, it is admissible even if it would have been improper to receive it for another purpose.[16]

2.2.2 Best Evidence Rule

The best evidence rule is a legal principle that holds that evidence that is best must be preferred before any other evidence is received. In modern times, this principle applies to the areas of documentary evidence. Thus, an original copy of a document is regarded to be superior evidence and ought to be preferred. The rule specifies that secondary evidence, such as a copy or facsimile, will be not admissible if an original document exists and can be obtained.[17] The rule has its origins in the 18th century case ***Omychund v Barker***[18] wherein, Lord Harwicke, stated that no evidence was admissible unless it was "the best that the nature of the case will allow".[19] However, Lord Denning is of the opinion that "nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility.

15 James, G, 1941, "Relevancy, Probability and the Law", California Law Review, 29;689-705.

16 Ibid.

17 Staff writer. "Legal Terms and Definitions". Law Dictionary. ALM Network of Legal Publications.

18 (1745) 1 Atk, 21, 49; 26 ER 15, 33.

19 The Law of Evidence Dublin 1754.

2.2.3 Privileges

Evidentiary privileges are rights held by certain persons that allow them either to refuse to provide evidence or to prevent evidence from being offered against them. Privileges are contrary to the general rules that all relevant and competent evidence is admissible and that every citizen has an obligation to give evidence in judicial proceedings. Privileges also hinder the basic function of the judicial system, which is the search for truth. Accordingly, privileges only exist to serve important interests and relationships, they are construed narrowly, and new ones are rarely created, at least by the courts.[20]

Since privileges are meant to vindicate a private or public interest in confidentiality, and since they are disfavoured, they can be waived by the persons or entities they are meant to protect. The person or persons who can waive the privilege are called "holders" of the privilege. Where more than one person holds a privilege, sometimes the act of only one is required to waive it and sometimes an act of both is required.[21]

2.2.4 Presumptions

There used to be considerable controversy over the effect of presumptions. Some courts held that a presumption went away as soon as evidence on the subject it covered was received. Others treated presumptions like evidence, to be weighed either against the other evidence in the case or against the burden of proof.

Presumptions are either conclusive or rebuttable. Rebuttable presumptions are of two kinds, those affecting the burden of producing evidence and those affecting the burden of proof. Most presumptions are interpreted to be rebuttable. The presumption itself is not considered evidence, however if no evidence is received to rebut the presumption, the finder of fact must assume the existence of the presumed fact if the existence of the basic fact upon which the presumption depends has been established.

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20 http://corporate.findlaw.com/litigation-disputes/summary-of-the-rules-of-evidence.html on 15/02/2018.

21 www.corporate.summary of the rules of evidence, accessed on 20/10/2017.

If evidence is received to rebut the presumption, the presumption has no further effect, but the finder of fact may infer the presumed fact from the basic fact if he believes that the inference is warranted. Therefore, evidence of the basic fact that is the condition of the presumption may be weighed against any other evidence in the case in determining whether the burden of proof has been met.

Conclusive presumptions are just that conclusive. A presumption will not be interpreted to be conclusive unless the law creating it specifically says that it is.

2.2.5 The Opinion Rule

Witnesses are required to give their answers in the form of statements of what they saw, heard, felt, tasted, or smelled. They are generally forbidden to express opinions or draw conclusions. As anyone who gives the matter any thought soon discovers, this distinction between fact and opinion is not always clear. In addition, many witnesses find it impossible to give their testimony in the required form, and certain perceptions are very difficult to communicate without using language that suggests judgments and opinions.

In general, a person who is not testifying as an expert will be allowed to testify in the form of an opinion if the opinion is both rationally based on his perception and helpful to an understanding of his testimony. In addition to this general rule, opinions by a competent layperson on certain subjects are specifically permitted by rule, statute, or cases.One of the exceptions to this rule is the an opinion evidence. there are cases in which witnesses are called to express their opinions instead of stating facts. The must know example is the opinion of experts or third persons.

2.2.6 The Rule against Hearsay

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing in question and that is offered to prove the truth of the matter stated. A statement can be in words or conduct that is intended by the actor as a

substitute for words.[22] Such kind of evidence is usually deemed inadmissible. The first step in any analysis of possible hearsay is the determination of whether the statement being offered is in fact hearsay. If the statement is not hearsay, the analysis ends. If the statement is hearsay, step two is a determination of whether the hearsay statement fits into one of the exceptions to the hearsay rule.

Since evidence of an out of court statement that is used to prove something other than the truth of its content is not hearsay, whether a statement is hearsay may depend on why it is being offered. If a statement has a possible use as hearsay and another non-hearsay purpose, it is generally admissible subject to a limiting instruction if requested, and subject to the court's discretion to keep it out if the judge believes that its prejudicial effect outweighs its probative value. There are several exceptions to hearsay evidence to be admitted in courts.

Among the exceptions includes, evidence of a statement by a minor if offered in certain actions against a person alleged to have injured the child, evidence of a statement by the deceased in a wrongful death action, all prior inconsistent statements of a witness offered in accordance with required procedures, statements made by the declarant to explain or qualify his conduct and made while he is engaged in the conduct, statements of the declarant prior mental or physical state including his intentions if the declarant is unavailable and that prior mental or physical state is an issue in the suit, certain statements of a declarant in an action against his estate, judgments determining the liability, obligation, or duty of a third person to prove the existence of that liability, obligation, or duty and statements concerning the family history of another where the declarant is unavailable under certain circumstances.

2.2.7 Orality Principle

Orality is a common law tradition way of receiving evidence. It

22 Park, R, 1986, 'The Hearsay Rule and the Ability of Verdict', Minnesota Law Review, 70;1057-1072.

is the physical appearance of the witness in court room. The rationale of this rule is to enable judges and magistrates to observe the demeanour of the witness and thereby assess the reliability of such evidence. Generally, spoken evidence given by a witness in court, usually on oath is called oral evidence. Under the Evidence Act, 1967,[23] all facts, except the contents of documents, may be proved by oral evidence.

2.2.8 Principles Developed by Courts through Case Law

Courts have, over the years, developed various principles, through case law which are not sufficiently reflected in the Act.[24] Many rules have been developed by courts about corroboration, confession (e.g. retracted and repudiated confessions, confessions extracted as a result of physical torture, etc.), accomplice witness, etc. Thus, documentary evidence is an exception to the general rule. Traditionally, oral evidence presupposes physical attendance of witnesses in court so that they could be examined with a view to giving judicial officers an opportunity to observe their demeanours and consequently assess the credibility of their testimonies. The recent development in which the law permits courts to receive evidence electronically (i.e. through videoconferencing and phones) presents another rare exception to the common law practice that demands personal and physical attendance of witnesses.

2.3 Types of Evidence

There are four general types of evidence[25] namely, real (tangible things such as weapon), demonstrative (a model of what likely happened at a given time and place), documentary (a letter, blog post or other documents and testimonial (witness testimony). Some rules of evidence as explained above apply to all four types

23 Section 61 of the Tanzania Evidence Act, Cap. 6.

24 Mandi, I.R., "Some Comments on the Proposals for Reforms of the Law of Evidencein Tanzania", A paper presented at the Wworkshop for Review of the Law of Evidence,Organized by the Law Reform Commission of Tanzania and held from 7th – 8th May, 2017, at JNCC, in Dar es Salaam.

25 *Ibid*.

and some apply only to some or one of them.

2.3.1 Real Evidence

Real evidence is a thing, existence or characteristics of which are relevant and material. It is usually a thing that was directly involved in some event in the case. The written contract upon which an action is based is real evidence both to prove its terms and that it was executed by the defendant. If it is written in a faltering and unsteady hand, it may also be relevant to show that the writer was under duress at the time of its execution. The bloody bloomers, the murder weapon, a crumpled automobile, the scene of an accident all may be real evidence. [26]

To be admissible, real evidence, like all evidence, must be relevant, material, and competent. By establishing these basic prerequisites, and any other special ones that may apply, is called laying a foundation. The relevance and materiality of real evidence are usually obvious.

Real evidence may be authenticated in three ways: by identification of a unique object, by identification of an object that has been made unique, and by establishing a chain of custody. One of these ways can be used, though it is prudent to prepare to use an alternate method in case the court is not satisfied with any of the methods.[27]

The second method is the identification of an object that has been made unique, is extremely useful since it sometimes allows a lawyer or client to avoid the pitfalls of proving a chain of custody by exercising some forethought. The third and least desirable way to authenticate real evidence is by establishing a chain of custody. Establishing a chain of custody requires that the whereabouts of the evidence at all times since the evidence was involved in the

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26 htthttps://plato.stanford.edu/entries/evidence-legal/. Accessed on 9th November, 2017 at 4:16 PM ps://plato.stanford.edu/entries/evidence-legal/. Accessedd on 9th November, 2017 at 4:16 PM.

27 Ibid.

events at issue be established by competent testimony.

2.3.2 Demonstrative Evidence

Demonstrative evidence is just what the name implies; it demonstrates or illustrates the testimony of a witness. It will be admissible when, with accuracy sufficient for the task at hand, it fairly and accurately reflects that testimony and is otherwise unobjectionable. Typical examples of demonstrative evidence are maps, diagrams of the scene of an occurrence, animations, and the like. Because its purpose is to illustrate testimony, demonstrative evidence is authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the exhibit and testify that it fairly and accurately reflects what he saw or heard on a particular occasion, such as the location of people or things on a diagram.[28]

When a photograph is authenticated by a witness who observed what is depicted in it and can testify that it accurately reflects what he saw, the photograph is demonstrative evidence. When it is authenticated by a technician or other witness who testifies about the operation of the equipment used to take it, it is real evidence.[29]

2.3.3 Documentary Evidence

Documentary evidence is often a kind of real evidence, as for example where a contract is offered to prove its terms. When a document is used this way it is authenticated the same way as any other real evidence by a witness who identifies it or, less commonly, by witnesses who establish a chain of custody for it. However, because they contain human language, and because of the historical development of the common law, documents present special problems not presented by other forms of real evidence, such as when they contain hearsay.[30] they can also be a forgery.

28 https://plato.stanford.edu/entries/evidence-legal/. Accessed on 9th November, 2017 at 4:16 PM.

29 https://plato.stanford.edu/entries/evidence-legal/. Accessed on 9th November, 2017 at 4:16 PM.

30 https://plato.stanford.edu/entries/evidence-legal/. Accessed on 9th November, 2017 at 4:16 PM.

As has been noted above, documents can be authenticated the same way as any other real evidence. Material alterations must be accounted for in addition, some documents, such as certified copies of public records, official documents, newspapers, periodicals, trade inscriptions, acknowledged documents to prove the acknowledgment, certificates of the custodians of business records, and certain commercial paper and related documents are to one extent or another and self-authenticating.
The best evidence rule provides that, where writing is offered in evidence, a copy or other secondary evidence of its content will not be received in place of the original document unless an adequate explanation is offered for the absence of the original.

2.3.4 Testimonial Evidence

Testimonial evidence is the most basic form of evidence and the only kind that does not usually require another form of evidence as a prerequisite for its admissibility. It consists of what is said in the court at the proceeding in question by a competent witness. In general, a witness is competent if he meets four requirements, namely, he must, with understanding, take the oath or a substitute, he must have personal knowledge about the subject of his testimony (in other words, the witness must have perceived something with his senses that is relevant to the case), he must remember what he perceived and he must be able to communicate what he perceived.

2.4 Laws Governing Admissibility of Evidence

Admissibility of evidence is governed by a number of pieces of legislation which concern with procurement/collection, packing, transportation, storage, analysis, tendering and admissibility of evidence. Some of these legislation are the Evidence Act, the Criminal Procedure Act, the Civil Procedure Act, the Magistrates' Courts Act, the Cybercrimes Act and the Electronic Transactions Act. Others are the Human DNA Regulation Act, the Inquests Act, the Court of Appeal Rules, the Law of the Child Act, the Land Disputes Courts Act, the Economic and Organized Crimes Act and the Labour Institutions Act.

2.4.1 The Evidence Act, Cap. 6

The Evidence Act[31] is a replica of the Indian Evidence Act of 1872. It was enacted in 1967 to take over from the Indian Evidence Act,1872. . The Act has a total of 180 sections which provide for admissibility of evidence. Part II of the Act provides for admissibility of admission statements while Part III is on admissibility of confession statements.

Parts IV and V provide for admissibility of statements by persons who cannot be called as witnesses and admissibility of statements under special circumstances. Under Part VI, the law provides for the extent to which statements are to be proved for admissibility.

Part VII contains provisions about the relevance of Judgments in a trial and how previous judgments are relevant to bar a second suit or trial[32]. Part VIII provides for admissibility of opinion Evidence.

The law also provides for admissibility of oral evidence which, according to the Act, must be direct[33]. How to prove the content of documents, through primary and secondary evidence is provided[34]. Mode of proof of banker's books and public documents is also stipulated.[35]

2.4.2 The Electronic Transactions Act, Cap. 442

This Electronic Transactions Act was enacted in 2015[36] to provide for recognition of electronic transactions, e-Government services, and the use of information and communication technologies in the collection of evidence, admissibility of electronic evidence and facilitation of the use of secure electronic signature. The Act has evidential aspects as it deals with admissibility of electronic evidence.

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31 Cap. 6.
32 *Ibid* section 42.
33 *Ibid* Part II of Chapter III of the Act.
34 *Ibid* Part III of Chapter III.
35 *Ibid* Part IV and Part V of Chapter III
36 Cap. 442.

The Act recognizes the admissibility electronic evidence and in any trial[37]. Section 18 of the Act sets out criteria to be considered by the court when determining admissibility of electronic evidence as being; the reliability of the manner in which the data message was generated, stored or communicated; the reliability of the manner in which the integrity of the data message was maintained; and, the manner in which its originator was identified. The Act also lays down some factors to be taken into consideration in determining the authenticity of the electronic evidence for the purpose of admissibility[38].

2.4.3 The Civil Procedure Code Act, Cap. 33

The Civil Procedure Code Act was enacted in 1966[39] to provide for the procedure and related matters in civil proceedings. This Act has some evidential aspects as it provides, among others, procedure for tendering evidence (documentary) in court, that is, the requirement of annexing documents intended to be relied upon[40]. The Act also provides for the procedures of summoning and attendance of witnesses[41]. It further provides for procedure for hearing of suit, how evidence is to be taken, examination and recalling of witnesses.[42]

The Act further provides for procedure of giving evidence in the form of affidavits. It provides for matters which can be proved through Affidavits, contents of affidavits and the procedure for cross-examining deponents.[43]

2.4.4 The Criminal Procedure Act, Cap. 20

The Criminal Procedure Act, It was enacted in 1985[44] to provide for procedure to be followed in the investigation of crimes and the

37 The Electronic Transaction Act, section 4.
38 Ibid section 18(3).
39 Cap. 33.
40 *Ibid* Order VI, VII and VIII.
41 *Ibid* Order XVI.
42 *Ibid* Order XVIII.
43 *Ibid* Order XIX.
44 Cap. 20.

conduct of criminal trials. The Act contains evidential aspects in criminal proceedings as it provides for the procedure of collecting and tendering evidence.

Under Part II, it details the procedure of arrest, escape and recapture, search warrant and seizure. In searching for an accused person there are procedures which have to be adhered to ensure that legality is attained and one's constitutional rights are preserved, especially, the right to privacy. The law strikes a balance between the constitutional rights and that of disclosure of the offence under the umbrella of public interest. Section 43 provides that the consent of the owner of the premise has to be obtained before search is conducted. The law further provides that during the search in the house or premises an independent person has to witness the search, failure of which will render the illegally collected evidence invalid.

The law allows the properties suspected to be used or acquired in connection with the crime to be seized and subsequently be used as evidence[45]. Therefore, failure to observe laid down procedure make the evidence obtained illegal as per section 169. The Act also provides for the procedure of examining witnesses and the manner of recording evidence in criminal trials.[46]

2.4.5 The Cyber Crimes Act, Cap. 443

The Cyber Crimes Act was enacted in 2015[47] with a view to supplementing the Penal Code by creating offences related to computer systems and ICT. It also supplements the Criminal Procedure Act by making provisions for investigation, collection, and use of electronic evidence in criminal matters.

Part IV provides for the collection of evidence through search and seizure in cybercrimes. The law vests powers to police officers to conduct investigation and imposes duty to suspects to disclose

45 *Ibid* section 38(1).

46 *Ibid* Sections 195-222.

47 Cap. 443.

data where the investigation requires so.[48]

2.4.6 The Inquests Act, Cap.24

The Inquests Act was enacted in 1980.[49] It establishes Coroners courts the major function of which is to inquire into unnatural death of a person where no evidence indicates the perpetrator of the death. According to the Act, the Coroner's Court has the function of inquiring into the death of any person who is reasonably suspected to have died violently or of unnatural causes; dies a sudden death the cause of which is unknown; dies or is found dead in such place and in such circumstances as to require an inquest.[50] The Act further provides for the procedure of how to conduct inquest and prepare reports of the same.[51]

2.4.7 The Human DNA Regulation Act, Cap.73

The Human DNA Regulation Act It was enacted in 2009[52] and provides for the management and regulation of collection, packing, transportation, storage, analysis and disposal of sample for Human DNA, disclosure of genetic information and research on Human DNA.

