KWIKIMA MUSSA HUSSEIN ALIMASI

(1939-2020)[1]

THE LAW STUDENT UNDER A MANGO TREE

By

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I INTRODUCTION

The man as I knew him

I met Mr. Mr Mussa Hussein Alimasi Kwikima at Tabora Boys' Secondary School in 1959. He was in standard thirteen (Form V) and a Prefect when I joined standard nine (Form I) in that year. Like the late Juma Omari Lweno, Mr Kwikima had been in Tabora School from standard five. 1959 marked the beginning of my long and fruitful association with Mr. Kwikima.

He was flamboyant, jovial, loquacious and extremely humorous. When in 1960 he received information that the University College, Dar es Salaam with a Faculty of Law would be established in 1961, he remarked, "We shall study law even under a mango tree." In 1964 he was privileged to be one of twelve (12) East Africans[2] who graduated with the degree of Bachelor of Laws (LL.B.) of the University of East Africa at the University College, Dar es Salaam. Many years later after his graduation with the LL.B., degree and having been appointed to the high post of Registrar of the High Court, he euphemistically referred to his post as a "dignified court clerk." He was an avid reader of books, journals and newspapers. He narrated to me that when, in his early years at the Judiciary, he visited the City of London for the first time he spent his Sunday reading newspapers, the Times, the Guardian, the Standard, the Daily Telegraph, the Daily Mail, the Mirror and Newsweek. He read every page including pages on law reports, sports, football, hockey, rugby, boxing, swimming and shipping news.

Al Hajj Mussa Hussein Alimasi Kwikima was a staunch Moslem. He was privileged to hold the post of General Secretary of the East Africa Muslim Welfare Society. His highest post in the Judiciary was Acting Judge, 1970-1973. He had, previously, held the posts of Resident Magistrate, Senior Resident Magistrate and Registrar of the High Court. When his tenure as Acting Judge ended, he was appointed Administrator General. In that position, he was Public Trustee, Official Receiver and Registrar General (Registrar of companies, business firms, societies, religious organizations, births, marriages and deaths). Subsequently, he resigned and became a practicing Advocate at Tabora for many years. In one case, he asked me to join him in an appeal at the Court of Appeal of Tanzania. I pointed out some flaws in the record of appeal and in the memorandum of appeal. He immediately quipped with reference to the Justices of

[1] Kwikima was one of the pioneering students of the Faculty of Law, UDSM on Wednesday 25th October 1961.

[2] Fourteen students were enrolled in 1961, one student was discontinued and another repeated the first year.

Appeal, *"Hawa jamaa wanaweza kukuvua suruali,"* (meaning: these guys can pull down your pair of trousers).

I was not privileged to access Mr. Kwikima's speeches (official and unofficial) or his extra judicial writings, letters or poems. In this short essay, therefore, I wish to spend time on materials which were available to me independently. I shall be discussing Mr. Kwikima's exciting judicial career as an Acting Judge of the High Court of Tanzania.

II JUDICIAL CAREER: THE CASES

The Role of Judge

A Judge is a leader and in him lies great responsibility. He determines the pace of the hearing of a case which has been filed in his Court. In the conduct of the case, he is assisted by the Advocates who appear in the case. In the summing up of the evidence and in composing the judgment, he determines the material facts in the case, that is to say, the facts which are relevant and which will assist him in his decision. It should be pointed out that during the period 1970-1973, the famous Arusha and Dar es Salaam Advocates who had graduated with the LL.B., degree at the University College Dar es Salaam were still employed as magistrates or State Attorneys or in parastatal organizations or in the East African Community. These are as follows, Messrs. Joe D'Souza, Wilfred A. L. Mirambo, J. Lipiki, Evarist Hubert Mbuya, Mohamed Ismail, Leopold Kalunga, Hussein J. Muccadam, Eliutherius F. Kapinga, Joachim R. Marandu and George M. B. Kilindu. Therefore, for the most part, Mr. Kwikima was on his own.

Nevertheless, Kwikima, Acting Judge scrupulously studied the law applicable to the case at hand and he was quick to refer to previous decisions of superior Courts. His Islamic upbringing was amply reflected in his decisions as will be seen in this essay. Generally, his character and disposition can easily be discerned in the decisions which I have collected and discussed. The bulk of these judgments were delivered at the High Court Registry, Arusha.

I have endeavoured to reproduce the judgments as they were reported in the High Court Digest (HCD), 1967-1972 and the Law Reports of Tanzania (LRT) so that there may be a meeting of the minds of the reader and that of the Acting Judge.

Approach of this Essay

Two possible approaches could be attempted; first, by subject matter according to the usual legal categories such as land law, landlord and tenant, criminal law, homicide (murder and manslaughter), torts, election petitions, civil procedure and criminal procedure. The second approach is by reference to the type or level of court in which the case was filed or commenced such as High Court, Court of the Resident Magistrate, District Court, Primary Court or Rent Tribunal. With regard to the High Court, Kwikima, Acting Judge exercised original jurisdiction

in civil and criminal cases. With regard to the lower courts, he exercised appellate and revisional jurisdictions. In this essay, I have chosen the first approach in order to assist students of law,[3] researchers and the general reader. It has been said, correctly that each case is a new legal problem. The criteria which guided selection of judgments were as follows:

- Points of law expounded and directives pronounced;
- Guidance and criticism of Magistrates;
- Intellectual vigour contained;
- Beauty and sweetness of language expressed;
- Decisions whose soundness may be open to debate.

The significance of this essay is three-fold, namely,

(a) It is an historical and analytical account of his work for which he should be remembered;
(b) Each judgment is good law unless and until it is overruled by the Court of Appeal or it is overruled by written law. Therefore, each judgment is a firm basis for judicial work of others in the High Court and magistrates' courts;
(c) Each judgment is useful material for reference and further research.

The Court Structure in Tanzania, 1970 -1973

Before I dwell on an analysis of the cases handled by the Acting Judge, let me present a bird's eye view of the structure of the courts of Tanzania in 1970. The relevant legislation was the Magistrates' Courts Act 1963 (Cap 537) which came into force on 1 July, 1964. The Primary Court was at the bottom of the ladder followed by the District Court and the Court of the Resident Magistrate. Appeals lay to the High Court of the United Republic which was established by section 56 of the Interim Constitution of Tanzania, 1965. Section 65(1) of the Constitution made provision for appeals from the High Court to lie to "another court in East Africa in cases other than questions as to the interpretation of this Constitution." In this case, it was the Court of Appeal for East Africa which was established by legislation of the East African Community. It may be recalled that the Treaty for East African Cooperation was signed in 1967.

Reported Cases Handled by the Acting Judge

The first recorded judgment of Hon. Mussa Kwikima, Acting Judge, relates to an appeal from a Primary Court, **Ndelaonjama** v. **R** reported as (PC) Crim. App. 188-A-70 in [1970] H.C.D. n. 349. The date of the judgment is not indicated in the High Court Digest.[4] His last reported

[3] The discipline of law is such that everybody is a student of law.
[4] High Court Digests (HCD) 1970-1972 and Law Reports of Tanzania (LRT) 1973-1979 were produced by the Faculty of Law, University College Dar es Salaam and University of Dar es Salaam. They have been word-processed under the supervision of Dean Prof. Hamudi Ismail Majamba.

judgment relates to criminal revision of a decision of a magistrate's court,[5] **Republic** v. **Tinga s/o Kelele**, High Court Crim. Rev. 11-DDM-73, 17/5/73, 1974 LRT n. 6.

Cases filed in the High Court:

Criminal

Criminal sessions are held in the High Court and they relate to homicide cases, that is to say, cases in which it is alleged that the accused person killed or caused the death of a human being. On the one hand, a charge of murder alleges that the accused killed a person intentionally (with *malice aforethought*). On the other, a charge of manslaughter alleges that the accused killed or caused the death of a person without the requisite intention. In this instance, there were nine (9) murder cases which were presided over by Hon. Mussa Kwikima, Acting Judge. No single conviction for murder was ever recorded whereas there were five (5) convictions for manslaughter and four (4) acquittals.

Civil

It is intriguing that Kwikima, Acting Judge is not reported to have determined a single civil case commenced in the High Court. In one case, **Pop Vriend (Tanganyika) Ltd** v. **Saburi Estates Ltd** which is reported at [1971] H.C.D. n. 416 ended at the stage of a preliminary point of objection. The Acting Judge correctly overruled the preliminary objection.

Election petitions

There were two (2) election petitions (Misc. Civil Causes) (with Bramble, J.); **Ngowi** v. **The Returning Officer, Moshi and Lucy Lameck** [1971] H. C. D. n. 238 and **Gigeus** v. **The Returning Officer Babati and Hon. Marke,** [1971] H. C. D. n. 242; both petitions were dismissed and both judgments were penned by Hon. Kwikima.

Cases originally filed in the District Court or the Court of the Resident Magistrate

If a party in a civil case or an accused person in a criminal case is dissatisfied with the decision of the District Court or the Court of the Resident Magistrate, he may seek the decision of the High Court. He will do so by way of appeal and the High Court file will be styled HC Civil Appeal or HC Criminal Appeal. If the matter originated in the Primary Court it will have considered by the District Court or the Court of the Resident Magistrate. The High Court file will be styled (PC) Civil Appeal or (PC) Criminal Appeal. Where there is no appeal but the Judge notices, while examining the monthly returns, an unusual matter, he may call for the original file of the lower court. The High Court file will be styled HC Civil Revision or HC Criminal Revision and if the matter originated in the Primary Court it will be styled (PC) Civil Revision or (PC) Criminal Revision.

[5] The report does not indicate whether it was District Court or Court of the Resident Magistrate

There were thirty seven (37) HC Criminal Appeals; eight (8) HC Criminal Revisions; eight (8) HC Civil Appeals; no HC Civil Revision; five (5) Rent Tribunal matters and one (1) Tax matter.

Cases originally filed in the Primary Court

There were thirty seven (37) (PC) Civil Appeals, (3) (PC) Criminal Appeals, and one (1) (PC) Civil Application. There were no (PC) Criminal Revisions and no (PC) Civil Revisions.

