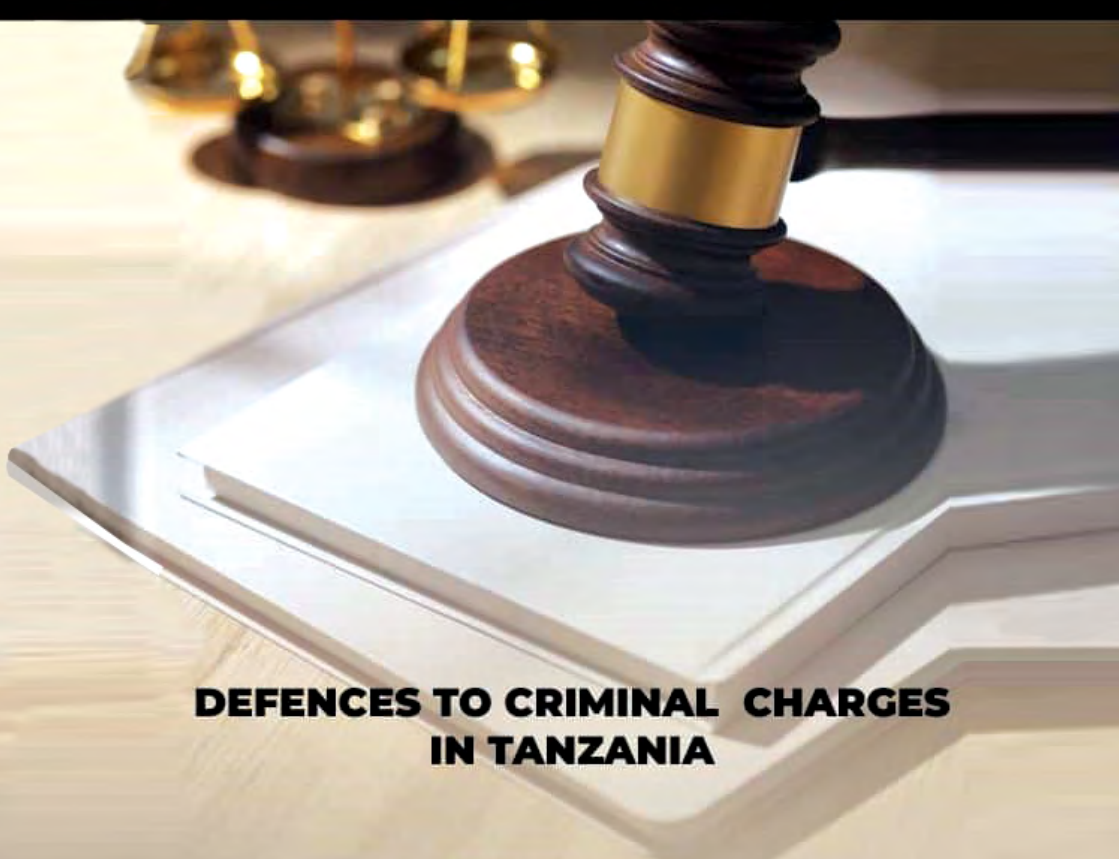




CRIMINAL PRACTICE MANUAL

A close-up photograph of a wooden gavel with a brass band, resting on a white, tiered base. In the background, a pair of brass scales of justice is visible on a wooden surface.

DEFENCES TO CRIMINAL CHARGES IN TANZANIA

2023 EDITION

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DEFENCES TO CRIMINAL CHARGES IN TANZANIA



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FOREWORDS

This manual will assist criminal law practitioners such as defence counsels, State Attorneys, Public Prosecutors, Honorable Judges and Magistrates, law enforcement officers as well as law students to quickly learn or grasp types of defence applicable in criminal charges. The manual has included a good number of current Court of Appeal precedents to update the reader on appropriate legal positions. It is my hope that it will produce fruitful results in the administration of criminal justice in Tanzania.



ACKNOWLEDGEMENTS

I first and foremost give thanks to the Almighty God, the creator of heaven and earth, the Savior of the world, *“in him my life is anchored and in him alone, there’s no failure!”*

Other special thanks are conveyed to my caring, loving, and supportive wife, *Hilda John* and our children; my deepest gratitude. It was a great comfort and relief to know that you were willing to provide management of our household activities while I was preparing this work. My apology to you and our children for taking away the time you should have benefited out of me. My heartfelt thanks.



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INTRODUCTION

Defences to criminal charges that have been discussed in this manual, are not restricted only to those which may be raised by the accused at the stage when he is called to defend his case. I have included both, those which may be applied at any time from when a charge is instituted in court and throughout the trial and those which normally the accused raises during defence case when he is called to answer the allegations facing him. I have done so for ease of understanding not only by law practitioners but also students.



