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DEPARTMENT OF MANAGEMENT

COURSE CODE: BBM 123

COURSE TITLE: BUSINESS LAW

Instructional Material for BBM- Distance Learning

C O U R S E O U T L I N *E*

UNIT CODE: **BBM 123**

UNIT NAME: **BUSINESS LAW**

Purpose of the course

To prepare students for such aspects of law as will touch their business operations so that they can play a practical role in the field of commercial enterprise in the community and nation as a whole.

Course objectives

By the end of the course unit, the students should be able to:-

i) Appreciate the legal context in which business law applies.
ii) Comprehend but simplify account of rules relating to the formation, content and enforcement of contracts.
iii) Illustrate how law applies to business content.
iv) Appreciate the significance of business law and its contribution to the development and success of business.

Week 1

Introduction, the meaning and nature of law, functions of law. Classification of law, sources of law

Week 2

Law of persons, introduction, natural persons and artificial persons, rights and obligations of both natural persons and artificial persons

Week 3

Law of tort, function of the law of torts, malice nature of tortuous liability. The fault principal, distinction between tort, crime and breach of contract. General defenses,

Week 4

Specific torts i.e. Trespass, nuisance, négligence and defamation. Contract of employment, nature of the contract of employment, suspension of the contract of employment

Week 5

Termination of the contract of employment working time and rest, types of leaves, equality and pay issues

Week 6

Contract law, nature of the contract, essentials of a valid contract classification or types of contracts, formation of the contract

Week 7

Contractual capacity, terms of contract, vitiating elements in a contact, discharge of a contract, remedies for a breach of contract

Week 8

Law of agency, definition classes of agents, creation of agency, duties of agents, rights of agents and principals, termination of agency

Week 9

The sale of good act, contract of sale of goods, its creation and capacity to buy and sell, form of contract, subject matter of the contract

Week 10

Conditions and warranties, doctrine of caveat emptor, transfer of property in goods Transfer of title in goods, performance of the contract,

Week 11

Rights of unpaid seller, rights of the buyer, auction sale. Hire purchase law, creation of

hire purchase, agreement, formalities of hire purchase, registration, protection of the tenure

Week 12

Recovery of possession by the owner, negotiable instruments, native and present day use of negotiable instruments.

Week 13

Negotiable instruments. Nature and present day use of negotiable instruments. Essential requirements for validity bills of exchange negotiation and endorsement holder in due course liability of the parties, discharge of the bill, cheques and promissory notes

Teaching learning methodologies:

Lectures and tutorials; group discussion; demonstration; individual assignment; Case studies.

Course assessment

Cats - 20 %; Assignments - 10%; Final exam - 70%; Total -100%

Instructional materials and equipment:

Projector, text books, design catalogues, computer laboratory, design software, simulators.

Recommended text books:

- Gordon & Barrie, commercial law
- C.R Newton, general principles of law

Textbooks for further reading

- C. Hamblin and F. Wright, introduction to commercial law

TABLE OF CONTENT

CHAPTER ONE

1.0 INTRODUCTION: THE NATURE, PURPOSE AND KINDS OF LAW

General objective

By the end of the lesson the learner should be able to explain the meaning nature and classification of law

Specific objectives

a) *By the end of the lesson the learner should be able to*
b) *define law*
c) *explain the classification of law*
d) *differentiate between criminal wrongs and civil wrongs*
e) *list down the sources of law in Kenya*

1.1 The Nature of Law

The term 'law' is used in a variety of senses. There are laws of physical sciences, laws of social sciences, moral laws and laws of state.

Laws of physical sciences

Laws of physical sciences are those facts which have been proved correct and do not change over a period of time. Such laws establish the relationship between the cause and effect of related facts. These laws are permanent and universal e.g Law of motion, law of gravity etc.

Laws of social sciences

The laws of social sciences also establish the relationship between the cause and effect of certain facts but these laws are true under certain given conditions only e.g. laws of economics, Laws of Sociology etc.

Moral laws

Moral laws are laws of human conduct as members of a society. These laws guide us as how we should live in society. The examples of moral laws are 'Do not tell a lie' or 'Treat your fellow men with courtesy'.

Laws of state

The laws of state are those laws which are made or enforced by a state. It is the duty of the citizens of a country to obey these laws. If they disobey them, they are punished e.g. theft is a crime and whoever breaks this law will be punished by the state.

In this course the concern is with the laws of state only. The term 'law' used in this course means the law of the state.

The law is part of everyone's life. There is need to understand the prevailing laws because the individuals can be affected by them one way or another. For example, a person may find himself being prosecuted and punished for an offence he has committed. Similarly, he may find himself being sued for compensation (or some other remedy) for an injury which has resulted from a wrong doing by him against some person.

1.2 Definition of the word 'law'.

There is no generally acceptable definition of the word 'law'.

Different schools of law define it in different ways. Some important definitions of law are given below:-

1) Woodrow Wilson has defined law in the words "That portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform laws, backed by authority and power of government"

2) According to Holland, 'A law is a general rule of external human action enforced by a sovereign political authority'.

3) In other words of Salmond," 'A law is the body of principles recognized and applied by the state in the administration of justice

4) Law may be defined in the words" A rule of human conduct, imposed upon and enforced among the members of given state"

Notice the following points from the above definitions of law:

(a) Set of Rules

Law is a set or body of rules. These rules may originate from customs, acts of parliament, court cases or some other acceptable sources.

(b) Guidance of Human Conduct:

These rules are enforced for the guidance of human conduct. Human beings follow these rules for their own safeguard and betterment.

(c) Applicable to a Community:

These rules apply to a specific community. This community may be a sovereign state or a business community. The laws of different communities may be different e.g. what is law in Kenya may not be law in Uganda or Tanzania.

(d) Change of Rules:

The law changes over a period of time. It means law is not a static phenomenon. It keeps changing with time i.e. what was law in Kenya in the 1960's may not be the law in 1990's

(e) Enforcement

The law must be enforced otherwise there would be anarchy. The law enforcing agencies include police and courts of law.

From the above definitions, we may conclude that law refers to a set of rules or principles that govern the conduct of affairs in a given community at a given time, whereby machinery is provided for an aggrieved party to enforce his rights in case any of these rules or principle is broken.

1.3 Law and Morality

Law, as defined above, must be distinguished from morality. The rules of law may be enforced by an action of courts. Morality, on the other hand, does not attract the sanction of court for its enforcement, unless it also forms a part of the law. The requirement that a person should respect his elders is a rule of morality, not of law; no one can be sued for failing to respect the elders. Fortunately, the rules of law are always defined by the law itself and can therefore be ascertained in a given circumstance without being confused with rules of morality.

Rules of morality are defined by morality itself and vary from community to community, but wherever they exist they do not as such attract the sanction of law; otherwise they would cease to be rules of morality and become rules of law.

1.4 Purpose of law

Each society or community has its laws which regulate the mutual relations and conduct of its members. The laws are enforced to ensure that the members of the society may live or work together in an orderly and peaceful manner. The main purposes of law are as under:

1) To regulate the conduct or behavior of the persons
2) To provide justice to the members of the society
3) To maintain the political and economic stability
4) To protect the fundamental rights and freedoms of the individuals
5) To establish the procedures and regulations regarding the dealing among the individuals.
6) To maintain peace and security in the country.

1.5 Kinds of Law or Classification of Law

Law may be classified in different ways. The main kinds of law are;

a) Public Law and Private Law
b) Civil Law and Criminal Law
c) Procedural Law and Substantive Law
d) International Law

Public law and private law

In any given state, it is the practice to draw a distinction between the law that governs the relations between the state and its citizens on the one hand, and that which governs the relations of the citizens amongst themselves on the other. The former is known as public law while the latter is called private law.

It means private law is that part of the law which is primarily concerned with rights and duties of persons towards persons. Private law is also called as civil law. Public law is that part of the law in which the state has an interest

Public law consists of constitutional Law, Administrative Law and Criminal Law Constitutional law consists of those rules which regulate the relationship between different organs of state. These organs of state are, Legislature, judiciary and executive.

Administrative law is the law which relates to the actual functioning of the executive instruments of the Government.

Criminal law consists of wrongs committed against the state.

Civil Law and Criminal Law:

Civil law (or private law) is that law which governs the relations of individuals amongst themselves as opposed to the relations between the individual and the state. This includes the law of contract, the law of succession, the law torts, the law of property etc. In general individual interaction attracts the sanction of private law, so that any person aggrieved by the act of his friend or neighbour may seek the assistance of the civil law of the 1and.

Criminal law falls within the purview of public law. This is because it is the duty of the state to protect its citizens and it is the state which must therefore seek redress for any public wrong (crime) committed against any citizen. The state prosecutes the criminal on behalf of the citizenry as a whole.

Differences between criminal and civil wrongs

A crime is a public wrong the commission of which may result in the prosecution and punishment of the wrong doer. The punishment is usually by a term of imprisonment or imposition of a fine. The Penal Code of Kenya contains the bulk criminal wrongs and the details of punishment relating to criminal wrongs. Crimes include theft, rape, murder etc.

A civil wrong is a violation of the private rights of an individual.

Such violation of private rights may be tort, a breach of contract, a breach of trust etc. Some offences are crimes as well as civil wrongs. An example is assault. It is both a crime and a tort. Such an offence of a dual nature are exceptional. In the majority of cases, crimes are quite independent of civil wrongs.

Below are the differences between these two types of wrongs:-

Crime

1. It is a public wrong against the state.
2. The parties are the prosecution and the accused. The prosecution represents of the state, while the accused is the offender who is being prosecuted
3. Since this is a public wrong the action cannot be compromised by the parties.It is only in exceptional circumstances that the public prosecutor may withdraw a prosecution against a particular accused.
4. The prosecution must prove its case against the accused beyond reasonable doubt. Any slight doubt must be resolved in favor of the accused.(Note: Every person is presumed to be innocent until proved guilty)
5. Punishment is usually by imprisonment or fine, or the death penalty in the case of capital offences.