III JUDICIAL CAREER: ANALYSIS OF JUDGMENTS

Law or National Policy

The first legal question which any judicial officer encounters is whether to apply the law or to apply the national policy. This question arose in a land dispute between **Kitambi** and **Makambi**.[6] The respondent, Makambi unsuccessfully tried to stop the appellant, Kitambi from planting crops on what he claimed to be the land he had been allocated in accordance with the customs of the tribe of the parties i.e. Wapangwa. On appeal the District Court gave judgment in his favour. The appellant, Kitambi, in the High Court, sought to rely on National Policy and claimed that he is entitled to cultivate the disputed land because the respondent has not been developing it and that he has just let it stand idle. Kwikima, Acting Judge noted that the ruling of the District Court to the effect that the appellant should take the land was based not on law but on the policy that no one can legitimately claim land unless he develops it or otherwise effectively occupies it. The Acting Judge rightly refused to follow that policy. In his own words,

> Whereas the respondent has shown that he was lawfully allocated the disputed plot, and that the allocation was made to him many years before the appellant chose to intrude, the appellant entered unlawfully without seeking the respondent's permission or the permission of the land allocation …
>
> Unfortunately courts of law do not base their decisions on political trends which may be in vogue at any particular time. There are definite laws and rules which the party has set down for courts to following resolving disputes. Courts would do well to confine themselves to their well-defined terms of reference, i.e. the laws of the Nation. The trial court accepted the respondent's contention that he had prior title to the land which he cleared and broke. The appellant did not seek or obtain leave to enter the land. Appeal dismissed.

Analysis of Judgments

[6] Kiatambi v. Makambi [1972[H. C. D. n. 15, (PC) Civ. App. 17-Dodoma – 71; the judgment was signed on 23/2/71.

The following cases which have been analyzed range from jurisdiction of courts to land law, landlord and tenant, trespass to land, criminal trespass, family law (or the law of husband and wife), Islamic law, customary law, *kuposola*, customary tenancy, appeals in marriage disputes and *res judicata.*

Jurisdiction of Courts

The issue of jurisdiction is basic. Every court must inquire whether it is vested with power to hear and determine the case before it. A higher court will invariably declare the proceedings null and void if the lower court had no jurisdiction.

Appeals in Marriage disputes under the Law of Marriage Act, 1971[7]

Kwikima, Acting Judge was the first judicial officer who pointed out in clear terms in February 1972 that the Law of Marriage Act 1971 had not changed the appeal structure. In **Kalengo** *versus* **Bula Mangi**[8] the District Magistrate (DM) forwarded to the High Court records of five appeal cases which were brought under Part VI[9] of the Law of Marriage Act. The DM contended that by virtue of sections 80(1) and 165(2) of the Act he was incompetent to determine them. In other words, the contention was that he had no jurisdiction in the matter. The Acting Judge stated,

> The (Law of) Marriage Act does not expressly or impliedly purport to repeal, replace, amend or in any way effect a single provision of the Magistrates Courts Act which lays down the order of Courts through which appeals are to be taken. Section 80(1) and section 165(1) of the Marriage Act do not provide for appeals from Primary Courts to go directly to the High Court. Section 80(1) reads: "Any person aggrieved by any decision or order of Magistrates' Court in a matrimonial proceeding may appeal therefrom to the High Court." These words certainly do not mean that a Primary Court case will go straight to the High Court without the appeal being taken, first to the District Court as laid down in the Magistrates Courts' Act sections 16(1) and 21(1) which the Marriage Act has not disapplied in relation to itself.

It is debatable whether this decision was subsequently confirmed by an amendment of the Law of Marriage Act by Act No. 15 of 1980 or whether the amendment was done *per incuriam* (in ignorance of) the above decision. Section 80(1) was amended to read,

[7] Act No. 5 of 1971, Cap 29 R E 2002; it came into force on 1st May, 1971 GN No. 109 of 1971
[8] [1972] H. C. D. n. 11, (PC) Civ. App. 65-Dodoma-71; the judgment is dated 7/2/72
[9] Part VI of the Law of Marriage Act is titled MATRIMONIAL PROCEEDINGS

> Any person aggrieved by any decision or any order of a court of the resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court.

Non-application of customary law to a suit in a Primary Court

In the following three cases Kwikima, Acting Judge had to determine the question of application of customary law. The first suit was between **Bicoli** and **Matemba**[10] whereby the respondent had successfully sued the appellant for Shs 130/= being the value of crops destroyed by the latter's goats on his *shamba*. The appellant appeal to the District Court was dismissed. The second appeal was allowed by the High Court where Kwikima, Acting Judge stated,

> This is by no means the first time when this court has been called upon to decide on the question whether the Primary Court being a court of original jurisdiction in Customary Laws is vested with the power to hear and determine suits for damages arising out of trespass by animals … The famous Customary Law Declaration[11] embodies the law of the Family and Succession only. Any claim brought under customary law must therefore be proved if it does not fall within the category of Family Law or Succession. In the current case the parties who are respectively Gorowa and Chagga have not shown any custom which is equally applicable to them on the question of cattle trespass. As such the Chagga respondent/original plaintiff has not obtained judgment under any proven custom equally applicable to his Gorowa adversary. The respondent cannot be said to have sued in the right court …

The second suit was between **Francis** and **Arobogasti**[12] related to dissolution of a partnership. The Acting Judge stated that the issue which was central in the case was whether the Primary Court had jurisdiction to hear a partnership case. He proceeded to decide that the suit was determined without jurisdiction "and it cannot be said to have been properly determined. Proceedings in both courts below were null and void and are hereby set aside."

The third case **Nkulu** v. **Mkungile**[13] was an appeal against the dismissal of a claim for damages for libel instituted by a primary court magistrate. The surrounding facts were that the respondent had lost two suits between himself and his wife. Both suits were heard and tried by the appellant. The respondent then, in one of the petitions of appeal, ascribed his lack of success to the "amorous relationship" between the magistrate and his wife. While dismissing the magistrate's appeal, Kwikima, Acting Judge stated,

> The learned Resident Magistrate who heard the first appeal was of the view that the magistrate could not sue the respondent because the communication was made in the course of a judicial proceeding and was therefore privileged. To this view I fully subscribe. I would hasten to add, however, that justice would be in jeopardy if litigants were scared to allege misconduct on the part of magistrates just because they were not in

[10] [1971] H C D n. 420, (PC} Civ. App. 71-A-71; the judgment is sated 25/10/71
[11] Customary Law Declaration (Law of Persons) GN No. 279/1963
[12] [1971] H C D n. 11 (PC) Civ. App. 17-A-70; the judgment is dated 6/7/71
[13] [1972[H C D. n. 70, (PC) Civ. App. 18-Dodoma-71; the judgment id dated 18/4/72

> a position to prove them should they be called upon to do so. I suppose a magistrate has to accept as a fact of life the prospect of being vilified without being able to do anything about it. On this score alone I would dismiss the appeal. There is another score on which I would dismiss the appeal. Libel is actionable under the common law of tort. There is no evidence in this case to show that under the customs of the tribe of the parties such action is maintainable. It is therefore doubtful if the suit was brought in the right court. Appeal dismissed.

Application of Customary Law to a suit commenced in the District Court

The issue of jurisdiction arose in a suit for breach of promise to marry which was commenced in the District Court, **Joseph** *versus* **Reonata**.[14] The respondent, Reonata, a teenager was engaged to one Baltazar according to Chagga customary law. It was established that all the formalities for a valid engagement were performed. She later became friendly with the appellant who proposed marriage which she accepted. The evidence established that they had sexual relations on several occasions. The appellant then broke off the engagement and the respondent successfully sued him in the District Court for breach of promise.

Kwikima, Acting Judge stated that the issue in the appeal was whether the suit was one under customary law and if so whether the District Court acted *ultra vires* as it had no jurisdiction to try the case. He framed the issue in this manner because of the requirements of section 37 of The Magistrates' Courts Act 1963 Cap 537. This section directed that "all civil proceedings in respect of the incidents of marriage must be taken in the primary court, unless the Republic or the President is a party or the High Court gives leave…" The Acting Judge reasoned,

> Attention was brought earlier on in this judgment to the fact that the respondent's (first) engagement to Baltazar went in accordance with Chagga customs. It cannot be said, and there is no evidence to suggest, that the respondent and appellant wanted to operate outside their tribal customs. Otherwise the respondent would not have insisted to be taken to the appellant's parents … There is no reason to suggest that the parties who are both Chagga Christians would have chosen to observe considerations other than these … I would therefore hold that the breach was one for a customary marriage and was itself justiciable under the principles of customary law. All suits involving customary marriages and matters incidental thereto must commence in the Primary Court, according to section 57 of the Magistrates Court Act, Cap 537. In this case it cannot be denied that that the suit is founded upon a matter incidental to marriages, namely a breach of a promise to marry ... The District Court therefore acted *ultra vires* in hearing the case. Consequently, the trial was a nullity … Appeal allowed.
>
> (In this appeal, the respondent was represented by Counsel).

There are glaring theoretical and constructional problems with regard to this judgment. The Law of Marriage Act (LMA) 1971 made clear and unambiguous provision, in section 69, for a suit for

[14] [1971] H. C. D. n. 350, Civ. App. 75-A-71, the judgment is dated 5/10/71

damages for the breach of promise of marriage and section 75 proceeded to vest jurisdiction, on the Primary Court, the District Court and the Court of the Resident Magistrate to entertain such suits. This Act became operational with effect from 1st May 1971.[15] The significance of section 69 lay in section 9(3A)[16] of the Judicature and Application of Laws Ordinance[17] (JALO) which excluded the above Chagga rule of customary law. The section stated,

> Notwithstanding the provisions of this Act, the rules of customary law and rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act.

Therefore, the District Court had jurisdiction to entertain the suit under section 75 of the LMA. However, it could not apply Chagga customary law since it was required to apply section 69 of the LMA. It is not clear, though, from the facts of the case whether the Law of Marriage Act was in force at the date of breach by Reonata of her promise to marry.