PART ONE

DEFENCE OF ALIBI

1.0 Introduction

The word “**alibi**” is a Latin word, meaning “**elsewhere**” or “**at another place**”. Based on that definition, an accused person raises the defence of alibi by alleging that during the particular time when the offence was committed, he was not present at the scene of crime hence he could not have been the one who committed it.¹ One can therefore define defence of alibi as;

“A defence raised by an accused person, alleging that, when the purported offence was committed, and or during the said particular time, he was not at the said scene of crime”, and therefore rendering it impossible for him to have committed the said offence.

1.1 Procedures to rely on defence of alibi

Any person charged with an offence of which during its commission he was at another place other than the scene of crime, may raise the defence of alibi to cast doubts on the prosecution’s case of the impossibility of him committing it. The law has put in place procedures to follow when the accused person intends to rely on such defence, and it is required of him to do the following;

¹ Msafiri Benjamin vs Republic, Criminal case No.549 of 2020 CAT (unreported) pg. 8, borrowing the position in a Kenyan case of Karanja vs Republic [1983]eKLR 501.



- (1) To give to the court and the prosecution notice of his intention to rely on defence of alibi before commencement of the hearing stage.²
- (2) If he fails to give such notice before commencement of hearing, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.³
- (3) Where he raises defence of alibi without having furnished notice as required by law, the court may on its discretion, accord no weight of any kind to such defence. (Although the court is still required to give reason of rejecting it failure of which is fatal)⁴

In ***Paul Thomas Komba and another vs Republic***,⁵ the Court stated that:-

“..... it is cardinal principle for a prior notice to rely on such defence to be given as per section 194 (4) of the CPA; or if the accused fails to give such notice at the early stage then he will be required to give the prosecution the particulars of alibi at any time before the prosecution closes its case as per section 194 (5) of the CPA. If the accused raises the said defence against the dictates of section 194 (4) and (5) of the CPA, then the court is entitled to accord no weight to such evidence.”

² Section 194(4) of CPA

³ Section 194(5) of CPA

⁴ Section 194(6) of CPA

⁵ Criminal Appeal No.177 of 2018 CAT (unreported) pg.16



1.2 Why furnish notice?

The law has deliberately required the accused person to raise defence of alibi at the earliest possible moment as such, to serve the following;⁶

- (i) To give to the prosecution an opportunity to inquire into the purported alibi and either concede with it by terminating the charge or if they are satisfied that it is false, challenge it by presenting in court adverse evidence to disprove it. If the notice is not furnished within the aforementioned dictates of the law, the prosecution will be deprived of the opportunity to challenge it since their case has already been closed, and that is bad for want of fair trial. It is also proper to believe that they would have discontinued the case upon being satisfied that the alibi was true.
- (ii) To establish before the court that the alibi is genuine. If he does not bring it forward within the avenues stated by the law, there is naturally a doubt as to whether he has not been preparing it in the interval.

1.3 Considering alibi even in absence of notice

The general position as per Section 194(6) of the CPA is that, where the accused person fails to furnish notice to the court prior to hearing or to the prosecution before they close their case, the court may, in its discretion accord no weight of any kind to the that defence.

⁶ R vs. Sukha s/o Wazir Singh & others (1939)6 EACA 145



However, as it is always the rule of law, the discretion of the court in according weight in respect of subsection (6) must be exercised judiciously, meaning that, a reason for the refusal or acceptance must be furnished. Case laws have further expounded that, the meaning of subsection (6) of section 194 of CPA, to require the trial court to consider such defence even when the accused did not comply with sections 194(4) and (5) of CPA (the good example is when he raises it during defence).

As long as it has been raised, the trial court is required to consider it in the judgment otherwise the judgment may be vitiated. It was stated in **Richard Otieno @ Gullo vs Republic**⁷ that;

“Lastly, the provision tasks the trial court to consider the defence of alibi even if no such notice has been given to the prosecution (subsection 6).”

And in **Masamba Musiba @ Musiba Masai Masamba vs R**⁸, quoting the decision in **Mwita Mhere and Ibrahim Mhere v. The Republic [2005] TLR 107** the Court stated that;

"Where a defence of alibi is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under the provisions of section 194(6) of the Criminal Procedure Act 1985 (now the CPA):

- a) The trial court is not authorized by the provision to treat the defence of alibi like it was never made,

⁷ Criminal Appeal No.367 of 2018 CAT (unreported) pg.26,

⁸ Criminal Appeal No.138 of 2019 CAT (unreported) pgs.18&19



- b) The trial court has to take cognizance of that defence, and
- c) It may exercise its discretion to accord no weight to the defence."

