

THE TORT OF NEGLIGENCE ON  
**ADVOCATES IN TANZANIA**

BY

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## ABSTRACT

*This paper narrates the relationship between an Advocate and the client pointing out that an Advocate may be held liable for a tort of negligence if he fails to exercise that due care skill and diligence expected from him/her in the discharge of his/her duty to the client.*

*The standard of care required by the law of torts is not that of the most skilful man, but that of a person reasonably skilled in legal profession. On the other hand, the standard is higher than that of an ordinary person.*

*Although, there is few Tanzanian decisions on the question of professional negligence, common law and East African cases show vividly the standard of care and skill which can be demanded from an Advocate in Tanzania.*

*The author argues that the standard of care and skill which can be demanded from an Advocate in Tanzania is similar to that of a Solicitor in England. Therefore, in order to maintain an action for negligence an advocate as a professional adviser for the client, the Advocate must be guilty of some misconduct or gross negligence.*

## 1. INTRODUCTION

Negligence may be defined as an act or omission which constitutes a breach of a duty of care owed by another person by the person who acts or fails to act and which causes that other person to suffer harm. There are three elements which the client (plaintiff) must establish if he wants to succeed. Firstly, he must establish that there was a duty of care owed by an Advocate. Secondly, the client must establish that there was a breach of that duty by an Advocate (the defendant). Thirdly, the client must establish that the breach of the Advocate's duty caused loss or damage to the client.

It is important to grasp at the outset that negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable for Advocates. Negligence is a basis of liability; not a single protected nominate against negligent advocates.

The tort of negligence illustrate the purpose of the law of torts in relation to Advocates; to adjust Advocates' losses and to afford compensation for injuries sustained by a client as a result of the professional misconduct.

On the other hand the term Advocate has been defined as a person who supports or speaks in favour of another; or a person who pleads for another. He is a professional pleader in a Court of justice<sup>1</sup>. However, the legislation<sup>2</sup> goes further by pointing out that an Advocate must be a duly qualified person. It means a person who is the holder of the professional qualifications (eg. holder of degree) is dully entered as an advocate upon the Roll<sup>3</sup> and he has in force practicing certificate.

Thus, Advocates are people who are holding themselves out to the public as competent to pursue their profession. However, they are required to conform to the standard of reasonable skill and proficiency on pain of having to pay their clients for any harm resulting from negligence.

## 2.0 THE LAW REGULATING ADVOCATES PROFESSION

The law regulating the Advocates profession in Tanzania is not clearly defined and it is difficult to say to what extent the English law applies, because the Advocates ordinance is not exhaustive. However, a close look at the Tanzania Advocates Ordinance indicates that it has borrowed quite extensively from the Kenya Advocates Ordinance of 1949<sup>4</sup>, and the Legal Practitioners Ordinance of Nigeria<sup>5</sup>. All these Acts have a common ancestry, the English Solicitors Remuneration Acts of 1870 and 1881, and the Solicitors Act of 1932<sup>6</sup>. The law governing advocates in Tanzania is of the kind which would be applicable to solicitors in England.

The Advocates Ordinance of 1955 amended and consolidated the law relating to advocates in Tanganyika. The Ordinance establishes a committee known as an Advocates Committee, consisting of a Judge of the High Court, as chairman, the Attorney-General, and a practicing advocate nominated by the Council of the Law Society<sup>7</sup>. Decisions in the committee are made by vote and the quorum must include the Attorney-General, who is the head of the legal profession.

The powers of the committee include the ability to examine allegations of misconduct against advocates and to discipline them by striking them from the Roll of Advocates, suspending them or admonishing them. Advocates aggrieved by decisions of the committee may appeal to the High Court which may affirm, vary, or reverse the decisions of the committee.

Apart from the advocates committee, the High court has the power for reasonable cause to admonish any Advocate or to suspend him from practising during any specified period<sup>8</sup>. Similarly, any Judge of the High Court may suspend an Advocate temporarily, pending reference to and the confirmation or disallowance of such suspension by the High Court. Orders of the High Court are to be noted on the Roll of Advocates and copies sent to other East African countries under the reciprocal enforcement of suspensions arrangement<sup>9</sup>. The advocate suspended or disbarred may apply to the high court for variation of the order, nevertheless, this right is subject to a number of limitations. First, in case of an order of suspension; no application can be made until two years from the date of such an order or after half of the period of suspension, whichever is less. Secondly, in case of an order

removing or striking the advocate from the Roll of Advocates, no application can be made until the expiration of two years.