With regard to matters related to evidence, Part III establishes the Human DNA Laboratory which makes analysis of DNA samples. Part IV provides for the procedure on how to collect and analyse DNA samples while Part VII provides for conditions for collection of samples for human DNA from incompetent persons and destruction of samples.

2.4.8 The Land Disputes Courts Act, Cap. 216

The Land Disputes Courts Act[53] establishes land disputes settlement machinery, namely, the Village Land Council, the Ward Tribunal, the District Land and Housing Tribunal,(DLHT) the High Court and

48 *Ibid* section 32.
49 Cap. 24.
50 *Ibid* section 4.
51 *Ibid* Part V.
52 Cap. 73.
53 Cap. 216.

the Court of Appeal of Tanzania.[54]

Among other things, it spells out the procedure for conducting proceedings in the Ward Tribunal and District Land and Housing Tribunals. The procedure includes how evidence is to be taken. The DLHTs for example, are entitled to receive documents not annexed to pleadings without necessarily following the practice and procedure under the Civil Procedure Code[55]. The Act requires the High Court and the DLHTs, when exercising the respective jurisdictions, to apply the Civil Procedure Act and the Evidence Act.[56]

2.4.9 The Whistleblower and Witness Protection Act, Cap. 446

The Whistleblower and Witness Protection Act was enacted for purposes of promoting and facilitating reporting of organized crimes, corruption offences, unethical conduct, illegal and dangerous activities, protection of whistleblowers and witnesses against potential retaliation or victimization and lays down legal mechanisms for rewarding and compensating whistleblowers and witnesses.

Through sections 9, 10, 11, 12 and 13 evidence can be obtained from whistleblowers and witnesses and provide for their protection. Once evidence is gathered the manner and test on how such evidence is relevant and admissible in court is subject to the Evidence Act and the procedures provided in the law of criminal procedure and other procedural laws.

2.4.10 The Prevention of Terrorism Act, Cap.19

The enactment of the Prevention of Terrorism Act provided comprehensive measures of dealing with terrorism, preventions and cooperation with other states in the suppression of terrorist acts. It stipulates provisions for the investigation of terrorist offences, jurisdiction and trial of terrorist offences and extradition and mutual

54 *Ibid* Section 3.

55 GN.No.174/2003, Reg 10(1).

56 *Ibid* Section 51.

assistance on terrorist offences.[57] With few exceptions, admissibility of evidence gathered through the procedure stipulated in the Act would still depend on how it meets the tests underlined under the Evidence Act.

2.5 Conclusion

This Chapter provides conceptual analysis of the rules of evidence with a view to enlightening on the foundation of the law of evidence. It prescribes various types of evidence and their admissibility in court. The laws governing evidence in Tanzania has been analysed and it is evident that evidence is a cross-cutting issue governed by various laws. It has been shown that, despite the Evidence Act there are sectoral laws which contain specialised rules of evidence. Reform to TEA must therefore take into consideration of rules stipulated under other sectoral laws.

57 See, Part II, IV, V, VI and VII the Prevention of Terrorism Act, Cap. 19.

CHAPTER THREE
RESEARCH FINDINGS AND ANALYSIS

3.1 Introduction

This Chapter contains findings and analysis of stakeholders' views, observations and recommendations collected during the review. It also provides for the Commission's observations and recommendations on the issues raised.

3.2.1 Orality Principle and use of ICT

Stakeholders' Observations

Stakeholders observed that the advancement of information and communication technology (ICT) makes the admissibility of evidence in court via video conference and teleconference unavoidable. It was further observed that giving evidence through electronic devices is a new phenomenon. A caution was, however, made that with the sophisticated technology there remains a probability of tampering with voices or physical appearances of witnesses. They also observed that, although the Evidence Act has undergone several amendments, there are no rules providing for conditions under which evidence through video and tele-conferences could be received and the manner of guaranteeing the authenticity of remote evidence.

Furthermore, stakeholders observed that courts in Tanzania are largely not equipped with modern technology including computers and reliable electricity. They pointed out other challenges as being absence of guidelines on how to observe the demeanor of a witness; difficulty in guaranteeing proper administration of witness's oath for authentic and reliability of evidence and impossibility of tendering exhibits in court electronically especially for evidence given orally.

It was therefore recommended that both the Criminal Procedure Act[58] and the Civil Procedure Code Act[59] should be amended

58 Cap. 20.
59 Cap. 33.

to empower the Chief Justice to make rules providing for clear procedures of tendering exhibits in case of oral evidence given through electronic devices. Alternatively, they recommended on the promulgation of stand-alone regulations but not in the Evidence Act.[60] Others recommended that the Evidence Act be amended to empower the Chief Justice to make regulatory rules. It was advised that ICT facilities be availed to the Judiciary starting with the Court of Appeal, the High Court and to the subordinate courts.

Commission's Observations

The Commission observes that in Tanzania, orality principle is provided for under sections 61 and 62 of the Evidence Act,[61] which requires all facts, except the contents of the documents, to be proved by oral evidence. But advancement of technology enables witnesses who cannot appear physically before the court to testify through electronic devices.

Likewise, the Commission is aware of the fact that in 2011, the Evidence Act was amended[62] by redefining oral evidence to include statements made through the use of other means of communication, including telecommunication or video conference. Thus, oral evidence can now be given by a physically present witness in court or by recording the witness' voice or by any other electronic means.

In Tanzania, reception of evidence through electronic means faces various challenges as outlined below:-

a) There are no procedural rules on reception of oral evidence through electronic means. The law only allows taking evidence through teleconference and video conference, but does not guide the court on how to go about it. This may lead to inconsistence in taking evidence through that mode;

60 Cap.6.

61 *Ibid*.

62 The Written Laws (Miscellaneous Amendment) Act No. 3 of 2011

b) There is no procedure regulating the way a witness can take oath especially in a teleconference where the witness cannot be seen but the voice can be heard;

c) Absence of mechanisms through which to ensure identity of the witness testifying via remote technology, bearing in mind the difficulty in identifying the voice heard in teleconference with an obvious danger to the court of receiving evidence of someone else other than the intended witness;

d) There is neither a provision nor procedure in the law to ensure that the devices used in receiving evidence through electronic means are genuine, accurate and not manipulated;

e) There are no safeguards at the place of receiving evidence through electronic means. For example, a witness may be in a room with other people who may falsify evidence because the court does not see the person testifying; and/or other electronic devices may be placed in the room where interfering with court processes can easily happen and privacy of proceedings interfered with;

f) There is no certifying authority which proves the authenticity of documents to be tendered; and

g) Shortage of electronic experts who are well conversant with the electronic means of taking evidence.

In India the procedure for receiving oral evidence given electronically were laid down in the case of ***Twentieth Century Fox Film Corporation vs NRI Film Production Association Private Limited.***[63] The Supreme Court of India set the following conditions:

a) Before being examined in terms of the audio-video link, a witness has to file an affidavit or an undertaking duly verified before a notary or a judge that the person who is shown as the witness is the same person who is going to depose on the screen, and a copy is to be made available to the other side (identification affidavit);

63 (AIR) 2003 Kant 148.

b) Persons who examine the witness on the screen have also to file an affidavit or undertaking with regard to identification before examining the witness and a copy being served upon the other side.;

c) The witness has to be examined during working hours of Indian courts;

d) The oath is to be administered through the media;

e) The witness should not plead any inconvenience on account of time difference between India and USA;

f) Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness, so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the court in that regard;

g) Learned Judge has to record such remarks as is material regarding the demeanour of the witness while on the screen;

h) Learned Judge must note the objections that rose during recording of witness and to decide the same at the time of arguments;

i) After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a notary public and thereafter it will form part of the record of the suit proceedings;

j) The visual is to be recorded and the record would be at both ends;

k) The witness also is to be alone at the time of visual conference and notary is to issue certificate to this effect;

l) The learned Judge may also impose such other conditions as are necessary in a given set of facts; and

m) The expenses and the arrangements are to be borne by the

applicant, who wants this facility.

In the United States of America, the procedure for receiving exhibits electronically requires that before starting the trial, the first thing should be looking at the monitor on how document appear on the screen. If the object does not show clearly, the court has to use a large projector with large screen because the document appear much large on the screen and make it easier to see for everything.[64] If one opts to use the large screen, caution is given to ensure that the jurors, judge, counsel and witness have clear view and need to have copies of exhibits.

The two main electronic choices for displaying are laptop computer and visual presenter. The presenter can serve as backup for any problems that arise for any exhibits that are preloaded on the laptop before the trial. To display through the laptop, the exhibits must exist as computer images or some exhibits would appear as electronic images, and others will need to be scanned.[65] The two primary ways to pull up document are by typing the exhibit identification number into the laptop or by using special scanner predetermined by codes.[66]

Commission's Recommendations

It is recommended that:

a) The Evidence Act need to be amended to empower the Chief Justice to make rules prescribing the procedure for receiving evidence through electronic devices.

b) The Rules should have the following conditions:
   (i) Before a witness is examined in terms of the audio-video link, witness has to file an affidavit or an undertaking duly verified before a notary, magistrate or a judge that he is the same person who is going to testify through

64 Stan Gibson, " Evolving Courtroom Technology ," GBSolo, Vol.23, No. 4, Mobility (June, 2006) pp.30-33 http://www.americanbar.org/publications/gp_solo/past_issues.html Accessed May, 20, 2017

65 *Ibid.*

66 *Ibid*.

electronic divices;

(ii) The person who calls a witness to testify through electronic devices has to file an affidavit with regard to identification of the witness and serve the copy to the other side;

(iii) The witness has to be examined during working hours of Tanzanian courts with oath administered through the media;

(iv) The judge or magistrate has to record such remarks as is material regarding the demeanour of the witness while testifying through the electronic divice;

(v) The judge or magistrate must note the objections that arise during recording of witness and decide accordingly.;

(vi) The witness must be alone at the time of visual conference and notary has to issue certificate to that effect.;

(vii) The judge/magistrate may also impose such other conditions as are necessary in a given set of facts.;and

(viii) The expenses and the arrangements are to be borne by the party who wants this facility.

c) The is a need to equip the courts should be equipped with all devices necessary for ongoing reforms in the Judiciary regarding use of electronic devices in conducting trials, recording evidence, keeping records and delivering decisions.

3.2.2. Admissibility of Illegally Obtained Evidence

Stakeholders' observations

Stakeholders views were divided with regard to admissibility of illegally obtained evidence. Some stakeholders stated that

evidence obtained illegally should be admissible arguing that what is important is the relevance of the evidence and not the mode of obtaining such evidence. They further stated that due to poor infrastructure and lack of finance, investigators find it difficult to observe all legal procedures in conducting investigation. Thus, failure to strictly adhere to the legal procedure often leads to the acquittal of offenders.

Other stakeholders were of the view that for the purpose of ensuring the rule of law and adherence to human rights principles, exceptions to the admissibility of the illegally obtained evidence is no longer relevant. They, therefore, recommended that the illegally obtained evidence should strictly not be admitted.

Commission's Observations

The Commission observes that admissibility of the illegally obtained evidence has been changing over time. Before 1985, courts only considered the relevancy of the evidence regardless of how it was obtained. For instance, in ***Mchomba vs Republic***[67], the court held that even by assuming that the search was illegal, evidence obtained therefrom is admissible. It was held further that the proper test is whether or not the evidence is relevant to the facts in issue.

Following the constitutional amendment of 1984 which incorporated the Bill of Rights into the Constitution and the enactment of the Criminal Procedure Act[68], the illegally obtained evidence became generally inadmissible. Section 169(1) of the Act[69], gives discretion to the court to admit the illegally obtained evidence or otherwise; for the benefit of public interest without infringing the freedom and rights of any individual. However, section 169(2) spells out conditions upon which the court may exercise the discretion to admit or exclude the illegally obtained evidence. These conditions include, the seriousness of the offence; the urgency and difficulty of detecting the offender; the urgency and the need to preserve

67 [1968] HCD No. 39.

68 Cap. 20.

69 Cap. 20.

evidence; the nature and seriousness of the offence; and the extent to which the illegally obtained evidence might have been lawfully obtained.

Internationally, there are two schools of thoughts on the way the illegally obtained evidence is treated. On one hand, there are countries which subscribe to the inclusionary rule which allows admissibility of the illegally obtained evidence. They believe in substantive justice and the question is often on whether the evidence is relevant notwithstanding the way it was obtained. The rule takes into account the rights of victims of crimes by subjecting the accused to liability based on the illegally obtained evidence. In countries such as Canada[70] and Nigeria,[71] is that the exclusion of the illegally obtained evidence is only possible in societies whose people are 'extra ordinarily' honest and requires such countries to be well equipped with investigative facilities.

The second school of thought includes countries which subscribe to the exclusionary rule. This rule restricts admissibility of the illegally obtained evidence. These countries' emphasis is more on the rights of the accused person. Courts consider adherence to procedural laws in procuring particular evidence. To that end rights of theaccused are more important than conviction. That is, allowing the illegally obtained evidence to be admitted or considered means violation of someone's rights. They believe that this connotes that police and other investigative authorities are allowed to violate individual rights. It is believed that both under international and municipal laws, countries are bound by, and should strive to achieve the rule of law, respecting and protecting fundamental rights. Hence, allowing the illegally obtained evidence to be admitted would encourage state authorities to violate other people's right. Examples of countries which favour the exclusion any rule include USA, Greece, Cyprus and South Africa.[72]

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70 See the case of *Republic vs Wray* (1971) SCR 272.

71 *Jordan vs Lewis* [1728]14 East 306.

72 www.quora.com/whycan'tillegal.. May4,2017, Cliff Gilhey JD Cumlaude, Scattle University Class of 2000.

Based on these observations, it is evident that Tanzania neither subscribes to the inclusionary rule nor to the exclusion rule. In Tanzania, as a general rule, illegally obtained evidence is not admissible except under conditions specified under section 169(2) of the Criminal Procedure Act. Katiti J, discussed the admissibility of confessions extracted by torture in the case of ***Josephat Somisha Maziku vs Republic***[73] discussed the admissibility of confessions extracted by torture. he held that:

(i) While it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise, it is inadmissible only if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt;

(ii) Where you have threats and a confession far apart without a causal connection, and no chance of such threats inducing confession, such confession should be taken to be free of inducement, voluntary and admissible;

(iii) It is a principle of evidence that where a confession is, by reason of threat, involuntarily made, and is therefore inadmissible, a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has before such subsequent confession, been dissipated and no longer the motive force behind such subsequent confession.

It is the observation of the Commission that the current state of the law suits the social, economic, technological and political environment of Tanzania. The infrastructural and financial capacity of investigation machineries makes it difficult for strict application of the exclusion any rule. Thus, the Commission subscribes to what was stated in the case of ***Josephat Somisha Maziku.***

Commission's Recommendations

The current state of the law on the admissibility of the illegally obtained evidence be retained.

73 [1992] TLR No.227.

3.2.3. Reports of Government Analysts in Health-Related Matters

Stakeholders' Observations

Stakeholders observed that the legal requirement which allows only medical examination reports by Government analysts to be admissible in court is unsatisfactory. They stated that due to the socio-economic development in the country and availability of a large number of private hospitals, the logic of separating private and government hospitals is meanigless. They argued that most of the doctors who work in government hospitals normally engaged on part-time basis in private hospitals. They also noted that what is important is ethical conduct of the medical officers and that doctors working in private and government hospitals take the same oath and are registered and are accountable to one professional body. They recommended that medical officers from private hospitals be permitted to provide medical evidence in the court of law.

Commission's Observations

The Commission observes that section 203 of the Criminal Procedure Act[74] provides for admission of medical examination reports by of Government analyst in matters related to health. According to that section, only Government senior pathologists are permitted to conduct medical examinations and prepare reports to be used as evidence. In other words, medical examination reports by pathologists working in private hospitals are inadmissible. The section provides thus:-

> 203(1) Any document purporting to be a report under the hand of any Government analyst upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceedings under this Act, may be used as evidence in any inquiry, trial or other proceeding under this Act.

The provision also mandates the court to presume that the signature to any such document is genuine and that the person signing it held the office which he professed to hold at the time

74 Cap. 20.

when he signed it.[75]

In South Africa, the Criminal Procedure Act[76] does not have a specific section for Report of Government Analyst, but rather, the section which is *in pari materia* with section 203 of the CPA is section 231 of the South African CPA which provides for the admissibility of reports which bear the signature of a person holding a public office. It provides thus:

> 231 Any document-
> (a) Which purports to bear the signature of any person holding a public office; and
>
> (b) Which bears a seal or stamp purporting to be a seal or stamp of the department, office or institution to which such person is attached, shall, upon the mere production thereof at criminal proceedings, be *prima facie* proof that such person signed such document

The provision does not exclude documents or reports from the private sector including medical reports as evidence.[77]

The Commission observes that section 203 (4) of the Criminal Procedure Act defines Government analyst to include any person appointed by the Minister responsible for health to perform the duties of government analyst. It provides thus-

> "…Government analyst" to include a senior pathologist, a pathologist and any other person appointed by the Minister responsible for health to perform the duties of a Government analyst.[78]

It is the view of the Commission that section 203(1) does not bind the Minister to appoint only persons from the public service. The section implies that the Minister can appoint even persons from the private sector whom he thinks can perform the duties of a Government analyst.