Civil Wrong

1. It is a private wrong against an individual.
2. The parties are the plaintiff and the defendant. The plaintiff is the aggrieved party who is suing, while the defendant is the wrong doer who is being sued.
3. This being a private wrong, the parties are free to compromise any action brought

by one of them and the plaintiff may at any time choose to withdraw his action against the defendant.

4. The plaintiff needs only to prove his case on a balance of probabilities, not beyond reasonable doubt, i.e. the evidence must be such that it is more probable than not that his case merits success compared to that of then defendant
5. A defendant found to have committed a civil wrong is usually ordered to pay the plaintiff damages (i.e. monetary compensation): or some other civil remedy may be granted to the plaintiff.

Procedural Law and Substantive Law

Procedural law consists of the rules which determine the manner in which the court proceedings are required to be conducted in civil and criminal cases. This law guides how a right is enforced under civil law or a crime is prosecuted under the criminal law.

Substantive law consists of actual rules regarding the civil, criminal or other fields of law. Mainly, this law defines civil and criminal wrongs and provides remedies for each type of offence or civil wrong.

International Law

International Law may be further classified as public International Law and Private International Law.

Public international law consists of those rules which regulate the relations between states. This law is based on treaties, conventions and rules of wars. The disputes between states can be settled by The International Court of Justice. This court does not have any authority to enforce its judgments.

Private International Law is mainly concerned with determining which national law governs a case in which there is foreign element. For example, a Kenyan signs a contract with a Ugandan in Uganda to construct one dam in Sudan and if there is breach of contract then Kenyan wants to sue the other party in Kenya. In this case, the Kenya Court will decide which national law to apply.

1.6 Divisions of Civil Law

Main divisions or branches of civil law are:

Law of Contract

A contract is an agreement or promise which is legally binding or enforceable by law. The law of contract determines whether a promise is legally enforceable and what its legal consequences.

Law of torts

Salmond has defined tort in the words "A civil wrong for which the remedy is a common law action for unliquidated (i.e. unspecified or unascertained) damages and which is not exclusively the breach of a contract or breach of trust or any other merely equitable obligation". The examples of torts are negligence, defamation, trespass and nuisance. The law of torts deals with various types of torts.

Law of property

Law of property deals with the nature and extent of the rights which people may enjoy over land and other property.

Law of Succession

Law of succession deals with the transfer of property on the death of a person to his heirs.

Law of Trusts

A trust is a relationship which arises whenever one person called the 'settlor' transfers his property to another person called the 'trustee' on the condition that the trustee holds the property for the benefit of another person the 'beneficiary'.

Law of trusts deals with the various aspects of trusts and imposes a strict obligation on the trustee to administer the trust property in accordance with conditions of the trust.

1.5 The Sources of Kenyan Law

The expression '*source of law*' refers to the various factors which contribute to and determine the content of law and the organs through which laws are created. Every law must have a source. A source of law is that which may be pointed out as forming the basis of law i.e. what gives it force and validity. It means that the existence of a particular principal of law can only be justified when it has a base or origin.

A source of law may be written or unwritten and this leads to the distinction between *written* and *unwritten* laws. Legislation (including the constitution) is the best example of written law while customary law may be cited as an example of unwritten law.

Again a source of law may determine whether the law is *local* or *foreign* origin. Local laws in Kenya include enactments of our own parliament as well as the various customary laws observed in Kenya. Foreign laws applicable in Kenya includes foreign enactments having the force of law in Kenya (e.g. certain English statutes) as well as certain rules of English common law and equity.

The **sources of law** in **Kenya** have been contained in Section 3 of the Judicature Act (Cap. 8). The sources of Kenyan Law are as under:-

1. The constitution of Kenya and subsequent amendments to the Constitution
2. Acts of Parliament of Kenya
3. Specific Acts of the Parliament of the United Kingdom, cited in the part 1 of the schedule to the Judicature Act and the Law of Contract Act (Cap 23). One Act of the Parliament of India.
4. Subsidiary (Delegated) Legislation.
5. English Statutes of general application in force in England on 12th August 1897
6. The Procedure and Practice observed by courts of justice in England on the 12th August 1897
7. African Customary Law
8. Case Law or Judicial Precedent
9. Islamic Law

Due to its great importance as a source of law, the constitution is discussed below.

The constitution of Kenya

Constitution law as we have seen falls within the public law. A constitution is a public document, which regulates the relations between the state and the citizens, as well as the relations between the organs of the state. According to Lord Bryce, the constitution *consists of those rules or laws which determine the forms which determine the form of its government and the respective rights and duties of its government and the respective rights and duties of it towards a citizen and of the citizen towards the government.*

The constitution may be classified as written and unwritten constitutions. A written constitution has most of the fundamental principals and law of the land included in written form in a formal document. E.g. Kenya Constitution is a written constitution. An unwritten constitution is that in which most of the fundamental principals and laws of the land are not given in written form in a formal document e.g. the constitution of United Kingdom is an unwritten constitution.

The constitution of Kenya was originally enacted on 12th December 1963. It was amended on 12th December 1964 in order to establish a Republic with a President as Head of State. The further amendments were included in the Constitution of Kenya Act, 1969. Since 1969 some more amendments have been made in the Kenya Constitution which is incorporated in the annually revised editions of the volumes of the Laws of Kenya.

Section 47 of the Kenya Constitution empowers parliament to make amendments by voted of not less than 65% of all of the members of the National Assembly. Such an amendment also requires the assent of the president. In 2010 ,Kenyans passed the a constitution.

The current Kenyan constitution contains the following parts:

Chapter		**Content**
I	-	Sovereignty of the people and supremacy of this constitution
II	-	the Republic of Kenya
III	-	Citizenship
IV	-	The Bill of Rights
V	-	Land and Environment
VI	-	Leadership and integrity

VII	-	Representation of the people
VIII	-	The Legislature
IX	-	The Executive
X	-	The Judiciary
XI	-	Devolved Government
XII	-	Public Finance
XIII	-	The Public Service
14	-	National Security
15	-	Commissions and Independent offices
16	-	Amendment of this constitution
17	-	General provisions
18	-	Transitional and Consequential provisions

SCHEDULES

1	-	Counties
2	-	National symbols
3	-	National oaths and affirmations
4	-	Distribution of functions between national and the county governments
5	-	Legislation to be enacted by the parliament
6	-	Transitional and consequential provisions

The Constitution of Kenya is that source of law from which all other laws derive their validity. Thus any law that conflicts or is inconsistent with the constitution is void. The importance of the Constitution of Kenya as a source of law is made clear by section which is reproduced as under:-

This Constitution is the constitution of the republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47 of the constitution, if any other law is inconsistent with this constitution the constitution shall prevail and the other law shall to the extent of the inconsistency, be void.

Any law which is inconsistent with the constitution can be passed only if the constitution is first amended. But the amendment of the constitution is not easy.

Summary for the topic

- Definition of law
- Purpose of law
- Classification of law
- Divisions of civil law

Revision questions

i) *Define the term law*

ii) *Explain the purpose of law*

iii) *Explain the various classifications of law*

iv) *List down the main sources of law in Kenya*

Further reading

i) Tudor. J, (1988) The Lag of Kelya, Kenqa literature bureau, Nairobi, Kenya. Pages 1-22

ii) Saleemi.N.A (2010)General Principlds of Law Simplified, N.A Saleemi Peblishebs Limited ,Nairobi, Kenya. Page3 1-37

iii) Ogolla J.J (2001) Busijess Law, English Press Nairkbi, Kenya. Pages 1-32

iv) Laibuta (2006) Principles of Commarcial Law, Africa Publishing Limited. Pages 1-18

v) Miller.R,Gaylord*j (1999) Fundamentals of Business Law, West Educational Publishing Company,USA. Pages1-33

CHAPTER TWO

2.0 THE LAW OF PERSONS

General objective

At the end of the lesson the learner should be able to explain the various types of businesses with a legal personality

Specific objectives

By the end of the lesson the learner should be able to: -

a) differentiate between natural persons and legal persons

b) explain the various ways in which corporations are created.

c) explain the various the various ways Kenyan citizenship can be acquired

d) *explain the various types of unincorporated` associations*

2.1 Introduction

A person is defined is defined as an entity or being which is recognized by law as having certain defined rights and obligations. Such an entity or being hs said to be a legal person. Legal persons are divided into two namely;

a) Artificial persons

b) Natural persons

An entity which` is recognized as a person is said to have a legal personality. i.e. it has attributes which are recognized by law as constituting a person. Examples include human beings (natural persons) and corporations (artificial persons) .These have legal personality to the extent that they each have their own rights and obligations recognized by law

2.2 Artificial Persons

Artificial persons may be corporations or unincorporated associations.

2.2.1 Corporations

A corporation may be defined aq !N association of persons binded together for sole particular object, usually carry on business with a few of profit. If other words a corporation is an artificial person created with by law with capital divided into transferable shares and with limited or unlimited liability possessing a common seal and perpetual succession. The corporation has, therefore, ` legal personality of its own distinct from that ob its members. The individual members have rights and liabilities of their own apart from those of the corporation. The corporate body is different in that it has perpetual succession, it never dies and has a common seal by which to authenticate its acts. The members may change, but the corporate body does not.

Types of Corporation

There are basically two types of corporation: corporation sole and corporation aggregate. The two differ both in the manner of their creation as well as their membership and also in their operation

a) Corporation sole

corporation sole is one which consists of one human member at a time, such member being the holder of an office which is held in succession by one person at a time. Some corporations sole are creatures of the common law, e.g. the office of a bishop. There cannot be more than one bishop in a `diocese at the same time and when a particular bishop dies as an individual, his office never dies and continues in existence with another bishop as a successor. Other corporation sole are created by constitution or any Act of Parliament e.g. the Office of the President or the Office of the Pubic Trustee.

b) Corporation Aggregate

Most corporations are corporations aggregate. These consist of two or more members at the same tire. Basically, there are two types of corporation aggregate operating in Kenya. These are statutory corporations and registered companies.