When an application has been made and denied no further application can be made until two years have elapsed. However, these limitations do not apply if new material facts have come to light since the making of the original order of suspension or disbarment. In the latter case, the advocate may apply to either the committee or the High Court for a reconsideration of the original order at any time<sup>10</sup>. Proceedings before the advocates committee can be initiated by either a member of the public or an advocate himself<sup>11</sup>. An application to remove the name of an advocate from the roll or to require an advocate to answer allegations has to be made in writing by the applicant and then sent to the secretary of the committee, together with an affidavit by the applicant stating the ground on which he relies to support his application.

In any case in which, in the opinion of the committee, a prima facie case has been shown, the committee then proceeds to fix the date of the hearing. Both the applicant and the advocate are given ample notice and allowed to inspect documents and other relevant information on which either of the parties wishes to rely<sup>12</sup>. Similarly, where an application is at the instigation of the advocate himself, the application and the affidavit are to be sent to the secretary, and unless the committee otherwise directs, they must be accompanied by two letters from two practising advocates who know the applicant<sup>13</sup>. All the committee's hearings are held in camera and an application once sent to the committee cannot be withdrawn except with the express consent of the committee.

## 2.1 **Professional Misconduct**

Neither the Advocates ordinance nor East African case law defines what constitutes "professional misconduct." Any kind of enlightenment on the matter is to be found in English cases. Even in England the phrase has not rendered itself to an easy definition, as can be inferred from the following cases. In the case of *In Re Hill*<sup>14</sup>, an attorney acting as a clerk to a firm of attorneys in completing the sale of certain property, received the balance of the

purchase money, which he appropriated to his own use. In an application to strike him from the role, he admitted that he had indeed misappropriated the money. The issue which was raised was whether Hill, through an attorney, could be removed from the Roll of Attorneys since he was acting as a clerk at the time of the alleged impropriety. The court held that the question was not whether the person was guilty of misconduct as an attorney, but whether he was guilty of misconduct which could render him unfit was not committed in his professional character, as long as it was a conduct which would have prevented him from being admitted as an attorney, the court had the power to exercise summary jurisdiction and punish the misconduct. This position was further reiterated by the judicial holding in *In Re Weare a Solicitor*<sup>15</sup>. In this case Weare, a solicitor, had been convicted under the Criminal Law Amendment Act of 1855, for allowing his houses to be used by tenants as brothels and was consequently sentenced to a term of imprisonment. Subsequently the Incorporated Law Society served him with notice of motion urging that his name be struck from the Roll of Solicitors on the grounds of professional misconduct. The contention on behalf of the solicitor was that this was an offence committed outside his professional capacity. Rejecting this argument the court went to hold that:

*"a solicitor may be struck off the roll for an offence which has no relation to his character, the question being whether it is such an offence which makes a person guilty of it unfit to the profession. Conviction for a criminal offence prima facie makes the solicitor unfit to continue on the roll; but the court has a discretion and will inquire into the nature of the crime and will not, as a matter of course, strike him off the roll because he has been convicted."*

The importance of these two judicial opinions lies in the fact that the court referred to make a categorical definition of what professional misconduct means and preferred in order to lay down broad parameters within which the court should operate<sup>16</sup>. Tanzanian courts will probably resort to this kind of reasoning in determining what amounts to professional misconduct for the purposes of invoking disciplinary measures under the Ordinance. Further support for this view can be found in the case of *In Re An Advocate*<sup>17</sup> in which the court was faced with the question of whether rules developed in England for the sole purpose of governing the conduct of solicitors with respect to remuneration and costs were equally applicable to advocates in Tanzania who had been called to the bar in England. The appellant, an advocate of the High Court of Tanganyika, had been paid sums of money on the expectation that he would perform certain services. The Advocate took the money but did not provide the services. The only point argued on appeal was the question of whether

