

**THE FOUNDATIONS OF THE LAW OF EVIDENCE AND THEIR IMPLICATIONS
FOR DEVELOPING COUNTRIES: THE BACKGROUND OF THE TANZANIA
LAW OF EVIDENCE PROJECT**

BY

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TABLE OF CONTENT

Introduction.....	3
Background of Tanzania Evidence Law Project	3
The Rationale for the Reform of evidence law	5
The relationship between corruption and reforming the law of evidence.....	5
Circumstantial Evidence and Prosecuting Crimes of Corruption	8
Conclusion	12
References.....	13

Introduction

This paper discusses three major issues: The background to the evidence law project in Tanzania, the reasons behind the proposed reforms and the relationship between the challenges corruption poses and the reform of the law of evidence in Tanzania. The paper concludes in support of the proposed draft of the Tanzania Evidence Act, 2014.

Background of Tanzania Evidence Law Project

In Tanzania the responsibility to reform laws is vested in the Law Reform Commission.¹ In June, 2009 the Law Reform Commission commenced reviewing all laws which impact the civil justice system in Tanzania including the Law of Evidence. The reviewing process was to be conducted under the Civil Justice Review Project, which was being funded by the Business Environment Strengthening for Tanzania (BEST).

During the same year (2009), the Prevention and Combating of Corruption Bureau (PCCB) consulted with the Law Reform Commission and proposed to the latter about amending the Tanzania Evidence Act (TEA) after realizing that in the fight against corruption, the existing law against corruption - the Prevention and Combating of Corruption Act² - cannot thrive without procedural laws (evidence law being one of them) being overhauled or substantially amended to reflect the current society's needs and realities.

In April 2010, the Law Reform Commission informed the PCCB that the law society of England and Wales (LSEW) has been assigned to undertake the consultancy of reviewing laws relating to civil justice system (including the Evidence Act) in Tanzania.

Official communications between the two institutions culminated in January, 2011 when the Commission informed the PCCB that the LSEW could not review the Evidence Act due to some financial constraints. It was at this point when the Commission mandated the PCCB to spearhead the process to review the Evidence Act. The PCCB accepted the opportunity and agreed to partially fund the project.

¹ Law Reform Commission of Tanzania, Act number 11 of 1980

² Act No.11 of 2007

The PCCB undertook the project in the modalities given by the Law Reform Commission of Tanzania which include:

- Organization of experts team and Legal Officers from Law Reform Commission of Tanzania,
- Preparation of a position paper which contain challenges, recommendations and proposed changes,
- Preparation of the stakeholder's consultative meetings to discuss the draft paper and
- Preparation of reports and draft Bill to be presented to the Minister of Constitutional Affairs and Justice for further action.

The PCCB consequently engaged the services of Prof. Ron Allen (Professor of Law and Wigmore Chair at the Northwestern Law School, Chicago Illinois, U.S.A) to undertake the consultancy work.

That being the case, since the year 2011 to date the PCCB Tanzania in collaboration with the Law Reform Commission, the Judiciary, various Tanzania legal experts and Prof. Ronald Allen and his Team from Northwestern Law School, and other stakeholders jointly, have been working together on reviewing the Tanzania Evidence Act of 1967 in order to come up with a draft of new Evidence Act. The new Act is intended to comprehensively embody modern requirements of evidence rules.

From 14th to 17th April, 2014 in Mwanza, the PCCB invited the Chief Justice of Tanzania, Justices of Court of Appeal to join and be part of the Project Working Group where the chief consultant Prof. Ron Allen submitted his draft proposal of the new evidence code for Tanzania.

In May 2014 the Chief Consultant Professor Ronald Allen and the Drafting Committee finalized a proposed final draft to repeal and replace the current Tanzania Evidence Act. The proposed Act will have to pass through several legal processes before its enactment.