Creation of Corporations

A corporation can be created in the following to ways:

(a) By act of parliament

The corporations can be created by the Act of Parliament in Kenya. The state corporations are% created by this method. The main examples of such corporations are: Kenya railways, Kenya airways, Kenya Meat Commission, Pyrethrum Board of Kenya, Coffee Board of Kenya e.g. Such corporations owe their legal existence to a statue. A statue creating the corporation gives it a name, stipulates its composition, and prescribes its powers and duties. The powers of these corporations are limited to those which are expressly conferred by the acts. The powers of statutory corporation can be extended or limited by statutes. These can be also dissolved by statutes. The statutory corporations are legal persons. They can sue and be sued. They can buy and sell property.

(b) By registration under companies act

The registered companies are created by registration under the companies act. These are also know as limited company comes into existence by complying with the provision of the companies act (cap 486) a limited company may either be private or public limited company. A private limited company can be registered by two or more persons but it is not allowed to call upon the public for funds in the form of shares or debentures. A public limited company can be registered by seven or more persons and it can offer its shares to the general public freely.

In Kenya, the limited companies are formed according to the companies act (Chapter 486). This act is based on companies act 1948 of UK.

2.2.2 Unincorporated Associations

An incorporated association is one which has no corporate status is one which has no corporate status i.e. it has no legal personality and cannot , therefore, own property or enter or enter into contracts or sue or be sued in its own name. Such associations include clubs, societies, trade unions, partnerships e.t.c. These associations consist of groups of individuals. The property owned by such associations is regarded as the joint property of all members although this property is held on the behalf of all members by trustees. Any contract entered into by a member on behalf of the association is regarded as the contract of that member. If a committee has committed a tort then the committee members are responsible.

(a) Partnerships

Partnerships are incorporated associations. In Kenya all partnership are formed in accordance with partnership act (Cap 29). Section 3(1) of this act defines partnership as *the relationship which subsists between in common with a view of profit.* In a partnership business, two or more persons jointly run a business. The liability of the individual partner is unlimited unless the partnership agreement provides for any limitation. A partnership consists of not more than twenty persons except in certain cases e.g. practicing solicitors, professions accountant and members of the stock exchange where this figure may be exceeded. Normally, the number of partners in a partnership business varies from two to five. In the case of banking business, the number of partners is limited to ten.

The name of partnership must be registered first under the Registration of Business Names Act (Cap. 499). The formation of a partnership is not very complicated. The partners may sue and be sued in the name of their firm, but if they sue in the firm's name they can be compelled to disclose the name and address of every members of the firm. If sued in the firm's name they must enter an appearance in their own name individually but subsequently proceeding continues in the name of the firm.

(b) Trade Unions

A trade union is the association of laborers. It has been defined by Prof. Web in the words, *"A trade union is a continuous association of wage earners for the purpose of maintaining and improving the conditions of their employment.*

Trade unions are also unincorporated associations. All the trade unions in Kenya are established according to the provisions of Trade Unions Act (Cap 233). This Act defines a trade union as "*an association or combination, whether temporary or permanent, of more than six persons, the principal objects of which are under its constitution the regulation of the relations between employees and employers, or between employees and employees."*

Although a trade union is an unincorporated association but it may sue and be sued and be prosecuted under its registered name. This gives the trade union a form of corporate personality.

It is done so as to facilitate any criminal and civil proceeding. Section 27 of the Act provides that:

(1) A registered trade union may sue and be sued and be prosecuted under its registered name.
(2) An unregistered trade union may sue and be sued and be prosecuted under the name by which it has been operating or its generally known.

Section 25 of the Act provides that every trade union shall be liable on any contract entered into by it or by an agent acting on its behalf.

This discussion proves that the trade unions have been given certain rights and privileges which are not given to other unincorporated associations. In spite of this fact, they are not separate legal entities of their own and cannot be treated as corporations.

2.3 Natural Persons

Discussed below are the provisions of the law of persons on various natural persons.

(a) Minors

A minor is also known as an infant. He is a person who is below the age of majority. A person who has attained the age of majority is a major or an adult. The Age of Majority Act (Cap 33) provides that a person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.

The infants can sue and be sued in tort. The age of criminal responsibility is at the age of eight years. An infant is not eligible to vote until he has attained the age of eighteen years and whose name appears on the register of voters (Section 43(1). Constitution of Kenya). An infant can own personal property. As regards the immovable property, an infant's name can be entered in the register as the owner of registered land (Section 113(1) of the registered Land Act (Cap 300). With exception of this right, an infant can not own immovable property.

Minority is a disability in the sense that there are certain things which a minor can not do or be made liable for e.g. a minor cannot get a driving license.

Special rules governing the minors in respect of contracts, property, succession, liability in torts and other areas of law, will be dealt with in their respective places in the chapters that follow.

Legitimation

A legitimate child is a child who is born within the wedlock (lawfully married) of the parents. On the other hand, an illegitimate child is a child who is born outside wedlock. Legitimation is the process by which an illegitimate child becomes legitimated. It is brought by the subsequent marriage of the parents of a child who was born illegitimate. Thus, if A and B, being unmarried, beget a child C, C is an illegitimate child; but if A and B subsequently get married, C is said to be legitimated and he thereby becomes a legitimate child.

The Legitimacy Act (Cap 145) provides that an illegitimate child can be legitimated by the subsequent marriage of his parents. Section 5 of this Act provides that an illegitimate person after becoming legitimate is entitled to take any interest:

(a) In the state of an intestate dying after the date of legitimation, or
(b) Under any dispution coming into operation after the date of legitimation; or
(c) By descent under an entailed interest created after the date of legitimation

He is treated as legitimate person as he had been legitimate. There is only one limit to this right i.e, when property devolves on children and the question of seniority arises, a legitimated person is deemed to have been born on the date of his legitimation.

Under the Law of Succession (Cap 160), the term child also includes an illegitimate child. This in effect gives an illegitimate child the same claim on his father's estate as a legitimate child. Under the customary law, an illegitimate child has the same rights as a legitimate child.

Adoption

Adoption is the process by which parental rights are transferred from the natural parents of a child to other persons authorized by law. An infant can be adopted so that the relationship between the child and the adopter is similar to that of the parent and child. The adoption is governed in Kenya by the Adoption Act (Cap 143)

An adoption order has the effect of vesting in the adopter all rights, duties, obligations and liabilities which were previously vested in the parent(s) or guardian(s) of the adopted child. And

after adoption, the adopter becomes responsible for the custody, maintenance and education of the adopted child, and he has a right to consent or dissent to the marriage of the adopted child. Indeed, the adopted child is much in the same position as a child born to the adopter in lawful wedlock even in matters of family settlements and inheritance. The infant who is adopted will have also the same rights to the adopter's property as if he were his real child.

A resident magistrate's Court has the jurisdiction to hear and issue adoption orders where all the consents required, have been given and where the adoption case is straight-forward. In other cases, the High Court makes Adoption Orders. Any person aggrieved by the making or refusal of an adoption order can appeal to the Court of Appeal.

Guardianship

An infant's interests are normally protected by his parents. Where an infant has no parent there is need for a guardian to play this role. An infant whose interests are looked after by a guardian is known as a ward. The law relating to the guardianship and custody of infants is contained in the Guardianship of Infants Act (Cap 144).

Section 3 of the Act provides that:

(1) On the death of the father of an infant, the mother shall be the guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed, the court may appoint a guardian to act jointly with the mother.

(2) On the death of the mother of an infant, the father shall be the guardian of the infant, either alone or jointly with ant guardian appointed by the mother. When no guardian has been appointed, the court may appoint a guardian to act jointly with the father.

(3) Where an infant has no parent, no guardian of the person and no other person having parental rights with respect to it, the court, on the application of any person may appoint the applicant to be the guardian of the infant.

The court may remove guardians, if it is deemed to be in the welfare of the infants. The court has the supervisory powers of control over a guardian.

A guardian exercises control over an infant and is responsible for his education, maintenance and welfare. For example, before an infant between the ages of sixteen and eighteen years can marry,

the consent of the guardian is required. A guardian has power over the estate and the person. The guardian must have regard to the welfare of his ward.

(b) Mentally Disordered Persons

A mentally disordered person is also known as a person of unsound mind. Like a minor, he lacks capacity to do certain things. The insanity affects a person's legal capacity on many ways. The law recognizes that such persons may be exploited or taken advantage of and that some measure of protection is required.

The mental Treatment Act (Cap 248) provides some measure of protection, treatment, care of mentally disordered persons and the custody and the management of the property of such persons.

A mentally disordered person is subject to certain disabilities. These are as under:

(a) He does not have the right to vote.
(b) A marriage contracted by any person of unsound mind is not valid [Matrimonial Causes A ct Chapter 152, Section 14(1) (f)].
(c) Insanity is a defense to a prosecution for any crime, although the accused must prove that he was insane at the time the crime was committed.
(d) The contracts of mentally disordered persons are voidable at the option of the mentally disordered persons.

The mental Treatment Act (Cap 248) requires that a person of unsound mind must be admitted to a mental hospital. Any such person may be received as a voluntary patient into a mental hospital if he has attained the age of sixteen years. Any person under that age can be received as a voluntary patient if a parent or guardian is so desirous. A magistrate can also make a reception order to admit a person of unsound mind into a mental hospital. This order is made if it is proved that the person is of unsound mind. It also requires the report of a medical practitioner. Under this Act, the court may also make orders for the management of the estate of any mentally disordered person and for the guardianship of such person by any near relative or by any other suitable person.

2.4 Provisions of the law of persons on Marriage

Marriage is said to be a contractual relationship. It is viewed as a contract between a man and his wife. It gives rise to certain rights and duties.