or not an action lay for the recovery of the fees paid since the appellant was a barrister of the English bar, enrolled as an Advocate of the High Court. The appellant argued that although he was enrolled to practice as an Advocate in the High court and subordinate courts, with respect to the fees paid to him by a client for professional services, he was in exactly the same position as if he was practicing in England, i.e., by virtue of this call to the bar, the fees received by him for professional services were mere honoraria and he could neither sue nor be sued for the recovery of such fees. The court rejected this line of argument and held that all Advocates of the High Court were deemed to have the same liabilities and their costs were governed by the Advocates Remuneration and Taxation of Costs Rules which provided for their taxation on the general principles applicable to solicitors in England. An Advocate of the High Court could not, therefore, plead that being a barrister of the English bar, he was governed only by rules governing barristers in England. The most important aspect to note about the attitude of the court is that it embraced English principles governing solicitors. This was a reaffirmation that the advocates in Tanzania are governed by practices and procedures which govern solicitors in England. The question is not merely whether what an Advocate has done would be infamous for anyone else to do, but whether he has done what is infamous for an advocate to do. Hence, there may be some acts which although they would not be infamous for any other person, if they are done by an advocate in relation to his profession, that is, in regard to his clients or professional brethren, they can fairly be considered infamous in a professional respect.

Black's law Dictionary, however, defines misconduct as a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness. The term "misconduct" when applied to an act of attorney implies "dishonest act or attempt to persuade the court by use of deceptive or reprehensible methods"<sup>18</sup>. One can classify the various types of professional misconduct or malpractices into two major groups, depending on which persons they regulate: those which seek to control the character of Advocates and those that prohibit non Advocates from doing certain things connected with legal practice. This paper focusses on the behaviour of Advocates.

## 2.2 **Disciplinary procedures:**

The advocates committee, with the approval of the chief justice, can make regulations with respect to the keeping of accounts by the advocates, practise, and etiquette of advocates. The present Advocates (Accounts) Regulations<sup>19</sup> require that advocates keep their personal accounts separate from their clients' accounts. In fact, the committee is vested with the power to compel an advocate to produce his statements of accounts or his bank account for the purposes of ascertaining whether he is complying with the regulations. Similarly, under the Advocates (Conduct, Practise and Etiquette) Regulations of 1955, it is considered non professional for an advocate to employ a person who has been convicted of larceny, embezzlement, fraudulent conversion, or any other criminal offense with respect to any money or property belonging to or held by an Advocate, or who has been a party to any act or default of any Advocate with respect to which an application has been made against such Advocate to the committee. Also, rules of etiquette prohibit Advocates from advertising in newspapers or other news media. In a relatively small profession where the demand for professional services is inversely proportional to the supply of advocates, there is no need for advocates to advertise. This may, however, not be true when advocates are concentrated in a few selected towns and are dependent on a fairly constant pool of clientele. Yet the most significant aspect of the regulations is their emulation of the English rules and practises governing solicitors. It is no wonder, therefore, that some of the lawyers thought that some of these regulations were "irrelevant" to the Tanzanian Advocates.

### 2.3 **Remuneration of Advocates**

The remuneration of Advocates in Tanzania is controlled by the Advocates Remuneration and Taxation of Costs Rules<sup>20</sup>. The power to make these rules is vested in the chief justice, who exercises it in consultation with the Remuneration Committee set up under the Advocates ordinance. The Remuneration Committee<sup>21</sup> consists of Advocates elected by the Law Society. The Remuneration Committee may together with the chief justice make Orders as to the remuneration of Advocates. The Act distinguishes between non-contentious business<sup>22</sup>, i.e., any business connected with sales, purchases, leases, mortgage settlements, and other business of conveyancing, and contentious business, referring to business mainly done by an Advocate in his capacity as an advocate.

In any noncontentious business, an Advocate and his client may make an agreement providing for the remuneration of the Advocates by a gross sum or by a commission or



percentage and such agreement may be sued and recovered on or set aside in the same manner just as any other agreement<sup>23</sup>. However, if on any taxation of costs the agreement relied on by the Advocate is objected to by the client as unfair or unreasonable, the taxing officer has the power to inquire into the facts and certify them to the High court. If on the basis of that certificate it appears to the high court that the agreement is inequitable in some material respects, the court may proceed to order that it be canceled or varied. Similarly, in contentious proceedings an advocate and his client are free to agree on the amount of fees or other relevant remuneration with respect to any contentious business done or to be done by him. Such an agreement may even provide that the advocate be paid by a gross sum or by salary or otherwise.