1.4 Burden of proof in alibi

When defence of alibi is raised, it is the prosecution which has the burden to prove that the accused person was indeed at the scene of crime at the time when the offence was committed. The accused person has no obligation to prove his alibi as it is enough for him to raise a reasonable doubt on balance of probabilities for his alibi, and leave then it to the prosecution to disprove it.⁹

The general principle is that, an accused person does not assume the burden of proving his defence, including defence of alibi. And for defence of alibi in particular, it is sufficient if his alibi raises a doubt in the mind of the court that it might be true, and thereafter, it remains to the prosecution to disprove it.¹⁰

1.5 Relaxation on the burden to prove alibi

In order to cast doubts on the minds of the court, it is not expected of the accused person to stay idle even in circumstances where it was possible for him to establish important matters. For instance, if he says

⁹ Salehe Siasa v R, Criminal Appeal No.281 of 2017, CAT (unreported) pg.3. Kubezya John Vs Republic, Criminal Appeal No.488 of 2015 CAT Tabora (unreported), Kilaga Daniel vs Republic, Criminal case No.425 of 2017, CAT (unreported) pg.14, Masanja Lupilya vs Republic, Criminal Appeal No.444 of 2017 CAT (unreported) pg.14&15, Rehani Said Nyamila vs R Criminal Appeal No.222 of 2019 CAT (unreported) pg.22, Kubezya John vs R Criminal Appeal No.488 of 2015 CAT (unreported) pg.20-23.

¹⁰ Leornard Aniseth v R (1963) E.A.C A 206



he was at another place and with witnesses out of reach, it is expected of him to procure them at least to assist the court to believe it, although not proving it like what is required by the prosecution. In ***Trazias Evarista@ Deusdedit Aron vs Republic***¹¹, it was held that;

“if a person charged with a serious offence alleges that at the time when it was committed he was at some other place where he is well known and he does not prove to the satisfaction of the court then the court must necessarily attach little if not no weight to his allegations.

¹¹ Criminal Appeal No.188 of 2020 CAT Bukoba (unreported),pg.12



PART TWO

INTOXICATION

2.0 Introduction

Intoxication can be defined in several ways depending on the circumstance of each case, but generally, it refers to the condition where a person does not have the normal mental capacity necessary to carry out a crime or understand its implications, due to ingestion of, or being injected with intoxicants, voluntarily or involuntarily. Intoxicants may be in the form of alcohol or drugs.

2.1 Types of intoxication

There are two types of intoxication as far as criminal law is concerned. They include voluntary intoxication and involuntary intoxication.

2.1.1 Voluntary intoxication

This refers to a willing ingestion or injection of intoxicating substance knowingly or when ought to have known of its intoxicating effects.

The good example is when a person drinks alcohol or injects himself with drugs while knowing it to have possible negative effects out of its influence. A person under such circumstances would have no other person to blame for the negative effects emanating from the influence of such intoxication, since he had prior knowledge of its possible effects and yet he went on to consume it anyway.¹²

¹² Adam Salehe Ramadhen v R Criminal Appeal No.547 of 2020 CAT (unreported) pg.21&22



2.1.2 Involuntary intoxication

This refers to intoxication caused by malicious or negligent acts of another person without the consent of the person who is being intoxicated.

The good example is when a person is tricked into ingesting drugs through drinks without his knowledge or against his will, thereby losing his mental capacity to understand what he is doing or whether what he is doing is wrong.

Negligent acts of other persons leading to involuntary intoxication is like when professional doctors inject medications to patients and results to negative effects. If the influence of such medication results to commission of offences, the offender can plead involuntary intoxication as a defence.

2.2 When intoxication can be a defence

As a general rule, in Tanzania, intoxication does not constitute a defence in any criminal charge. However, as an exception, it is taken into account in those cases requiring proof of a specific intention for the purpose of determining whether the person charged had formed any intention to commit the offence.¹³ The specific intent construed here includes constructive intent to ingest or inject intoxicants voluntarily with knowledge of their effects.

In majority of the common law jurisdictions, only ***involuntary intoxication*** within the meaning ascribed above can be accepted as a defence to criminal charges.