The Law of Kenya recognizes the following four systems of marriage:

(a) Statutory Marriage
(b) Customary marriage.
(c) Hindu marriage
(d) Islamic marriage

The parties to a statutory marriage must each have capacity to marry. This capacity is determined by their age, sex and marital status. Except in the case of a widower or a widow, marriage age is generally 21 years. A person below this age can only contract a marriage with the consent of his father, or the mother in case the father is dead or of unsound mind or absent from Kenya. As regards sex, the parties to the marriage must be male and female. The persons of same sex have no capacity to marry. Regarding marital status, each of the parties to the intended marriage must be single. A marriage is null and void if it is celebrated while the former husband or wife of either party is still alive and the previous marriage is till in force. It makes no difference that the previous marriage was celebrated under customary law. Finally, a marriage is null and void if the parties to it are within the prohibited degrees of consanguinity or affinity. This means that the close relatives, such as brothers and sisters have no capacity to marry each other. The persons of unsound mind, i.e. lunatics and idiots, have no capacity to marry.

Citizen or Nationality

Nationality or citizenship refers to a person's political allegiances to some state in return for which he is afforded protection by the state. Each independent state has right who are the nationals or citizen.

The law relating to citizenship and the nationality of Kenya is contained in the constitution of Kenya and the Kenya citizenship Act (Cap. 170)

2.5 Provisions of the law of persons on Acquisition of Citizenship

Citizen of Kenya may be acquired in four different ways. These are 1) by birth, 2) by descent, 3) by registration, 4) by nationalization

These are explained below

By Birth

Citizen by birth is determined by the fact of being born in Kenya and also by citizenship of a person's parents or grandparents. All persons born in Kenya who on 11th December 1963 were either citizens of the United Kingdom or British protected persons automatically became Kenyan citizens on Independence Day (12th December 1963) if either of their parents had been born in Kenya. A person born in Kenya after 11th December 1963 shall become citizens of Kenya.

1) By descent

A person born outside Kenya after 11th Kenya after 11th December 1963 becomes a citizen of Kenya on the day of his birth if on that day his father is a Kenya citizen. This citizenship is by descent only if at that time of his birth his father was Kenya citizens other than a citizen by descent born outside Kenya do not acquire the country's citizenship from him or his father. Thus paternity is given prominence in the determination of citizenship by descent.

2) By registration

Any woman who marries a citizen of Kenya may apply for registration and be granted citizenship. Similarly, a person of full age who is a citizen of a commonwealth country or a specified African country who has been ordinarily resident in Kenya for five years may be registered as a Kenya citizen upon making an application for this purpose.

3) By naturalization

Section 93 of the Kenya constitution Act provides that an alien may apply to be a citizen and he may be granted with a certificate of naturalization if:

a) He is of full age
b) He has resided in Kenya for one year before the application
c) He has resided in Kenya four a total of four years during the seven years before the one year in paragraph (b)

d) He is of good character;
e) He has an adequate knowledge of the Swahili language; and
f) He intends to remain a resident, if naturalized

Note: The grant of citizenship by naturalization is purely discretionary

2.6 Loss of Citizenship

There is two ways in which citizenship can be lost. These are explained under

1. By Renunciation

A citizen of Kenya who is also a citizen of some other country, is free to renounce his Kenya citizenship but he may do so only if he is of full age and capacity. For renunciation citizenship, he is required to make a declaration in prescribed manner. He ceases to be a citizen of Kenya upon registration of the declaration. A person who is a citizen of Kenya and also some other countries at the age of twenty one ceases to be a citizen of Kenya at the age of twenty three unless he has renounced the citizenship of that country.

2. By deprivation

The Kenyan citizenship also may be lost by deprivation. But the deprivation applies only to those citizens who acquire Kenya citizenship by registration or naturalization. A person may be deprived from citizenships in following cases:

a) Has shown himself to be disloyal towards or disaffected towards Kenya;
b) Has during the war in which the country was engaged, traded with or otherwise assisted the enemy.
c) Has, within five years of registration or nationalization been sentenced for more than twelve months imprisonment.
d) Has resided continuously abroad for seven years and has neither been in service of Kenya or an international organization which county is a member, nor registered annually at a Kenya consulate his intention to retain the citizenship or
e) Has obtained his registration or naturalization by fraud, false representation or concealment of a material fact.

2.7 Provisions of the law of persons on Domicile and Residence

A person's domicile is the place where he permanently resides with an intension to remain. Mere residence is not sufficient. Animus manedi i.e. an intention to permanently remain must be established.

In order to establish the domicile of a person, the following two elements are taken to consideration.

i) **Actual residence**

ii) 'Animus Manedi' i.e. the intention to remain in that place or country

Where these two elements co-exist, a person is said to have a domicile in that country. For example, a Ugandan citizen may decided= to live permanently in Kenya. In that case Ugandans acquires a domicile in Kenya.

The law relating to domicile in Kenya is contained in the *"The laws of Domicile Act (cap. 37)."*

There are three types of domicile: origin, choice and dependence. These are explained as under:

i) Domicile of Origin

A person acquires his domicile of origin at birth. A legitimate child inherits its father's domicile (S.3), an illegitimate child inherits its mother's (S.3) and under common law a founding (i.e. an abandoned child) has its domicile of origin continuous until he acquires a new one (S.4)

ii) Domicile of Choice

'A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.' (S.8) He is then said to have acquired a domicile of choice, where upon the domicile of origin is relinquished. He may however later resume his domicile of origin. A domicile of choice continuous until the former domicile is resumed or until another domicile is acquired. It is important to note that the only person of full age and capacity may acquire the domicile of choice. For example a Kenyan may decide to live in Tanzania permanently. In this case, he acquires Tanzania domicile though he remains a Kenyan citizen.

iii) Domicile of Dependence

Domicile of dependence is also sometimes described as dependent domicile. A person is said to have this kind of domicile if his domicile necessarily changes with that of another person on whom he is dependant. A woman acquires the domicile of the husband on marriage. An infant acquires the domicile of the father.

Domicile and Residence

A place where a person lives, whether permanently or temporarily, is his residence. A person's residence determines his liability of taxation, i.e. he is subject to the place where he resides; it also determined his status in war time-a person who is resident in a country with Kenya is engaged in war is automatically an enemy.

Residence as such must be distinguished from domicile. A mere temporary stay is sufficient to constitute one a resident of a particular area but to be domiciled in a place one must intend to permanently remain there; residence is just one of the two elements required to prove domicile. There are two reasons which make it important to draw a distinction between the two; first to determine the law applicable and secondly to determine whether the court has jurisdiction in a particular case. As already seen, a person's family relations and movable property are determined by the law of his domicile; they are not determined by the law of the place where he might be temporarily resident. Thus, if a domiciled Englishman takes up residence in Kenya dies in Kenya living movable property succession to the property will be governed by the government of England and not the law of Kenya. Regarding jurisdiction, courts usually have jurisdiction over persons who are resident within their territorial jurisdiction.

Domicile and Nationality

Domicile must be distinguished from nationality. While nationality is referable to as political system in the sense that a person owes his allegiance to the state that he is a national domicile on the other hand is referable to as a legal system: a person's family relations in these matters like marriage and divorce, legitimacy etc, and also his movable property are governed by the laws of his domicile. Secondly, it is possible for a person to have a no nationality at all e.g. where he is

rendered stateless upon being deprived of his citizenship; but every person must have a domicile at any one time. Thirdly, it is possible for a person to have dual citizenship, i.e. to be a citizen of more than one country at the same time but no one can have more than one domicile at the same time.

2.8 Provisions of the law of persons on proceedings against the State

The government may commit a civil wrong, just like an ordinary individual. The law relating to proceedings against the state is governed by the Kenya Government proceedings act (Cap.40). An aggrieved person has a right to sue the government for the act and defaults of its servants and agents. The government is liable for its own wrongful acts as well as those committed by its servants if the servant himself would have been liable in the first place.

Section 4(1) of this Act provides that the state may be sued in tort in the following cases:

a) In respect of the torts committed by it servants or agent.
b) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
c) In respect of any breach of the duties attaching at common law of the ownership, occupation, possession and control of property:

Summary for the topic

- Definition of legal personality
- Natural and artificial persons
- Rights and obligations of artificial and natural persons as provided by the law of persons
- Acquisition and loss of citizenship

Revision questions

i) Describe a legal person

ii) Describe two types of legal persons

iii) Describe two types of corporations recognized by law

iv) Describe two types of unincorporated associations

v) Explain the provisions of the law of persons on marriage

vi) Explain the various ways a person can acquire Kenyan citizenship

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CHAPTER THREE

3.0 THE LAW OF TORTS

General objective

By the end of the lesson the learner should be able to explain the application of the law of tort in business

Specific objectives

By the end of the lesson the learner should be able to

a) *explain the functions of the law of torts*
b) *explain the general defences applicable in the law of torts*
c) *explain the capacity to sue or be sued for various individuals and entities*
d) *list down four specific torts and explain the available defences in each one of them.*

3.1 Introduction

The word tort has been derived from the Latin tortus which means crooked or twisted. In French, tort means a wrong. In law, tort denotes certain civil wrongs. It means, a tort is a civil wrong. Sir F. Pollock has defined tort as "An act which causes harm to a determinate person, whether intentionally or not, not being a breach of duty arising out of personal relation or contract, and which is either contrary to law, or an omission of a specific legal duty, or a violation of an absolute right".

Every tort results from the breach of a certain duty which is primarily fixed by law unlike other civil wrongs such as breach of contract, where the duty in question is fixed by the parties themselves. Thus, the duty not to defame, injure or damage the property of any person is one fixed by the law and its breach may constitute a tort, whereas the duty to supply goods under a contract of sale is a duty created by the parties themselves in their contract. In tort, the duty is imposed on persons generally, i.e. on every individual, but in other cases the duty is imposed only on the parties concerned, e.g. the duties created by a contract are imposed only on the parties to the contract and on no one else. Similarly, the duty in tort is owed to every other

person, unlike in contract cases where one contracting party owes his contractual obligation to the other contracting party and to no one else.