75 The Criminal Procedure Act, Cap. 20, s. 203(2).
76 Act No. 51 of 1977.
77 The Criminal Procedure Act of (RSA), Section 231 No.51 of 1977.
78 The Criminal Procedure Act, Cap. 20, Section 203(4).

Commission's Recommendations
It is recommended by the Comission that current position of section 203 of the Criminal Procedure Act should be maintained because the definition of "Government analyst"under section 203 (4) of the CPA accommodates the private sector as well.

3.2.4 Proof of Documents

Stakeholders' Observations
Stakeholders observed that there is confusion on the documents which need evidential proof and those which may be proved by presumptions. They noted that there are contradictions between sections 66 and 71 of the Evidence Act, on one hand, and section 99 of the Evidence Act, on the other. They further said that sections 66 and 71 of the Evidence Act provide for the manner documentary evidence can be admitted, notwithstanding, its duration while section 99 of the the Evidence Act tends to contradict the requirements provided in sections 66 and 71 of the Evidence Act. Section 99 provides that the court may presume the content of any document of not less than twenty one (21) years. They were of the opinion that section 99 is redundant and confusing hence be removed from the statute or the sections be harmonized through a single provision rather than separating them.

On the other hand, other stakeholders observed that there are no contradictions between sections 69, 71 and 99 as the two sets of sections have a distinguishing element which is the custody of the document and were of the opinion that the current status of the law should be retained.

Commission's Observations
The Commission observes that the Evidence Act provides for the proof of documentary evidence in sections 66, 69, 71 and 99. Section 66 provides for the proof of documents by primary evidence, section 69 provides for the proof of signature or handwriting of the person alleged to have signed or written document while section 71 provides for the proof where no attesting witness is found.
However, section 99 seems to contradict sections 66, 69 and 71 as

it provides that documents of less than 21 years may be proved by presumption. According to section 99, it seems documents that may be proved through sections 66, 69 and 71 have the alternative way of proof through presumption under section 99 of the Act. The said section reads:-

> **99**.-(1) When a document purporting or proved to be less than twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested.

These provisions contradict each other since documents which are required to be proved under sections 69 and 71 are those of less than twenty years old, and therefore, do not require proof under section 99.

The Evidence Act[79] of Kenya has a provision for proof of document by presumption. It provides thus:-

> 96(1):- Where any document purporting or proved to be not less than twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Furthermore the Indian Evidence Act[80] provides that any document, purporting or proved to be thirty years old, produced from any custody which the court considers proper, the court may presume that the signature and every other part of such document, which

79 The Evidence Act, Cap. 80.

80 The Indian Evidence Act 1872, s. 90.

purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

The Indian Evidence Act[81] provides further that where any electronic record, purporting or proved to be five years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorized by him in that behalf.

The Indian position, as opposed to section 99 of the Evidence Act, is that only documents which are of more than 21 years can be proved by presumption. It is the Commission view that the position of the evidence law in Kenya regarding document that needs to be proved by presumption is a good lesson that emulated in Tanzania.

Commission's Recommendations

It is recommended that:

a) Section 99 of the Evidence Act be amended to require proof by presumption only to documents which are more than 20 years.

b) The Evidence Act be amended to require proof by presumption of electronic records which are more than five (5) years.

3.2.5 Admissibility of Evidence Discovered after Closure of Parties' Case but before Judgment

Stakeholders' Observations

Stakeholders observed that the Civil Procedure Act allows for additional evidence by way of review after judgment has been entered.[82] They stated that the evidence law does not provide a room for reopening the case in case a party has acquired

81 S. 90A.

82 S. 78 and Order XLII r.1.

additional evidence which was out of his reach during the hearing of the case. Thus they recommended the amendment of the law to allow admission of evidence discovered after closure of parties' cases but before judgment in order to save time for both the court and parties. But they were of a firm opinion that additional evidence should be admitted only in exceptional circumstances. Thus, a desiring party should make a formal application setting out the reason for having omitted such evidence in the first place. All the same, to avoid abuse of the court process it was recommended that the law should specify clearly time within which such application is to be made.

Other stakeholders observed that a court, on its own motion, should be given room to reopen the case after closure of the case if it finds that certain additional evidence is necessary in making a just decision. They recommended for promulgation of procedural rules in such connection, especially the mode through which to admit such evidence.

On the other hand,same stakeholders were against the admission of new evidence at that stage. They further observed that the admission of evidence obtained before judgment would create a chance to the parties to temper with evidence and may unnecessarily prolong judicial proceedings cause endless litigation and allow admission of fabricated evidence on an afterthought basis. They hence recommended that the current status of the law which does not allow admissibility of the new evidence to be retained.

Commission's Observations

The Commission observes that the current laws do not provide a room for the admission of new evidence after closure of the case but before judgement. The only remedy available to a party who discovers new evidence is through section 78 and Order XLII rule 1 of the Civil Procedure Code[83] which provides avenue for parties to apply for the review of the judgment in case of discovery of new and important matter or evidence which, after the exercise of due

83 Cap. 33

diligence, was not within the knowledge of the party or could not be produced by that person at the time when the decree was passed.
The law requires a party who discovers new evidence after closure of the case but before judgment to apply to the court for review. The law does not provide for a mechanism of bringing to the attention of the court such evidence. A party who discovers new evidence before judgment is required to wait for the court to deliver judgment and then apply for review, where necessary.

It is a firm view of the Commission that there is a need for a provision that allows parties to apply to the court for tendering of new evidence rather than waiting for the review stage. This will serve time and resources involved in applying for and contesting review.

Commission's Recommendations
It is recommended that the Civil Procedure Code Act be amended to provide for:-
a) Admission of new evidence after closure of the case by parties but before judgment;
b) Safeguards against the abuse of court process on admission of new evidence after closure of the case should be given clearly.

3.2.6 A Trial within a Trial
Stakeholders' Observations
It was observed by stakeholders that the procedure for conducting a trial within a trial has been developed through case law and is not codified yet. They noted that there is no standard procedure which regulates the process of conducting a trial within a trial.

Stakeholders further observed that courts use different procedures in conducting the trial within a trial. For example, some of the judges have ruled that assessors should retire when a trial within a trial is conducted and others have different opinion in that regard. They recommended that the Criminal Procedure Act need to be amended to provide for clear guidelines on the procedure for conducting the trial within a trial as well as allowing application

of the trials within trials in the subordinate courts. Regarding the procedure stakeholders were of the view that the assessors should not take part in the trial within a trial and others were of the view that they should not retire at all. Further, they were of the view that the law should also provide for the procedure of conducting an inquiry in the subordinate courts.

Commission's Observations

The Commission observes that the trial within a trial is a procedure conducted by courts to determine the admissibility of confession statement when the accused repudiates or retracts it. It is known as the *trial within a trial* when conducted by the High Court and at the subordinate courts it is referred to as *inquiry*.

The Commission observes further that procedure for conducting the trial within a trial is not codified but was laid down by the East Africa Court of Appeal in the case of ***Kinyori s/o Karuditu vs Republic***[84]. This procedure was reiterated by the Court in the case of ***Ezekia vs Republic***[85]. That procedure may be summarised as follows:

(i) If the defence is aware, before the commencement of the trial, that such an issue will arise; the prosecution should be informed of that fact.[86] Having been informed, the prosecution would refrain from mentioning anything in relation to the statement in the presence of the assessors.

(ii) When the stage is reached at which the issue must be tried, the defence should mention to the court that there is a point of law to be resolved and submit that the assessors be asked to retire (exit the court room).This must be done before any

84 [1956] 23 EACA 480.

85 [1972] EA 427.

86 The court subsequently held in the case of ***Uganda vs Lwasa***[1968] EA 363 that in case the accused is unrepresented the rule of practice obliges the judge to see to it that the statement is not mentioned in court before he asks the accused whether he wished to object it. And that he (the judge) must take every possible step with a view to discovering whether the unrepresented accused objects to the admissibility of that statement. This duty, however, does not exist when an accused is represented by an advocate.

witness testifies in relation to the statement. The insistence is that it should be quite early before any such witness goes to the witness box.

(iii) The court will then order the lay members of the court (the gentlemen or/and ladies assessors) to retire, i.e. to go out of the court and stay at a distance long enough not to hear or even see anything in the courtroom.[87]

(iv) After the departure of the assessors, the prosecution (upon whom the burden to prove the statement lies[88]) will call its witnesses including, of course, the person to whom the statement was made, the interpreter (if any) and any other person acquainted with the fact in issue. These witnesses would be examined-in-chief in a normal way, and then the defence will cross-examine them.

(v) The accused has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. The accused and his witnesses (if any) will be cross-examined by the prosecution on the issue of admissibility of the statement and not on the general issue in the main trial.

(vi) Having heard both sides of the case, the judge will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties.

(vii) After the ruling, the lay members of the court (the assessors) would be called back to retake their seats in the courtroom and the main trial would then resume.

(viii) If the statement is admitted, all witnesses who had been called during the trial within trial will have to give evidence for the second time but this time before the assessors.

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87 The convenient way is perhaps for them to remain in a secluded place like a room until they are called back.

88 The principle that the onus proving that the statement was voluntarily made lies on the prosecution side is now provided for under section 27(2) of the *Evidence Act*, Cap. 6.

The effect of authorities is that this procedure is applicable to the High Court but not in subordinate courts. In subordinate courts, the inquiry was, for instance, conducted in ***Masasila s/o Mtoba vs Republic***.[89] But in the ***Seleman Abdallah*** case, summarised below, the court declared that procedure in the High Court is also applicable in subordinate courts *mutatis mutandis*.

The procedure of conducting inquiries in subordinate courts according to the case of ***Seleman Abdallah and 2 others vs Republic***[90] is that:

> Since the end result of a trial within a trial and an inquiry is the same, we are of the considered opinion that the procedure to be followed by a subordinate court in determining the voluntariness of such statement should be the same. So, the procedure of conducting a trial within a trial which is normally conducted in High Court where it sits with assessors should also be applicable in subordinate courts when conducting an inquiry, save that portion pertaining to retirement and recalling of assessors.

Consequently, the court stated the procedure to be followed by subordinate courts to be as follows:

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 Criminal Procedure Act.

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

d) Then the prosecution shall re-examine its witness.

89 [1982] TLR 131.

90 Criminal Appeal No. 384 of 2008 (Unreported).

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

f) The court is to call upon the accused to give his evidence and call witnesses, if any, on oath or affirmation as in the prosecution case.

g) Whenever a witness finishes, the prosecution should be given opportunity to cross examine.

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) Having heard both sides of the case, the magistrate will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties.

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 that witnesses to tender the statement as an exhibit. The court should accept and mark it as an exhibit, the contents of which should then be read in court.

l) In case the court find[s] out that the statement was not made voluntarily, it should reject it.

The procedure in ***Seleman Abdallah's (Supra)*** case sought to fill the gap that existed previously. Before this decision, the procedure of conducting an inquiry in subordinate courts was not clearly outlined. Essentially, there are differences that need to be highlighted. Subordinate courts (the District and Resident Magistrates Courts) do not sit with assessors thus there is no process of assessors' retirement as is the case in the High Court. In the High Court, witnesses who testified during trial within a trial may be

called to testify once the main trial resumes. The idea is that the assessors must hear all evidence that was given in their absence so that they can form their opinion about the statement.[91]

Apart from the differences pointed out above, it befits noting that the procedure of the trial within a trial is not confined to the resolution of disputes over the admissibility of extrajudicial statements only. It is a procedure that also applies to all interlocutory matters in which the court has to temporarily abandon the main trial.

However, the Commission observes further that the process of conducting the trial within a trial in Kenya is more simplified than in Tanzania. In Kenya, trial within a trial is conducted as follows: The prosecution must inform the court of their intention to produce the confession and then the accused will be required to indicate to the court whether or not they have any objection to the production. If the accused has no objection then the statement will be produced, but where the accused opposes the production then the court will conduct a trial within a trial whose main objective will be to establish the circumstances under which the statement was taken. The main trial will be interrupted and in the court file, the judicial officer will indicate that a trial within a trial is commenced. If the trial within trial will start with testimony relating to the manner, conditions and circumstances under which the statement was recorded, the witnesses will be examined in chief, cross examined and re-examined.[92]

After the closure of the prosecution case, the court will not enter a ruling; instead the defence will be given opportunity to adduce their evidence. At the end of the defence case and then the court will make a ruling. The ruling will limit itself to the issues raised during the trial within trial and will either allow or disallow the production of the statement. The magistrate has to determine how the statement

91 See I.R. Mandi, "The Procedure of 'A Trial within a Trial': The Need for Statutory Intervention," in *Eastern Africa Law Review*, Vols. 35-40, Dec, 2009, pp.142-170, at pp.149-151.

92 http://www.kenyalawresourcecenter.org/ accessed on 6th March, 2019

was taken. Where the court rules that the statement was made voluntarily by the accused then the witnesses who produced the statement shall resume his stand in the main trial; and produce it accordingly.

The practice is that during trial within trial the disputed statement should not be read out and that it is only after a ruling favouring its production that it can then be read out. On production, the accused/defence will still have the opportunity to cross-examine the witness on the contents of the statement. The procedure to conduct trial within a trial in Kenya is short and clear therefore need to be adopted in Tanzania.

Commission's Recommendations

The Commission recommends that:

a) Trial within a trial should be conducted in all courts.

b) Criminal Procedure Act be amended to provide for procedure for trial within a trial.

c) In case of the High Court, the trial within trial procedure should be as follows;

(i) If the defence is aware, before the commencement of the trial, that such an issue will arise; the prosecution should be informed of that fact. Having been informed, the prosecution would refrain from mentioning anything in relation to the statement in the presence of the assessors.

(ii) When the stage is reached at which the issue must be tried, the defence should mention to the court that there is a point of law to be resolved and submit that the assessors be asked to retire (withdraw from the court room). This must be done before any witness testifies in relation to the statement. The insistence is that it should be quite early before any such witness goes to the witness box.

(iii) The court will then order the lay members of the court

(the gentlemen or/and ladies assessors) to retire, i.e. to go out of the court and stay at a distance long enough not to hear or even see anything in the courtroom.

(iv) After the departure of the assessors, the prosecution (upon whom the burden to prove the statement lies) will call its witnesses including, of course, the person to whom the statement was made, the interpreter (if any) and any other person acquainted with the fact in issue. These witnesses would be examined-in-chief in a normal way, and then the defence will cross-examine them.

(v) The accused has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. The accused and his witnesses (if any) will be cross-examined by the prosecution on the issue of admissibility of the statement and never on the general issue in the main trial.

(vi) Having heard both sides of the case, the judge will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties.

(vii) After the ruling, the lay members of the court (the assessors) would be called back to retake their seats in the courtroom and the main trial would then resume.

d) In subordinate courts, trial within a trial procedure should be as follows;

(i) 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.

(ii) 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 Criminal Procedure Act.

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

(iv) Then the prosecution should re-examine its witness.

(v) When all witnesses have testified, the prosecution shall close its case.

(vi) The court should call upon the accused to give his evidence and call witnesses, if any, on oath or affirmation as in the prosecution case.

(vii) Whenever a witness finishes, the prosecution should be given opportunity to ask questions.

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

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

(x) Having heard both sides of the case, the magistrate will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties

(xi) 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 that witnesses to tender the statement as an exhibit. The court should accept and mark it as an exhibit, the contents of which should then be read in court.

(xii) In case the court find[s] out that the statement was not made voluntarily, it should reject it.

3.2.7 Procedure for Tendering Evidence in Court

Stakeholders' Observations

Stakeholders had divergent opinions on the procedure for tendering evidence in court. Some of them observed that there is no clear procedure on how to tender and receive documents in civil and criminal proceedings and advised that the Evidence Act should set out the procedure for tendering exhibits including how it should be recorded in court proceedings. However, other stakeholders observed that in order to avoid complications, procedures be provided under regulations or the "Practice Directives" which can easily be amended in case there are procedural changes in the manner of tendering documents.

Other stakeholders observed that the procedure for tendering evidence is well settled through case laws, hence, no need to legislate on the matter.

Commission's Observations

It is observed that Courts in Tanzania operate under the adversarial system. This system requires a party to appear in court and defend own case, *viva voce* (orally). Courts are supposed to arrive at fair and just decisions based on reliable evidence produced or tendered in court by the parties concerned. This evidence can be oral or documentary.

In practice, before a party tenders evidence (such as documents or objects or evidence in any other form) the evidence sought to be tendered has to be introduced to the court in the presence of the adverse party who shall examine it physically or read it. Once the adverse party does not have any objection on that particular evidence, a party intending to rely on it shall describe and tender such evidence before the court and crave for leave of the court to tender that evidence and shall ask the court that such evidence should form part of the proceedings. The court is supposed to mark such evidence as exhibits so and so and order such exhibits to form part of the court record. On the other hand, if the adverse party

objects on such evidence the court is required to make a ruling on its admissibility.