¹³ Section 14(1)(4) of the Penal Code [Cap.16 R.E 2022], Nicco Peter @ Rasta v Republic, [2006] TLR 84, Anthony Samila v R Criminal Appeal No.32 of 2010 CAT (Unreported) pg.15



Voluntary intoxication (self-induced intoxication) is not accepted since the law stands to protect the victim rather than the offender who knew or was in a position to know the possible effects of intoxicants prior to its consumption.¹⁴

In **John Ulirick Shao vs Republic**,¹⁵ the court asked itself whether it should protect suspects who commit offences under self-induced intoxication or the victim, borrowing with approval the wisdom from the English decision of **R v Heard [2007] EWCA Crim 125 All ER 2007 Vol.3 (30/09/2022)** where it was held that;-

“The defendant could not rely upon his voluntary intoxication, including intoxication or otherwise altered state of mind resulting from the voluntary taking of drugs or other substances as negating the necessary intention to touch”

The provision of *section 14(2) (a) and (b)* of the CPA, states that, intoxication can be a defence under the following circumstances;

- (1) If by reason thereof, the person charged at the time of the act or omission complained of, did not understand what he was doing **and the state of intoxication was caused without his consent by the malicious or negligent act of another person.** (*The meaning of this subsections falls under involuntary intoxication and the remedy of which will be a discharge*);

¹⁴ John Ulirick Shao v Republic, Criminal Appeal No.151 of 2019 CAT (unreported) pg.8&9, Adam Salehe Ramadhen v R Criminal Appeal No.547 of 2020 CAT (unreported) pg.21&22

¹⁵ *ibid*



- (2) If the person charged, at the time of the act or omission complained of did not understand what he was doing “**and**” was by reason of intoxication insane temporarily or otherwise. *(The remedy thereof is to subject him to provisions relating to insanity).*

Borrowing the wisdom from the Indian case of **Shaik Ahmed vs State Of Telangana**, Criminal Appeal No.533 Of 2021 the use of the words “and” before mentioning the subsections and “or” between the two subsections under section 14(2)(a) and (b) of the CPA, seem to have been couched with a purpose and objective. The use of “and” requires the theme under subsection (2) to be read in conjointly with either (a) or (b). Also, the use of the word “or” thereof, separates (a) from (b) making them independent items.

Construing subsection (2) of section 14 thereof, you will find that, there are only two separate instances where intoxication can be accepted as defence and that is either section 14(2)(a), or section 14(2)(b) of the Penal Code as narrated to be (1) and (2) above.



PART THREE

DEFENCE OF INSANITY

3.0 Introduction

Generally, insanity refers to a defence to criminal charges based on the idea that due to mental disorder or defect at the time of commission of the alleged offence, the accused person was unable to understand what he was doing, or, that he was unable to understand that what he was doing was wrong. It implies lack of criminal responsibility by reason of mental disease or defect.¹⁶

As a general rule, it is a principle of law that every human being is presumed sane at all times unless the contrary is proved. *Section 12 of the Penal Code* provides that:-

“Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved.”

3.1 Exceptions to the rule of sanity

The law recognizes circumstances where a person may be insane and as a result of it be unable to understand what he is doing or that what he is doing is wrong, hence he should not be punished for the acts emanating from his mental defect. ***Section 13(1) of the Penal Code*** provides that, a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission, he is “through any disease affecting his mind”;-

(a) Incapable of understanding what he is

¹⁶ Thomas Pius vs Republic, Criminal Appeal No.145 of 2019 CAT (unreported)



doing,

- (b) Incapable of appreciating that he ought not to do the act or omission,
- (c) Does not have control of the act or omission.

A person however, may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects referred in subsection (1) of section 13 to that act or omission.¹⁷

3.2 Things to remember in insanity

Before we embark on the procedure to be followed on raising the defence of insanity, it is important to note the following;

- (i) Do not mix up aspects between “unfitness to make a defence due to insanity” (*that the accused person is incapable to stand trial*) and a “plea of insanity as a defence to a charge or information” (*that at the time of the alleged offence, he was insane*). The law provides for two separate instances of insanity and procedures to raise them as defence.¹⁸
- (ii) If an accused person intends to raise a defence of insanity as a bar to a trial, in that, he is incapable to stand trial; it will be dealt with according to **sections 216 and**

¹⁷ Section 13(2) of the Penal Code

¹⁸ Fracis Siza RWambo vs Republic, Criminal Appeal No.17 of 2019 CAT (unreported), MT. 81071 PTE Yusuph & Another vs Republic, Criminal Appeal No. 168 of 2015 CAT (unreported)



218 of the CPA. The inquiry must be in relation to an accused's mental condition at the time of the trial as distinct from his mental condition at the time the offence or omission was made.