There is another aspect which relates to section 8(1)[18] of the JALO as amended by Act No. 55 of 1963. It made provision for the application of customary law in civil matters by all courts. The courts which were referred to were Primary Courts, District Courts, Courts of the Resident Magistrate and High Court. The section stated,

> Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature between members of a community in which rules of customary law relevant to the matter are established and accepted.

Accordingly, the District Court had jurisdiction to apply customary in this case. However, the stumbling block was section 37 of the Magistrates Courts Act (MCA) 1963 Cap 537 (as properly noted by the Judge) which designated the Primary Court as the proper forum for all "suits involving customary marriages and matters incidental thereto."

Res Judicata

In the case of **Cosmas** *versus* **Faustini,**[19] the appellant claimed damages for defamation whereby the respondent is said to have uttered "*Cosmas si mtoto wa Merinyo ni mtoto wa Mlyahoro mamake alimleta nje.*" In previous criminal proceedings arising out of the same incident the High Court had set aside the conviction of the respondent and acquitted him of the charge. In subsequent proceedings the Primary Court gave judgment for the appellant. The assessors and the magistrate found that these words were defamatory. The appellant stated that the *innuendo* was that the appellant was an illegitimate child and that his mother was a prostitute. The respondent was ordered to pay to the appellant a goat and a cow or Shs 250/=by way of damages.

[15] GN No. 109 of 1971

[16] As amended by the Law of Marriage Act 1971, now section 11(4) of the Judicature and Application of Laws Act, Cap 358 RE 2002

[17] R. L. 453 (Cap 453) in the 1964 Revision of the Laws; it came into force on 9th December, 1961

[18] Now section 11(1) of the JALA

[19] [1971] H. C. D. n. 349 (PC) Civ. App. 81-A-71; the judgment is dated 4/10/71

That decision was reversed on appeal by the District Magistrate who held that the matter was *res judicata* in view of the respondent's acquittal in the criminal case. In the High Court, the appellant argued that the appellant "has never been sued by me in any other court for a claim similar to this. The suit was entirely fresh and therefore the question of *res judicata* could never arise." Kwikima, Acting Judge upheld the appellant's argument. He stated,

> It must be respectfully pointed out that the position of the law is as set out by the appellant. The parties were before a civil court and a criminal case based on the same facts cannot bar a subsequent civil claim based on the very (sic) same facts … It need hardly be pointed out that the respondent's argument that that the matter between them and the appellant was *res judicata* in view of his acquittal was wrongly upheld. Appeal allowed.

Islamic Law

I shall now turn to Hon. Justice Kwikima's handling of cases under Islamic law. The Judge decided, with competence, cases on Islamic Law. It must be pointed out that Islamic Law fell under Family Law formed part of the University of London LL.B. Curriculum which adopted by the University College, Dar es Salaam.

The first notable case was between **Mwanamvua** and **Shabani**,[20] whereby Mwanamvua sued he husband, Shabani for a declaration that their marriage had been dissolved by her husband's acts of returning her to her parents and demanding the dowry back. Kwikima, Acting Judge decided that the law to be applied by Primary Courts in cases between Tanzanian indigenous Muslims is Sunni Shafii law. He stated,

> The notorious fact that most Tanzanian indigenous Muslims are Sunnis of the Shafii sect is **judicially noticeable** … Unless Muslim litigants prove to the contrary, the Primary Court shall apply the Sunni Shafii law, and according to that law, this appeal is determinable.

It should be pointed out that where a court takes judicial notice of a fact, it does not demand that fact to be proved by evidence.

The second case was between **Assi** and **Yusufu**[21] whereby the appellant, Zainabu Assi had petitioned for divorce. They were a Muslim couple. Purporting to apply, Muslim law, the Primary Court found the husband guilty pf constructive desertion and cruelty. The respondent husband was accordingly ordered to pronounce *talak* and divorce his wife. On appeal by the wife, the District Court confirmed that the husband should divorce his wife by *talak*. On the wife's further appeal to the High Court, Kwikima, Acting Judge decided that the court order compelling the husband to pronounce *talak* was incompetent and illegal and was thus set aside.

[20] [1971] H C D n. 86, (PC) Civ. App. 13-A-71; the judgment is dated 9/2/71.
[21] [1972] H C D n. 127, (PC) Civ. App. 37-DDM-71; the judgment is dated 4/5/72

He explained that the Primary Court should have inquired into the alleged matrimonial offence and thereafter dissolved the marriage by *TASHKI* if it satisfied itself that the offence was proved.

The third case arose in most unfamiliar circumstances. In **Shabani** *versus* **Sofia,**[22] the respondent lived with the appellant's father, the deceased, as his concubine for nineteen (19) years. She sued the appellant for compensation of Shs 9,120/= for evicting her from the deceased's house which she used to occupy in his lifetime. The Primary Court dismissed the claim because the respondent and the deceased were Muslims and according to Islamic Law, a concubine has no right to inherit part of the estate which a legally wedded (sic) wife is entitled to. On her appeal to the District Court, Sofia succeeded. The District Magistrate felt that the respondent was entitled to some of the estate after staying with the appellant's father for 19 years and awarded her a quarter of the amount claimed. In allowing the appeal, Kwikima, Acting Judge stated,

> With due respect this decision cannot be in accordance with the law. In suing the appellant, the respondent necessarily meant that the appellant had wronged her by depriving her part of the inheritance. How could this be if she was not entitled to any? Both Chagga and Islamic law exclude her from inheriting. According to Chagga law she would not inherit in the presence of the appellant even if she was legally wedded (sic) to the deceased. She could not inherit under Islamic law[23] either, being only the concubine of the deceased.

The above case does not exhibit a true conflict of law situation since under both Chagga law and Islamic law Sofia had no right to inherit.

Customary Law

I shall pick up little known rules of customary law which were considered, applied, disapplied or rejected by the Acting Judge. Section 9(3) of the Judicature and Application of Laws Ordinance[24] (JALO) directed that courts should not apply any rule of customary law which has been expressly or impliedly disapplied or superseded by written law. It stated,

> Provided that the court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any written law.

The six cases which are considered here relate to compensation for unexhausted improvements on land, customary tenancy, bride price, custody of children and the Nyakyusa custom of *Kuposola*.

[22] [1971] H. C. D. n. 5, (PC) Civ. App. 27-A-70; the judgment is dated 4/11/70
[23] See Restatement of Islamic Law, GN No. 222/1967
[24] Cap 453 in the 1964 Revision of the Laws

i. Compensation for unexhausted improvements

The first case of **Zabloni** v. **Agrey**[25]relates to compensation for unexhausted improvements. The appellant was sued for Shs. 1,000/= compensation for unexhausted improvements on a piece of land which he won from the respondent in a civil case. The suit for compensation was rejected by the Primary Court because the improvements were made by the respondent for the parties' (sic) father long before the land became the appellants. The District Court reversed this decision on the ground that the respondent had cared for the improvements for 12 years since the land was given to the appellant and therefore the appellant should pay compensation for the care since it was his fault in taking so long before clearing his title. In allowing the appeal, Kwikima, Acting Judge made a decisive pronouncement on conditions for award of compensation. He stated,

> The learned District Magistrate himself conceded that the respondent effected no unexhausted improvements[26] on the disputed land … It has often been held that compensation is only for unexhausted developments of a permanent nature such as perennial crops, buildings etc. In this case the respondent does not claim to have made any such improvements on the disputed land. There can therefore be no basis for awarding him compensation, his 12 years of illegal occupation and enjoyment of the usufruct notwithstanding. Appeal allowed.

ii. Customary Tenancy

The second case of **Kyauka** versus **Malasi**[27] the appellant leased a parcel of land from the respondent under Chagga customary law on the understanding that his tenancy would be good only as long as he paid "Masiro" as consideration for such tenancy. The appellant was found by the District Court to have been in occupation from 1959 to 1966, the year when the suit was filed. The appellant brought evidence that he spent Shs. 600/= for clearing and preparing the land for cultivation. At the time when his tenancy was terminated, he had not made any unexhausted improvements on that land, apart from the clearance for cultivation. The crops which the appellant were annual, and not perennial. The court of first instance awarded him Shs. 300/= for this improvement. He appealed with the result that the District Court gave him no relief. On appeal to the High Court, Kwikima, Acting Judge dismissed the appeal. He stated,

> It is not in dispute that the respondent was entitled to terminate the appellant's tenancy, especially after serving him twice with a written notice to vacate the land. The respondent cannot therefore be said to have sought repossession at his whim, as was the case in

[25] [1971] H. C. D. n. 115,)PC) Civ. App. 12-A- 70; the judgment id dated 8/4/71

[26] The expression "unexhausted improvements" was first defined in the Land Regulations, 1948 (made under the Land Ordinance, Cap 113). This definition was reproduced in section 2 of the Village Land Act, 1999. It reads, "unexhausted improvement" means anything or any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, the sustainability or the environmental quality thereof and includes trees, standing crops and growing produce whether of an agricultural of horticultural nature."

[27] [1971] H. C. D. n. 4, (PC) Civ. App. 65-A-69; the judgment is dated 7/11/70

Mwehela Kibungo v. Mudabe Muhungula 1969 H.C.D. n. 274. Compensation, however, is "for improvements of a permanent nature" (Makofia Merijananga v. Asha Ndisia 1969 H. C. D. n. 204.

iii. Bride price

The third case of **Loijurusi** *versus* **Ndiinga**[28] relates to Masai marriage law. The appellant spent six years working for the father of a woman who was, subsequently, given to him as a wife in consideration of that service to the father. According to Masai custom the appellant was obliged to pay (sic) a female calf for the first year of service, a male calf in the following year and so on. Alternatively, he could opt to marry his master's daughter by paying in addition four head of cattle, four tins of honey and other incidental gifts, snuff, clothes etc. It was established at the hearing that the appellant did not make such payments due to the untimely death of his father in law. The appellant and his wife lived as husband and wife for six years after the death of her father. Her brother, the respondent then took her and the children away in order to exact payment of bride price from her husband. At the Primary Court judgment was given in favour of the appellant on the advice of the assessors. On appeal this decision was reversed on the ground that the appellant had not paid the requisite bride price in accordance with the proven Masai custom. The High Court allowed the appeal. Kwikima, Acting Judge reasoned as follows,

> In this case (the learned District Magistrate) was dealing with the welfare of the appellant, his wife and their offspring. The spouses had cohabited in harmony for six years. Providence had graced them with the offspring. So closely knit was the life and the future of their offspring that no one, not even the wife's brother, had business to interfere with the settled life together. It is against public policy to interfere with the family which is the fabric of the entire society and Courts of Law all over the world are very (sic) loathe to allow such interference … This court has held that under customary law prolonged cohabitation raises a presumption that of marriage unless there are circumstances indicating the contrary (**Fatuma Amani** v. **Rashidi Athumani** 1967 H C D. n. 173) … Nonpayment of bride price cannot be fatal to a long enduring marriage and any arrears thereof can be recovered by way of a civil suit and not by withdrawal of the bride. If there is any tribe with such custom, it is time our courts put a stop to such custom. Indeed the recent law of marriage has expressly laid down that non-payment of bride price cannot be fatal to the marriage.[29] In this case there was no evidence of any Masai custom to support the respondent's highhandedness. His action was clearly inequitable and contrary to public policy. Appeal allowed.