However, the agreement cannot affect the amount of any costs payable by the client to, or to the client by, any person other than the advocate, and the client may, unless otherwise agreed, require that such costs be taxed. At the same time, the client is not entitled to recover from any other person, under an Order for payment of any costs to which the agreement relates, more than the amount payable by him to his Advocate under the agreement. In the same manner the agreement is always presumed to exclude any claim other than a claim for the agreed costs and cannot be interpreted to include claims expressly exempted from the agreement. To reinforce the protection of the client, any provision in the agreement that the Advocate is not liable for negligence<sup>24</sup> or that he is relieved from responsibility to which he is otherwise subject as an Advocate is considered void and of no legal consequence. This underscores an earlier observation that the profession is governed by rules and principles similar to those governing solicitors in England. Under the English practice, it is only solicitors who can be sued in negligence, barristers are free from tortious liability founded on negligence<sup>25</sup>.

Therefore, Advocates' profession in Tanzania is controlled and regulated by common law, precedent/local legislation and regulations. Moreover, the profession is also controlled by ethics which have been laid down by Tanganyika law society and other ethics which bind the barristers within the common law. Any breach of these laws and/or ethics may amount to a professional misconduct.

### 3. **The duties of an advocate:**

There are several features that characterise the place of the legal practitioner in society. These relate to the various duties that attach to advocacy: duty to his client, to the court, and to society. Sir Edward Marshall Hall in his biography is quoted as saying<sup>26</sup>:

*“Now it is difficult for a man, however wise or eloquent to speak for himself, when fortune, reputation, happiness, life itself, are in jeopardy and rest on the decision of strangers, sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling for into his keeping are entrusted the dearest interests of other men. His responsibility is wider in its scope than a physician’s and more direct and individual than that of a statesman; he must be something of an actor not indeed playing a well-learned part before a painted scenery, but fighting real battles on other men’s behalf in which at any moment, surprises may render all rehearsal and preparation futile”.*

Lord Macmillan, formerly of the House of Lords, Classified the duties of the Advocate as five-fold: In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state. Judge Mwalusanya<sup>27</sup> argues that Lord Macmillan could and some say he should, have included other duties in the already formidable list. In the circumstances, therefore, the advocate’s position is far from enviable: “a good advocate must be histrionic crafty, courageous, eloquent, quick-minded charming and a great hearted. He is not a mere mouthpiece of his client. His office is a higher to consider him in that light is to degrade him. He gives to his client the benefit of his learning, his talents, and his judgement<sup>28</sup>.”

Advocates are Officers of the court and their main duty is to assist the court in the administration of justice. Their duty is to see that justice is administered fairly and fearlessly in this country. Whenever they are instructed to represent a person say on a criminal charge, their duty is first to the court and then to the accused person. Where they believe that the client is innocent they must at their disposal see that he is not convicted for an offence which he has not committed.

But it is also the duty of Advocates to advise their clients on what the laws of this country are, so that if under the law their clients have committed offences, although he may not think of so himself, Advocates are required to advise them to plead guilty. Moreover, where their

clients confess to them that they have committed the offence in question but instructs Advocates to conduct his defence as if he has not committed the offence, the Advocate's duty is to advise him to plead guilty. Then they may after his plea of guilty produce before the court such factors surrounding the commission of the offence including mitigating circumstances as will enable the court to award a suitable sentence. If the client insists on pleading not guilty the Advocate's duty is to withdraw from the defence. These views have on various occasions been expressed by the Attorney General and also have been shared by other officers in the Ministry of Justice, particularly the Chief Justice.

#### 4. **Advocate's liability on tort of Negligence:**

An advocate may be responsible for negligence in the exercise of his/her expertise. He/She impliedly undertakes and is bound to use skill and diligence in the conduct of the business in which he is employed by the client. He is liable to his client for consequences of ignorance and non-observance of the rules of practice of the Court. Such as refusal to turn up at the time of hearing without substantial reason. If he is instructed to defend an action and allows a judgment to be entered by default, he is guilty of negligence and can be liable to his client for damages. It is no excuse for him to say that his client has no defence. When ignorance in other respects is established, the Court will usually interfere and compel the advocate to compensate his client. In general sense, therefore an advocate a an professional undertakes to bring to the exercise of his profession a reasonable degree of skill.