- (iii) If an accused person wishes to rely on insanity as a defence to criminal charge or information, that is to be dealt with according to **Section 219(1) of the CPA**, and he shall raise it at the time when he is called upon to plead.¹⁹
- (iv) Insanity within the context of **section 13 of the Penal Code** is a question of fact which could be inferred from the circumstances of the case and the conduct of the person at the material time. Courts are not bound to accept medical experts where there are good reasons for not doing so.²⁰

3.3 Procedure to plead defence of insanity

The procedure to be followed where the accused intends to plead insanity as a defence to a criminal charge was laid down in the cases of **MT. 81071 PTE Yusuph & Another vs Republic**,²¹ and **Mwale Mwansasu vs DPP**,²² and it includes: -

¹⁹ Estar Jofrey Lyimo vs Republic, Criminal Appeal No.123 of 2020 CAT (unreported) pg.22

²⁰ Hilda Abel V Republic 1993 TLR 246 (CA).

²¹ MT. 81071 PTE Yusuph & Another vs Republic, Criminal Appeal No. 168 of 2015 CAT (unreported)

²² MT. 81071 PTE Yusuph and Another vs Republic, Criminal Appeal No. 168 of 2015 (unreported), Mwale Mwansasu vs DPP, Criminal Appeal No.105 of 2018 CAT (unreported) pg.15



- (1) First, where it is desired to raise the defence of insanity at the trial in relation to mental status of the accused at the time the offence was committed; such defence should best be raised when the accused is called upon to plead.
- (2) Second, upon being raised the trial court is enjoined to adjourn the proceedings and order the detention of the accused in a mental hospital for medical examination.
- (3) Third, after receipt of the medical report the case precedes the normal way with the prosecution leading evidence to establish the charge laid and then closes its case.
- (4) Fourth upon the closure of the prosecution case, the defence leads evidence as against the charge laid, including medical evidence to establish insanity at the commission of the alleged act, and
- (5) Fifth, the court then decides on the evidence, whether or not the defence of insanity has been proved on a balance of probabilities. If such enquiry be determined in the affirmative, the court will then make a special finding in accordance with section 219 (2) and 220 (4) of the Act and proceed in accordance with enumerated consequential orders.



3.4 Burden of proof in Insanity defence

The burden to prove insanity lies on the accused person who raises it, not for the prosecution to prove his sanity.²³ In ***Bashiru Rashid Omar vs Director of Public Prosecutions***,²⁴ the court held that, the burden of proof in respect of insanity lies to the accused person on a balance of probabilities and not merely to raise a reasonable doubt as to his sanity.

23 Thomas Pius vs Republic, Criminal Appeal No.145 of 2019 CAT (unreported), pg.11, Bashiru Rashid Omar vs Director of Public Prosecutions, Criminal Appeal No.309 of 2017, CAT Zanzibar,(unreported) pg.11

24 Bashiru Rashid Omar vs Director of Public Prosecutions, Criminal Appeal No.309 of 2017, CAT,(unreported) pg.11, Joseph John Makune v. Republic [1986] T.L.R. 44



PART FOUR

PROVOCATION AS A DEFENCE TO MURDER

4.0 Introduction

Under **section S.201 of the Penal Code**, the term "provocation" means and includes, except as herein after stated,

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

In majority of common law jurisdictions, provocation is accepted as a defence to murder in exclusion of other offences involving violence. This is the same position for Tanzania, and this part will only concentrate on killings under provocation.²⁵

Provocation however, is not an absolute defence, but partial within the meaning that, where the accused successful establishes it, he will not be acquitted, rather, it reduces the offence of murder to Manslaughter. So the accused person will not

²⁵ Section 201 of the Penal Code



walk out completely unpunished as if it was an absolute defence, he at least gets convicted on a lesser offence of manslaughter.²⁶

4.1 Proof of provocation

The following are conditions to be fulfilled for the defence of provocation to stand, as reduced from ***Kato v. Uganda* [2002] 1 EA 101** and ***Georgina Venance v R* [2005] TLR 84**, adopted by ***Hamis Chuma @ Hando Mhoja v Republic***²⁷ and ***Ibendu Hashimu v Republic***,²⁸

- (1) The act or insult which causes provocation must be wrongful; lawful act or conduct cannot provide provocation.
- (2) The person provoked must have been deprived of the power of self-control.
- (3) The provocation must be sadden and the death must have been caused in the heat of passion before there is time to cool,²⁹
- (4) The person assaulted must be the one who offered the provocative act, insult or conduct.