The Rationale for the Reform of evidence law

Since its enactment, Tanzania law of evidence of 1967 (TEA) has undergone several amendments for purposes of addressing several weaknesses, which posed challenges in both Criminal and Civil proceedings. Despite all the amendments made, TEA has not been able to keep pace with the development of today and challenges that have emerged.

The TEA was drafted by an Englishman, James Fitzjames Stephen, and derived largely from the Indian Evidence Act of 1872. The Act is a barrier to the successful prosecution of corruption cases in the country, because it does not recognise the utility of circumstantial evidence which is important in proving corruption offences given its secretive nature of the commission of the offence and, more fundamentally, it does not reflect the modern advances of legal knowledge about evidence specifically, the nature of technological advancement and attainment of accurate fact finding which is the bedrock of fair trial and justice.

Globalization and rapid advancement in science and technology have made the TEA look obsolete to promote and facilitate accurate, efficient and fair fact finding during the trial process. Ultimately the TEA has not responded effectively to a rational search for truth rather the TEA is founded on obscurity of imperial order that had used it to promote business and trade of the imperial majesty kingdom of England. Therefore the TEA is built on a foundation that cannot sustain the aspiration and realities of modern Tanzania.

The relationship between corruption and reforming the law of evidence

While we are discussing the fundamental foundations of the law of evidence and their implications, it is important to briefly discuss the relationship between corruption and reforming the law of evidence in Tanzania because the foundation of law of evidence is premised on the accurate, efficient and fair fact finding to legal disputes.

Suffices to say, there are two vital elements of the evidence law that have been applied by legal practitioners in Tanzania without having adequate governing legal provisions in the TEA. These are electronic and circumstantial evidence.

- **Electronic evidence**

It was observed by the Court of Appeal in the case of **Tanzania Cotton Marketing Board .v. Cogecot Cotton Company SA**³ that “the law cannot be and is not ignorant of modern business practices (methods) and must not shut its eyes to the mysteries of the computers”.

In 2007, the legislature through the current Evidence Act⁴ introduced a new section 40A which provides for admissibility of electronic evidence in criminal proceedings and section 78A which allows admissibility of Bank’s electronic records which was not the case before these amendments.

Section 40A states:

“ In any criminal proceedings (a) an information retrieved from computer systems, networks or servers; or (b) the records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities (c) the audio or video recording of acts or behaviors or conversation of person charged, shall be admissible in evidence.”

For a particular thing to become evidence in criminal proceedings, it has to be collected or seized by investigators through different means as provided by the Criminal Procedure Act.⁵ Thereafter, the same has to be produced and tendered in court where the issue of its admissibility rises.

However, the 2007 Amendment did not incorporate provisions regarding how the same evidence should be collected, stored or produced in court. Electronic evidence plays a vital role in proving corruption and related offences such as bribery⁶, which normally transpire secretly between two or more parties. Voice or video recorders used during undercover operations can reveal

³ (1997) TLR 165 (CA)

⁴ (CAP 6 R.E 2002)

⁵ CAP 20 R.E 2002

⁶ Section 15 of the Prevention and Combating of Corruption Act No. 11 of 2007

offender's solicitation to obtain or give bribery. It is also useful when producing electronic records such as e-mails, bank statement and other bank records.

- **Challenges faced by prosecution when producing electronic evidence in court**

The following are some of the challenges prosecutors encounter when applying section 40A of the Act:

Firstly, the marginal note lacks clarity. It reads "evidence obtained undercover operations".

Without a linking word in the middle, it talks about two different things, which are, "*evidence obtained*" and "*under-cover operation.*"

Literally the term "undercover" means "*working or done secretly in order to find out information for the police, a government, etc*"⁷ It is one of investigation stages or techniques used when law enforcement agencies are investigating crimes. There are other stages, which are done openly for instance, interrogating suspects and interviewing witnesses.

It is obvious that the marginal note by itself leaves ambiguities for the reader who may ask several questions such as:

Does section 40A refer to electronically evidence obtained through undercover operation only? Or it also includes such evidence obtained through all other investigation stages.