It is easy to appreciate the Judge's decision in this appeal. In the Primary Court, there was no proof that under Masai custom a bride can be withdrawn from the bridegroom as a sanction for non-payment of bride price. In any case if such custom existed Kwikima, Acting Judge was prepared to "put a stop to such custom." Such custom would appear to have been superseded by

[28] [1971] H. C. D. n. 331, (PC) Civ. App. 1-A-71; the judgment is dated 14/8/71

[29] Section 41(a) of the Law of Marriage Act 1971 Cap 29 RE 2002

section 41(a) of the Law of Marriage Act as confidently observed by the Judge. The section states,

> A marriage which in all other respects complies with the express requirements of this Act shall be valid for all purposes, notwithstanding-
>
> (a) Any non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage.

iv. Custody of children

The fourth case relates to rules of paternity among the Masai. In **Lengunyinya** *versus* **Lormasi**[30]the parties disputed title (sic) to some three children. The appellant was their mother's husband and the respondent was their maternal grandfather. The issues which were resolved in the appellant's favour by the Primary Court sitting with Masai assessors were (a) whether the children were born while the marriage was subsisting; (b) whether under Masai law and custom children born when the marriage still subsists belong to the husband whoever their natural father may be; (c) whether the children born before the marriage again (sic) belong to the husband. All these questions were answered in the affirmative and the children found to be the appellant's. The District Court reversed this decision. In allowing the appeal, Kwikima, Acting Judge stated emphatically,

> A trial court is the best judge of facts and although an appeal court may interfere where inferences drawn are so unreasonable as to warrant interference, it can only do so with caution. In this case no caution appears to have been exercised by the appeal magistrate. For this reason the conclusion reached cannot be allowed to stand, particularly when the trial court has not been shown to have improperly arrived at the reversed inference. Appeal allowed.

In the fifth case, **Halifa** v. **Hadija**[31] the appellant filed a claim for the paternity of a child and its custody from the respondent, its mother. Evidence adduced in the Primary Court established that there were various customary payments and rites[32] which the respondent permitted the appellant to perform and make. He gave for example the ceremonial dress customarily given to an expectant fiancée and Shs. 150/= to the mother of the respondent for having deflowered her daughter. These payments were made with due publicity. Evidence further showed that the respondent allowed the appellant to care for her during her pregnancy by taking her to hospital for antenatal care and she lived with him for sometime after the baby was born before she run away to a new lover. The Primary Court found for the appellant, but the District Court reversed that decision. In allowing the appeal, Kwikima, Acting Judge stated,

[30] [1971] H. C. D. n. 260, (PC) Civ. App. 63-A-70; the judgment is dated 23/7/71
[31] 91971] H. C. D. n. 1, Civ. App. 75-A-69; the judgment is dated 2/11/70
[32] The report does not identify the customary law community to which the parties belonged.

> The respondent cannot now be heard to deny the child's paternity by the appellant. It is the law, according to the Customary Law Declaration[33] that once a man is named as the father of a child, the burden is on him to prove that he is not, provided there is evidence that he had sexual intercourse with the mother before the child was born. In this case the appellant actually paid the respondent's mother damages for deflowering the respondent. He did this willingly and apparently quite happily as he was going to marry the respondent. He even took her to his home where she remained until she ceased having love for him. There was sufficient evidence for the trial court to find as it did that the appellant had established his claim over the disputed child. The purported reversal by the District Magistrate is at variance with the facts established, the customary law so clearly spelt out by the trial court, and the unanimous opinion of all he assessors in both courts below. As such the purported reversal, unjustified by the facts and law as it is, cannot be allowed to stand. Appeal allowed.

v. Action for Enticement

In the last case, **A. M. Mapugilo** *versus* **J. F. K. Gunza**,[34] the Court discussed the time honoured Nyakyusa custom of *Kuposola*[35] by which fathers exacted penalties from men who deflowered their daughters or had sexual intercourse with their daughters. Case law has established that this custom was substantially qualified by Rule 89 of the Customary Law Declaration (CLD) 1963 as shown below. In this case the appellant sought to obtain Shs. 2000/= from the respondent whom he alleged to have seduced, deflowered and enticed from his home his 15 year old daughter, Keta. The Court of the Resident Magistrate at Mbeya dismissed the claim because, in his words, "the plaintiff … failed to establish a cause of action." The appeal to the High Court was dismissed and Kwikima, Acting Judge agonized,

> The law as it stands just does not afford aggrieved fathers any remedy (sic) … In Abraham's case (Abraham v. Owden, 1971 H.C.D. n. 426), my learned brother, Mr. Justice Mwakasendo, had this to say about Rule 89 [of the Customary Law Declaration]; "From a proper reading of the above provision it seems to me that for an action of enticement (which in Kiswahili, *Kumshawishi msichana aliye chini ya miaka 21 aliye chini ya ulinzi wa baba yake ahame kwao na kukaa na – mwanaume anyedaiwa, kinyumba*) to succeed the plaintiff has to establish … the following: (a) that the defendant enticed the girl who is his daughter, (b) that his daughter is or was under the age of 21 and (c) that the daughter was prior to the enticement living with him under custody." I would go further and add that the plaintiff must also show to the satisfaction of the court that the defendant enticed the daughter and took her away to live with him in concubinage (i.e. *kinyumba*). In the present case it was found that as a fact that the girl, Keta, was living with one woman called Mage during the time of her disappearance from

[33] Customary Law Declaration (Law of Persons) GN No. 279/1963
[34] [1972] H. C. D. n. 143, Civ. App. 6-DDM-72; the judgment is dated 30/6/72
[35] The penalty payable upon *Kuposolwa* was called *Luposo*

home. The appellant failed miserably to show that the respondent was keeping Keta as his concubine …I would therefore … dismiss the appeal.

Thus, the Nyakyusa custom of *Kuposola* still exists to the present day as modified by written law, that is to say Rule 89 of the Customary Law Declaration[36] 1963. Before publication of the CLD the custom was open-ended by enabling a father to sue a person who deflowered his daughter. After the CLD an aggrieved father must prove the above elements including the fact that the defendant enticed the daughter and took her away to live with him as his concubine.

Landlord and Tenant

i. The Tribunal must act judicially

Rent Tribunals were established under the Rent Restriction Act 1962.[37] They operated in urban areas and the chairman was also a Resident Magistrate. In **Ladack v. Salimin**[38] the appellant claimed in the Dodoma Rent Tribunal that the rent he was paying for the shop-cum-dwelling house should be reduced from 325/= to 150/= The Tribunal granted his request after visiting the premises. The appellant had contended that the rent as at 1st January 1965 was Shs. 300/= According to section 4(1)(a) of the Rest Restriction Act, Shs. 300/= was the standard rent of the suit premises. The defendant appealed against the decision. In allowing the appeal, Kwikima, Acting Judge held that the Tribunal did not act judicially. He stated,

> The respondent's application for reduction of rent was based on the consideration that the house was built of mud bricks. The Tribunal visited the suit premises and observed first that they were dilapidated and second that there was a co-tenant occupying the other portion of the premises who was paying only Shs. 170/= The Tribunal has been held by this court to be a quasi-judicial body which must approach its task judicially. So that when the Tribunal embarked on a visit to the suit premises, it could only do so properly if such visit had been requested by one or both parties. Furthermore, the appellant should have been given opportunity to controvert the Tribunal when it was noting its observation. (Sachak v. Kabuye 1969 H C D. n. 292, Govind v. David 1971 H C D. n. 241) To fail to adhere to such practice (sic) as the Tribunal did in this case is to fail to act judicially. Appeal allowed, case remitted to Tribunal for judicial reconsideration.

ii. Landlord's right to re-possess leased premises

[36] Customary Law Declaration (Law of Persons), GN No. 279/1963

[37] Cap 479 in the 1964 revision of the laws. The Act was repealed by the Rent Restriction Act No 17 of 1984 Cap 339 R E 2002. It was, in turn, repealed in 2005 by section 30 of the Written Laws (Miscellaneous Amendment) (No.2) Act No. 11 of 2005.

[38] [1972] H. C. D. n. 81, Misc. Civ. App. 1-Dodoma-71; the judgment is dated 3/5/72

The second case is **Mrs. Clara D'Souza** v. **Charles Kanyamala**.[39] The respondent bought the suit premises from one Aziz G. Albhai, the vendor. The appellant was the vendor's tenant, and although there was no fresh tenancy agreement between the parties a letter was sent to the appellant advising her of the sale of the premises and asking her to pay the rent to the respondent's father, Mr. A. M. Kanyamala. However, the appellant gathered that that the actual transferee of the property was the respondent and she started paying the rent to him directly and promptly.