In ***Simon Mwaijande vs Republic,***[93] the appeal was successful on the ground that the trial court did not give the appellant an opportunity to examine the document for him to object or concede. In this respect, the High Court had this to say:

> In his petition of appeal, which he adopted in whole during the hearing of his appeal, the appellant complained that the trial court erred in law and fact in convicting him without corroborative evidence; violated the provisions of Sections 8, 34B and 68 of the Evidence Act, by admitting a photocopy of a report of the handwriting expert and without giving him opportunity to object or concede[94]

In this case, the High Court stated the procedure required in tendering evidence in court. The court held:

> The prosecution ought to have been conversant (and with respect the court ought to have given guidance) with the well-established procedure in cases where witnesses are required to testify on a document or object which would subsequently be tendered as exhibit. The procedure is not simply to refer to it theoretically, as was the case here, but to have it physically so that it is referred to by the witness before the Court (either by display or describing it) and then have it put in custody of the Court after marking it as a "Court Identification Exhibit number so and so", awaiting proper time and proper witness to tender it as full exhibit. Only then would the court record, "Court Identification Exhibit so and so is now admitted and marked as Exh "or words to similar effect[95]

The procedure was also stated in ***Emmanuel Saguda @ Sulukuka and another vs Republic***[96] where the High Court held that:

> It is well established practice in cases where witnesses are required to testify on a document or object which would

93 Criminal Case No. 40 of 1994 by Kalegeya, PRM (With Extended Jurisdiction)

94 *Ibid.*

95 *Ibid.*

96 Criminal Appeal No. 422 'B1 of 2013 (CAT at Tabora)(Unreported).

> subsequently be tendered as exhibit. The procedure is not simply to refer to it theoretically as was the case here but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as exhibit

As shown, procedures on tendering documentary evidence are not provided in the law but have well been developed by case law. It is the observation of the Commission that it is high time for the Evidence Act to incorporate procedures for tendering evidence in court.

Commission's Recommendations

The Commission recommends that, the Chief Justice to make Rules for tendering and receiving exhibits in courts, which may include the following;

a) to have a document or object physically produced so that it is referred to by the witness before the Court;

b) the Court to avail an opportunity to the adverse party to raise an objection (if any) and make submission thereof regarding admission of the exhibit in question;

c) A party tendering the exibit to make reply submissions as to the objection;

d) The objecting party to make rejoinder (if any);

e) The court to make ruling either to overrule or sustain the objection;

f) In case the objection is overruled, to admit the evidence and put it in custody of the Court after marking it;

g) Where the Court finds that the evidence tendered is not worth of admitting as an exhibit but is important for a future use in the dispensation of justice, may receive it for identification purposes.

3.2.8 Circumstantial Evidence

Stakeholders' Observations

Stakeholders observed that most of criminal cases, especially those related to corruption, fail due to the fact that, by their nature, only evidence available to prove such cases is often times circumstantial. They noted that in some cases circumstantial evidence directly relatesto the fact in issue but it is disregarded unless it is corroborated. They, therefore, recommended for courts to base their convictions solely on circumstantial evidence.

They observed further that for a conviction to be based on circumstantial evidence the evidence should be relevant and should irresistibly point to the guilt of the accused. The court need to warn itself before basing a conviction solely on circumstantial evidence. They recommended that in order to get out of the mess, the law should provide types of circumstantial evidence which the court may rely upon without a need for corroboration. In the same line stakeholders recommended that the Evidence Act be amended so that it expressly provides for the manner in which circumstantial evidence, as developed through case law, can be solely relied upon to procure a conviction.

Other stakeholders argued that there is a danger on basing conviction purely on circumstantial evidence and, were emphatically of the views that the current state of the law be maintained so that circumstantial evidence must be corroborated by other evidence. They recommended that the law should admit and give weight to circumstantial evidence only after taking adequate precautions, as such circumstantial evidence need to be corroborated and should be considered only if it is relevant and directly connected to the fact in issue.

Commission's Observations

The Commission observes that circumstantial evidence is described as indirect evidence due to its nature. It is an indirect mode of proof by drawing inference from facts closely connected to the

facts in issue. There is a notion that courts in Tanzania consider the circumstantial evidence in a negative way. Various decisions on circumstantial evidence have been delivered by the courts. All those decisions insist on great care when convicting the accused based on circumstantial evidence.[97]
Tanzanian courts have to grapple with the setting of guiding principles of circumstantial evidence. Precedents emphasize that when the court is basing its conviction purely on circumstantial evidence, there must be a cautious approach. This tells clearly that even the courts have problems of attaching more weight to direct evidence than circumstantial evidence in fact finding process.[98]

In the case of ***Ilanda Kisongo vs Republic,***[99] the court insisted that before drawing an inference of guilt from circumstantial evidence, it has to be sure that there are no co-existing circumstances which would weaken or destroy the inference. Under this case the court enunciated principle on circumstantial evidence. The court concluded as follows:

> In a case depending on circumstantial evidence, the direction must be very careful and the court must find that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

The same position was held in the cases of ***Magendo Paul and another vs Republic***[100] and ***Hamidu M. Timotheo vs Republic***[101] where it was held that generally, courts have to be very cautious in convicting the defendant of crimes based on circumstantial

97 Ronald J. Allen, Proposed Final Draft: Tanzania Evidence Act, May 7,
98 Ronald J. Allen, Proposed Final Draft: Tanzania Evidence Act, May 7, 2014 from the Chief Consultant and Drafting Committee to the Government of the United Republic of Tanzania on the Reform of the Law of Evidence Project.
99 Ronald J. Allen, Proposed Final Draft: Tanzania Evidence Act, May 7, 2014 from the Chief Consultant and Drafting Committee to the Government of the United Republic of Tanzania on the Reform of the Law of Evidence Project.
100 (1960)EA pg.780 at p.782.
101 [1993] TLR No.219.
102 [1993] TLR No.125.

evidence. Further, in the case of ***Shaban Mpunzu @ Elisha Mpunzu vs Republic***[102] the Court of Appeal held as follows:

> It is a settled trite principle of law that in criminal case in which the evidence is based purely on circumstantial evidence, it must be satisfied that the evidence irresistibly points to the guilt of the accused.

In the case of ***John Magula Ndongo vs Republic***[103] the Court of Appeal made the following remarks on circumstantial evidence:

> In a case depending entirely on circumstantial evidence, before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The Commission notes that the principle was developed by court in 1960 and still holds water to date. It is the view of the Commission that this principle needs to be codified in the Evidence Act. The Evidence Act has been cited to be a barrier to the successful prosecution of corruption cases in the country because it does not recognize the utility of circumstantial evidence which is important in proving corruption offences given the secretive nature of the commission of the offence.

In other countries this matter is already settled. For example, in Kenya the issue of circumstantial evidence has been clearly spelt out in various judgments . In the case of ***Abanga Alias Onyango vs Republic***[104] the court stated as follows:

> It is settled law that when a case rests entirely on circumstantial

103 criminal Appeal No. 18 of 2004 (Unreported),
104 CR. APPEAL No. 32 of 1990 (unreported).

evidence, such evidence must satisfy three tests:

a) The circumstances, from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

b) Those circumstances should be a definite tendency unerringly pointing towards guilt of the accused.

c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

In the case of ***Simon Musoke vs Republic***[105] the High Court of Kenya also held that:

> It is also necessary before arriving the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Commission's Recommendation

The Commission recommends that the current status of the law on circumstantial evidence be retained.

3.2.9 Overlapping Laws

Stakeholders' Observations

Stakeholders observed that there are overlapping provisions on evidence rules from different legislation. An example was given that sections 169 and 192(4) of the Criminal Procedure Act have some overlapping provisions on evidential matters. They further observed that there is a conflict between section 60 of the Evidence Act and section 192(4) of CPA. They recommended that evidentiary provisions in the CPA and CPC as well as any other procedural statute, should be harmonized with the Evidence Act and that the Evidence Act should be the overriding law where contradiction arise.

Other stakeholders observed that the Evidence Act is the general

105 [1958] EA, 75.

law that guides courts and other institutions on the manner of admitting and assessing evidence. They argued that the Evidence Act is the principal legislation that provides for the majority of evidential rules in the country. That, it provides for types of evidence and witnesses that may testify before the court. Other laws, such as CPA and CPC only provide guidance to courts on the procedure to be followed from admission to determination of the case. They, therefore, argued that there are no overlapping provisions between the Evidence Act , CPA and CPC since each law regulates its subject matter. They argued that provisions in these separate laws are serving different purposes thus, each law has its own role and function. They further argued that the standard of proof in criminal law and civil law differs, thus, they need some specific rules of evidence based on the test involved. They recommended that the current position should be retained.

They observed that the problem is that the Evidence Act is always not considered when CPA and CPC are amended to be aligned with developments in the society. They, therefore, recommended that the Evidence Act should be amended regularly to cope with changes occurring in the society.

Commission's Observations

The Commission understands that the Evidence Act is the main substantive law containing general rules regulating admissibility of evidence before the court. This is a cross-cutting law regulating both criminal and civil matters. On the other hand, the Criminal Procedure Act contains rules of procedure regulating issues related to investigation and prosecution of criminal cases. The Criminal Procedure Act contains rules of procedure regulating admission, hearing and determination of criminal cases before the court. The standard of proof in criminal cases is beyond reasonable doubt" while the standard of proof in civil cases is "on preponderance of probability".

From the analysis,the Commission observes that it is clear that each of the two laws covers specific area in evidential matters. There

are no obvious overlapping provisions between the two. Although the provisions may seem to be similar but the test of proof required under CPA and CPC is different, and, therefore, it requires specific evidentiary provisions.

With regard to section 60 of the Evidence Act and section 192(4) of CPA, it is the observation of the Commission that there is no conflict between the two laws. Section 60 of the Evidence Act excludes from proof any fact admitted before or during the hearing through pleadings or in writing. However, the court has been given discretionary power to require proof of facts excluded under section 60. On the other hand, section 192(4) of CPA excludes from proof any fact or document admitted or agreed in the memorandum. This section also gives power to the court to require proof of fact or document admitted or agreed in the memorandum if the interests of justice so demand. It is therefore the observation of the Commission that there is no conflict between the two sections.

In Indian, the India Evidence Act[106] has similar provisions which provides that no fact need to be proved in any proceedings which the parties agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the fine they are deemed to have admitted by their pleadings. It provides further that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

The analysis shows that other jurisdictions also have similar provisions regarding admission of facts or documents that has been admitted or agreed prior or at the hearing. Therefore, there is no conflict between section 60 of TEA and section 192(4) of CPA as observed by stakeholders.

Commission's Recommendation

The Commission recommends that the current state of the law be maintained.

106 The India Evidence Act, 1872, s. 58.

3.2.10 Codification

Stakeholders' Observations

Stakeholders observed that the Court of Appeal has set a number of principles which form part of laws of Tanzania. However, most of these principles are scattered and unknown to other judicial officers because most of cases are unreported and publication of law reports has been erratic and irregular. As a result, most of the principles are not referred by key legal stakeholders especially in the rural areas. They emphasized that it is very important for decisions of the High Court and the Court of Appeal of Tanzania to be analysed from time to time in order to determine areas of the laws which requires reform.

It was further observed that there is a need for codifying court's principles and decisions as soon as practicable to ensure accessibility of the laws to most of legal practitioners. They implored for codification of court's principles and decisions for the purpose of filling gaps that exist in the law. They recommended that codification should be a regular exercise so that, as soon as the Court of Appeal notes a *lacuna* and develops a principle, that principle should be made part of the rule within the relevant law through amendment.

In addition it was observed that decisions of Court of Appeal need to be codified. They recommended that there should be a special system to enable the Court of Appeal to point out areas in the law that need statutory reforms. They recommended further that Court of Appeal decisions creating precedents should be codified for easy access by the public and emphasised the need for the Law Reform Commission to identify and analyse principles developed by case law for the purpose of legal reforms.

Other stakeholders argued that it is important that precedents be codified but these should be restricted to only Court of Appeal decisions. They lamented that there is no clear mechanism of communication between courts of records and subordinate courts

especially with regard to decisions of precedential value.

Stakeholders pointed out some areas that need to be codified. The areas include the procedure of recording statement of the accused by police officers, chain of custody of exhibits, a trial within a trial and tendering documentary evidence.

Commission's Observations

The Commission observes that courts in Tanzania have developed a number of rules through case law, which are not sufficiently reflected in the current Act.[107] Many rules that have been developed by courts and used for a long time are not codified. Some of these rules relate to the procedure of recording statements of the accused by police officers, chain of custody of exhibits, a trial within a trial, tendering documentary evidence, admissibility of electronic evidence and confessions.

The Commission notes it is important to ensure that reforms made under the law of evidence takes on board codification of all evidentiary rules developed through court decisions taking into account there is inadequate facilities of accessing evidentiary rules developed by courts of law.

Commission's Recommendations

The Commission recommends that:

a) Codification be made as and when the need arise on important decisions developed by the court;

b) Judiciary needs to jinstall a system where all evidentiary rules developed by the Court of Appeal are accessed online.

107 "Some Comments on the Proposal for Reform of the Law of Evidence in Tanzania": A Paper Presented at the Workshop for Review of the Law of Evidence, Organized by the Law Reform Commission of Tanzania Held on 7th to 8th May, 2017, at Mwalimu Nyerere International Convention Centre Dar Es Salaam pg.10

3.2.11 Privileged Information

Stakeholders' Observations

Stakeholders observed that it is important to protect relationship, trust and confidence of certain groups of people in the society. They stated that the existing category of protected relationship is narrow and pointed for a need of expanding the category of privileged information. They pointed out that the protection should be extended to confessions made by believers to religious leaders, communication between patient and a doctor and self-incrimination to a friend. With regard to clergy privilege, stakeholders were of the view that the law should provide for qualifications of a clergy who will enjoy that privilege taking into account mushrooming of religion denominations in the society. They observed that the protection should take into consideration the larger national interest.

On the other hand some stakeholders observed that there is no need to expand categories of privileged communication. They argued that doing so will mean shutting out doors for evidence which mayl affect the administration of justice. They further argued that types of privileged information currently protected under the Evidence Act should be maintained.

Some stakeholders argued that sometimes it is necessary that holders of privileged information be required to disclose information if they are willing to do so and that, for the interest of justice, it is necessary that they testify. They recommended that provisions governing protected or privileged information be revisited to allow holders, on their discretion, to testify before the court in case they see that this information is necessary for the attainment of justice.

Stakeholders also observed that section 129 of the Evidence Act gives privilege only to judges and magistrates when discharging judicial functions and that it does not accord similar privilege to other persons who assist the judges or magistrates in discharging judicial functions. They were of the view that section 129 should be

amended to extend the privilege to prosecutors, advocates, court clerks, and other person present when the court is in session to assist the judges or magistrates when performing judicial functions.

Commission's Observations

The Evidence Act contains rules on evidentiary privileges. It provides for judicial privilege which allows a judge to decline to testify regarding all information received or possessed through the performance of the judge's official duties.[108] This privilege does not extend to other court officers as well as witnesses. The Act also provides spousal privileges for a husband and wife or wives in a marriage.[109] It also provides privilege to any unpublished official government records or communication if its publication would be prejudicial to public interest. It provides privilege to judges, magistrates and police officers to disclose source of information regarding commission of an offence.[110] The law gives privilege to advocates, advocate's clerk and interpreters from disclosing any communication made in the course of employment by or on behalf of clients. Likewise, clients have privilege over information received from advocates while conducting cases.[111]

In the law of evidence, a privilege is a rule of evidence that allows the holder of privilege to refuse to disclose information or provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other kind of proceedings. Rules on privileges are exceptions to the general truth-seeking purpose of evidentiary law. A privilege keeps evidence out of court which otherwise may be highly probative information. Thus, any privilege rule reflects a trade-off between the general truth-seeking purpose of evidence law and protection of certain social relationships. Yet, for the past several centuries, the law of in many countries has contained evidentiary privileges, where it is generally believed that the communications generated by certain

108 TEA Section 129.

109 TEA Section 130.

110 TEA Section 133.

111 TEA Sections 134, 135 and 137.

relationships and the contribution of those communications to the relationships is so valuable as to outweigh the loss to the legal process of useful information. For example, the law of privileges may foster and protect numerous relationships, including spousal, legal, medical, spiritual, and governmental.[112] Unlike other rules excluding evidence, privileges do not exclude evidence due to flaws in relevance, materiality, or undue prejudice. Instead, evidence is excluded due to a social judgment that the value of protecting the privileged information outweighs the cost to the fact-finding process.

It should be noted from the outset that there are some countries which have refused to accord privilege to religious communications. Some of these countries include England whose courts have refused to recognize a religious communication privilege since the Seventeenth Century.[113] There is still no priest-penitent privilege statute in England to date. A minister in post-Reformation England did not have a privilege against testifying and also in present day England the law remains that a minister has no right to refuse disclosure of confidential communications.[114]

Commission's Recommendation
The Commission recommends that the current status of the law be maintained.