If section 40A covers only undercover operations, does it mean that the section cannot be applied in other criminal investigation stages such as interrogations, collection of electronic bank records, CCTV records etc?

Secondly, who is the proper person to seize/collect, store and produce electronic evidence in court? What skills should the person possess to be a competent witness?

Thirdly, regarding authenticity of the electronic evidence. Issues which arise in court include: whether electronic data or information which was collected or made by using a particular

⁷ Oxford Advanced Learner's Dictionary of current English, 7th ed; oxford university press (2006) pg.1604

electronic device such as voice recorder or hidden cameras and later printed on a paper, stored, recorded or copied in optical or magnetic media such as Compact Disks (CD) are primary or secondary evidence. It is argued by defense lawyers that courts should admit primary evidence only. The reform of the law of evidence is inevitable as electronic evidence is so vast an area that requires clear rules of evidence.

Fourthly, Authenticity: As the evidence is made or collected by using one device for instance, Video Cameras and later transferred through computer program to other devices such as Digital Versatile Disks (DVD) or for storage, the argument is always that the person who deals with the evidence can temper with its authenticity. That, electronic records are most vulnerable to unnoticeable modifications.

Fifthly, Admissibility of surveillance records: All law enforcement organs consider evidence obtained during surveillance means as vital. However, critics have pointed out that evidence obtained surreptitiously interfere with individual's rights and freedoms; therefore privacy which is guaranteed by the Constitution must be protected and guaranteed.⁸

Given the above challenges, it has now become a culture among defense lawyers to strongly object production of this kind of evidence in courts. It takes long time before rulings on admissibility are given.

Circumstantial evidence and Prosecuting Crimes of Corruption

Corruption is regarded as one of the difficult crimes not only to detect but also to prosecute. Its investigation consumes a lot of time and immense resources.⁹

As in any "white collar" crimes, corruption offenders are skillful and they know how to cover their trails. They are careful not to expose themselves and are very good in disguising their criminal intent and actions. Most of them are financially rich and can engage other professions such as lawyers, computer experts, accountants etc. not only in their illegal operations but also to

⁸ Article 16 of the Constitution of United Republic of Tanzania of 1977.

⁹ Tony Kwok Man-Wai, Investigation of Corruption cases, <http://www.unafei.or.jp/english/pdf>

launder the proceeds of crimes. This reality compels investigators and prosecutors of corruption cases to rely heavily on circumstantial evidence to prove their cases in courts.

Several authors have described circumstantial evidence as indirect evidence. For instance,

“Circumstantial evidence is all evidence other than direct evidence; provided that it logically connects the defendant to the crime. Circumstantial evidence is sometimes referred to as indirect evidence for this reason.”¹⁰

Or,

“Circumstantial evidence is evidence of circumstances and thus Circumstantial evidence is a proposition consistent with either the proposed conclusion or its contradiction...”¹¹

Or,

“Circumstantial evidence is an indirect mode of proof by drawing inference from facts closely connected to the fact in issue.”¹²

As evidence, there is no difference between direct and circumstantial evidence. The only distinction is, as proof, the former directly establishes the commission of offence whereas the latter does so by placing circumstances, which lead to irresistible inference of guilt.¹³

The guilt of a person can be proved by circumstantial evidence because it carries the same weight as direct evidence. In practice, circumstantial evidence often has an advantage over direct evidence since it is more difficult to suppress or fabricate.

¹⁰ Allen, R.J, (2006), Evidence: Text, Problems and Cases, Aspen Publishers USA, 4th Ed pg. 137

¹¹ Edward Hoseah, Corruption in Tanzania: The case for Circumstantial evidence (2008)

¹² Ratanlal and Dhirajlal's, The law of evidence, 24th Ed, 2011 pp.10-11

¹³ ibid

In order to prove criminal intent or *mens rea* that is: "purposely", "intent" or "knowingly," circumstantial evidence is unavoidable means to employ to prove the commission of an offence.