The respondent sued through his father for arrears of rent and vacant possession. The respondent wanted the premises for himself as he was about to marry. The premises were going to be a matrimonial home. Alternative accommodation[40] was offered to the appellant who would not take it because, in her own words, she "refused to move to Dr, Dull's part." Through his advocate the respondent sent the appellant a notice to vacate the premises. The appellant would not bulge. The respondent lodged this suit (sic).[41] The parties were not represented by Advocates. The appellant appointed her husband and the respondent his father. The appeal against the award of arrears of rent was allowed but the appeal against an order for vacant possession was dismissed. Kwikima, Acting Judge stated,

> It cannot be fair or correct to say therefore, that the appellant was in arrear in as much as the rent was promptly paid to the respondent. Whether or not the vendor's instructions were disregarded is beside the point. Rent was paid to the respondent and his agent cannot claim an overriding interest in the rent. The appeal against the order to pay arrears of rent would therefore appear to be justified … The appellant had no right to decline the alternative accommodation when the noisy bar she was running herein was going to be replaced by a quiet newly- wed couple who would not be the same noisy neighbours that the bar is. What is more, the respondent's need and wish to reoccupy (sic) the premises for his own residence is a sufficient ground to allow him re-entry, especially when the appellant's husband boasts of having and in fact has three other houses which he occupies or lets out to tenants. The trial court cannot be faulted in holding it fair and reasonable that the respondent should re-enter.

Criminal Law

i. Murder and Manslaughter

C*orpus delicti*

[39] 1974 LRT. n. 27, H C Civ. App. 12-DDM-72, the judgment is dated 23/1/73

[40] The requirement that the landlord should provide alternative accommodation was contained in the Rent Restriction Act Cap 479, 1964 Revision of the Laws. See footnote 34 above.

[41] It is not clear from the report whether the forum of origin was the Rent Tribunal or the Court of the Resident Magistrate.

C*orpus delicti* means the body of the crime, that is to say, the body of the deceased or victim in a trial for murder or manslaughter. In the first case of murder for our consideration, the body of the deceased was never found. In **Republic** v. **Mgomboi** s/o **Bwanyigeta**,[42] The accused stood charged with the murder of his father between 1st and 11th days of September 1970. He denied the charge. The evidence as regards the *corpus delicti* (the body of the crime) as well as the evidence implicating the accused was purely circumstantial. Kwikima, Acting Judge convicted him of manslaughter and sentenced him to six years imprisonment. On *corpus delicti* as well as guilt of the accused, the Acting Judge stated,

> At the same time only one set of human remains were found in that village. The Government Chemist has confirmed that the bones were indeed human as were the blood stains on a *shuka*, a maize leaf and sand collected where the bones were exhumed. The witness Salakoje, a brother of Bwanyegeta, identified the hair found at the scene to be that of Bwanyegeta. He also claims to have picked up at the scene a bangle which he identified to that which Bwanyegeta used to wear on his hand. Although the bones were exhumed from an ant-eater burrow, some of them were found lying on the surface. There was found close to the scene, in fact only 25 paces from the burrow, the *shuka* which Salakoje, Masanga Mkama and Masasu Chiwaza identified to be Bwanyegeta's. The Government Chemist found the *shuka* to have the same blood grouping as that found on the maize leaf and the sand. The only reasonable inference which could be drawn from this evidence is that the deceased (sic) is indeed dead and that the bones, hair and cloth came from his body. The blood stains scattered round the scene are evidence of his having died through violence. His body could not have hidden itself in the burrow. It must have been hidden there by his assailant who by so doing wanted to cover up his crime. Like all the assessors, therefore, I am satisfied and I hold, that the man Bwanyegeta who was last seen in the company of his son, the accused is dead and that he was killed by an assailant. It is the law that a homicide cannot normally be proved without showing the *corpus delicti,* but as was laid down in R. v. Mwanamere Sefula (1931) 13 K.L.R. 58, "the circumstances may be sufficiently strong to show the fact of murder although the body of the deceased was never found." In the case just cited, some human bones were found at the place where the murder was said to have taken place. The *corpus delicti* was by this evidence held to have been established. In another case, (Ngunjiri Mugi 1939 6 E.A.C.A. 90) the facts of which were not entirely dissimilar either to the current case or to Mwanamere's the *corpus* was held to have been proved when after the deceased vanished, a skeleton, his necklace, part of his belt as well as his beads were dug up from a dunghill. From these authorities I cannot but accept the unanimous opinion of the assessors that Bwanyegeta is dead. I have already found him to have been killed by an assailant, and that the remains are his.
>
> …
>
> Taken together, the circumstances adduced in this case are incapable of any other explanation except the guilt of the accused. The evidence is incompatible with his

[42] 1973 LRT. n. 90, High Court Crim. Sess. 140-DDM-72; the judgment is not dated

> innocence. I would therefore disagree with the one assessor who was skeptical about the accused's complicity in this homicide for reasons which I need not repeat here. I would side with the two assessors who held the accused responsible for the violent death of his father, for the very (sic) same reasons.

The Acting Judge found that the accused took considerable amount of liquor and that he spent some five hours drinking with his father, "quarrelling as they caroused." On this basis, he found that the accused killed his father "as usual, in a drunken brawl." He concluded, "I would therefore give the accused the benefit of the doubt and hold with the assessors that he killed without *malice aforethought*. I would find him not guilty of the charge but guilty of the lesser offence of manslaughter. With that offence I accordingly convict him.

Moshi

The next case stands on its own for the accused person stated that he was responsible for the death of the victim. The death occurred in very peculiar circumstances and according to the accused it occurred in the act of sexual intercourse after he and the deceased had consumed *moshi*. In **R**. v. **Magara**[43] the accused was charged with murder contrary to section 196 of the Penal Code. In his extra judicial statement[44] the accused stated that while at the house of their host he bought *pombe* known as *Moshi*. On the next day he bought some more and while they were drinking the accused seduced the deceased. The deceased agreed to his request and they left for a *shamba* to have sexual intercourse. In the course of having sexual intercourse, the accused held the deceased by the neck and after the act the deceased was not able to rise again. On realizing that she was dead, the accused dragged the deceased to a nearby bush.

The main issue at the trial was whether or not the accused had killed the deceased with *malice aforethought*. The medical evidence did not establish with any precision whether or not the force applied on the deceased was great or not. Kwikima, Acting Judge refused to infer *malice aforethought* and found the accused guilty of manslaughter. He stated,

> The accused furnished the only explanation as to how the deceased met her death. Having accepted his statement which cannot be said to be in any way exculpatory, I cannot hold him to have intended the death of his lover especially when the prosecution fail to show motive or any use of excessive force as they (sic) have failed to show in this case … it is not a criminal offence to sleep with a woman other than one's wife. While conceding the learned State Attorney that adultery is a matrimonial offence and for this reason an unlawful act, I cannot go so far as to say that this would be enough reason for a court of law to infer *malice aforethought* in such circumstances.

[43] [1971] H. C. D. n. 293, Crim. Sess. 98-A-70; the judgment is dated 13/7/71

[44] A statement made by an accused person to a police officer and recorded by the police officer for purposes of evidence in a trial.

ii. Criminal trespass – elements of the offence

The case of **Ndelaonjama** v. **R**[45] is one of the early cases which came before him as an Acting Judge. The appellant was charged before a Primary Court for criminal trespass contrary to section 299(1)(a) of the Penal Code. He built a dwelling house for himself on what he took in good faith to be his land. Not until the house was completed did the complainant lodge "complaint." Some TANU officials ordered the appellant to pull down the house but he refused whereupon criminal proceedings were instituted against him. He was convicted. In quashing the conviction, Kwikima Acting Judge stated,

> There is nothing on the record to show that the elements of criminal trespass had been established, let alone established beyond reasonable doubt. To constitute criminal trespass, the entry should have been forcible with intent to annoy. The appellant entered the land genuinely believing it to be his own, and in broad daylight he started to erect his house, until it was complete. Only then did the respondent stir. If the complainant was annoyed, it was not for the forcible entry, for there had been none. The complainant must have woken up to the prospect of acquiring for himself or dispossessing the appellant the house which the appellant had just completed after putting in effort and capital. Appeal allowed. Conviction quashed.
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> .

iii. The offence of store breaking – entry through aperture

In the case of **Chelula** v. **R**[46] the Acting Judge dealt with the definition of "breaking" as an element of the offence of store-breaking. The accused was seen leaving the store through an aperture through which he entered. In the lower court, he was convicted of store-breaking and stealing .The issue on appeal was whether or not entry through a permanent aperture constituted "breaking." In quashing the conviction for store-breaking, Kwikima Acting Judge stated,

> The point about entry through the chimney which seems to have misled the learned trial magistrate is well-covered by this authority (Petro Samson v. R 1970 H C D. n. 35. I would only point out that our Penal Code (Cap 16) is fair in defining "breaking" the way it does because members of the public have a duty to themselves to build secure houses without leaving gaping apertures through which criminals may gain entry…to render havoc to their property or even life and limb. I would for this reason let the law remain as it is without seeking to imitate the Indian Penal Code … In my view, I am reinforced by the opinion of the late Mr. Justice Hamlyn in Ramadhani s/o Bakari v. R 1970 H C D. n. 90: "The authorities appear to regard an aperture needlessly left open as it were an implicit invitation to enter or at least as a situation not proclaiming a state of inviolability of the premises concerned … As was said in Rex v. Spriggs and Nancock 174 E.R. 122, if a man chooses to leave an opening in the wall or roof of his house instead of a fastened window, he must take the consequences. The entry through such an opening is not a

[45] [1970] H C D. n. 349, (PC) Crim. App. 188-A-70; the judgment is not dated0000. See above.
[46] [1971] H.C.D. n. 449, Crim. APP. 264-A-71; the judgment is not dated

breaking." Appeal allowed and conviction for store-breaking quashed, conviction for simple theft substituted.

iv. Uttering abusive or insulting words in a public place (re Dr. W. Klerru)

R. v. **Omari Halfani**[47] related to alleged utterances of the accused with reference to the death of Dr. W. Kleruu, former Regional Commissioner of Iringa Region. The accused was charged with conduct conducive to a breach of the peace contrary to section 5 of the Public Order Ordinance, Cap 304.[48] The definition of this offence read: "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