3.2.12 Oral Evidence against Documentary Evidence

Stakeholders' Observations
Stakeholders observed that practically the trend in the court of law is that documentary evidence is given more weight than oral evidence. They stated that the court usually does not give adequate weight to oral evidence since it always prefers

112 Ronald J. Allen, Proposed Final Draft: Tanzania Evidence Act, 2014 from the Chief Consultant and Drafting Committee, May 7,2014, p. 97

113 See Seward Reese, Confidential Communications to the Clergy, 24 OHIO ST. L.J. 55, 57 (1963).

114 Jacob M. Yellin, The History and Current Status of the Clergy-Penitent Privilege, 23 Santa Clara L. Rev. 95, 103 (1983).

documentary evidence. They observed that courts disregard oral evidence which tend to contradict contents of a document. They pointed out that oral and documentary evidence should be given equal status as long as the two intend to prove the same fact in issue. They suggested that the court should put more emphasis on the credibility of witnesses. They recommended further that there should be criteria for determining the credibility of witnesses that should be followed by courts.

Other, stakeholders observed that it is not true that oral evidence is given less weight compared to documentary evidence. They pointed out that always documentary evidence needs to be corroborated by oral evidence. They further pointed out that law gives equal weight to both oral and documentary evidence as long as they intend to prove or disprove the same fact in issue and the court makes appropriate decision after proper evaluation.

Commission's Observations

The Commission observes that law provides that evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue.[115] It further requires that all facts, except the contents of documents, may be proved by oral evidence.[116] With regard to the content of documents, it provides that the contents of documents may be proved either by primary or by secondary evidence.[117] With that regard the law provides that the existence of any fact in issue may be proved by oral evidence or documentary evidence. The law puts equal weight to both oral and documentary evidence.

Despite the above position of the law, there is a view that there is a tendency by the court of preferring documentary evidence over oral evidence. This has affected persons who are devoid of the means to make such records and produce them in courts when such times are called for. It is the view of the Commission

115 The Evidence Act, s. 7.

116 *Ibid, s.* 61.

117 *Ibid,* s. 63.

that the fear that makes courts to favour documentary evidence over oral evidence is not attributed by the position of the law. The law is very detailed and clear on the admission of both oral and documentary evidence. There is no provision within the Evidence Act which depicts favoring documentary evidence over oral evidence. However, stakeholders views that courts gives more weight to documentary evidence over oral evidence show that there is lack of awareness among the public on the admissibility and assessment of oral and documentary evidence. This perception need to be cleared to maintain the integrity of the Tanzania legal system.

The Indian Evidence Act[118] has similar provisions which provide that all facts, except the contents of documents or electronic records, may be proved by oral evidence. It provides further that contents of documents may be proved either by primary or secondary evidence.[119] These provisions do not give undue weight over documentary evidence over oral evidence.

Kenya also has similar provisions with respect to admission of oral and documentary evidence. It provides that all facts, except the contents of documents, may be proved by oral evidence.[120] It provides further that the contents of documents may be proved either by primary or secondary evidence.[121]These provisions also do not give due weight over documentary evidence over oral evidence.

The analysis show that India and Kenya have similar provisions with regard to admission of oral and documentary evidence. These laws accord similar weights on oral and documentary evidence. Therefore the tendency of preferring documentary evidence over oral evidence is not caused by weakness in the law but misconception in the Judiciary and litigants.

118 Ibid, s. 59.
119 The Indian Evidence Act, Section 61of 1872.
120 The Evidence Act, Cap. 80 Section 62.
121 The Evidence Act, Cap. 80 Section 64.

Commission's Recommendations

The Commission recommends that:

a) The current state of the law be maintained.
b) Public legal awareness on admissibility and evidential value of oral against documentary evidence be conducted.

3.2.13 Timeline for Interviewing Suspects

Stakeholders' Observations

There were conflicting views by stakeholders on the time within which to interview suspects after arrest. Section 50(1)(a) of the Criminal Procedure Act set a time limit of four hours within which the interview need to be undertaken after the arrest. Some stakeholders stated that the time is too short taking into account infrastructural and personnel challenges facing the Police in making investigation of offences. They pointed that in some cases Police officers are required to travel long distances to cover areas with poor infrastructure to administer interview and therefore difficult to undertake the interview within four hours as provided by the law. They recommended that the time be extended to 48 hours. On the other hand some stakeholders stated that a period of 4 hours is adequate due to the fact that, during this time, the accused has fresh memory and it avoids coaching before the interview. They recommended that the current law be maintained.

Stakeholders also observed that there is no elaborate procedure on how police officers can apply for extension of time after expiry of four hours required by the law in interviewing the suspect. They observed further that the law does not require police officers to give reasons for such delay. They pointed out that there is a need of having elaborate procedure on how police officers can apply for extension of time for interviewing suspects. They gave an example of the Drugs Control and Enforcement Act,[122] which provides elaborate procedures for extending time of interviewing a suspect after the statutory time has elapsed. They recommended for a prescribed form to be used in the application for extension of

122 Act No. 5 of 2015.

time. They further suggested that police officers should be required to give reasons on why they did not record the statement within stipulated time.

Commission's Observations

Stakeholders' observation raises two issues related to interviewing of suspects. The first relates to adequateness of timeline within which the police officer is required to interview the suspect, and, second is lack of procedure on extension of time after lapse of the statutory time.

With regard to adequateness of the time provided by law, the law excludes certain instances from the period prescribed for interviewing a person who is under restraint in respect of an offence. These include the time when the police officer refrains from interviewing the person while conveying the accused person to a police station or other place for any purpose connected with the investigation or while enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer.[123] With that regard it is the view of the Commission that four hours provided for interviewing suspects is adequate since it takes into account all factors that may prevent interviewing a suspect within the statutory time. The time provided is in line with the need to ensure that the suspect is not arbitrarily restrained by police officers. In the case of ***Janta Joseph Komba and 3 others vs Republic,***[124] the court observed that if the accused is being in police custody for a period beyond the prescribed period of time it may result in torture, either mentally or otherwise.

The law provides for elaborate procedure on extension of time for interviewing a suspect after the stipulated time of four hours has expired. The law provides that the police officer - in - charge of investigating the offence can extend the interview for a period not exceeding eight hours if the basic period available for interviewing a person has elapsed and it appears to the police officer, for a

123 Criminal Procedure Act, Section 50(2).

124 Criminal Appeal No.95 of 2006 CAT(Unreported)

reasonable cause, that it is necessary that the person be further interviewed. The law provides further that the police officer is required to make an application to a magistrate for a further extension of that period before the expiration of the initial period or that of the extended period.[125]

Furthermore, the law prohibits police officers from frivolously or vexatiously extending the basic period available for interviewing a person. On breach, the police officer may be liable for damages or compensation against frivolous or vexatious extension of the basic period.[126]This position of the law was elucidated in the case of ***Republic vs Thabo Hamza Mini @Mini Thabo Hamza.***[127]

However, section 51 (1) (b) of the CPA is silent on the mode of making applications by police officers before a magistrate for the extension of time of interviewing suspects. The Commission agrees with stakeholders' observation that there is a need to provide for a mode which police officers should apply to a magistrate for further extension of time after the extended period has expired.

Commission's Recommendations

The Commission recommends that:

(a) The current timeline for interviewing suspect as provided for under section 50 of the Criminal Procedure Act is adequate and should be maintained.

(b) The CPA should provide for a prescribed form for applications for extension of time to interview a suspect after expiry of four hours.

3.2.14 Chain of custody of exhibits

Stakeholders' Observations

Stakeholders observed that the evidence law does not provide clearly about duties for all persons dealing with exhibits in criminal cases from the stage of receiving the exhibit to the time of the

125 Section 51(1)

126 Section 51(2)

determination of the case. They were of the view that the law should provide for the procedure for the custody of exhibits tendered as evidence before the court of law. They added that legal principles laid down by the Court of Appeal on this aspect be considered.

Commission's Observations

Chain of custody means the chronological documentation and or paper trail, showing the seizure, custody, transfer, analysis and disposition of evidence be it physical or electronic. The essence of recording chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than being secretly planted in order to make the accused appear guilty. [128]

A proper chain of custody requires three types of testimony, which are, testimony that a piece of evidence is what it purports to be; testimony of continuous possession by each individual who has had possession of the evidence from the time it is seized until the time it is presented in court; and testimony by each person who has had possession that the particular piece of evidence remained in substantially the same condition from the moment one person took possession until the moment that person released the evidence into the custody of another.[129]

In the case of ***Paul Maduka and Others vs Republic,***[130] the court stated that the chain of custody requires that from the moment the evidence is collected, its transfer from one person to another must be documented and that it should be provable that nobody else could have accessed it. Failure to observe that may lead to lack of linkage between the alleged evidence and alleged offence.

On the other hand, in the case of ***Issa Hassan Uki vs Republic***[131] the court observed that there are items which cannot change hands

128 Paul Maduka and Others vs. Republic Criminal Appeal No. 110 of 2007.

129 Accessed on 18/01/2018 http://law.jrank.org/pages/5130/Chain-Custody.html

130 Criminal Appeal No. 110 of 2007

131 Criminal Appeal No. 129 of 2017 (Unreported).

easily and therefore not easy to tamper with whereby this principle can be relaxed. It was further noted that 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 when the potential evidence is not in the danger of being destroyed or polluted or in any way tempered with. Where the circumstance indicates 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 in every particular case.

In the case of ***Chacha Jeremiah Murimi and 3 Others v. Republic***,[132] it was stated that in order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis until the exhibit seized is received in court as evidence. The Court stated further that there should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. The movement of exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tempering with that exhibit. The chances of tempering with the Government Laboratory analysis should also be eliminated. According to the Court, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in court after being satisfied that there was no meddling or tempering done in the whole process.

However, in the same case of ***Chacha Jeremiah Murimi*** (***supra***) it was found that the documentation is not the only requirement in dealing with exhibits. The Court had the view that an exhibit cannot fail the test of chain of custody merely because there was no documentation as other factors have to be looked at depending on the prevailing circumstances in every particular case. The Court in the case of ***Chacha Jeremiah (supra)*** echoed

132 Criminal Appeal No. 551 of 2015, the Court of Appeal of Tanzania sitting at Mwanza (Unreported)

its previous position in the case of ***Joseph Leornard Manyota v. Republic***[133] where it was held thus-

> …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. We are certain that this cannot be the case say, 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. Of course, this will depend on the prevailing circumstances in every particular case.

It is the view of the Commission that proving chain of custody is necessary in laying a foundation for the evidence tendered before a court of law. Chain of custody helps in to dispel the possibility of alteration, substitution, or change of condition. This is in harmony with the foundation testimony for tangible evidence which requires that exhibits be identified as being in substantially the same condition as they were at the time the evidence was seized, and that the exhibit has remained in that condition through an unbroken chain of custody.

The Commission observes that the Evidence Act does not have elaborate procedures on chain of custody. Parties to civil and criminal litigation depend on the court to impartially weigh the evidence brought before it. In order to uphold the integrity of the legal system, there is a need for ensuring that court judgments are not based on tainted, unreliable, or compromised evidence. This can be enhanced by elaborate procedure on chain of custody.

The Commission is also mindful that chain of custody is provided for under various laws depending on the subject matter. For example, collection of samples for human DNA, packing, receipt, storage, recollection and destruction is covered from Part IV up to VII

133 Criminal Appeal No.485 of 2015 (Unreported)

under the Human DNA Regulation Act[134], seizure and disposition of narcotic drugs is provided for under Parts IV and V of the Drugs Control and Enforcement Act[135] while seizure of computer systems and information communication technologies is covered under Part IV of the Cyber Crimes Act.[136]

Commission's Recommendations

It is the Commission's recommendation that:

a) The procedure for the chain of custody should be provided in the respective laws;

b) The Criminal Procedure Act be amended to empower Minister responsible for legal affairs to make regulations providing general guidelines on the chain of custody of exhibits.

3.2.15 Language Complexity

Stakeholders' Observations

Stakeholders were of the view that the language in the Evidence Act is too technical, complex and drafted in an old style. This makes the Evidence Act neither user friendly nor easily understood by members of the public, especially laymen. Stakeholders observed further that, the Evidence Act consists of repetitive provisions such as sections 43A, 34B and 34C. They advised that since the Evidence Act is a cross cutting law it is important to simplify its language and where necessary should be in plain language.

They further observed that repetitive and conflicting provisions in the Evidence Act need to be harmonized. They were of the opinion that the Evidence Act provisions should have commentaries for further explanation just like the Indian Evidence Act and the same should be translated in Swahili language.

However, others had different opinion arguing that every profession has a language of its own based on certain fields of specialization.

134 Act No. 8 of 2009.

135 Act No. 5 of 2015.

136 Act No. 14 of 2015.

Since law is a profession, its language also, (including the language of the Evidence Act) should be understood by only legal professionals. They argued that simplification will lead to ambiguous interpretation and may complicate the use of the statute even more. Stakeholders further observed that the Evidence Act should not be translated into Swahili since Swahili language is not rich in legal terminologies.

Commission's Observations

It is the Commission's observations that the Evidence Act was crafted from the Indian Evidence Act of 1872 by the eminent jurist of the nineteenth century called Sir James Stephen. In this perspective, even the language of the Evidence Act reflects the language which was used in 1870s. This obvious fact makes it complex and not user- friendly. From the year 1872 to date, it is about 146 years and a lot of improvement has been done in terms of language due to existing changes in social, economic and technological advancement. In this regard, the language of the Evidence Act needs to reflect the current circumstances.

The Commission further observes that some provisions in the Evidence Act are redundant as they are repetitive and others are superfluous. Good examples are sections 43 and 20. Section 20 is inconsistent in the way it has been constructed. The wording contain a phrase which reads "expressly or impliedly authorized by him to make them, are admissions." Something can only be express or implied, but not both. This construction anomaly needs to be rectified. Some provisions in the Act are superfluous, confusing and not related or connected. the Evidence Act also has unnecessary repetitions in its provisions. For instance, the Act contains many similar provisions, though not collected in a single section. Section 2 of the Act defines the scope of the Evidence Act.

Further, the definition of "confession" in section 3 contains redundancies; sections 3(a) and 3(d) provides that a confession is a statement or act that alone, or in conjunction with other facts, allows the inference that the person has committed an offence.

But sections 3(b) and 3(c) define a confession as admission of the "terms" or all "ingredients" of an offence. So, any statement of act that constitutes a confession under sections 3(b) and 3(c) will also constitute a confession under definitions in sections 3(a) and 3(d).

Thus, section 3(b) and 3(c) of the Evidence Act are superfluous. In this perspective, there is a need of reviewing all provisions of the Evidence Act and harmonizing all redundant and superfluous provisions. The Commission concurs with the opinions that putting some commentaries in certain provisions of the Evidence Act would be significant as it will add more clarification and explanation on its applicability.

The fact that the Evidence Act is a progenitor of the Indian Evidence Act which is about 146 years past, the Commission agrees with stakeholders' opinions that, the language of the Evidence Act should be simplified to make it easy to understand by users. In addition, there are other countries with laws that are in simplified language. These include Bahamas,[137] Kenya,[138] Uganda[139] and South Africa.[140]

Commission's Recommendations

The Commission recommends that:

a) The language of the Evidence Act should be simplified.
b) The Evidence Act be translated into Kiswahili language.

3.2.16 Compellability of Spouses

Stakeholders' Observations

Stakeholders observed that there are situations where in certain cases a non-compellable witness is a key and the only witness in the case. Since they are not compellable, most cases are being dismissed for want of prosecution. Some stakeholders, thus, were of the view that the law be amended to make spouses compellable

137 The Evidence Act, Cap. 65.

138 Evidence Act, Cap. 80.

139 Evidence Act, Cap. 6.

140 Criminal Procedure Act, Act No. 51 of 1977.

witnesses in all offences. Other stakeholders argued that the current status on compellability of witnesses be maintained in order to preserve marriage sanctity.

Commission's Observations

The Commission observes that the aspects of competence and compellability of witnesses are provided under Chapter V of the Evidence Act. Testimony of spouses is governed by section 130 whereby a spouse is a competent witness but not compellable to testify against the other spouse. A spouse is competent to testify against the other spouse in a case where a spouse is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act in cases where the spouse 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 spouse or the children of either or any of them. This position is also well amplified in the case of ***Jenesia Philemon vs Republic***[141] whereby it was held that in the criminal trial the evidence of a spouse admitted contrary to the provision of section 130 of TEA is inadmissible and of no effect.

The intention of the legislature in this situation was to protect the sanctity of marriage. The need for protection the of marriage institution outweighs the need for testifying against spouses. Apart from that there are other countries in East Africa such as Kenya and Uganda where the spouse is a competent but not compellable witness in the criminal proceedings.[142]

Commission's Recommendation

The Commission recommends that the position of section 130 of the Evidence Act with regard to non-compellability of spouses be maintained.

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141 Criminal Appeal No.179 of 2009. Also see *Matei Joseph vs Republic* [1993] TLR 152.

142 Section 127 Evidence Act, Cap. 80 and section 120 (1) (a), Evidence Act, Cap. 6 respectively

3.2.17 Defence of *Alibi*

Stakeholders' Observations

Stakeholders obseved that CPA provides for the defence of *alibi* and the procedure thereof. When a person intends to rely on the defence of *alibi* as a matter of procedure, that person is supposed to issue a notice prior to the hearing of the case. In most cases the accused who are not represented by advocates are not aware of this procedure and therefore most of the accused denied of this defence.