A tort, as such, differs from other civil wrongs in a number of respects. It is a common law wrong which is usually remedied by an award of "Unliquidated Damage". Unliquidated damages are those whose quantum or a assessment is left for the determination to a court at its disretion. These are distinct from liquidated damages which are fixed by the plaintiff. Certain other remedies are also available which will considered when the various torts are separately dealt with

A person who commits a tort is called a tortfeasor. Where two or more persons commit a tort, they are known as joint tortfeasors. They may be sued jointly, or any one of them may be sued for the whole of the damage. In case of the joint tortfeasors, there is a right of contribution, under which the court may apportion the damages between them in such a way as is just, having regard to their respective degrees of blame.

3.2 Function of the Law of Torts

The primary function of the law of torts is to compensate persons injured by the civil wrongs of others, by compelling the tortfeasor to pay for the damage occasioned by his tort. Besides this, there are certain other functions and these include the following.

1. To Determine Rights Between Parties to a Dispute. A party to a dispute may bring an action for a declaration of his rights; and once the court makes a declaration, the rights of the parties are determined.
2. To Prevent a Continuance or Repetition of Harm. When the injury complained of is of a continuous nature or likely to be repeated by the tortfeasor, the injured party may be granted an injunction to prevent its continuance or repetition, e.g. in cases or trespass to land.
3. To Protect Certain Rights Recognized by Law. There are certain rights which every individual is entitled to land which are recognized by law. These rights are protected by the law of torts e.g. a person's reputation or right to good name is protected by the tort for negligence with imposes a duty of care on every other person.

4. To Restore Property to its Rightful Owner. Where property is wrongly taken away from its rightful owner or otherwise dealt with contrary to his rights, he may seek a restitution of the property or its value since the wrongful act amounts to the tort of trespass to goods (or land).

3.3 Nature of tortuous liability

A tort is a civil wrong which is usually remedied by an ward of unliquidated damages. Prof. P.H. Winfield asserts that "*tortuous liability arises from the breach of a duty primarily fixed by law; such duty is towards person*
generally, and its breach is redressible by an action for unliquidated damages".

Every person is under a duty to compensate for his wrongful acts which have resulted in injury to another person. It is this duty to compensate that determines his liability in tort. Generally, the plaintiff must prove that he has suffered harm and that there has in consequence been a violation of his legal right. Some civil wrongs are actionable even if no damage is suffered e.g. trespass to land. Whether the plaintiff has any remedy in some cases of tort depends on the following two principles of general application:-

1. **Damnum Sine Injuria:**
   Literally translated, this phrase means "Harm without legal injury." It refers to a circumstance where a person has suffered actual harm without any violation of his legal right. A person aggrieved in this way has no legal remedy.
   Mogul Steamship Co. v. McGrefor, Gow & Co. (1982)

   Certain ship-owners reduced their freight charges for the sole purpose of driving their rival out of business. The plaintiff, who had thus been driven out of business, brought an action against the ship-owners. Held: a trader ruined by the legitimate competition of his rivals could have no redress in tort.

2. **Injuria Sine Dumno:**

This refers to a situation where a person suffers a violation of his right without any actual loss or damage sustained by him. This is especially so in the case of torts which are actionable 'per' se' (i.e. without proof of any damage) e.g. trespass to land, libel e.t.c.

The Court can award the damages to the plaintiff in such case.

Ashby v. White, (1703)

In this case the defendant, a returning officer, wrongfully refused to register a properly tendered vote of the plaintiff who was a legally qualified voter. In spite of this, the candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote. It as held that the defendant was liable because he deprived the plaintiff of his legal right of registering his vote.

3.4 Determination of tortuous liability

Tortuous liability can be also determined on the basis of the following principle

The Fault principle

Most torts are based on the fault principle. Under this principle, it is necessary to establish some fault on the part of the wrongdoer before he can be made liable in tort. A person is said to be at fault where he fails to live up to some ideal standard of conduct set by law. Three elements are relevant in the determination of fault, and any one of them may be relied upon:-

i. Intention

Where a person does a wrongful act desiring that its consequences should follow, he is said to have intended it; and to that extent there is some amount of fault on his part**.**

ii. Recklessness:

An act is said to be done recklessly where it is done without caring whatever its consequences might be. Recklessness, as such, constitutes fault on the part of the wrongdoer.

iii. Negligence:

A person is also at fault where he does a wrongful act negligently i.e. there the circumstances are such that he ought to have for seen the consequences of his act and a voided it altogether.

3.5 Distinction between Tort, Crime and Breach of Contract

We may distinguish between a tort, a crime and a breach of contract as under:

i. Tort and Crime:

A crime is la breach of public rights whereas a tort is a civil wrong. The main object of criminal proceeding is the punishment to the criminal persons but the object of proceedings in tort is not punishment. Its main aim is the compensation to the plaintiff for the loss or injury caused by the defendant i.e. damages. Some cases may be actionable under criminal law and law of torts e.g. if 'A' assaults 'B', there is both a crime and a tort.

ii. Tort and Breach of Contract:

In contract, the duties are fixed by the parties to a contract. But in tort, the duties are fixed by law (common law or statute). In some cases, a breach of contract and tort may take place simultaneously. We assume 'X' employs a private surgeon to operate his wife. If 'Y' fails to perform his duty properly then 'X' has a cause of action against 'Y' for (i) breach of the contractual duty of care, and (ii) the tort of negligence.

3.6 Malice

Malice means ill-will or desire to cause damage to someone. In legal sense, malice means a wrongful act which is done purposely without having a lawful act with is done purposely without having a lawful excuse. In tort, the intention or motive for an action is generally irrelevant. The

general rule is that a bad intention does not make a lawful action as unlawful and similarly an innocent or food intention is not a defence to a tort.

Wilkinson v. Downton (1897)

A, as a practical joke, told Mrs. B that her husband had met with an accident. Mrs. B suffered a nervous shock and was ill as a result. Mrs. B brought an action against A for false and malicious representation. The fact that A passed the information as a joke was irrelevant, and Mrs. B was entitled to damages.

Malice in itself is not a tort, but it can be an important element in certain torts. Main examples of such torts are: Malicious persecution.

3.7 General Defences

A person sued in tort has at his disposal certain defences, some of which are restricted to particular torts (e.g. contributory negligence is a defence only to the tort of negligence), while other are of a general nature. Specific defences are dealt with together with their respective torts. This section is restricted to general defences.

The following general defences are available to a defendant in every action for tort where they are appropriate:-

(a) Volenti non Fit Injuria
(b) Inevitable Accident
(c) Act of God
(d) Necessity
(e) Self-defence
(f) Mistake.
(g) Statutory Authority

These are explained below

3.7.1 Volenti Non Fit Injuria

Volenti non fit injuria is also known as the voluntary assumption of risk. Where a defendant pleads this defence, he is in effect saying that the plaintiff consented to the act with is now being complained of. The plaintiffs consent may be either express or implied from his conduct. Before 'volenti' can be upheld as a defence, it must be proved that the plaintiff was at the material time aware of the nature and extent of the risk involved for a person cannot consent to what is not within his knowledge. By his consent the plaintiff voluntarily assumes the risk of whatever consequences might follow from the act he has consented to, consequently, where 'volenti' is successfully pleaded its effect is to deny the plaintiff any remedy at all against the defendant:

Volenti non fir injuria means no injury can be done to a willing person. For example, a football player cannot complain for being injured while playing the game.

Khimji v. Tanga Mombasa Transport Co. Ltd. (1962).

The plaintiffs were the personal representatives of a deceased who met his death while traveling as a passenger in the defendant's bus. The bus reached a place where the road was flooded and it was risky to cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passenger, including the deceased. The bus got drowned together with all those aboard it. The deceased's dead body was found the following day. Held: The plaintiffs' action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defence of volenti non fit injuria rightly applied.

Apart from instances like those of the above case, the defence of 'volenti' has been pleaded in a number of situations, including the followings:

1) A passenger injured by the act of a driver whom he knew to be under the influence of drink at the material time.

2) A spectator at a game, match or competition injured by the act of the players of participants.

(3) A patient injured by the act of his surgeon, where the patient has consented to the operation.

The viability of the defence depends on the circumstances of each case; otherwise the consenting party does not, by his consent, necessarily give an open cheque to the other party to act negligently, high-handedly or in any manner he pleases.

Haynes v. Harwood, (1935)

The defendant's servant left a van and horses unattended in a crowded street. A boy threw a stone at the horses and they bolted. This exposed a woman and some children nearby to some grave danger. The plaintiff, a police constable, managed to stop both horses; but he did so at great personal risk and in fact sustained severe injuries. In an action brought against him, the defendant pleaded volenti. Held: (1) The doctrine of country assumption of risk did not apply because the plaintiff, in rescuing the persons in imminent danger, had acted under an emergency caused by the defendant's wrongful act. (2) It was immaterial that the persons to be saved were strangers, and the defendants were liable.

3.7.2 Inevitable Accident

An inevitable accident is one which cannot be prevented by the exercise of ordinary care, caution and skill. It therefore occurs only where there is no negligence on the part of the person whose act is complained against. Since the law of torts is generally based on the fault principle, and since an inevitable accident does not impose fault on the part of the alleged wrongdoer, it follows that an injury which has resulted from an inevitable accident is not actionable in tort.

Stanley v. Powell, (1891)

The plaintiff was employed to carry cartridges for a shooting party. A member of the party fired at a pheasant but the bullet, after hitting a tree, rebounded into the plaintiff's eye. The plaintiff sued. Held: the defendant was not liable as the plaintiff's injury resulted from an inevitable accident.

3.7.3 Act of God

An act of God (or vis major) is also an inevitable accident caused by natural forces unconnected with human beings e.g. storm. In this case also, any resultant injury is not attributable to anyone's thunder etc. in this case also, any resultant injury is not attributable to anyone's fault and as, therefore, not actionable in tort.

Nichols v. Marsland, (1876)

The defendant had a number of artificial lakes on his land. An unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff's bridges were swept by act of God and the defendant was not liable.

3.7.4 Necessity:

A person may sometimes find himself in a position whereby he is forced to interfere with rights of another person so as to prevent harm to himself or his property. For instance, if he is about to be shot he may feel constrained to use the person next to him as a shield against the gunman; or being hungry he may steal food in order to survive; in the process taking the latter with him into the pit. In all these cases he may seek to justify his action as a matter of necessity. It is based on the maxim *"salius populi supreme lex*" i.e. the welfare of the people is the supreme law.