²⁶ Section 201 of the Penal Code

²⁷ *Hamis Chuma @ Hando Mhoja v Republic*, Criminal Appeal No.36 of 2018 CAT (Unreported) pg.28

²⁸ *Ibendu Hashimu v Republic*, Criminal Appeal No.546 of 2020 CAT (unreported) pg 18

²⁹ *Benjamin Mwansi v. Republic*[1992] TLR 85, *Said Kigodi@Side v Republic*, Criminal Appeal No.281 of 2009 CAT (unreported)



- (5) The provocative act, insult or conduct must have been directed to the person committing the assault or a person who stands to him in the relationship as explained under section 202 of the Penal Code.
- (6) The provocative act or insult must have been done or offered in the presence of the person committing the insult.
- (7) The test is the ordinary person in the society. The wrongful act or insult must be of such a nature as would likely to deprive an ordinary person of the class to which the accused belongs, the power of self-control. This is to say that, any individual idiosyncrasy, such as for instance as that the accused is a person who is more readily provoked to passion than the ordinary person; is of no avail;

4.2 Essentials in provocation

Apart from the above elements to prove the provocation, the following can be used as a checklist that one should have in mind when dealing with it;

- (a) A successful defence of provocation reduces the offence of murder to manslaughter. This is why it is termed as a partial defence (not absolute) because a successful defence of provocation does not render accused to go unpunished, he will still be convicted to the lesser offence of manslaughter.³⁰

³⁰ Section 201 of the Penal Code



- (b) Defence of provocation is available only when the accused admits killing the deceased. Where the accused denies an act of killing, such defence disappears automatically.³¹
- (c) For the defence of provocation to stick, it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances.³²
- (d) Defence of provocation is available to a suspect who kills at the spur of the moment in the heat of passion before he has time to cool down. If the chain of events breaks to allow it to cool, the defence cannot stand.³³
- (e) For provocation to be a defence it is not enough for one to cite a long existing conflict or provocation, what is required is a sudden provocation without time for cooling down.³⁴

31 Shabani Rashidi v Republic 1995 TLR 259 (CA).

32 Damian Ferdinand Kiula & Charles v R 1992 TLR 16 (Ca).

33 See Kagambo Bashasha vs Republic, Criminal Appeal No.591 of 2017 CAT (unreported) pg.13, Saidi Kigodi Side vs R, Criminal Appeal No.281 of 2009 CAT (unreported) pg.12.

34 Jacob Asegelile Kakune vs DPP, Criminal Appeal No.178 of 2017 CAT (unreported) pg. 20.



- (f) When the unlawful act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any relationship referred to in subsection 202(1), the former is said to give the latter provocation for an assault.³⁵
- (g) A lawful act is not provocation to any person for an assault.³⁶
- (h) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.³⁷
- (i) An arrest which is unlawful is not necessarily provocative for an assault, but it may be evidence of provocation to a person who knows of the illegality.³⁸
- (j) For the purposes of section 202 of Cap. 16, the expression "an ordinary person" means an ordinary person of the community to which the accused belongs.³⁹

³⁵ Section 202(2) of the Penal Code

³⁶ Section 202(3) of the Penal Code

³⁷ Section 202(4) of the Penal Code

³⁸ Section 202(5) of the Penal Code

³⁹ Section 202(6) of the Penal Code



PART FIVE

Self-Defence

5.0 Introduction

This refers to the use of force to protect oneself, another person or property from a real or threatened attack.⁴⁰ It involves the use of essential and reasonable defensive force against an aggressor who is perpetrating an illegitimate attack for the purpose of repelling this attack and thus protecting legitimate interest.⁴¹

Section 18A (1) of the Penal Code provides that, every person has the right to;

- (a) To defend himself or any other person against any unlawful act or assault or violence to the body; or,
- (b) To defend his property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence.

When exercising such right, section 18B (1) of the Penal Code is clear that, he is required to use only such reasonable force as may be necessary for that defence. The use of excessive force renders him criminally liable for the offence which results out of it.

⁴⁰ Black's Law Dictionary, 9th Edn (West Group, 2009) pg 1481

⁴¹ Sangero, Self-Defence in Criminal Law (Oxford: Hart Publishing, 2006) pg 45-52.



Also, where death occurs as a result of excessive force used in defence, the accused shall be guilty of manslaughter.⁴²

A successful establishment of self-defence plea results to an acquittal of the accused, and where he was not yet arraigned in court and the prosecution upon reviewing evidence in the file recognizes so; he ought not to be prosecuted at all. *Section 18 of the Penal Code* provides:

“subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self defence, or the defence of another or the defence of property in accordance with the provisions of this Code.”

5.1 Burden of proof in self- defence

Where the accused person raises defence of self-defence, defence of another person or property, the burden of proof does not shift to him. It still remains with the prosecution to disprove it beyond reasonable doubt that the accused was either not acting under self-defence or used excessive force.⁴³

Under the common law, and reducing from the above provisions, there are three conditions which have to be met before the defence of self-defence or defence of another is accepted;

- (i) There must be an imminent danger to the life or limb of the accused, another person or property sought to be protected.