Other stakeholders observed that this procedure is not fair for the accused who should be given a chance to raise it at any time before the closure of the prosecution case or even during the defence case since all defences are being raised during the defence case. Stakeholders advised that if the defence of *alib*i is raised during the hearing, then a trial within a trial should be conducted to enable the prosecution to bring evidence to counter the defence.

In this regard, stakeholders recommended that the *alibi* defence should also be provided for in the Evidence Act and conditions for its application be set out. They argued that *alibi* as a defence, just like other defences in criminal cases, should be pleaded during the defence case and the prosecution side should be given a chance to bring evidence against the accused.

Other stakeholders were of the view that the current procedure on the admissibility of the *alibi* defence be maintained. Nevertheless, courts should inform the accused during the preliminary hearing on procedures for raising *alibi* as a defence.

Commission's Observations

The Commission observes that the defence of *alibi* is provided under section 194 (4) of CPA and sections 13 of the Evidence Act, whereby, an accused person who intends to rely on the defence of *alibi* is supposed to issue a notice to the court and the prosecution side before the hearing of the case. The law provides further that where the accused person fails to issue a prior notice is supposed to furnish the prosecution with particulars of the *alibi* at any time

before the prosecution case is closed. This implies that the notice can be furnished even during the prosecution case.

The same position was discussed in the case of ***Amin Mohamed vs Republic***[143] whereby the Court refused to rely on the defence of *alibi* on the ground that the appellant did not give a notice to either the prosecution or to the court of the intention to rely on such defence. He merely raised the defence after the prosecution had closed its case.

In the case **Edward *Mnembuka @Edu vs Republic,***[144] the Court held that the appellant's ground of appeal had no merit due to the reason that the procedure of giving a notice was not complied with hence the court offered no weight to the appellant's defence of *alibi*.

It is the Commission's view that the right to rely on the defence of *alibi* is vital. However, due to the nature of the defence, it is important for the defence of *alibi* to be raised at the earliest stages of the case, so that the prosecution gets the opportunity to cross-check its authenticity.

Commission's Recommendations

The Commission recommends that:

a) Section 194 of CPA should be amended to impose the duty to the court to notify the accused to raise the defence of *alibi* (if any) during the preliminary hearing.
b) Awareness should be conducted to let the public understand the importance of raising the defence of *alibi* during preliminary stages of the proceedings.

3.2.18 Visitation and Evidence from *Locus in Quo*

Stakeholders' Observations

Stakeholders observed that visiting a *locus in quo* is among the

143 Criminal Appeal No. 170 of 2004 (Dar Es Salaam District Registry at Dar es Salaam (Unreported).

144 Criminal Appeal No.3 of 2008.

ways used by courts in receiving evidence necessary for decision making. However, the procedure is not regulated by the Evidence Act or other legislation. There are no procedural rules on what should be done when a court visits the *locus in quo*. This has led to confusion as between the court and parties especially on who should bear the costs of the visit, who is to be assess the costs of the visit, who is to be paid such costs and how the same should be utilized. In some cases, magistrates have found themselves acting as witnesses thereby affecting the concept of impartiality. In this regard, stakeholders recommended that Rules on visit to *locus in quo* be made to address the confusion.

They also recommended that a witness should take an oath and evidence given without the oath should be taken cautiously. Evidence obtained at the *locus in quo* should form part of evidence of the case.

Commission's Observations

The Commission agrees with stakeholders' observation that visiting of the *locus in quo* is a procedure which is not provided in the Evidence Act, CPC or in any other laws. Since it is not regulated, there are no procedural rules on what should be done when a court visits the *locus in quo*.

The Commission takes note that, the Court of Appeal in ***Nizar M. H. Ladak vs Gulamali Fazal Janmohamed***[145] provides guidance on this issue. In this case the Court observed that; it is only in exceptional circumstances that a court should inspect the *locus in quo*, as by doing so, the Court may unconsciously take the role of a witness rather than an adjudicator. The Court of Appeal further held that where it is necessary or appropriate to the visit *locus in quo* the court should attend with the parties and their advocates, if any, and with such witnesses who may testify in that particular matter.

The Commission notes that the fact that this procedure is not provided for has led to confusion between the court and parties

145 [1980] TLR No. 29.

on who should bear the costs of a such visit, who should assess the costs of the visit, who should receive such costs, how the cost should be utilized, at what stage the court should visit the *locus quo* and the impartiality of magistrates . This was revealed in the case of ***Sospeter Kahindi vs Mbeshi Mashini***[146] whereby the appellant requested the Court to reopen the case after visiting a *locus quo* on the ground that the value of the disputed suit has changed.

The court held that the request for reopening proceedings has come rather belatedly because the tribunal visited the *locus in quo* after both sides had closed their cases.

Since this is a matter of procedure, the Commission is of the opinion that the same be provided in the CPC rather than making specific Rules of evidence on visiting a *locus in quo*.

Commission's Recommendations

The Commission recommends that:

a) The Chief Justice should be empowered to make rules prescribing the procedures on visiting *locus in quo*.
b) Rules should provide for, who should bear the cost of a visit , at what stage the court should visit the *locus in quo*, who should assess the costs of the visit and that when visiting *locus in quo* the court should attend with parties and their advocates and relevant witnesses in that particular matter.
c) The rules need to clarify the status of the evidence that is given at the *locus quo*.

3.2.19 Investigation of Offences by a Single Police Officer

Stakeholders' Observations

Stakeholders observed that there are court decisions which restrict one police officer from interviewing the suspect, investigating and conducting identification parade in the same offence. The reason given is to avoid bias while discharging duties.

146 Civil Appeal No. 56 of 2017.

Other stakeholders were of the view that involving various police officers with different roles in the same case delays the disposal of cases in court. They argued that the same police officer could be allowed to participate in subsequent stages of investigation since the police officer has adequate knowledge on the offence concerned. Other stakeholders were of the view that evidence of a single police officer should be used cautiously by courts.

Commission's Observations

The Commission is aware of the amendments made in 2011[147] regarding section 58 of the Criminal Procedure Act where it was allowed that a police officer investigating an offence may record the statement of the accused. However, the Commission takes note of the concerns by stakeholders concerning possible bias which may creep in where a single police officer is involved in more than one stage of investigation process. In line with this the court in the case of ***Republic versus Thabo Hamza Mini@ Mini Thabo Hamza***[148] stated, *inter alia,* that it is preferable that a police officer recording the caution statement be different from an investigating officer.

The Commission observes that involving various police officers with different roles in the same case enhances effective investigation of offences. Despite challenge of limited number of police officers, involving various police officers in all stages of investigations should be highly encouraged.

Commission's Recommendations

The Commission recommends that the investigation and recording of a caution statement of the accused should be undertaken, preferably, by different police officers.

147 The Miscellaneous Amendment Act No.3 of 2011, section 15(4) amending section 58 of the CPA

148 Criminal Session Case No. 29 of 2015 High Court of Tanzania at Dar Es Salaam.

3.2.20 Real Evidence

Stakeholders' Observations

Stakeholders observed that, generally, courts do admit real evidence that is relevant to facts in issue. There is no legal procedures for regulating tendering, admitting and disposition of real evidence. This has led to confusion especially at the primary courts. They recommended that the procedure for tendering and admitting real evidence be provided for in the law including a prescribed form outlining the type, nature, substance, and state of the real evidence from the time it was obtained in the course of investigation up to the time of tendering in court.

Stakeholders observed further that, the law does not provide the procedure for the custody and tendering of real evidence. This has led to confusion to the court, especially in primary courts where in some of the courts real evidence are tendered at the preliminary stage of the case while in other courts they are tendered at the final stage of the proceedings.

Commission's Observations

The Commission observes that section 34B (5) of the Evidence Act provides that any document or object referred to as an exhibit and identified in a written statement tendered in evidence need to be treated as if it had been produced as an exhibit and identified in court by the maker of the statement. The Commission observes further that despite the fact that the law provides for the admissibility of objects, which impliedly includes real evidence, the law does not provide for the definition of real evidence and the procedure of tendering real evidence in criminal proceedings. Furthermore, failure to provide a definition and procedure for tendering real evidence has led to inconsistence in court proceedings.

The South African criminal procedural law,[149] allows a party to criminal proceedings to produce a photograph to the court *in lieu* of article as admissible evidence notwithstanding the existence of

149 The Criminal Procedure Act No. 51 of 1977, section 232.

such article. Nonetheless, the court may, for a good cause, require the production of the article in question.

Commission's Recommendations

The Commission recommends that the Evidence Act be amended to provide for:-

a) Admission of real evidence in civil and criminal proceedings; and

b) Procedure for tendering real evidence to include:-

(i) production of photographs or sample *in lieu* of real evidence;

(ii) production of real evidence where the court deems necessary.

3.2.21 Questioning Witnesses by Assessors

Stakeholders' Observations

Stakeholders observed that although the law allows assessors to ask questions, there are no express provisions on the nature and purpose of questions asked by assessors. This has caused assessors to ask irrelevant questions and sometime questions that do not relate to what the witnesses testified causing delay in determination of cases.

In some cases, assessors cross-examine or contradict witnesses contrary to the directive of the law. They suggested that Section 177 of the Evidence Act be amended to restrict the asking of questions by assessors which seek clarification after re-examination of witnesses.

Commission's Observations

The Commission observes that section 177 of the Evidence Act provides that in cases tried with assessors, the assessors may put questions to the witnesses, through or by leave of the court, which the court itself might put as it considers proper. However, the law does not expressly state the type of questions to be asked by

assessors and at what stage of proceedings such questions may be asked. Lack of the express provision regarding the type of questions to be asked by assessors has led to conflicting decisions by the Court of Appeal.

In the case of ***Mwalimu vs Republic***,[150] the court held that in a criminal trial assessors do not cross examine witnesses but they ask questions as per sections 290 and 294 of the CPA and section 177 of the Evidence Act. It was further held that the purpose of cross examination is essentially to contradict, and by nature of their function, assessors in a criminal trial are not there to contradict witnesses. They are there to assist the court in the fair dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness.

In the case of ***Abdallah Bazamiye & Another vs Republic***,[151] the Court of Appeal stated clearly the role of assessors. The role of assessors is not to cross-examine or re-examine witnesses or the accused. Their duty is to assist the trial judge in accordance with section 265, and doing so, they may put questions based on conditions provided under section 177 of the Evidence Act. This emphasises that, it is the judge's duty to control assessors from asking questions which are patently irrelevant, perverse or otherwise improper.

In the case of ***Mapuji Mtogwashinge vs Republic***[152] the Court of Appeal, while referring to sections 146 and 177 of the Evidence Act, stated that it is clear that the duty of assessors and the judge is to put questions to witnesses for clarification and not to cross examine. The aim of cross examination is basically to contradict, weaken or cast doubt upon the accuracy of the evidence given by the witness during examination in chief.

Comparatively, section 165 of the Uganda Evidence Act[153]

150 Criminal Appeal No.*147 of 2008* Court of Appeal of Tanzania at Dodoma Registry (2009) (Unreported).
151 [1990] TLR. No. 42
152 Criminal Appeal No. 162 of 2015 (Unreported)
153 Cap.6

empowers assessors to put any questions to the witness, through or by leave of the judge. It can be noted that although assessors in Uganda are allowed to question witness, judges are given powers to consider the kind of question that can be put to witnesses by assessors.

Commission's Recommendations

The Commission recommends that:

a) Section 177 of the Evidence Act be amended to provide that questions to be put to witnesses by assessors should be questions intended for clarification purposes only.
b) Assessors should put questions to witnesses after re-examination.
c) There should be induction course on appointment and post-appointment training for assessors.

3.2.22 Printouts from Electronic Devices as Documentary Evidence

Stakeholders' Observations

Stakeholders observed that the law is not clear on whether a print out document from electronic devices is primary or secondary evidence. They advised that Rules on admissibility of electronic evidence should clearly state the status of print outs, whether they should be treated as secondary or primary evidence, original or photocopy. Stakeholders noted that, currently, the law allows the production of printouts of bankers' books only. They recommended that all printouts be admitted provided they are obtained from a genuine source. They advised that the law should provide for rules and procedures for the production and admissibility of printouts from electronic devices provided that thay meet the test of authenticity.

Other stakeholders were of different view that in Tanzania, technology is not yet advanced to the extent of being able to verify the authenticity and originality of documents printed from electronic devices. It is difficult to verify the author of a print out.

Commission's Observations

The Commission observes that in the cyber world, the application of computers has become more pronounced. Increased reliance on electronic means of communications, e-commerce and storage of information in digital form has raised the need to transform the law relating to information technology and rules of admissibility of electronic evidence both in civil and criminal proceedings world wide.[154]

The proliferation of computers and influence of information technology has necessitated various reforms in order to appreciate digital evidence in Tanzania. In 2007, the Evidence Act was amended through the Written Laws (Miscellaneous Amendments) Act. The amendments introduced three sets of important provisions, namely, sections 40A, 76 and 78A. Section 40A of the Evidence Act deals with the admissibility of electronic evidence in criminal proceedings, whereby, information retrieved from computer systems, networks or servers, records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities or the audio or video recording of acts or behaviours or conversation of the accused may be admissible in evidence.

Sections 76 defines the banker's book and 78A provides for admissibility of a print out ofan entry in a bankers' book. It also treats such entry as primary evidence and 'document' for the purposes of section 64 of the Evidence Act which provides for the best evidence rule. [155] These changes recognize electronic evidence and are applicable in all criminal proceedings and to a limited extent, in civil proceedings, where evidence in the banking business is in question.

In 2015, the Electronic Transaction Act (ETA) was enacted. This Act

154 Vivek Dubey, "Admissibility of Electronic Evidence: An Indian Perspective" in Forensic Research & Criminology International Journal Volume 4 Issue 2 2017.

155 Alex Makulilo, "The admissibility of electronic evidence in Tanzania: new rules and case law" Digital Evidence and Electronic Signature Law Review 13(2016) 121.

is a significant legislation in relation to of electronic evidence in Tanzania. It applies both in criminal and civil proceedings. More specifically, Section 18 (1) of the ETA clearly provides that in any legal proceedings, nothing in the rules of evidence can be applied so as to deny the admissibility of a data message on the ground that it is a data message. The term 'data message' is defined under section 3 of ETA as data generated, communicated, received or stored by electronic, magnetic optical or other means in a computer system to another. Accordingly, section 18 of the Act prohibits the application of rules of evidence to deny admissibility of data message (i.e. electronic evidence) on the ground that it is a data message. [156] Similarly, section 10 of ETA provides that in case the law requires a person to provide a certified copy of a document and that document exists in an electronic form, the requirement shall be met if the person provides a certified printout of the document.

Furthermore, ETA under section 20 recognizes and gives equal legal recognition on admissibility between evidence retrieved from electronic documents and documents in a written or original form. In other words, section 20 provides for functional equivalence between the rules on electronic evidence with best evidence rule (the rule that requires original documents for admissibility of evidence) under the Evidence Act. Section 20 (1) (a) of ETA provides that "where a written law requires a person to produce a document or information, that requirement is met if the person produces, by means of an electronic communication, an electronic form of that document or information".

In dealing with the admissibility of electronic evidence, Section 18 of ETA needs to be read together with sections 19 and 20 of the same Act. Since ETA provides for a special regime of the admissibility of electronic evidence, it prevails over any general law regulating the admissibility of evidence. This is so because the principles '*generalia speciallibus non derogant*' (the general does not detract from specific) and '*lex specialis derogate legi generali*'

156 Alex Makulilo, "The admissibility of electronic evidence in Tanzania: new rules and case law" Digital Evidence and Electronic Signature Law Review 13(2016) 129.

(special law repeals general).[157]

In ***Vodacom (T) Limited, the National Micro-finance Bank (NMB) vs Mwansa Jonas***[158] the Court interpreted the wording of section 18 (1) to be wide enough to cover any computer printouts or data stored or kept in an electronic form. The court further held that rules of evidence concerning the need to produce an original of an electronic or automated document should be interpreted to mean presenting a reproduction in legible form (including a printout) or a copy or derivative of an electronic document. From the foregoing analysis, the Commission is of the view that Tanzanian laws allow admissibility of electronic evidence in all proceedings including printout from electronic devices.

Commission's Recommendations

The Commission recommends that the position of the law on admissibility of printouts from electronic devices as stipulated by ETA be maintained.

3.2.23 Competency of a Child to Testify

Stakeholders' Observations

Stakeholders observed that the *voire dire* test is very important in assisting the court to satisfy itself on whether the child understands the duty of speaking the truth and understands the nature and meaning of an oath. Stakeholders noted that the law does not provide elaborate procedures for the determination of the competency of the child to testify. However, procedure is laid down by case law.

Stakeholders observed further that currently the law does not take into account the environment under which the child can testify. It is worth noting that there are instances which are not friendly to the extent that the child cannot be able to testify due to fear. They further stated that in some cases the environment for a child witness

157 Vivek Dubey, "Admssibility of Electronic Evidence: An Indian Perspect" in Forensic Research & Criminology International Journal Volume 4 Issue 2 2017 p 6.