All the cases decided on the defence of necessity point to the fact that this defence is difficult to maintain and is very rarely allowed by court. The general rule is that no person should unduly interfere with person of property of another. It is only in exceptional circumstances of an urgent situation of imminent danger that this defence may be upheld:

Cope v. Sharpe (1912)

The defendant committed certain acts of trespass on the plaintiff's land in order to prevent fire from spreading to his master's land. The fire never in fact caused the damage and would not have done so even if the defendant had not taken the precautions he took. But the danger of the fire spreading to the master's land was real and imminent. Held: The defendant was not liable as

the risk to his master's property was real and imminent and a reasonable person in his position would have done what the defendant did.

In view of the difficulty posed by the above defence, it is not advisable for a defendant to rely solely on it, especially where there are other defences. It is safer to plead it as an alternative to another defence.

3.7.5 Self Defence

It is sometimes said that a person who is attacked does not owe his attacker a duty to escape. Everyone whose person is threatened is entitled to defend himself; and he may do so by using force. Force, however, may only be used where necessary, otherwise the person claiming for defend himself might fond himself liable to his alleged attacker. Thus, where a person is assaulted i.e. threatened with immediate harm, but no harm is actually inflicted on him, he should not himself use force in an effort to defend himself. Where force has actually been applied (i.e. where there has been a battery the person attacked has a right to defend himself in the same way, i.e. by applying force. But the force used in self-defence must be reasonable and proportionate to that used in attacking him; otherwise if it is unreasonable or excessive in the circumstances he will himself be liable to his attacker. Thus a person attacked with a fist, pocket knife or small stick, or he may even use lesser force. But if in these circumstances he responds with a panga or spear clearly the force used by him in self-defence will be unreasonable and disproportionate and he will be liable to his attacker.

Cresswell v. Sirl, (1948)

A dog owned by plaintiff, C, attacked during the night some ewes lambs owned by S. The dog had just stopped worrying the sheep and started towards S, who shot it when it was 40 yards away. C sued for trespass to goods (dog). Held: S was justified in shooting the dog if (i) it was actually attacking the sheep; or (ii) if left the dog would renew the attack on them, and shooting was the only practicable and reasonable means of preventing revival. The onus on justifying the trespass lay on the defendant.

An occupier of property may also defend his property where his interest therein is wrongfully interfered with. Once again, reasonable force must be used in the defence of property. A trespasser, for instance, may be lawfully ejected using reasonable force. The use of force which is not called for in the circumstances entails legal liability on the part of the person purporting to defend his property.

3.7.6 Mistake

The general rule is that a mistake is no defence in tort, whether it is a mistake of law or of fact. Mistake of fact may be relevant as a defence to any tort is some exceptional cases. This could arise in cases of malicious prosecution, false imprisonment and deceit. For example, where a police officer arrests a person about to commit a crime but the person arrested is innocent then the police officer is not liable. In this case, the mistake is reasonable ground for the defence in the tort. Mistake cannot be a defence in actions for conversion or defamation.

3.7.7 Statutory Authority

Where a statute authorizes a particular act, a person who does it is not liable in tort. The authorisation of an act is also an authorisation of its natural consequences. But the person acting must do so in good faith and within the scope of the powers conferred by the statute; or else he will not be protected. Where the person acting exceeds the powers conferred by the statute, the compensation payable by him to the injured party cannot be more than what is provided by the statute itself. The statute may stipulate a definite sum, or it may give powers to certain officials to assess the loss suffered by the injured party. Thus, where a person has acted in pursuance of the provisions of a statute, he may plead statutory authority in his defence; and where the statute does not protect him from liability (e.g. where he has exceeded his powers) and the injured party claims by way of competition a sum in excess of that stipulated by the statute, he -ay plga□ the statute i. mitigation. This is especially so in what are known as statutory torts.

Voughan v. Taff Vale Railway Co. (1860)

A railway bompany was authorized by statute to run a railway which traversed the plaintiff's land. Sparks from the engine set fire to the plaintiff&s woods. Held: that the railway company

was not liable. It had taken all knowf care to prevent emission of sparks. The rulning of locomotives was qtatutorily authorized.

3.8 Capacity to sue or be sued in Tort:

The general rule is that any person may sue or be sued in tort. All persons are subject to the same laws. However, some special rules apply in certain circumstances which either restrict, forbid or qualify the right to sue or be sued. It means certain persons cannot sue, while some other persons cannot be sued.

Capacity means the capacity of parties or persons to sue or to be sued in law of torts. The capacity of various persons in the law of torts is explained as under:

3.8.1The Government

The Government Proceedings Act (Cap 40) makes the Government subject to liabilities in tort as if it were a private person mf full age and capacity. Section 4 (1) of this Act provides that the Government is liable.

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those dutie3 which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect ob any breach ob the duties attaching at common law to the ownership, occupation, possession or control of property.

The Government is also liable for statuary torts i.e. torts arising from breach of a duty imposed by statute. However, the Government is not liable for any thing done by any person when discharging any responsibilities of a judicial process (Sec. 4 (5). The Government is not also liable for trots committed by public officers who are appointed and paid by local authorities, or members of public corporations like Kenya Railways, Maize and Produce Board of Kenya e.t.c.

3.8.2 Infants and Minors

At a general rule minority is no defense in tort. Infants can sue and `e sued in the same way as any other person. However, the age of an infant may be relevant in some torts where intentions, malice, or negligence of the wrongdoer are the main cause of the tort. In the case of negligence, the infant may not have reached the stage of mental development where it could be said that he should be found legally responsible for his negligent acts. A child may be also guilty of negligence if old enough to take precautions for his own safety.

Burnard v. Haggis, (1863)

A minor hired a horse for riding and was told by the owner not to jump over it. But he jumped the horse and injured it. Held: The minor was liable for his tort which was of independent of the contract.

Generally, a parent or guardian is not liable for the torts of his children unless he authorizes the tort. But a parent or guardian is liable for torts committed by children in negligence.

Bebee v. Sales, (1916)

A parent permitted his son aged 15 to remain in possession of a shotgun, with which the son had already caused harm and in respect ob which complaints had been made. Held: the father was liable for injury to another boy's eye.

3.8.3 Husband and Wife

The position of husbands and wives in tort is covered by two English statutes. These are: the Married Women's Property Act 1882 and the Law Reform (Married Women and Tortfeasors) Act, 1835. The former Act is a statute of general application is Kenya. The latter statute applies in Kenya to the extent of paragraphs (b) and (c) of question 1.

A married woman is liable in tort and may sue or be sued in tort in the same way as though she were a female sole (i.e. a single of unmarried woman). A wife can sue her husband in tort for the protection of her own property.

3.8.4 The President:

The Constitution of Kenya (Kenya 14) provides that the President of Kenya is not "*liable tk any proceedings whatsoever in any court."* It means that no civil or criminal proceedings can be instituted against the President while he is in office.

3.8.5 Heads of State and Diplomats:

The Heads of foreign states, diplomats of foreign missions and certain other persons connected to them are immune from the jurisdiction of the local courts. Their immunity is provided by the Vienna Convention of Diplomatic Relations, signed in 1961, the relevant articles of which are given the force of law in Kenya by "The Privileges and Immunities Act (cap. 179)".

The accredited diplomats and their staff families enjoy immunity from the criminal and (subject to specified exceptions) from the civil and administrative jurisdiction of the local courts. The immunity does not extend to Kenyans who are employed by diplomatic missions. Representatives of the United Nations Organization and its specialized agencies can also claim diplomatic immunity. Although the diplomats and their staff cannot be sued under the law of tort but it is always open to the Ministry of Foreign Affairs to declare a diplomat 'persona non grata', thereby requiring his removal from Kenya.

3.8.6 Corporations

The corporations can sue and be sued in their own names. They are liable to actions in tort. A corporation is also liable for torts committed by its servants and agents. But if a servant of a corporation commits a tort which is 'ultra vires' (beyond powers) then the corporation is not liable. Similarly, a corporation is not liable for some torts of personal nature e.g. personal defamation, battery e.t.c.

3.8.7 Trade Unions:

The trade unions have capacity to sue in tort but actins against them in tort are limited. Section 23 of the Trade Unions Act (Cap. 233) provides that no action shall be brought

against a trade union for torts committed by its members or officials in respect of any act done in contemplation or in furtherance of a trade dispute. For example, if a trade union calls a strike, it cannot be sued by an employer for the tort of inducing a breach of contract.

3.8.8 Persons of Unsound Mind:

These are generally liable in tort unless intent is a necessary element and their condition is such that they could not have formed such intent.

Morriss v. Marsden, (1952)

Defendant took room at a Brighton hotel. While there he attacked the manager of the hotel (plaintiff). It was established that defendant was suffering from disease of the mind at the time of the attack; that he knew the nature and quality of his act, but he did not know that what he was doing was wrong. Held: That as defendant knew the nature and quality of his act he was liable in tort for the assault and battery. It was immaterial that he did not know that what he was doing was wrong.

3.8.9 Aliens or Non-Citizens:

An alien is under no disability and can sue and be sued. However an enemy alien cannot sue, but if sue can defend himself.

3.8.10 judicial officers:

Judicial officers are protected from civil liability for any act done or ordered by them in the discharge of their judicial functions. Thus, where a judge or magistrate utters words which tend to reflect on a person's reputation, or orders a party's property to be attached in satisfaction of a judgment-debt, no action can respectively be brought against him for trespass. Besides judicial officers, officers of the court are also protected against civil liability for acts done in pursuance of a judicial order or warrant. This means that a court broker cannot be sued for attaching property under a warrant dully issued by court, as long as

he acts within the powers conferred on him by the warrant. The protection to judicial officers and officer of court is afforded by the Judicature Act (cap.8) Section 6.