If for instance someone wants to prove before the court that a suspect "knew" that a document contains false material particulars and submitted it with the intent to defraud another party, it is essential to rely on circumstantial evidence.¹⁴

The same applies to the offence of abuse of position.¹⁵ This offence requires that the "abuse" should be intentional. Only the surrounding facts can establish the intention.

Knowledge and intent are states of mind of the suspect and circumstantial evidence allows these elements to be "inferred from all of the facts and surrounding circumstances" which include suspect's conducts, education level, official position, official duties, communication, and statements uttered. Eyewitnesses nor direct evidence can neither prove these elements alone. Without the utility of circumstantial evidence it is almost impossible to prove a complex corruption case.

Tanzanian courts have to grapple with the setting of guiding principles of circumstantial evidence. Precedents emphasize that when the court is basing its conviction purely on circumstantial evidence, there must be a cautious approach. This tells clearly that even the courts have problems of placing more weight to direct evidence than circumstantial evidence in fact finding process.

In the case of **John Magula Ndongo .v. Republic** Criminal Appeal No.18 of 2004 (unreported) Nsekela, Msoffe and Kaji (Justices of appeal) stated that,

"... in a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of

¹⁴ Section 22 of the Prevention and Combating of Corruption Act No.11 of 2007

¹⁵ Section 31 of the Prevention and Combating of Corruption Act No.11 of 2007

*guilt. And it is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Indeed, this principle is well enunciated in the case of **Ilanda Kisongo v. R (1960) EA 780** at page 782.”*

Other relevant decisions on circumstantial evidence include: **Magendo Paul And Another v. R** (1993) TLR 219, **Hamidu M. Timotheo v. R And Another** (1993) TLR 125, **Hassani Fadhili v. R** (1994) TLR 89, and **Abdul Muganyizi v. R** (1980) TLR 263.

All these decisions insist that the court has to be cautious in convicting the defendant of a crime based on circumstantial evidence. What is important to bear in mind when considering circumstantial evidence, it must consider total cumulative effect of all the proved facts and the standard of proof is always beyond reasonable doubt.

- **The proposed Draft of the Evidence Act, 2014**

As the Court of Appeal once observed¹⁶ that the court has not shut its eyes to the social, economic and political development in our society, the reform process has to sufficiently incorporate the needs of today’s world.

The new proposed draft code of evidence has substantially incorporated provisions, which extensively cover the area of electronic evidence. For instance interpretation of a term “document” under section 1.1 of the draft code has broadened the meaning of the term “document”.

The definition specifically covers among others, electronic database and computer readout, printouts and every recording upon any tangible or digital medium now in existence or hereafter developed. This provision significantly addresses above mentioned challenges.

Further, matters of authentication are covered under section 7.2 which provide for General Standard of Authentication and Illustrations. Under this provision, the evidence as to authenticity of electronic evidence is admissible.

¹⁶ Tanzania Cotton Marketing Board .v. Cogecot Cotton Company SA (1997) TLR 165 (CA)

Section 2.1 of the proposed Act provides for General rule of Admission. The section reads, “*All evidence relevant to a material proposition is admissible unless otherwise provided by this Act or by law. Irrelevant evidence is not admissible.*”

It is this author’s belief that although there is no particular provision, which deals with circumstantial evidence, through section 2.1, circumstantial evidence can be admitted in courts.

As I have mentioned earlier, it is high time now for Tanzania to have in the evidence law a provision governing admissibility of circumstantial evidence instead of relying on judicial decisions, which are partly premised in the Indian Evidence Act, 1872.

Conclusion

Social, economical and political changes in the Tanzanian society necessitate changes in current laws one of them being the Evidence Act. With a reformed Evidence law, the administration of justice in Tanzania will be enhanced because the proposed new Act touches on all crucial areas which under the current Act are either insufficient or have other legal shortcomings.

I am convinced that the fight against corruption in Tanzania will immensely strengthened by the proposed reforms of the law of evidence.

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