158 Consolidated Civil Appeals No.1 and 2 of 2016, in the High Court at Mbeya (unreported).

to testify is very intimidating particularly when a child is required to testify in a room where the accused is present. In some cases the environment of the court is surrounded by armed police officers thereby instilling fear into the child. They advised that the courts environment under which a child can testify should be friendly and comfortable to a child. They implored the need for separating a child witness from the accused person.

Other stakeholders were of the view that the current status of the law on testing the competency of a child has no problem save that the minimum age of a child who is capable to adduce evidence in court needs to be provided. They were of the view that a child below seven years should testify upon taking oath since at that age the child understands the nature of speaking the truth while a child below seven years should testify without taking oath.

Other stakeholder recommended for re-introduction of *voire dire* test because principles laid down by CAT in testing the credibility of the child based on promise to tell the truth are ambiguous and unclear. Some stakeholders stated that the testimony of a child should depend on case to case and should be upon court's discretion to decide on the intelligence of the child in question.

Commission's Observations

The Commission observed that section 127 (1) of the Evidence Act [159] provides for the general rule that every person is competent to testify unless the court considers that such person is incapable of understanding the questions put forward or giving rational answers by reason of tender years, extreme old age, disease (whether of body or mind) or any other similar cause. However, it should be noted that the competency of a person to testify goes along with the requirement of taking oath or affirmation as provided under section 198 (1) of the CPA.

With regard to children of tender age, the position of the law before 2016, courts were required to conduct the *voire dire* test

159 Cap. 6 .

before receiving evidence from the witness of tender age. Section 127(2) of the Evidence Act provided thus;

> Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify receiption of his evidence, and understands the duty to speak the truth

The Court of Appeal of Tanzania in the case of ***Kimbute Otiniel v. Republic***[160] while interpreting section 127(2) as it then was before 2016, held that the concern of the provision in governing the competence of a child of tender years is to obseve the following:

(i) The court satisfies itself that a child of tender years understands the nature of oath;

(ii) Consider receiving the evidence of such witness of tender age though not given upon oath or affirmation if the said witness is possessed of sufficient intelligence to justify the reception of his evidence;

(iii) The witness of tender age understands the duty to speak the truth.

The Court was of the firm view that when considering receiving evidence of the witness of tender years, the two other conditions must be considered only after the court had satisfied itself that the witness did not understand the nature of the oath. The Court in ***Kimbutes' case (supra)*** had this to say regarding failure to observe the conditions afore said:

> …where there is a complete omission by the trial Court to correctly and properly address itself on section 127(1) and 127(2) governing the competence of a child of tender years, the resulting testimony is to be discounted.

160 Criminal Appeal No.300 of 2011 (unreported), p.

Following the decision of the Court of Appeal in **Kimbute's case,** section 127 of the Evidence Act was amended in 2016[161] to provide that a child of tender age may give evidence without taking an oath or making an affirmation. The child need to promise to tell the truth to the court. This amendment removed the requirement which was imposed by section 127(2) and (3) of this Act whereby the court was required to determine whether the child should give sworn or unsworn evidence through the *voire dire* test. With this amendment, the only requirement for admissibility of the evidence of the child is the promise by the child to tell the truth to the court. The issue raised by stakeholders and need to be addressed is how the court can know that the child understands the importance of telling the truth and promises to tell the truth. It is not just a matter of promising to tell the truth but knowing the importance of telling the truth and the effects of telling lies. There is a need of having rules, like the ones used in the *voire dire* test, to guide courts in establishing the capability of the child to tell the truth. The a bsence of these rules will make each judge or magistrate to establish own way of determining that ability from the child.

Commission's Recommendation

The Commissions recommends that the Chief Justice make guidelines for courts to use in determining the ability of the child to promise to tell the truth and the effect of telling lies .

3.2.24 Additional Evidence

Stakeholders' Observations

Stakeholders observed that there are certain circumstances where a party requires additional evidence, especially witnesses, to strengthen own case. There is established practice for calling additional witnesses but the law is silent on the same. They recommended that the law should provide for elaborate procedure for calling additional witnesses.

Other stakeholders were of the view that calling an additional

161 the Written Laws (Miscellaneous Amendments) (No.2) Act 2016, section 26.

witness would prolong litigation and may lead to abuse of the court process and is not clear as to what stage additional witness should be allowed. If witnesses are exceptionally necessary then each party should ensure that all such witnesses are called before the closure of one's case.

Commission's Observations

The Commission is of the view that stakeholders were generally concerned with lack of adequate legal provisions for calling additional witnesses in both civil and criminal proceedings. Additional witnesses are just part of additional evidence that are always required by parties in strengthening their cases. Evidence tendered in the court of law is either in form of oral or documentary evidence. It is the Commission view that it is necessary to address addition of evidence which shouldl also include the issue of calling additional witness.

The Civil Procedure Code Act gives the High Court, in the exercise of appellate jurisdiction, power to take additional evidence or to require such evidence to be taken.[162] However, additional evidence is allowed only where the trial court had refused to admit evidence which ought to have been admitted or where the Court requires a document to be produced or a witness to be examined to enable the court to pronounce a judgment or for any other substantial cause. [163] The Act enables the court to take additional evidence or to require the trial court or any other subordinate court to take such additional evidence.[164]

The Commission observes that the current law does not provide for the procedure of taking additional evidence in subordinate courts. It has also been noted that the current law does not provide for taking additional evidence in criminal proceedings both in the High Court and in subordinate courts. The Commission observes generally that there are scenarios where the parties are required to call new witnesses to strengthen their cases in the High Court and

162 Section 76 and Rule of 25 of Order XXXIX of the Civil Procedure Code Act.

163 Rule 27 of Order XXXIX of the Civil Procedure Code Act.

164 Rule 28 of Order XXXIX of the Civil Procedure Code Act.

in subordinate courts. As rightly elucidated by stakeholders, there has been an established practice of calling additional witnesses in courts without having an enabling legal provisions.

As pointed out by stakeholders, taking additional evidence if not controlled can be abused and thus prolong litigation. The issue of taking additional evidence, particularly additional documents, was discussed in the case of ***Chintan Maganlal kakkad vs Magdallena A. Orwa and Others***[165] whereas the Court held as follows:

> I find that the learned counsel for the plaintiff cannot be allowed to produce the three bundles of list of additional documents to be relied by plaintiff during trial and a notice to produce since this court had already framed issues for determination. Therefore, I proceed to find an attempt to produce these documents after the commencement of the final pre-trial conference without adduced good cause not tenable in law.

Conditions to be fulfilled to justify receiving additional evidence on appeal were stated in the case of ***S. T. Paryani vs Choitram and others***[166], whereby the Court quoted with approval Lord Denning, LJ, as he then was in the ***Ladd vs. Marshall***[167] and clearly enunciated by the Court of Appeal for Eastern Africa in ***Tarmohamed and another Vs. Lakhani & Co***[168] in the following way:

> To justify the reception of fresh evidence or a new trial three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that; if given would probably have an important influence on the result of a case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible

165 Land Case No. 381 of 2014, in the High Court of Tanzania (Land Division) at Dar es Salaam (Unreported).
166 (1963) EA 462.
167 (4) [1954]3 All E.R 745.
168 (3) [1958] E.A 567(CA).

In Kenya, in the case of ***Raila Odinga & 5 others vs IEBC & 3 Others***,[169] the Court considered to allow additional evidence filed outside the contemplation of the rules in a Presidential election petition. It enunciated adverted to the principles applicable as follows:

> The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/ or admission of additional evidence.

Also **Sarkar on Law of Evidence**,[170] discusses grounds upon which additional evidence may be given and the related restrictions as follows:

> The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision of a case. The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent; and not where discovery is made outside the court of the fresh evidence and the application is made to import it. The rule is not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal.

From the foregoing analysis, it is the view of the Commission that the law be reformed to provide circumstances for taking additional evidence in civil proceedings by subordinate courts. The law should also provide the procedure for calling additional evidence in criminal proceedings in both the High Court and subordinate courts. Tendering and admission of additional evidence needs to

169 SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR
170 16TH Edition, 2007 at pg. 2512.

be controlled to avoid its abuse by parties. Safeguard provisions should be enacted to prevent unnecessary additional evidence at the expense of the disposal of cases timely.

Commission's Recommendations

The Commission recommends that:

a) The Civil Procedure Code Act be amended to provide for the taking of additional evidence in civil proceedings by subordinate courts.
b) The Criminal Procedure Act be amended to provide for taking additional witnesses in the High Court and subordinate courts in criminal proceedings.
c) Conditions for admission of additional evidence should include:
    i. that the evidence could not have been obtained with reasonable diligence for use at the trial;
    ii. if the evidence is given would probably have an important influence on the result of a case;
    iii. the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible.

3.2.25 Discovery of Documents

Stakeholders' Observations

Stakeholders observed that the law does not provide procedure for discovery of documents in possession of the opposite party. It was noted that the question of discovery of documents be an entitlement of an accused person because the prosecution has all necessary mandate and facilities to access any document during investigation.

Commission's Observations

The Commission observes that Order XI Rule 10 of the Civil Procedure Code Act provides for the discovery of documents which are, or have been in possession or power of the opposite party in a civil suit. However, the Criminal Procedure Act does not have a corresponding provision in respect of discovery of documents

in criminal matters. This lacunae impedes parties' right to use documents in possession of the adverse party.

The Commission understands that while the prosecution has the advantage of using evidence collected during investigation, the accused lacks such opportunity. It is the view of the Commission that it would be in the interests of justice for the parties to be accorded with the right to access documents in possession of the opposite party.

Commission's Recommendation
The Commission recommends that CPA be amended to allow parties to apply for discovery of documents.

3.2.26 Proof by Written Statements

Stakeholders' Observations
Stakeholders observed that the Evidence Act allows statements made by a person whose attendance in court cannot be procured. However, once admitted, there is no room for the opposite party to cross - examine on these statements. They were of the view that the law should set higher standards for admitting such statements and give guidelines as to the weight to be accorded since it was admitted without cross examination. Stakeholders further stated that conviction should not be made based solely on uncorroborated written statements.

Commission's Observations
The Commission observes that section 34B of the Evidence Act allows, in criminal proceedings, admission of a written statement of a person who is not called as a witness in court. Admission of such document is allowed where the maker is dead or unfit by reason of bodily or mental condition to attend as a witness, or if the person is outside Tanzania and is not reasonably practicable to call him as a witness. In ***Omar Mohamed China and 3 others versus Republic***[171] the Court of Appeal confirmed the admission of written statement of the person who could not be called as witness. In the

171 Criminal Appeal No. 230 of 2004 (Unreported) Court of Appeal of Tanzania sitting at Dar es Salaam.

view of the Court, the precondition set forth under section 34B (2) of the Evidence Act were met before admitting the statement as evidence.

Other grounds for admission of the written statement of the witness who cannot attend are; if all reasonable steps have been taken to procure attendance but such witness cannot be found or cannot attend because he is not identifiable or by operation of any law the witness cannot attend. In the case of ***Priscus Kimario versus Republic***[172] the Court of Appeal held that, in terms of section 38B of the Evidence Act, before admitting any statement of a deceased person, there must be proof of death of the alleged person, and that such statement of the deceased person must be served on the other party.

Similarly, in the United Kingdom, the law[173] provides for conditions under which written statement can be used as evidence in criminal proceedings.[174] Accordingly, for the statement to be admitted it must be:-

a) a formal written document of a person;
b) a set of facts relating to a certain event or events;
c) signed by the person who makes it, to confirm the truthfulness of its contents;
d) served on the other parties before the trial;
e) relevant to a fact which has to be proved or disproved;
f) free from objections against its being tendered as evidence; and
g) with the witness' age at the beginning of the document.

The Commission is of the view that, in Tanzania the conditions necessary for authenticating written statements are well prescribed under section 34B of the Evidence Act. The essence of admitting written statement is to enable the court to make use of evidence which would otherwise be inadmissible due to the maker's

172 Criminal Appeal No. 301 of 2013(unreported)
173 The Criminal Justice Act 1967, s. 9.
174 Home Office, Witness Statement, Pg. 1 of 23 Published for Home Office staff on 6 February 2017, at pg 5 & 6.

absence.

Commission's Recommendation
The Commission recommends that the current state of the law on authenticating written statement of witnesses who cannot attend court proceedings as provided under section 34B of the Evidence Act be maintained.

3.2.27 Primary Courts' Rules of Evidence
Stakeholders' Observations
Stakeholders pointed out that a number of changes have taken place since the Primary Courts' Rules of Evidence were made. For instance, Primary courts are now presided over by law graduates who are competent with the Evidence Act. The rules, however, are not comprehensivesuch that most of the magistrates have to seek assistance from the Evidence Act. They observed that there are many provisions in the Evidence Act and other procedural statutes which are not replicated in the Primary Courts' Rules meaning that such rules are inapplicable in primary courts.

Stakeholders recommended that these rules should be updated to accommodate new developments. Alternatively, the application of the Evidence Act in primary courts be allowed where there are *lacunae*. They were of the view that whenever procedural rules are amended or updated, rules applicable in Primary Courts should also be looked at so that there would be uniformity in the law.

Commission's Observations
The Commission observes that the Evidence Act was enacted to apply in the High Court and subordinate courts save for primary courts. The exclusion of primary courts was done so as to ensure that technicalities of evidence which are encompassed in the Evidence Act do not complicate proceedings in primary courts which were previously manned by magistrates who were not lawyers assisted by two assessors. The Primary Courts' Rules of evidence were made specifically to simplify procedures of adducing evidence in primary courts.

The Commission is aware of the ongoing reforms in the Judiciary where majority of primary courts are now manned by holders of degree in law. The reforms will eventually lead to the uniform application of procedural laws including evidential rules. Despite such reforms, it is the view of the Commission that Primary Courts' Rules are the best rules for the expeditious disposition of cases. The Rules have few technicalities on admission of evidence compared to the Evidence Act.

Commission's Recommendation

The Commission recommends for updation of the primary court rules of evidence to accord them with the current socio-economic development.

3.2.28 Hostile Witness

Stakeholders' Observations

Stakeholders observed that the law is silent on how to deal with hostile witnesses. According to stakeholders, the available procedure for dealing with hostile witnesses has been laid down by case law and were of the view that the amendment of the Evidence Act be made in order to provide for the procedure of dealing with hostile witnesses. It was also advised that procedures for dealing with hostile witnesses should be in conformity with the requirement provided under section 164 of the Evidence Act.

Commission's Observations

The Commission is aware that the current procedure on dealing with hostile witnesses has been developed by practices through case law. In the case of ***Shiguye and Another vs Republic***[175], the Court of Appeal of East Africa gave the position of how to treat a hostile witness. In this case, the witness called Shizya repudiated a police statement as untrue. The trial Court found the appellants guilty of assaulting and causing death of the deceased. On appeal the court held that:

> After having declared Shizya a hostile witness, the effect

175 [1975] 1 EA 191.

> would be that Shizya was an unreliable witness, whose evidence would not be accepted by a court. All parts of the evidence of a witness declared hostile would be rejected as untrustworthy, not only some parts. The purpose of having a witness declared hostile by the party which calls him is to discredit him completely, and it follows that nothing Shizya said in court could be accepted against the appellants.

Furthermore, in the case of ***Amir Mohamed vs Republic***[176]**,** PW5 was called in the trial court by the appellant (accused) to testify before the court. During testimony, the witness turned hostile by stating that the appellant used the bush knife (exh. 13) to kill the deceased. The trial Magistrate thus used the evidence adduced by a hostile witness to convict the appellant. On appeal, the Court of Appeal of Tanzania held that it was improper for the trial court to use evidence of a hostile witness but could have instead, thrown out the evidence totally. Nonetheless, the appellant was found guilty based on evidence adduced by a hostile witness because there was evidence of appellant himself instructing the hostile witness to throw into a latrine or river the weapon alleged to have been used for murder.

This principle was repeatedly stated in the cases of ***Said Mwamwindi vs Republic,***[177] ***Mbewa & 30 0thers vs Republic***[178] and **Ben Zuberi Mwamba vs Republic.**[179] In ***Ben Zuberi*** case, the court held; that:

> It is not every witness that gives unfavorable evidence that can be declared hostile; for a witness to become hostile it must be shown that he prevaricates or suppresses the truth.

Moreover, in a Kenyan case of ***Thomas Maina vs Republic,***[180] the court considered evidence of a hostile witness and held as follows:

> Where the prosecution wishes to show that its witness has

176 [1994] TLR 138.
177 [1972] HCD No. 212
178 [1971] HCD No. 310
179 [1984] TLR 172
180 Criminal Appeal No. 112 of 2017

> retracted previous statements made by him to the police, the prosecutor must apply to cross examine his witness as to such previous statements made by him to the police, the prosecutor must apply to cross examine his witness as to such previous statement. In such circumstances the court must ensure that the provisions of Section 153 and Section 154 of the Evidence Act are observed. The witness will then be cross examined by the defence.
>
> The purpose of such cross examination by the prosecution may extend, not only to establishing that the witness retracted his previous statement. The prosecution will be at liberty to cross examine the witness as to his credibility, accuracy and veracity among other things. If the prosecution succeeds in shaking the credibility and injuring the character of its witness, the witness will be treated as a hostile witness.