Besides the judicial holding in *Re an Advocate* and few unreported Tanzanian cases, we can also look at various decisions which were handed down by the East African Court of Appeal for cases originating in Kenya and Uganda. The issue of professional negligence was raised in the case of *The Insurance Company of North America V Baeriem and James*.<sup>29</sup> In this case the plaintiff sued the defendant advocates for damages for breach of contract, plus Shs. 8,933/15 representing costs incurred in unsuccessful suit.

The plaintiffs had consulted the defendants regarding a sum of money due to them from their agent, one Howitt, at Kampala, Uganda. It was agreed that this sum which represented premiums collected by Howitt for the plaintiff would be treated as a loan to him and its repayment would be secured by a bill of sale, the assignment of two life insurance policies, and a guarantee by Mrs. Howitt. The defendants were instructed to prepare the necessary

documents, which they did. A bill of sale was prepared embodying a list of chattels, including a car, which was to be brought in a future date, and in the guarantee the bill of sale was treated as the consideration.

Subsequently, the plaintiffs sued Mr. Howitt and when they failed to recover, sued Mrs. Howitt under her guarantee. The action was dismissed, the High Court holding that the bill of sale was void and that the guarantee was void for want of consideration. The bill of sale was void for non-registration in time and it was not in the proper form as not all the chattels set out in the schedule were capable of identification. Also it purported to assign the car in the future. The plaintiff then sued the defendants, alleging negligence. The Court therefore, had to consider the standard of care, which can be demanded of an advocate. The court argued that:

*"The standard of care and skill which can be demanded from a solicitor is that of a reasonably competent and diligent solicitor. Lord Ellenborough has said: 'An attorney is responsible for crassa negligentia' Again Lord Campbell in discussing the essential elements to sustain an action for negligence has said 'what is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding or should be chargeable with gross misconduct or gross ignorance. It is only upon one or the other of those grounds that the client can maintain an action against the professional adviser. This, however, does not mean that the standard of care impose on other professional men; it only means that it is not enough to prove that the solicitor had made an error of judgment or shown ignorance of some particular part of the law, but that it must be shown that the error or ignorance was such that an ordinarily competent solicitor would not have made it."*<sup>30</sup>

Having established the standard of care required of an Advocate, the court proceeded to hold that the security by the bill of sale was not in proper form, and that the negligent drafting and defects in the bill of sale and guarantee went beyond an error of judgment and constituted professional negligence for which the appellants were liable to pay damages. The same line of argument was reiterated in the case of **Kirima Estates (U) Ltd. V. Korde**<sup>31</sup>, three years later. In this case the defendant, an advocate, advised the appellant company to accept a mortgage which he valued at Shs. 120,000 in return for which the

appellant company gave shs. 60,000. The mortgage, however, failed to pay and on selling the mortgage the appellant could only recover shs. 45,000. They consequently filed an action against the defendant advocate urging that he as an Advocate had been negligent in his duty in advising them as to the value of the property. It was further argued, inter alia, that the charge of negligence was vindicated by his failure to engage a qualified surveyor or estate agent to assess the property and to make local inquiries as to the value of similar properties in the area. The court held that the property was not adequate security for Shs. 60,000 at the time the loan was given. Consequently in assessing the value of property at 120,000, the defendant had failed to exercise that due care skills, and diligence expected of him in the discharge of his duty to the plaintiff company as his client. He had failed to make inquiries as to the value of the property and also failed to engage the services of a surveyor or estate agent thereby failing to have a proper valuation of the property made before advising the client. Therefore, upon the evidence, the defendant was not only negligent in the discharge of his duty but also committed a breach of that duty.

## 5. **Conclusion and Policy Implications**

For a long time, the Tanzania legal profession did not have its own code of professional conduct. The applicable rules, therefore, were those which applied in England. This position was recognised in a number of court decision. In *Jaffeli and Another V Borrison and Another*<sup>32</sup> Bramble J. Said:

*“There has been no code of practice in Tanzania as far as I am aware and the practice as laid down by the General council of the Bar in England has generally been adopted as shown by certain cases.”<sup>33</sup>*

However, the Tanganyika law society has recently adopted rules of conduct and ethics. They are published as the Rules of Professional conduct and Etiquette of the Tanganyika Law Society. These rules of ethics of a profession are supposed to regulate the behaviour of advocates with the people they serve and the society generally. But there exists notable omissions and short comings which include absence of clear-cut offences and sanctions,

absence of express sanctions on criminal convictions, inadequacy of remedies of the remedies for the complainant, absence of obligatory professional insurance, absence of regulations on fees in uncompleted work and absence of continuous inspection, to ensure that advocates continue to adhere to professional ethics and admission conditions.