On 29th December, 1971 the accused was relaxing at Nyang'oro Bar together with three other customers. They talked about the death of the late Dr. Kleruu who had just been killed. In the course of the conversation the accused uttered words which displeased the others. He was reported to the Police who arrested him and charged him. He was convicted and fined Shs. 800/=

The three persons who testified against the accused gave three different versions of the words uttered by the accused. The Magistrate was aware of the contradictions in the versions of the eye witnesses. However, he did not resolve them. He chose to believe these prosecution witnesses. In the High Court, Kwikima, Acting Judge felt that the words were not abusive or insulting. He stated,

> It should be pointed out to the learned Magistrate that the issue was not whether the prosecution witnesses were to be believed or not. The issue was whether the words reported to have been uttered by the accused were "abusive or insulting" as is laid down in section 5, Cap 304. It was certainly unpatriotic and naïve on the part of the accused not to sympathize with his compatriots on the demise of a national leader. But this is not saying that in uttering his drunken words the accused was abusive, insulting or that he intended to breach the peace. The court could not ascertain what actual words the accused did utter ... Had the learned trial magistrate given the contradiction the attention it deserved, it is doubtful whether he would have concluded that the accused uttered any of the four versions. And looking at the reported words, it cannot be said that all four versions or any of them could be taken as abusive or insulting. Indeed even the witnesses were only displeased. They were not annoyed in such a way as to want to teach the accused a lesson. Certainly, even this court is displeased at the accused's folly but the law has not yet got to punish the foolish or unpatriotic. The trial court appears to have acted vindictively especially if it is recalled that the accused, as a first offender, was fined Shs. 800/= There is nothing to exclude the possibility that his conviction was also arrived at vindictively and against natural justice. Accordingly it is hereby quashed and the

[47] [1972] H. C. D. n. 222, H.C. Crim. Rev. 33-DDM-72; the judgment is dated 14/8/72
[48] Public Order Act Cap 386 R E 2002

sentence thereof set aside. The Shs. 800/= should be refunded to the accused who is hereby acquitted.

v. Malicious damage to property

In **Ngowi** *versus* **R**[49] the appellant was convicted of malicious damage to property by uprooting trees. In the Primary Court there was no finding that the land from which the trees were uprooted was undisputably (sic) the complainants. In quashing the conviction, Kwikima, Acting Judge stated as follows,

> There was considerable doubt at who was entitled to occupy the disputed land. As such the appellant could not have been held to act without colour of right when he uprooted the trees planted by the complainant on the disputed land. If the appellant held a claim to the land he was entitled to remove any object planted there by the complainant.

In this case, the issue of jurisdiction appears to have escaped the attention of the Acting Judge. There was no inquiry by the appeal court as to whether the Primary Court had jurisdiction to try this 'offence' since it is not listed in the First Schedule to the Magistrates' Courts Act as being triable by Primary Courts. In the event of a finding that the Primary Court had no jurisdiction, its proceedings would be set aside and the appellant would be a free man. Thus in this case the Court's failure to investigate the jurisdiction of the Primary Court did not prejudice the appellant.

Sentencing

In the cases which came before him by way of appeal or revision, Kwikima, Acting Judge was inclined to reduce the sentence meted out by the lower court.

i. Rape

In **R.** v. **Hiiti,**[50] the accused was convicted of rape by the District Court. He was sentenced to 12 months' imprisonment and 12 strokes corporal punishment. He was ordered to pay Shs 300/= as compensation to the victim. The report of the case reads as follows: "The accused was seen by no less than two persons having unlawful sexual intercourse with the complainant who had not consented to it. There was no doubt as to his guilt." This case is included here on account of the Judge's conception of sentencing. While criticizing the trial magistrate, Kwikima, Acting Judge stated,

> The trial magistrate took a very serious view of the offence and sentenced the accused to 12 months' imprisonment[51] and 12 strokes corporal punishment under Cap 17.[52] The

[49] [1971] H. C. D. n. 285, (PC) Cri. App. 220-A-71; the judgment is dated 22/6/71
[50] [1971] H C D. n. 202, High Court Crim. Revision. 14-A-71; the judgment is dated 28/4/71
[51] This was before enactment of the Sexual Offences Special Provisions Act (SOSPA) No 4 of 1998 Cap 101 R E 2002

> complainant was a married woman to whom sexual intercourse was a frequent if not a weekly indulgence. The act itself took place in the presence of many other people who were sleeping at the time. No violence was inflicted on the complainant. As such the learned District Magistrate could not have justifiably chosen to treat the accused so harshly. In my opinion the 12 strokes would have adequately met the circumstances of the case. I am minded, however, to let the accused remain in jail a little longer in order to discourage potential rapists. Accordingly, I reduce the jail term to six months. The order for corporal punishment shall stand. The compensation must have been awarded on account of the venereal disease infected on the complainant by the accused. Indeed the learned District Magistrate remarked: "In this case there exists some thoroughly foul breach of any elementary decency as committed by the accused, and some mean injustice against PW1 who came to contract gonorrhea as a result of the unlawful sexual intercourse committed … One never knows other more serious consequences might not befall the poor lady e.g. sterility." Taken in the light of these words, the order appears to have been made not in order to redress the damage to the complainant's health; but rather to make the accused suffer for his act of gross immorality. This is surely a moral rather than legal consideration, and it explains why the obviously disproportionate figure of Shs. 300/= was fixed … Accordingly the amount of compensation is hereby reduced by Shs. 250/= The accused shall pay Shs. 50/= compensation or distress.

ii. Unlawful possession of leopard skin

In **R**. v. **Salima**[53]the accused was convicted, on his own plea, of unlawful possession of a leopard skin of the value of Shs. 1,500/=. The trial magistrate observed that: 'I can only express some grave concern here that the lovely beast is being illegally hunted away in the area in question with the grievous danger the leopard might go into extinction in this country which sorely needs foreign exchange that comes to Tanzania through tourists. As a rather stern lesson, not only to the accused but also to those irresponsible persons who carry out such whole-sale slaughter of an animal of such beauty." He sentenced the accused to two years' imprisonment.

The above sentiments did not go well with Kwikima, Acting Judge. In revision of the sentence, the Judge stated,

> So carried away with feeling was he (the trial magistrate) that he could not pose (sic) to consult the law … the sentence was grossly at variance … the maximum term of imprisonment thereunder, s. 53(1)(a)(ii) Fauna Conservation Ordinance Cap 302, is six months imprisonment for a first offender and nine months for a repeater … the accused was not caught killing a leopard or even skinning the carcass of one. He could not therefore be punished for some slaughter of which he might not be responsible. At any rate the slaughter of one leopard cannot be wholesale unless the word wholesale has acquired a new meaning. The sentence was not based on judicial grounds, grossly

[52] 1964 Revised Laws of Tanzania; Cap 17 R E 2002

[53] [1971] H C D n. 216, HC Crim. Rev. 20-A-71; the judgment is dated 15/5/71

disproportionate and illegal. Sentence set aside. Accused to pay a fine of Shs. 400/= or four months' imprisonment.[54]

iii. Stealing, the Minimum Sentences Act, Young Offender

In **R** v. **Hemed**[55] the accused was convicted of stealing (contrary to section 265 of the Penal Code) of two books of containing State Lottery tickets, the property of the United Republic. He was sentenced to two years' imprisonment and 24 strokes. The issues raised on appeal (sic) were (1) whether theft from the State Lottery was theft from the Government and (2) whether the appellant could have benefited under section 5(2) Cap 526 (the Minimum Sentences Act) because of his age and other factors. Kwikima, Acting Judge reduced the sentence. He reasoned as follows,

> Such theft is indeed theft from the Government of the United Republic of Tanzania following the ruling in R. v. Rajabu Juma 1969 H.C.D. n. 303. The trial court accepted the age of the appellant [a first offender] to be 19.The monetary value of the stolen property was Shs. 42/= only. These factors were sufficient to cause an inquiry to be made as to whether there were any special circumstances. The learned trial magistrate did not find any. The learned State Attorney supported this view. With the greatest respect it should be pointed out that the courts are anxious that youthful offenders should not be kept in jail too long lest they should be contaminated by older and hardened criminals. There is always a chance to reform a young offender. In Yusufu Mauruti v. R [1967 H C D. n. 419 to name one among many authorities, youth was held to be a special circumstance … Accused's sentence reduced to facilitate his immediate release.

iv. Manslaughter, Young Offender

In **Republic** v. **Mgomboi** s/o **Bwanyigeta**,[56] where the accused was convicted of manslaughter, Kwikima, Acting Judge sentenced the accused to imprisonment for four years. He stated,

> Harsh sentences have, over the years failed to curb killings at *pombe* parties. But occasionally the court is tempted to administer shock treatment where the circumstances warrant it. In this case, however, the youth of the accused, the loss of his father and the long time he has been in remand cry for leniency. The accused is therefore sentenced to four years' imprisonment.