42 Section 18B (2) and (3) of the Penal Code.

43 Oloo S/o Gai Versus R. (1969) EA 86 EACA, Crime Prosecution Service of the UK, Legal Guide 2022



- (ii) The force used in the face of this danger must be necessary for the safety of the accused. By this it means, the force must be both necessary in the circumstances and proportional to the threat which is being combated, and,
- (iii) If the person assaulted has means of escape or retreat, they are bound to opt for it.



PART SIX

OTHER DEFENCES

6.0 Introduction to other defences

This part will discuss all other defences other than those discussed above. Some may be perceived not as pure defences but pleas, although the same can be argued in court as defences as well.

6.1 Immaturity of Age

This is a defence in criminal prosecution that due to age, the suspect is immune to be responsible for the crime. It is provided under *Section 15(1)-(4) of the Penal code* which provides that:-

- (1) A person under the age of ten years is not criminally responsible for any act or omission.
- (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that, at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission.
- (3) A male person under the age of twelve years is presumed to be incapable of having sexual intercourse (therefore he cannot be charged with rape or unnatural offence).



- (4) Any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the law of the Child Act. (it means, he is immune to be prosecuted in adult courts).

6.2 Mistake of fact

Section 11 of the Penal Code provides that, unless there exists an express or implied provisions of the law relating to the subject, a person who does or omits to do an act under an honest and reasonable, but mistaken, believing the existence of any state of things, is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.⁴⁴ Mistake of law is generally not a defence, so is ignorance of law.

6.3 Compulsion

A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence, unless the offender is a child. The governing provision is *section 17 of the Penal Code*.

6.4 Retrospectivity of the law

It is settled principle that, a person is not criminally responsible for an act or omission of which, at the time it was so committed, did not constitute a crime under

⁴⁴ Section 11 of the Penal Code.



the law. In other words it means, no person shall be criminally responsible under a Statute for the conduct committed prior to its entry into force. This position is provided under *Article 13(6) (c) of the Constitution of the United Republic of Tanzania* which states;

No person shall be punished for any act which at the time of its commission was not an offence under the law, and also, no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed.

This therefore may be used as a defence when a person is charged and he has proof that at the time he committed the alleged offence, it was not a crime under the law.

6.5 Bona Fide Claim of Right

This is provided under *section 9 of the Penal Code* which states that, a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

6.6 Death within a Year and a Day

Death within a year and a day is also a defence in criminal law especially when the suspect assaulted deceased who died after a year and a day as a result of the purported assault. **Section 205 of the Penal code** provides that, a person is not deemed to have killed another, if the death of that person does not take place within a year and a day of the cause of death.

For the purpose of reckoning the period referred to above regards shall be made to the followings;



- (a) The period shall include the day on which the last unlawful act contributing to the cause of death was done;
- (b) When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased; and
- (c) When the cause of death is in part an unlawful act and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the later.

6.7 Judicial immunity

Under *section 16 of the Penal Code*, judicial officers are immune from criminal prosecutions for acts or things done or omitted to be done bonafidely in the exercise of their judicial functions.

6.8 “autrefois acquit” as a defence

Although this is considered more as a plea to a criminal charge as such, on the other hand it may be construed as a defence against prosecutions. *Autrefois acquit* (a former acquittal), is grounded on the universal maxim of the common law of England, that no one is to be brought into jeopardy of his life or limb more than once for the same offence he was formally acquitted.⁴⁵

In a simple language, it is a bar to charge a person with the same offence which he was previously charged by

⁴⁵ Double jeopardy Rule, House of commons commentary pp.335-6



a competent court and acquitted.⁴⁶ It may be used as a defence from further prosecution.

6.9 “Autrefois convict” as a defence

This one also may be used as a defence from further prosecution. It is the rule against double jeopardy, grounded on the principle that, no man ought to be twice brought in danger of his life for one and the same crime which has previously been adjudicated by a court of competent jurisdiction and convicted him. i.e *Nimo Bis Debet Puniri pro Uno Delicto*. Since a court of competent jurisdiction has previously convicted such a person on such same offence, he has already paid the price of his guilty and it will not be fair to punish him again for the same.⁴⁷

HOWEVER, this rule does not protect a person from being prosecuted for a different offence originating from the same facts, as was stated in ***Republic v Msusa Ally***,⁴⁸ where an accused person was charged and convicted of assault causing actual bodily harm. Later on the victim died of the same assault and was again charged with murder. He attempted to raise the defence of autrefois convict but was barred since his previous conviction was not on murder, but assault causing actual bodily harm which is a distinct offence though they originate from the same transaction.