The only express exception to the above mentioned legal shortcoming is in respect of the keeping of clients accounts. The law enjoins advocates to keep the clients money separate from their own<sup>34</sup>. According to the Advocates (Accounts) Regulations, it amounts to a professional misconduct if a cheque drawn by an advocate on his client's account is dishonoured<sup>35</sup>.

Therefore, it is urged that the government and the Tanganyika law society should improve the laws and ethics which control the behaviour of advocates. The current rules of professional conduct and Etiquette are not explicit enough to point out an act or omission that amount to misconduct.

However, advocates have the right of audience before courts of law above primary courts. They may represent litigants in civil cases<sup>36</sup> or accused persons in criminal cases<sup>37</sup>. This is a core function of the legal profession. Court advocacy stands out for public scrutiny more than any other task on advocate's long list of roles and duties. In carrying out this tasks in court, the advocate has to evaluate the various available arguments, weed out the bad points and retain the good ones. To be good enough, legal argument must be cogent and compelling. Such systematic manner of persuasion keeps litigation within sensible bounds and gives credibility to sound argument. The skills and the ability to argue cases in an interesting and exciting fashion, can only be learnt and perfected through learning and practice. This is one reason why the presence of a proficient and experienced person at the side of the accused or litigant becomes so important.

Advocacy carries heavy responsibilities. An advocate has a duty not only to uphold justice, but also to represent his client. It is a vocation, which is all absorbing and demands total dedication, striving and commitment throughout the duration of the case or transaction. This requires that an advocate plans his work "in such a way that he gives his best to his clients without breaking down in process<sup>38</sup>".

He/she is required to attend at the court at the time of hearing and defend the client by using his/her skills and dilligence. Where he believes that the client is innocent, the advocate has to make sure that such a client is not convicted for an offence, which he/she has not committed. Thus, an advocate is required to use his/her special competence, which is not part of the ordinary equipment of the reasonable man, but the result of aptitudes developed by special training and experience.

An advocate is expected to show the average amount of competence normally possessed by other advocates who also defend clients. If such competence falls short of the standard required, the advocate as a professional adviser may be held guilty of some misconduct and be liable for a tort of negligence.

### Endnotes

1. The Concise Oxford Dictionary of current English, Eighth Edition, Edited by R.E. Allen.
2. Advocates Ordinance Cap 341.
3. The Concise Oxford Dictionary of Current English, Eighth Edition, Edited by R.E. Allen.
4. Advocates Ordinances 1949, Ordinance No. 55 of 1949 (Kenya).
5. The Legal Practitioners Ordinance, Cap. 110 (Nigeria).
6. The Solicitors Act 1932 consolidated the Solicitors Acts 1839 to 1928 and other enactments relating to solicitors of the supreme court. See 24 Halsbury's Statues of England p. 18.
7. Advocates ordinances, Cap. 341 of Tanzania Laws, as amended by Advocates ordinance (Amendment) Act of 1969, Act No, 39 of 1969.
8. Act No. 39 of 1969, § 4, 13, 24, 24A. The power of the high court is wide and includes making the advocate liable for costs unnecessarily incurred. The court of appeal has given valuable guidance as to how the inherent powers should be employed, see Lebo v. Saleh s. Dhiyebi (1961) e.a. 223 ("a court if it considers that an advocate, in his conduct of the client's case, has been guilty of some misconduct, should first find facts only insofar as is necessary to dispose of the case before it. Remembering that it is the client's case and not that of the advocate which it has heard and is called upon to decide, it should deal in the judgement with the advocate's conduct only insofar as that is necessary to the case before it and if the court is of the opinion that a prima facie case of professional misconduct is disclosed should refer the matter to the appropriate professional body for report and if necessary for adjudication by another court. The other court will be concerned with the question of the advocate's conduct and not with the adjudication of the client's cause: and the



advocate will then have an opportunity of explaining, if he wishes to do so, matters which appear to be prejudicial to him").