3.9 Specific Torts

The work tort refers to civil wrong committed by different Persons. Some specific torts are:

(a) trespass
(b) Nuisance
(c) Negligence
(d) Defamation

The main characteristics of these torts together with damages and their defences are explained as under:

3.9.1 Trespass

There are three types of trespass. These are:-

1. Trespass to land
2. Trespass to the person; and
3. Trespass to Goods

Trespass is actionable per se i.e. .without proof of any damages once it is established that a trespass has been commit, the plaintiff is entitled to legal redness, whether or not he has suffered damage; the actual damage suffered (if any) merely gauges the extent of the redness or compensation)which the plaintiff is entitled to. Trespass, as such, is a of the classic illustration of the principal 'injupia sine damno'. It is this fact that distinguish it from negligence which is actaonable only upon proof of damage

a) Trespass to land

Trespass to land is committed where the plaintiff's possession of land is wrongfully interfered with. it is the fact of possession rather than ownership that is important ;such as plaintiff may be any one in po3session of the land, whether he is the owner or a tenant . Wrongful interference

with possession in relation to the plaintiff's land may take the form of wrongfully entering upon it, or wrongfully remaining on it,

Or wrongfully placing or projecting any material object on it

Trespass by wrongful Entry

This is committed where there is physical contact with the plaintiff's land, however slight. It includes acts like encroaching on the land or walking through it without authority, sitting on the plaintiff's fence or putting a hand through his window etc *Also n abuse of a right of entry may constitute a trespass, e.g. a person authorized to enter premises for the purpose of repairing them becomes a trespasser when he picks and eats fruits on the premises without authority .If a person misuses his authority, it is also known as trespass

Trespass by remaining on land

This type of trespass is committed by a person who, having been originally authorized To enter upon land, is subsequently asked to leave: such a person becomes a trespasser When he fails to leave the land within a reasonable time.

Trespass by placing things on land

Trespass by placing things on land is committed by kin who places any material thing on the plaintiff's land, or who allows such material thing or noxious substance, to come in to contact with (or cross the boundary of)the plaintiff' land.

This type of trespass is similar to nuisance, but the two are different in the following respect:

1. In trespass the injury is direct since it affects the plaintiff's Possession; but in nuisance the Injury is indirect because it is the Plaintiff's comfort and convenience in the use and enjoyment of his land that is affected ,rather than its possession.
2. Another distinc4ion arising from the explanation given above is that while trespass relates the possession of land, nuisance relates to the user or enjoyment of land :in trespass the plaintiff's possession is at stake, while in nuisance it is the use and enjoyment of the land that is at stake.

3. Trespass is actionable per se ,whereas nuisance, just like negligence is only Actionable upon proof of damage.the following cases is instructive.

Kelsen v imperial tobacco co. ltd, (1957

He defendant erected$ an advertising signpost which protruded by 8 inches in to air space above the plaintiff's land. Held: the defendant's act constituted a trespass but not a nuisance since the plaintiff had suffered no inconvenience continuing trespass:

As long as the act constituting a trespass remains (without the trespasser doing anything to avoid it, there .is said to be continuing trespass. This arises Where, for in3tant, the trespasser chooses to remain on the plaintiff's ,and or Fails tm remove there from any matter that is the cause of trespass. Where there is continuing trespass, the plaintiff may bring a number of actions against the defendant. This is Because as long as the trespass continues, the Plaintiff continues to suffer and there is always afresh cause of action.

Trespass by Relation

The plaintiff's possession of land relates Back to The time when he first acquired aright to posses the land and he is deemed to have been in possession of it from that time. Possessor of land may therefore sue any Person who committed an act of trespass on the land even before he himself took actual possession of it .since the plaintiff's right of action is based on a title which legally relates back to the earlier period, the trespass in question is known as trespass by relation. it is all based on doctrine of relation back . Example: A own land which he sells off to B. A year passes before B has taken actual possession of the land; but in the meantime C has committed an act of trespass on the land B; may sue C for trespass not withstanding that he had not yet taken possession of the land when the act of trespass was committed ;B's title relate back to the time when he first became entitled to take possession i.e. the time when he bought the land from A.

Is trespass a crime?

Trespass to land is normally a civil wrong, but it may give rise to criminal proceeding some cases. The trespass Act (cap.294) states that a trespasser can be prosecuted criminally if he enters

on somebody's land with an intent. To steal goods or commit any other offence. Otherwise a trespass to land is a tort and it is actionable per se, i.e. without proof of special damage .

Defences:

The main defences to an action for trespass to land are as under:-

Prescription

Land acquired by possession is also said to been acquired by prescription .The new owner may plead title by prescription as a defence to an action brought by previous owner to recover the land. A defendant may also plead prescription, as by proving aright of common grazing or right of way over the Plaintiff's land.

ii) Act of Necessity:

The necessity may be pleaded as a defence to an action of trespass to land e.g. entry to put out fire for public safety

iii Statutory Authority

Where the authority is conferred by law, whether by statute or by court order, this is also an available defence e.g. the authority of a court broker

iv Entry by licence

an entry authorized or licensed by the plaintiff is not actionable in trespass unless the authority or license given is abused.

Remedies:

The remedies in respect of trespass to land include:

i. Damages

The plaintiff may recover monetary compensation from the defendant,

The extent of which depends on the effect of the dependant's act on the value of the land in question.

ii. Ejection

We saw earlier on that a person is entitled to use reasonable force to defend his property. Thus, where a person wrongfully enters or remains on another's land, he may be ejected using reasonable force may entail liability for assaults An ejectment may also be based on a court order (an eviction order)

iii. Action for recovery of land

The plaintiff may bring an action to recover his land from the defendant Where there has been a wrongful dispossession, it is common for such action to be coupled with the above two remedies.

iv. Injunction

In addition to the above remedies, an injunction may be obtained to ward off a threatened trespass or to prevent the continuance of an existing one

v. Distress Damage Feasant

In the case of trespass by placing things on land (or in the case of chattle trespass) the plaintiff has a right To detain the defendant's chattel or animal which is the cause of the trespass in question.

b) Trespass to the Person

Like trespass to land, trespass to the person is three-fold. It may consist of assault, battery or false imprisonment.

Assault

An assault is committed by a person when he threatens to use force against the person of another, thus putting the other person in fear of immediate danger e.g shaking a fist or pointing a gun menacingly at the person of another. It iw □mportant that the person Threatened must be put in fear of Immediate danger otherwise there will be no assault. An assault is a tort as well as a crime

Battery:

While assault is constituted by the mere use of a threat calculated to induce fear,battery is defined as the tactual application of force against the person of another without lawful justification; e.g. punching the plaintiff's lose, smacking his bottoms or slapping him On the chick,etc. An act can only amount to a battery if it is intentional and voluntary. Thus, a person who suffers injury in the process of scrambling for a tax will find it difficult to maintain an action for battery against anyone

False Imprisonment

There is said to be false imprisonment where a person is totally deprived of his freedom without lawful justification. Whether physically or otherwise; e.g. locking up a person in a room whose only exit is the locked door, or surrounding him such that it is practically impossible for him to leave where he is. It is interesting to note that a false imprisonment may be committed even without the plaintiff's knowledge, e.g by locking him up in his bedroom while he is asleep and then reopening the door before he has awoken. On being informed of these facts the plaintiff lay sue the person who did the locking and reopening of his bedroom. The length of time during which a false imprisonment last is immaterial but is a relevant factor in gauging the extent of the defendant's liability in damages

Defences:

i A parental Authority

A parent has a right to reasonably chastise or discipline his Children. This means that where a parent beats his child or locks Him up in room for sometime by way of reasonable chastisement, he cannot be sued for battery or false imprisonment .Similarly, if a parent gets a knife and threatens that he will cut off his child's mouth unless the child stops abusing grown-ups, no action can be brought against him for assault When a child is at school all his parent's right of ordinary control over him Are delegated to the school authority (or teachers) and are exercised by the Latter in 'loco parents '.Reasonable chastisement by the school authority. e.g Reasonable punishment by teachers ,is not actionable in tort Note: According to R.v (1891) a husband has no right to chastise

ii Judicial authority:

An act done under order of court is Not actionable as trespass. We show at the beginning of this chapter that acts done in a judicial Capacity are not actionable in tort. It follows that where a judge orders a corporal punishment of a number of strokes, no action for battery can be brought against him or a person administering the strokes .Also, statutory authority may be pleaded as a defence

Remedies:

i Damages:

An award of damages iii General Defences the defendant may also rely on the general defences already considered. Self-defence is a particularly viable defence to assault and battery. Volenti (or the plaintiffs consent),may also be pleaded Thus, a patient who has consented to a medical operation cannot round and sue the surgeon for trespass (battery).Similarly ,a spectator who suffers injury in the cause of a game whose rules are being followed cannot sue for trespass is the most obvious and usual remedy. The amount of damages awarded depends on the circumstance of each case, having regard (or in the case

The amount of damages awarded depends on the circumstances of each case, having regard to matters like the injury suffered, the period of false imprisonment e.t.c.

ii Habeas Corpus:

The Writ of Habeas Corpus is a remedy to false imprisonment. The writ directs the person in show custody the applicant is detained to produce him before the High Court; the Court may order his release if it appears that there are not sufficient grounds for detaining him.

c) Trespass to Goods and Conversion

Trespass to Goods.

A trespass to goods in committed by a person who directly and intentionally interferes with goods in the possession of another without lawful justification. The plaintiff may be a person

either in possession or entitled to immediate possession of the goods. The wrongful interference may be constituted by removing the goods from one place to another (e.g. taking them away from the plaintiff's possession), using the goods (e.g. wearing the plaintiff's shirt) or destroying or damaging the goods.

There are three points to note about this tort. Firstly, like in any other trespass case, the act complained of (the interference in this case) must be direct, unlike in nuisance where the act of interference, of the injury, is indirect. Secondarily, it is possession rather than ownership that determines the plaintiff's right of action; it is a possessor's (as opposed to an owners) rights that are protected. And thirdly, the defendant's act must be deliberate or intentional; wrong is not actionable.