Criminal Procedure

[54] This was before enactment of the Wildlife Conservation Act No 12 of 1974 Cap 283 RE 2002
[55] [1972[H C D. n. 46, HC Crim. Rev. 47-A-71; the judgment is dated 17/12/71
[56] 1973 LRT. n. 90, High Court Crim. Sess. 140-DDM-72; the judgment is not dated; this case is referred to above

Justice Kwikima had to grope into Criminal Procedure although at the University College, Dar es Salaam he did not study the Indian Criminal Procedure Code which was made applicable to Tanganyika by the Indian Acts (Application) Ordinance 1923. As it turned out, this omission was not a handicap to the Acting Judge.

i. Unequivocal plea of guilty

In **Republic** v. **Shabani** s/o **Ntulungo**,[57] the accused was, on his own plea of guilty, convicted of attempting to rape a woman. He was sentenced to one year imprisonment. The record was called up for revision because on perusal the plea was found to be equivocal. In quashing the conviction, Kwikima Acting Judge stated,

> Another irksome aspect of this case is the accused was not asked to confirm or deny the particulars. That, I think, was an irregularity which rendered the accused's plea still equivocal. When an accused says as in this case, "It is true," his plea is equivocal until it is established by and ascertained from the particulars submitted by the prosecution and admitted by him.
>
> In a charge where the law is involved, as the law in all charges for attempt is, "It would be desirable … for the prosecutor to outline the facts … of the charge and then to hear the (accused's) reply thereto before entering a conviction on a plea of guilty." (Stanislaus Kyamwibula v. R 1969 H C D. n. 150, also c.f. Damian Christopher v. R 1969 H C D. n. 178). Like my learned brother who called this record for revision, I am satisfied that the accused did not plead unequivocally and that his conviction was, on the facts supplied by the prosecution, untenable. I was minded to order a retrial but since the accused has already served five months in what is clearly a case of unaggravated indecent assault, I would quash the conviction and sentence and order his immediate release, subject to his having forfeited his freedom in no other lawful way.

ii. Identification of accused by one witness

Alibi[58] was set up as defence in **R**. v. **Donald**.[59] However, the accused was convicted of burglary and robbery. The conviction depended on the identification of one witness. The accused set up an *alibi* as a defence but the trial court disbelieved him. In revision, Kwikima, Acting Judge, the conviction was quashed. The Court made pronouncements on identification of the accused person by one witness and on court's approach to *alibi*. Kwikima, Acting Judge stated,

> The only issue before the trial court was whether Zainabu's assailant was identified beyond reasonable doubt. There was no other witness besides Zainabu to identify the

[57] 1973 LRT. n. 94, H C 8-DDM-73; the judgment is dated 7/9/73.
[58] *Alibi* is a defence whereby the accused person states that he was not at the scene of the crime with which he is charged.
[59] [1971] H C D. n. 318, Crim. Rev. 27-A-71; the judgment is dated 26/7/71

intruder. It is dangerous to convict on the evidence of a single identifying witness and a trial court must warn itself (R. v. Chantigit 1970 H C D. n. 343). In the present case the learned trial magistrate did not warn himself of the danger of convicting upon Zainabu's evidence however credible she may have appeared to be. A tougher test than credibility had to be applied before her evidence could be the basis for a conviction. In the case of Abdallah Wendo v. R (1954) 21 E A C A 166 it was stated that: "Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring identification are difficult. In such circumstances, other evidence, circumstantial or direct, pointing to guilt is needed." The learned trial magistrate did not point out any circumstances tending to connect the appellant to the crime. The record itself is berefit of such circumstances ... An *alibi* need not be proved by the accused (R. v. Rutema Nzungu 1967 H C D. n. 445, Morrison Shem v. R 1968 H C D. n. 417, Leonard Aniseth v. R 1963 EA 142). It is therefore wrong for a trial court to reject an *alibi* because it disbelieves the accused and his witnesses. The prosecution evidence had to meet the tests laid down in the law and in this the failure of the prosecution was abysmal. There was insufficient evidence on which to convict the accused. Conviction quashed.

iii. Credibility of witnesses

In **Petro** v. R[60] the appellant was convicted of assault causing actual bodily harm contrary to section 241 of the Penal Code. He attacked the complainant with stones and a hammer. The complainant was a Magistrate who had just convicted him of theft. In dismissing the appeal, Kwikima, Acting Judge stated,

> Since the case was decided on the credibility of the witnesses, it would be improper for the appeal court to interfere … Indeed I am highly persuaded, if not bound by the decision in the case of Mwabusile v. Mwafwile 1968 H C D. n. 59 where it was held: "an appellate court should reassess the credibility of witnesses only if there are circumstances of an unusual nature which appear in the record." I must confess that that I find no circumstances of an unusual nature in this case. The sentence awarded to the appellant, though stiff, cannot be excessive in view of the fact that a deterrent sentence had to be meted out to protect magistrates from similarly inclined **characters**.

iv. Common Intention

> Kwikima, Acting Judge clarified common intention in the case of **R** v. **Aloys and seven others.**[61] Eight (8) accused persons were originally charged with murder and

[60] [1971] H C D. n. 154, Crim. App. 318-A-70; the judgment is dated 26/3/71
[61] [[1971] H C D. n. 197, Crim. Case 101-A- 70; the judgment is dated 10/4/71

subsequently they were called upon to answer a charge of manslaughter. They were alleged to have participated in the beating of a suspected thief. The trial Judge, Kwikima, Acting Judge convicted seven of them for manslaughter. He examined the law governing common intention. He referred to two judgments of the Court of Appeal for East Africa, namely, **Okute Kaliebi and Onor** (sic) v. **Rex,** 1941 (8) EACA 78 and **R**. v. **Tabulayenka and Others** 1943 (10) EACA 51. In the latter case, the deceased was beaten to death after being suspected of stealing. He was discovered sitting near the door of a hut at night. The alarm was sounded and several persons came rushing to the spot and at once proceeded to kick and punch the deceased till he died of multiple injuries. The Acting Judge quoted from this latter case where it was stated, "There being no suggestion that the violence used was necessary to effect the thief's arrest, it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the assault." On the basis of this judgment, the Acting Judge held,

> … in this case all the accused stayed long at the scene and their purpose could not have been other than to punish the thieves in the customary way of their tribe. For this reason I feel bound to acquit Aloys Paulo of the charge as his purpose and intention may have been to take the deceased to justice as he himself alleges. I convict Aloys of simple assault which he has been proved to have committed. As for the rest of the accused, the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended to punish him. As such they were *particeps criminus*, and I have no hesitation to finding them guilty of manslaughter as charged.

v. Self - Defence

In **Amina and Another** v. **R**,[62] Kwikima, Acting Judge was faced with a rare case of murder whereby a woman was alleged to have killed another woman. In this case, the Acting Judge correctly invoked the self-defence. Amina was charged with the murder of one Zaina. The evidence was that the deceased had accused Amina of having had an affair with her husband. Amina was pregnant and in the fight which followed the deceased felled Amina down and sat on her stomach intending to squeeze the foetus out of her. Amina then stabbed the deceased with the deceased's knife. In acquitting the accused, Kwikima, Acting Judge, invoked the right of self-defence. He stated,

[62] [1972] H C D. No. 117, Crim. Sess. 169-D-71; undated.

There was enough reason for Amina to retaliate with all means at her disposal in order to avert possible death if the deceased was allowed to squeeze her pregnancy out. This alone would have justified Amina killing the deceased even if the latter had not gone further to take a knife from her clothing and using it on Amina. In **R** v. **Nyakahe**[63] 1970 H C D. n. 344, Saidi, J (as he formerly was) held that it was justifiable for a woman to kill the person attempting to rape her. It is my considered opinion that a pregnant woman has more reason and justification to kill the person attempting to abort her by physical force as the deceased did in this case. There would be no question of her using excessive force to defend herself. I am left in no doubt that the deceased was the author of her own demise when, through jealousy, she set out to look for Amina in order to give her a beating when she learned that Amina had gone with her husband (sic). Accused acquitted.

In KENNY'S Outlines of Criminal Law it is confirmed that "a homicide in reasonable self-defence does not involve the killer in any legal liability."[64]

IV JUDICIAL CAREER: AN INVESTIGATION OF MR JUSTICE KWIKIMA'S MIND WHILE ON THE BENCH

Besides the above, the following judgments reveal Hon. Kwikima's state of mind when he composed them; he appears to have enjoyed every minute on the bench. In these seven selected judgments, Kwikima, Acting Judge vividly expressed his sentiments, idiosyncracy and philosophy on a range of unrelated subjects: belief in witchcraft and the role of neutralizers in an African society, documentary evidence in African society, close link of intoxication and crime as well as participant witnesses. These judgments should satisfy the appetite and curiosity of any reader with a sense of humour.

i. Belief in Witchcraft and Neutralizers of Witches

The first case, **Republic** v. **Phillimon s/o Vahaye**,[65]we find negative statements on the belief in witchcraft. The accused stood charged for the murder of his father at their home village of Ilembula. He denied the charge. Kwikima, Acting Judge decided that the accused was provoked by the deceased when he struck him "in the heat of passion." He stated,

[63] In [1970] H C D.) No. 344 the name of the accused is **Nyakaho**.
[64] Kenny's Outlines of Criminal Law, 18th Edition, 1962, by J. W. Cecil Turner, Cambridge at the University Press, 1964, paragraph 118, p. 166.
[65] 1973 LRT. n. 78, High Court Cri. Sess. 105-IRINGA-72; the judgment is not dated

> With great respect, I would agree with two of the three assessors who assisted me in the trial that the accused killed his father in the heat of passion, after the latter had jumped on him, grabbed him by the collar and slapped him … Like the two gentlemen assessors I am satisfied that the accused dealt his father the head blows in the heat of passion, directly after the deceased slapped him on the face. There was no time for the accused's temper to cool.

The subject of witchcraft arose in this way. Phillimon, the accused, had pointed out that his father, the deceased was a witch when the accused's son and brother fell sick. The deceased demanded to be taken to medicemen who would prove if the accusation was justified. The matter was taken to the Arbitration Board whereupon its chairman gave the accused, his father and his step mother, Lina, a letter to a mediceman, Kakono who lived at Kidodi in the Kilombero area of Ulanga District. Kakono confirmed that both the father and Lina were indeed possessed of occult powers. The mediceman demanded Shs 500/= as a fee for dispossessing them of their power. This fee was paid by the accused whereupon the deceased and Lina had their hair shorn and they were taken to have lost their magic. With regard to this evidence, Kwikima, Acting Judge spoke his mind on witchcraft as follows,

> Traditionally, tribal societies had recognized and ritualistic ways of dealing with witches. Traditional society did not leave it to the aggrieved to dispatch witches. It would therefore be a retrograde step, a step back to the stone age, if the aggrieved were left to take self-help against those they believed to have bewitched them. It would be a failure of Natural Justice to allow such practice because the aggrieved would be judging their own causes, which is contrary to one of the rules of Natural Justice. They would be prosecutors, judges and executioners in their own causes. If anarchy and lawlessness is not to return to us, the punishment of witches should be left to the Police and the Courts. In that way the ends of Natural Justice would be served.
>
> Before concluding, I would, however, air my objections to those medicemen who purport to have power over witches and wizards. Those are the people who cause hatred between close relatives such as father and son. The accused in this case would have been convicted of a capital offence had there not been evidence that he was provoked by the deceased himself.