9. The Reciprocal Enforcement of Suspensions and Strikings Off (Kenya) Order 1955, Government Notice No. 332 of 1955. Also Section 24 of the Advocates ordinance provides that
  - (t) he Registrar shall send to the Supreme Court or High Court as the case may be, of each East African territory and the Court of Appeal for Eastern Africa a certified copy of every order (including orders made on appeal) made under or by virtue of this advocate on the Roll or as to suspending an advocate from practise.
10. Advocates ordinance, § 28.
11. Advocates (disciplinary) Rules 1955, Government Notice No. 135 of 1955.
12. Ibid Section 5.
13. Ibid Section 12
14. Re Hill, (1868) 3 Q.B. 543.
15. In Re Weare, A Solicitor, (1893) Q.B.D. 439.
16. Courts had earlier considered similar cases which involved other professions, particularly the medical profession. Some of these cases have even gone further to hold that the court would not as a rule question the committee's decision, adopting as a definition of professional misconduct one laid down by the court of appeals for the medical profession in Allinson v. General Council of Medical Education and Registration (1894) 1 Q.B. 750. "If it is shown that a medical man in the pursuit of his profession had done something with regard to it which would be reasonably regarded as disgraceful or dishonorable by his professional brethren of good repute and competency then he is guilty of professional misconduct." Quoted in Halsbury's Statutes of England, supra note 23, at 7 - 8. It is interesting to observe that the term has also been a subject of controversy under American law. See Botte, Ethics for Success at the Bar 14 - 36 (1928).
17. (1921 - 1952) Tanganyika Law Report 551.
18. Black, Henry Campbell (1983): Blacks Law Dictionary, abridged 5<sup>th</sup> edition, St Paul Minn: West publishing Co. at P. 517.
19. Government Notice No. 207 of 1956.
20. Under the Tanganyika Order in Council 1920, the power to make rules for regulating the practice and procedure of the high court and subordinate courts was vested in the high court

(art. 26). Immediately after independence, the Judicature and Application of Laws Ordinance (Amendment) Act, 1962 (Cap. 453) provided:

4(1) Subject to the provisions of any other written law the Chief Justice may make rules for regulating the practice and procedure of the High Court and of all other courts established in Tanganyika.

(2) The power to make rules under this section shall include a power fix fees, and to amend, revoke and replace rules made under Article 26 of the Tanganyika order in Council 1920 to 1921.

The power vested in the chief justice is exercised subject to the provisions of the Advocates ordinance cap. 431.

21. Advocates Ordinance Cap. 341, part VI.
22. Ibid Section 53
23. Ibid Section 55
24. Ibid. Section 55(2)
25. The rationale behind these barristers privilege would also seem to be based on public policy. Lord Reid said: "It has long been established that judges, witnesses and barristers alike have absolute privilege with regard to what is said by them in court: for the reasons similar to those which apply to proceedings in Court." See *Rondel V. Worsely* (1967) 3 W.L.R. 1966.
26. Marjoribanks, E. *Famous Trials of Marshall*, London; Penguin at p. 9.
27. *Kassim Manywele v R* Criminal Application No. 39 of 1990 H.C.T Dodoma at p. 20 of typed Judgement.
28. *Khassim Manywele V. R.* Criminal Application No. 39 of 1990 H.C.T Dodoma at p. 20 of typed Judgement.
29. (1960) EA 993
30. Charles Worth on Negligence (1968) 3rd edition.
31. *Kirima Estates (U) Ltd V. Kode.* (1962) EA22.
32. 1971 EA

33. His Lordship cited the cases of *Gandesha V. Kilingi Coffee & Another* (1969) EA 299 and *Safi seed Ltd. V. ECTA (Kenya) Ltd and ors*, civil Revision No. 1 of 1967 H.C.T, Dar es salaam.
34. Regulation 2 of the Advocates (Accounts Regulations) 1956.
35. Rule 13(b) of the rules of Professional conduct and Etiquette.
36. Order 111 rule 1 of the second schedule to the civil procedure Code 1966.
37. Section 310 of the criminal procedure Act, No. 9 of 1985.
38. Quoted in *Oputa, C. J. (1981) Op. Cit.* at p. 119.