The court in ***Maghanda vs R.***[181] also discussed the manner in which the evidence of a hostile witness should be treated by a trial court. It stated that:

> Halima was called to testify for the prosecution. She was declared a hostile witness. The magistrate said that, therefore, her evidence could be safely disregarded for, being the appellant's girlfriend, it was but natural that she would testify as a defence witness. The first part of the magistrate's statement strictly was misdirection. The evidence of a hostile witness must be evaluated, in particular, if it tends to favour the accused though it may not necessarily be acted upon by the court.

The decisions analysed above emphasized on the status of evidence adduced by a hostile witness. Principally, the court should be warned on how to consider the evidence adduced by a hostile witness. The CPA does not have provisions for dealing with the evidence of a hostile witness.

Commission's Recommendations

The Commission recommends that the Evidence Act be amended to provide for the procedure on how to deal with the hostile witness as follows:

181 [1986] KLR 255 at pg. 257

(i) A party who called the witness may apply for court to declare such witness hostile.
(ii) Upon the determination of the application the court may declare the witness hostile.
(iii) The court may proceed to allow the party who called the witness to cross examine the witness.
(iv) The Court wil not consider the evidence of the hostile witness.

3.2.29 Protection of Witnesses
Stakeholders' Observations
Stakeholders observed that the law does not adequately protect witnesses appearing before the court to testify. They observed that sometimes witnesses do not show up during the hearing out of fear and advised that one way of the protecting witnesses is through hiding their identities. They recommended that the law should be reformed to protect witnesses thereby encouraging free participation of public in court processes. However, other stakeholders were against such recommendationl for want of transparence in criminal justice system.

Commission's Observations
The Commission observes that Tanzania like other countries, is not spared by challenges related to procurement of witnesses to testify in both ordinary and new forms of crimes. Sometimes the perpetrators of crimes are not easily traced and, once traced; the investigation and/or prosecution encounter a number of obstacles to secure key and credible witnesses. Reluctance of witnesses is partly because their families or themselvesare intimidated, harassed, attacked, killed or otherwise injured by offenders, relatives or accomplices.

The Commission appreciates that the successful administration of justice in criminal matters depends on effective investigation and prosecution processes which enable the collection and use of strong evidence in court. Currently, Tanzania experiences a series of adjournments in criminal cases, which consequently

result in either discharge or acquittal of the accused due to non-appearance of witnesses.[182]

The Commission is mindful of the existence of the legal regime on the protection of witnesses in Tanzania. The main legislation on the protection of witnesses is the Whistle Blowers and Witnesses Protection Act which, among other matters, requires investigative authorities to protect witnesses from dismissal, suspension, discrimination, harassment or intimidation.[183] Another piece of legislation is the Anti-Money Laundering Act,[184] which gives power to court to allow tendering of evidence through the use of communication technology such as video conferencing, non-disclosure or limited identity of whereabouts of witnesses, taking into account security of the informer or the witness.

The above position, notwithstanding, the legislation do not adequately resolve challenges on the protection of witnesses. Due to lack of adequate protection most of witnesses refrain from cooperating in making statements before investigative authorities and other law enforcement agencies. Consequently, there are prolonged adjournments and the accused end up being discharged or acquitted. [185]

Similarly, Kenya enacted the Witness Protection Act, 2006.[186] This law, among other things, establishes the Witness Protection Agency[187] whose mandate is to formulate witness' protection framework. The functions of the agency include, establishing and maintaining witness protection programs; determining criteria for admission to, and removal from the witness protection program; determining the type of protection measures to be applied; and advising the Government on the adoption of strategies and measures on

182 Mwenda, A.Y.,"Witness Protection in Tanzania" available at www. unafei.or.jp

183 Cap. 446, section 11.

184 Cap. 423, section 22.

185 Ayub Yusuf Mwenda A.Y. , "Witness Protection in Tanzania"available at www. unafei.or.jp

186 No. 16 of 2006.

187 The Whistleblower and Witness Protection Act, Cap. 466, s. 3A.

witness protection.[188]

Some of the protective measures provided under the Kenyan law[189] include; physical and armed protection; relocation within or outside Kenya; change of identity or any other measure necessary to ensure the safety of a protected person; and assigning a pseudonym. On the basis of te foregoing, `it is the view of the Commission that the Tanzania legal regime does not adequately protect witnesses and there is a need for its reform.

Commission's Recommendations

The Commission recommends that:

a) The Whistleblower and Witness Protection Act be amended to establish a specialized Witness Protection Unit.
b) The Minister should prescribe regulations on protection of witnesses as envisaged under section 15 of the Whistleblower and Witness Protection Act.
c) Magistrates and Prosecutors be trained on general duties regarding witness rights and protection.

188 Ibid, s. 3C.
189 Ibid, s. 4C.

CHAPTER FOUR
CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The review has studied and analysed the Evidence Act and related legislation, identified challenges and gaps in the Evidence Act by revisiting precedents from decisions of both the High Court of Tanzania and the Court of Appeal. For gaining indepth experience on the subject matter. The reviews also sought the guidance from from other jurisdictions, scholarly and judicial review has been undertaken.

It is obvious that the law of evidence is the cornerstone for administration of justice in Tanzania. It is for that reason the law of evidence needs to be updated so as to of facilitate fair fact finding during the trial processes.

The review has identified challenges affecting the effectiveness of evidence law in Tanzania. These challenges include complexity of the language that cannot be understood by ordinary citizens,failure to adequately accommodate the current scientific and technological revolution and the prevailing economic and social reforms and deficiencies in assessing competency of child to testify are among the challenges under the evidence law.

Other challenges include the confusion between oral evidence *vis-a'-vis* documentary evidence, lack of clear procedure for the tendering of real evidence and other documents, weight given to hearsay evidence, codification of case laws, weight given to circumstantial evidence, admissibility of forensic evidence, principle of orality in ICT, reception of evidence through electronic means in Tanzania, admissibility of the illegally obtained evidence, treatment of evidence discovered after closure of cases but before delivery of judgment, a trial within a trial, procedure for tendering of evidence, confession obtained through inducement as well as, authenticity and admissibility of electronic evidence.

The review has revealed that despite the Evidence Act being important law for administration of justice, there are weaknesses, shortcomings and gaps in some of the provisions which, in one way or the another, affect the administration of justice. These challenges call for reform of the law of evidence so as to come up with a well-structured law of evidence which corresponds with changing economic and social needs.

4.2 Recommendations

on the basis of the review of laws governing evidence law in Tanzania, taking into account the challenges and gaps that have been identified, the Commission makes recommendations on issues identified in the following manner:

4.2.1 Orality Principle and use of ICT

It is recommended that:

a) The Evidence Act should be amended to empower the Chief Justice to make rules prescribing procedure for receiving evidence through electronic devices.

b) The Rules should have the following conditions:

i. Before a witness is examined in terms of the audio-video link, witness has to file an affidavit or an undertaking duly verified before a notary, magistrate or a judge that he is the same person who is going to testify through electronic divises;

ii. The person who calls a witness to testify through electronic devices has to file an affidavit with regard to identification of the witness and serve the copy to the other side;

iii. The witness has to be examined during working hours of Tanzanian courts with oath administered through the media;

iv. The judge or magistrate has to record such remarks as is material regarding the demeanour of

the witness while testifying through the electronic divice;

v. The judge or magistrate must note the objections that arise during recording of witness and decide accordingly.;

vi. The witness must be alone at the time of visual conference and notary has to issue certificate to that effect.;

vii. The judge/magistrate may also impose such other conditions as are necessary in a given set of facts.;and

viii. The expenses and the arrangements are to be borne by the party, who wants this facility.

c) The courts should be equipped with all devices necessary for ongoing reforms in the Judiciary regarding use of electronic devices in conducting trials, recording evidence, keeping records and delivering decisions.

4.2.2. Admissibility of Illegally Obtained Evidence

It is recommended that the current state of the law on the admissibility of the illegally obtained evidence be retained.

4.2.3. Reports of Government Analysts in Health-Related Matters

It is recommended that current position of section 203 of the Criminal Procedure Act should be maintained because the definition of "Government analyst"under section 203 (4) of the CPA accommodates the private sector as well.

4.2.4 Proof of Documents

It is recommended that:

a) Section 99 of the Evidence Act be amended to require proof by presumption only to documents which are more than twenty (20) years; and

b) The Evidence Act be amended to require proof by presumption of electronic records which are more than five (5) years.

4.2.5 Admissibility of Evidence Discovered after Closure of Parties' Case but before Judgment

It is recommended that the Civil Procedure Code Act be amended to provide for:-

a) Admission of new evidence after closure of the case by parties but before judgment; and

b) Safeguards against the abuse of court process on admission of new evidence after closure of the case should be given clearly.

4.2.6 A Trial within a Trial

It is recommended that:

a) Trial within a trial should be conducted in all courts;

b) Criminal Procedure Act be amended to provide for procedure for trial within a trial; and

c) In case of the High Court, the trial within trial procedure should be as follows:

(i) If the defence is aware, before the commencement of the trial, that such an issue will arise; the prosecution should be informed of that fact. Having been informed, the prosecution would refrain from mentioning anything in relation to the statement in the presence of the assessors.

(ii) When the stage is reached at which the issue must be tried, the defence should mention to the court that there is a point of law to be resolved and submit that the assessors be asked to retire (withdraw from the court room). This must be done before any witness testifies in

relation to the statement. The insistence is that it should be quite early before any such witness goes to the witness box;

(iii) The court will then order the lay members of the court (the gentlemen or/and ladies assessors) to retire, i.e. to go out of the court and stay at a distance long enough not to hear or even see anything in the courtroom;

(iv) After the departure of the assessors, the prosecution (upon whom the burden to prove the statement lies) will call its witnesses including, of course, the person to whom the statement was made, the interpreter (if any) and any other person acquainted with the fact in issue. These witnesses would be examined-in-chief in a normal way, and then the defence will cross-examine them;

(v) The accused has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. The accused and his witnesses (if any) will be cross-examined by the prosecution on the issue of admissibility of the statement and never on the general issue in the main trial;

(vi) Having heard both sides of the case, the judge will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties;and

(vii) After the ruling, the lay members of the court (the assessors) would be called back to retake their seats in the courtroom and the main trial would then resume.

d) In subordinate courts, trial within a trial procedure should be as follows;

(i) 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;

(ii) 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 Criminal Procedure Act;

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

(iv) Then the prosecution should re-examine its witness;

(v) When all witnesses have testified, the prosecution shall close its case;

(vi) The court should call upon the accused to give his evidence and call witnesses, if any, on oath or affirmation as in the prosecution case;

(vii) Whenever a witness finishes, the prosecution should be given opportunity to ask questions;

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

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

(x) Having heard both sides of the case, the magistrate will then make a ruling either to admit the statement or to exclude it, and pronounce the ruling to the parties;

(xi) 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 that witnesses to tender the statement as an exhibit. The court should accept and mark it as an exhibit, the contents of which should then be read in court;and

(xii) In case the court find[s] out that the statement was not made voluntarily, it should reject it.

4.2.7 Procedure for Tendering Evidence in Court

It is recommended that, the Chief Justice to make Rules for tendering and receiving exhibits in courts, which may include the following;

(a) to have a document or object physically produced so that it is referred to by the witness before the Court;

(b) the Court to avail an opportunity to the adverse party to raise an objection (if any) and make submission thereof regarding admission of the exhibit in question;

(c) A party tendering the exibit to make reply submissions as to the objection;

(d) The objecting party to make rejoinder (if any);

(e) The court to make ruling either to overrule or sustain the objection;

(f) In case the objection is overruled, to admit the evidence and put it in custody of the Court after marking it; and

(g) Where the Court finds that the evidence tendered is not worth of admitting as an exhibit but is important for a future use in dispensation of justice, may receive

it for identification purposes.

4.2.8 Circumstantial Evidence

It is recommended that the current status of the law on circumstantial evidence be retained.

4.2.9 Overlapping Laws

It is recommended that the current state of the law be maintained.

4.2.10 Codification

It is recommended that:

(a) Codification be made as and when the need arise on important decisions developed by the court;and

(b) Judiciary needs to install a system where all evidentiary rules developed by the Court of Appeal are accessed online.

4.2.11 Privileged Information

The Commission recommends that the current status of the law be maintained.

4.2.12 Oral Evidence against Documentary Evidence

The Commission recommends that:

(a) The current state of the law be maintained; and

(b) Public legal awareness on admissibility and evidential value of oral against documentary evidence be conducted.

4.2.13 Timeline for Interviewing Suspects

It is recommended that:

(a) The current timeline for interviewing suspect as provided for under section 50 of the Criminal Procedure Act is adequate and should be maintained;and

(b) The CPA should provide for a prescribed form for applications for extension of time to interview a suspect after expiry of four hours.

4.2.14 Chain of custody of exhibits

It is recommended that:

(a) the procedure for the chain of custody should be provided in the respective laws;and

(b) The Criminal Procedure Act be amended to empower Minister responsible for legal affairs to make regulations providing general guidelines on the chain of custody of exhibits.

4.2.15 Language Complexity

The Commission recommends that:

(a) The language of the Evidence Act should be simplified;and

(b) The Evidence Act be translated into Kiswahili language.

4.2.16 Compellability of Spouses

The Commission recommends that the position of section 130 of the Evidence Act with regard to non-compellability of spouses be maintained.

4.2.17 Defence of *Alibi*

The Commission recommends that:

(a) Section 194 of CPA should be amended to impose the duty to the court to notify the accused to raise the defence of alibi (if any) during the preliminary hearing;and

(b) Awareness should be conducted to let the public understand the importance of raising the defence of alibi during preliminary stages of the proceedings.

4.2.18 Visitation and Evidence from *Locus in Quo*

The Commission recommends that:

(a) The Chief Justice should be empowered to make rules prescribing the procedures on visiting *locus in quo*;and

(b) Rules should provide about, who should bear the cost of a visit , at what stage the court should visit the *locus in quo*, who should assess the costs of visit and

that when visiting the *locus in quo* the court should attend with parties and their advocates and relevant witnesses in that particular matter.

(c) the rules need to clarify the status of evidence that is given at the locus in quo

4.2.19 Investigation of Offences by a Single Police Officer

The Commission recommends that the investigation and recording the caution statement of the accused should be undertaken, preferably, by different police officers.

4.2.20 Real Evidence

It is recommended that the Evidence Act be amended to provide for:-

a) Admission of real evidence in civil and criminal proceedings; and

b) Procedure for tendering real evidence to include:-

(i) production of photographs or sample *in lieu* of real evidence;and

(ii) production of real evidence where the court deems necessary.

4.2.21 Questions to Witnesses by Assessors

It is recommended that:

a) Section 177 of the Evidence Act be amended to provide that questions to be put to witnesses by assessors should be questions intended for clarification purposes only;

b) Assessors should put questions to witnesses after re-examination;and

c) There should be induction course on appointment and post-appointment training for assessors.

4.2.22 Printouts of Electronic Devices as Documentary Evidence

It is recommended that the position of the law on admissibility

of printout from electronic devices as stipulated under ETA be maintained.

4.2.23 Competency of a Child to Testify

The Commissions recommends that the Chief Justice make guidelines for courts to use in determining the ability of the child to promise to tell the truth and the effect of telling lies .

4.2.24 Additional Evidence

It is recommended that that:

a) The Civil Procedure Code Act be amended to provide for the taking of additional evidence in civil proceedings by subordinate courts;

b) The Criminal Procedure Act be amended to provide for taking additional witnesses in the High Court and subordinate courts in criminal proceedings;and

c) Conditions for admission of additional evidence should include:

   i. that the evidence could not have been obtained with reasonable diligence for use at the trial;

   ii. if the evidence is given would probably have an important influence on the result of a case;and

   iii. the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible.

4.2.25 Discovery of Documents

The Commission recommends that CPA be amended to allow parties to apply for discovery of documents.

4.2.26 Proof by Written Statements

It is recommended that the current state of the law on authenticating written statement of witnesses who cannot attend court proceedings as provided under section 34B of the Evidence

Act be maintained.

4.2.27 Primary Courts' Rules of Evidence

The Commission recommends for updation of the primary court rules of evidence to accord them with the current socio-economic development.

4.2.28 Hostile Witness

The Commission recommends that the Evidence Act be amended to provide for the procedure on how to deal with the hostile witness as follows:

i. A party who called the witness may apply for court to declare such witness hostile;

ii. Upon the determination of the application the court may declare the witness hostile; and

iii. The court may proceed to allow the party who called the witness to cross examine the witness.

iv. the court will not consider the evidence of the hostile witness.

4.2.29 Protection of Witnesses

It is recommended that:

a) The Whistleblower and Witness Protection Act be amended to establish a specialized Witness Protection Unit;

b) The Minister should prescribe regulations on protection of witnesses as envisaged under section 15 of the Whistleblower and Witness Protection Act;and

c) Magistrates and Prosecutors be trained on general duties regarding witness rights and protection.

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