ii. The influence of Liqour

In **Republic** v. **Mgomboi** s/o **Bwanyigeta**[66] referred to above,[67] Kwikima, Acting Judge lectured as follows, after convicting the accused of manslaughter,

[66] 1973 LRT. n. 90, HC Crim. Sess. 140-DDM-72; the judgment is not dated
[67] P. 23 and footnote No. 52

> I suppose we have to accept the ugly fact that drinking is part of our lives. Those of us who believe that it is wrong to drink cannot, in moral indignation and self-righteousness impose our will on the drinking majority. But the idea of curbing the manufacture of liquor should certainly be looked into by society. Beer drinking is the source of most tragedies. It is in addition a hindrance to progress. People sit to drink and leave the work to the women. It is time the Party[68] directed its attention to the problem of drinking and its sister alcoholism.

iii. The Prosecution obtains evidence by employing an experienced consumer of *moshi*

In **Lotisia v. R** [69] the Acting Judge had disapprovingly commented on the Police style of obtaining evidence of *Moshi*. In that case the appellant was convicted of being in unlawful possession of *Moshi* and fined Shs. 1,000/= or 12 months imprisonment. In order to prove that the liquid found was *Moshi*, the prosecution called a special constable who stated, "I know that it was '*Moshi'* because I was myself a manufacturer and drinker of *Moshi* before I was employed as a special constable." In dismissing the appeal, the Acting Judge stated,

> It hardly seems just that the Police should employ experienced drinkers to go about "tasting" *moshi*. This practice, although recognized by Seaton J in his ruling above,[70] goes contrary to the concept of justice and should be discouraged. Any Police Officer boasting as PW1[71] did in this case would be confessing to his crimes and the accused if not the public at large would be left wondering why such expert should be rewarded with a job instead of standing in the dock like the accused. Whatever the demerits of this mode of proof, however, this court seems to have accepted it and I cannot go back on it. There is further authority to the effect that scientific or expert testimony is not necessary to identify native liquor (R. v. Amiri Rashidi 1968 H C D. n. 302). This is further support to the conviction of the appellant recorded without the liquor being scientifically analysed by the Government Chemist. I find myself bound to accept the unpleasant fact of identification by self-confessed *moshi* brewers and testers employed by the Police. Accordingly, I will not disturb the conviction of the appellant ... In the absence of any aggravating circumstances, I reduce his fine to Shs. 600/= The appellant who is serving a jail sentence of twelve months in default is to serve six months only. Appeal against conviction dismissed.

iv. Paternity among the Wagogo

[68] Section 3 of the Interim Constitution, 1965 declared Tanzania a One Party State.
[69] [1971] H.C.D. n. 123, 221-A-70, the judgment is dated 12/2/71
[70] The ruling of Seaton, J., was not included in the report.
[71] PW1stands for Prosecution Witness No. 1.

The fourth case relates to rules of paternity among the Wagogo. In **Mgowa Madole** versus **Mgogolo Dododo**[72] the parties were formerly husband and wife. In 1966 the appellant sued for divorce which was granted. According to the respondent the appellant was suckling the disputed child at the time she divorced him. The appellant on her part admits conceiving the child before she obtained the divorce. Both parties are therefore agreed that the child was conceived when they were still husband and wife. In dismissing the appeal from the decision of the District Court, Kwikima, Acting Judge stated,

> The appellant alleges that the child was sired by her present husband who was her paramour just before she divorced the respondent. She is now asking this Court to deny the respondent the child born when she was still his wife *de facto* and *de jure*. She goes further to request that the child should be given to the person who was then her paramour. Her request is immoral and no court of law would countenance it. It is settled custom amongst the patrilineal tribes of Tanzania, the Wagogo being among them, that all children conceived during wedlock belong to the husband. Any one who sires a child adulterously cannot be heard to claim it. Even if such were not the accepted custom, the ethics of our present would not tolerate an adulterer benefitting from his sin to the detriment of his cuckold. It would be adding insult to injury. This appeal has no merit whatever. Accordingly it is forthwith summarily (sic) rejected.

The Acting Judge's decision was in conformity with the Wagogo customary law, namely, all children conceived during wedlock belong to the husband. However, his excursion to the realm of morality was not necessary for his decision in so far as morality was not contemplated by section 9(3) of the JALO which is reproduced above.[73]

v. Application to appeal in *causa pauperis*

Lyimo v. **Lyimo**[74] was an application to appeal in *causa pauperis* (as a pauper). The parties are father and son fighting over a piece of land. The applicant, the son, gave the reasons for this application that he did not have any income. There was evidence that he had been able to pay the court fees in the lower courts. In dismissing the application, Kwikima, Acting Judge stated,

> And yet the applicant is in occupation of a fully developed piece of land. Had he been as destitute as he would like this court to believe, he should have approached the lower courts right away. They would then have referred him to the administration who are in a better position to assess the ability or inability of a litigant to meet the court fees. The

[72] 1973 LRT n. 7, (PC) Civ. App. 11-DDM-72; the judgment is not dated
[73] P. 10
[74] [1971] H C D. n. 114, (PC) Civ. App. 4-A-70; the judgment is dated 30/3/71

applicant whose claim has failed in both courts below is acting inconsistently when he decides that he should have it free this time when he has already proved his ability to pay for litigation which is taken in futility and even spite. It is becoming fashionable these days for *kihamba* occupiers to pretend that they are destitute. It must be brought home to all those who are similarly inclined that litigation costs money and that before embarking on it one should have not only the money but a fairly good claim. They should be dissuaded in pursuing hopeless claims which have no chance of winning and if they have to take such claims to court they should pay for them. In this case the applicant has consistently lost in his bid to evict his own father. I cannot see any conceivable explanation from his move to avoid paying fees in a case which he is very likely to lose. Accordingly, his application is rejected. The applicant should pay the fees if he still wishes to pursue his doubtful claim. Application dismissed.

vi. Documentary evidence in African Society

In **Fadhili** v. **Lengipengi**[75] the appellant successfully sued for domestic animals and their offspring entrusted to the respondent by the deceased appellant's mother. The District Court allowed the appeal of the respondent on the grounds that: (1) the appellant sued only after his mother's death and not during her lifetime. The suit must have been based on "retold history from the neighbours." And anyway the respondent had reported the death of all the animals to the deceased when she was still alive. (2) The claim could not be sustained without documentary evidence and without eye witnesses to say that the goats and sheep did not die and that the appellant did not report. In allowing the appeal, Kwikima, Acting Judge stated,

> With due respect to the learned District Magistrate, his reasoning is bad in law. The court which heard the witnesses found that the respondent had received the stock from the appellant's deceased mother and had kept it till her death. If the animals had died while in the appellant's custody, the trial court found it improbable that the deceased had been informed. After all it is easy to allege things in respect of deceased persons since these persons cannot be called to refute them. In African custom business is transacted without documents. Writing as such is an innovation which is only familiar to the sophisticated young who have had opportunity to receive coaching in the ways of the white man. The appellant cannot be blamed for not acting during his mother's life, either. The reason is simply that the animals then belonged to her and any claim by the appellant would not have been entertained in a court of law. The appellant had capacity to sue for the animals after inheriting them from his mother. Appeal allowed.

V CONCLUSION

[75] [1971] H. C. D. n. 31, (PC) Civ. App. 31-A-69; the judgment is dated 16/11/70

In this essay, I set out to discuss Mr. Kwikima's exciting judicial career as an Acting Judge of the High Court of Tanzania. The essay is not a chronicle but an historical and analytical account of his selected judgments. I have reproduced his words as they were reported in the High Court Digest and the Law Reports of Tanzania so that the reader may decipher the mind of the Acting Judge. I arranged and discussed the judgments by subject matter according to the usual legal categories. At the same time, I stated the criteria which guided the selection of judgments. I am now able to conclude that Mr. Justice Kwikima was extremely industrious. With regard to the High Court, Kwikima, Acting Judge exercised original jurisdiction in civil and criminal cases. With regard to the lower courts, that is to say, the District Courts, the Courts of the Resident Magistrate and the Primary Courts, he exercised appellate and revisional jurisdictions. He penned numerous judgments in in the short period of four (4) years of his tenure. The cases range from land law to landlord and tenant, trespass to land, criminal trespass, family law (or the law of husband and wife), customary law and Islamic law.

Mr. Justice Kwikima astutely avoided basing his decisions on political trends "which may be in vogue at any particular time." He dutifully studied the law applicable to each case and relied on previous decisions of the Court. Accordingly, while on the Bench, he acquired immense grasp of the written law, election laws, civil procedure and criminal procedure, Islamic law as well as rules of customary law (compensation for unexhausted improvements on land, customary tenancy, bride price, custody of children, paternity, promise to marry and the Nyakyusa custom of *Kuposola),*. On rules of customary law, he often deferred to Primary Court Magistrates who sit with assessors. He may have been lenient on sentencing and one may be forgiven for thinking that he showed cynical disdain for certain customary practices. Mr. Kwikima had a most rewarding career. His command of the English Language was unquestionable although occasionally he employed journalese formulations.

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The author was born at Kitunda village in Kiwere Ward, Sikonge District, Tabora Region. He grew up and schooled there and Moravian Church Middle School Sikonge before joining Tabora Boys' Secondary School where he met the late Mussa Kwikima. Like Al Hajj Mussa Kwikima, he studied law at the University College Dar es Salaam.

On graduating with the LL.B., degree in 1969, he was selected to join a career in *academia* as a Tutorial Assistant in Law, University College Dar es Salaam. He retired as a Professor of Law in 2003 when he reached the age of 60 years. He now holds the post of Emeritus Professor of Law for life at the University of Dar es Salaam School of Law.

Prof. Fimbo was enrolled as an Advocate of the High Court of Tanzania in 1979. From 1999 he practiced law, on part time basis, under the style of Mgongo Fimbo and Company, Advocates located at NIC Life House Building, Sokoine Drive/Ohio Street, Dar es Salaam. He was privileged to serve as *Amicus Curiae* (friend of the Court) in four (4) appeals in the Court of Appeal of Tanzania. He retired as an Advocate and closed his Chambers in 2019.