46 Godison Ndobho v Republic [1993]TL 287, Republic v Msusa Ally [1987] TLR 190, Twaha Hussein v R, Criminal Appeal No.415 of 2017 CAT Mwanza (unreported), Section 228(5) (a) (i) of the CPA

47 Double jeopardy Rule, House of commons commentary pp.335-6

48 Republic v Msusa Ally [1987] TLR 190



In the case of ***Maduhu Masele v Republic***,⁴⁹ it was further stressed that, it is the duty of the accused to raise the plea of autrefois acquit or convict at any time before closure of defence case, and as a general rule, the burden of proof is upon him who asserts it.

6.10 Presidential Pardon as defence

A pardon is a common law extra-judicial power which is exercised by the Crown under the Royal Prerogative of Mercy.⁵⁰ In Tanzania it can be defined as a Presidential decision to relieve a convict or prisoner of some or all of the legal consequences resulting from a criminal conviction. It is a forgiveness which exempts a convict or prisoner from a particular punishment.

Article 45(1) (a)-(d) of the Constitution of the United Republic of Tanzania designates the President as the only person with the power to grant pardons.

A person cannot be tried for a criminal offence if he shows that he had been pardoned for that offence by the President.⁵¹ He can reply to the charge that he has already been pardoned by the President on that offence, and thereafter the provision of ***section 228(5) (b) of the CPA*** shall apply. So when such person is charged, he may use it as a defence from prosecution or conviction on the same.

49 *Maduhu Masele v Republic* [1991] TLR 143

50 The Royal Prerogative of Mercy, 2015 & see *R v Foster (Barry)* [1985] QB 115; [1984] 3 W.L.R. 401]

51 Momanyi Bwonwong'a, *Procedures in Criminal Law in Kenya*. Nairobi: East African Education Publishers Ltd, 1994 pp.87



6.11 Parliamentary Privileges

Under **Article 100(2) of the Constitution of the United Republic of Tanzania**, subject to the constitution and other laws in force, a *Member of Parliament* shall not be prosecuted and no civil proceedings may be instituted against him in a court in relation to anything which he has said or done in the National Assembly or has submitted to the National Assembly by way of a petition, bill, motion or otherwise.

6.12 Prosecutions which require consent of DPP

Generally, anything can be used as defence in criminal charges especially where the process infringes a requirement of law. This part shall not discuss consent in economic offences which is well known by many, although that is also important, but consent under “**the Consent to Prosecute (Delegated Powers) Government Notice No. 830 published on 8/11/2019**” which many people may not be aware of.

This GN contains about 113 offences stipulated under its 2nd Schedule which cannot be prosecuted without the consent of the DPP. Under its Regulation 5(1)(e) for example, the following persons cannot be prosecuted without the consent of the DPP, they include;

- i) A person who is presidential appointee,
- ii) Member of Parliament,
- iii) Justice of Appeal,
- iv) Judge of the High Court,



- v) Registrar of Court of Appeal and High Court,
- vi) Magistrate and
- vii) State Attorneys.

Therefore, where it follows that any of the above listed is being prosecuted, and detects that no consent was issued in that respect, he may use that fact as defence.



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2. **Damian Ferdinand Kiula & Charles v R** 1992 TLR 16 (CA)
3. **Godison Ndobho v Republic** [1993] TL 287
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7. **Leonard Aniseth** v R (1963) E.A.C A 206
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13. **Shabani Rashidi** v Republic 1995 TLR 259 (CA)

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3. **Bashiru Rashid Omar vs Director of Public Prosecutions**, Criminal Appeal No.309 of 2017, CAT (unreported)
4. **Estar Jofrey Lyimo vs Republic**, Criminal Appeal No.123 of 2020 CAT (unreported)
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7. **Ibendu Hashimu v Republic**, Criminal Appeal No.546 of 2020 CAT (unreported)
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9. **John Ulirick Shao v Republic**, Criminal Appeal No.151 of 2019 CAT (unreported)
10. **Kagambo Bashasha vs Republic**, Criminal Appeal No.591 of 2017 CAT (unreported)
11. **Kilaga Daniel vs Republic**, Criminal case No.425 of 2017, CAT (unreported)
12. **Kubezya John Vs Republic**, Criminal Appeal No.488 of 2015 CAT (unreported)
13. **Masamba Musiba @ Musiba Masai Masamba vs R** Criminal Appeal No.138 of 2019 CAT (unreported)
14. **Masanja Lupilya vs Republic**, Criminal Appeal No.444 of 2017 CAT (unreported)
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18. **Paul Thomas Komba and another vs Republic** Criminal Appeal No.177 of 2018 CAT (unreported)
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