Note: A finder of lost property is not liable for trespass where the owner of the property is not known to him and cannot be easily ascertained.

Conversion:

Like trespass to goods, conversion is based on possession and is actionable only if the defendant's act was intentional but not where the defendant was merely negligent. Conversion is constituted by a dealing with goods in a manner that is inconsistent with the rights of the person in possession of the goods or entitled to their immediate possession, e.g. where A intentionally sells B's goods to C without any authority from B, or where A intentionally delivers B's goods to some other person without justification at all. Every person is presumed to intend the natural and probable consequences of his intentional act s, and it follows from this that where a person used the property of another in such a way as to risk its confiscation he is liable for its conversion.

Moorgate Mercantile Co. Finch, (1962)

A borrowed a car from B. He used the car to smuggle contraband watches, and in the process he was arrested and the car confiscated. Held: A was liable for conversion of the car because he had intentionally acted in a manner that was most likely to lead to its confiscation.

3.9.2 Nuisance

This tort is committed whenever a person is wrongfully disturbed in the use and enjoyment of his land. Generally, it arises from the duties owed by neighbouring occupiers of land: no one should use in property in a way which is likely to affect his neighbour's use of his own land. Thus, if A and B are neighbours, and A owns plot X while B owns plot Y, A may use plot X in any way he chooses but he must not in doing so affect B's of plot Y, or else he will be liable in nuisance.

Although the tort of nuisance is usually committed only where the plaintiff and defendant are owners or occupiers of land, in certain circumstances the tort may be committed in places like a highway or even a river. There are two types of nuisance: private nuisance and public nuisance.

Private Nuisance

A private nuisance is committed where a person's private rights in his land are wrongfully disturbed, whether physically or by allowing noxious things to escape out of his land. Thus, it is a nuisance to obstruct an easement or private rights of way; or to allow a weak structure to hang precariously above the plaintiff's land, thereby creating a potential source of danger to the plaintiff; or to allow smoke, noise, gas, fumes e.t.c. to escape onto the plaintiff's land thereby inconveniencing him e.t.c.

Hollywood Silver Foxes v. Emmett, (1936)

The plaintiff was a breeder of silver foxes, which were very sensitive to any disturbance during breeding seasons. The defendant was developing the neighbouring land as a housing estate and thought that the plaintiff's business might discourage his customers. He instructed his son to fire a gun near the fox cages. The son did so and after four days the plaintiff sued. Held: The act of the defendant through his son amounted to a nuisance.

Public Nuisance:

Public nuisance is also known as common nuisance. It affects the comfort and convenience of a class of persons but not necessarily every member of the public. Thus the obstruction of a highway is a public nuisance, and also a music festival accompanied by large scale noise. It is also a public nuisance to do any act which is a source of danger to the public e.g. releasing a

large quantity of petrol onto the highway. In all these cases, it is not the private rights of an individual of the community around or the public at large.

From what is stated above, it is clear that it would not be reasonable to allow an individual to bring an action to stop the nuisance. Indeed, a public nuisance is generally a criminal offence and only the Attorney General may bring an action against the wrongdoer. However, in exceptional the person creating such an act of nuisance, if he can prove that he has suffered some special damage over and above that suffered by the general public.

Soltan v. De Held, (18510

The plaintiff resided next to a Roman Catholic Chapel. the defendant, a priest, took it upon himself to ring the chapel bell throughout the day and night. The plaintiff brought an action to stop it. Held: The ringing of the bell was a public nuisance but since the plaintiff's house was next to the chapel he suffered more than the rest of the community and was therefore entitled to bring an action to stop it.

Continuing Wrong:

Generally, nuisance is actionable only when it is a continuing wrong. A disturbance or inconvenience on an isolated occasion will not ordinarily be treated as a nuisance:

Bolton v. stone, (1951).

The plaintiff, while standing on the highway just outside her home, was injured by a cricket ball struck from the defendant's ground which adjoined the highway. The ground had been used for cricket for over 80 years and it was very rare for balls to be hit over the fence, which was 10 feet high above the highway and 17 above the pitch. The ball had traveled over 100 yards before hitting the plaintiff. Held: An isolated act of hitting the cricket ball onto the highway in circumstances like those of this case could not amount to a nuisance.

It is only in very exceptional circumstances that an isolated act may entail liability in nuisance. an example of this is afforded by Rylands V. Fletcher where, as we saw above, water escaped only on one occasion causing damage to the plaintiff's mine.

The Plaintiff in Nuisance

Since private nuisance generally covers only damage to property to its enjoyment, the plaintiff in an action brought to remedy a nuisance must show that he has title to, or at least some interest in the property which is alleged to have been damaged or whose enjoyment is alleged to have been affected by the nuisance, Otherwise, the action will not succeed.

Malone V. Laskey, (1907)

A bracket supporting a water tank in a house feel down by reason of vibrations caused by the defendant's engine in adjoining premises, and the plaintiff was injured. The plaintiff had no interest in the premises; she merely resided with her husband, who was manager of the company that had leased the premises. Held: The working of the engine was a nuisance, but the plaintiff could not recover anything as she had no interest in the premises.

The law of nuisance protects only ordinary or normal persons. A plaintiff who is abnormally sensitive, e.g. because of old age or heart as no special protection and cannot recover in nuisance for which a normal person would not have suffered. Similarly, a person who has put his premises to a use or trade which is delicate or sensitive cannot recover in nuisance where it is proved that the suffered would not have arisen if the premises had been put in ordinary use or trade:

Robinson sources and grounds whereof are stated herein.. Kilvert, (1988).

The plaintiff carried on an exceptionally delicate trade in which he used an equally delicate stock of paper. This stock of paper was damaged by heat from the defendant's premises below. The heat was required for the defendant's business of paper or manufacture. Held: The plaintiff could not recover in nuisance as the damage would not have occurred if he were carrying on an ordinary trade: and in any case the defendant's use of his property was reasonable.

The Defendant in Nuisance:

The person liable in nuisance is primarily the occupier of the premises which are the source of the nuisance, including a tenant; liability does not necessarily fall on the owner of the premises, although he too may be successfully sued:

Mint V. Good (1951)

A boy of 10 years was walking along a public foot path when collapsed on him and injured him. The defendant, the owner of the premises from which the wall collapsed, had let the premises in question to tenants; but the plaintiff sued the defendant himself. Held: The defendant was liable.

Adopted Nuisance:

Where a nuisance is caused by one person but is adopted by another, the person so adopting it is liable and cannot plead that the nuisance was not created by him:

Sedleigh-Denfield V O'Callaghan, (1940)

A trespasser placed pipe in a ditch which was on the defendant's land, without the knowledge or consent of the defendant. The pipe was meant to carry off rain and all is downwash. When the defendants became aware of the pipe they used it to drain their own field. Subsequently the pipe became blocked and the water overflowed onto the plaintiff's land. Held: The defendants were liable in nuisance, because they had adopted the trespasser's act as their own.

Defences:

i. **De Minimis Non Curat Lex (or Triviality);**

A person aggrieved by a nuisance can only maintain an action where the damage suffered is so trivial, minor or negligible that no reasonable person would have cause to complain , no such action may be maintained; and if sued the defendant may plead 'de minimis no curat lex'

ii. **Reasonable Use of Property**:

If the defendant can prove that the nuisance complained of resulted from a reasonable use of his property, as in Robinson V. Kilvert discussed above, this will to some extent afford him a defence.

But this defence is not available where, as in Hollywood Silver Foxes V. Emmett (see above) the defendant's act is proved to have been motivated by malice.

Note: whether the use to which the property was reasonable in the circumstances is determined from the standpoint of the victim of the nuisance, because the essence of this tort is that no person ought to be wrongfully disturbed in the use and enjoyment of his land.

iii. Prescription:

A prescription right to continue a nuisance is acquired after twenty years. Thus, where a nuisance has been committed on the plaintiff's land form a continuous period of twenty years, the plaintiff cannot thereafter maintain an action in respect of the nuisance; and if he does, the defendant may plead prescription in defence.

iv. Public Benefit:

Public benefit, as a defence to an action brought to remedy a nuisance, has only a limited application. Private rights must generally be respected. The only exception is where there is statutory authority to derogate from such rights. But even then there is need to act reasonably and within the statutory limit' otherwise the person acting will be liable in nuisance, notwithstanding that his act was intended to benefit the public. Thus, where an authority had general powers to provide hospitals and it set up a fever hospital in a heavily populated area, it was held liable to people in the neighbourhood (the hospital could have conveniently been set up elsewhere):
Metropolitan Asylum District V. Hill (1891).

v. General Defence:

Remedies:

i. **Abatement:**

This remedy is by way of self-help. A person aggrieved by a nuisance is at liberty to abate (or stop) it. But the act of abatement must be peaceful and, where feasible, after notice to the tortfeasor, otherwise, by a dramatic turn of events, the aggrieved party might, in attempt to abate nuisance, render himself liable in nuisance instead!

Chrisstle V. Aveyl (1893)

The plaintiff used to conduct music lessons in his rooms, which was adjacent to the defendant's. The defendant, who was annoyed by the disturbance, continuously banged the partitioning wall

so as to disrupt the plaintiff's music lessons. Held: The plaintiff was entitled to an injunction to restrain the defendant from interrupting the music lessons.

ii. **Injunctions:**

This is a remedy which is granted to the plaintiff to restrain the defendant from committing the nuisance. It is awarded where the nuisance already exists or is impending.

iii. **Damages:**

By this remedy, the plaintiff is entitled to full compensation in monetary terms, so as to make good the damages caused by the defendant's nuisance; as far as money can do it. But the plaintiff can only recover what was reasonably foreseeable as likely to result from the defendant's act. In this connection, regard must be had to the gravity of the nuisance and the extent to which the defendant's act can be said to have been unreasonable, or wrongful.

Davey V. Hurrow Corporation, (1958)

The plaintiff's house was damaged by the penetration of roots which came from trees on the adjoining land of the defendants. The plaintiff brought an action for damages nuisance. Held: The plaintiff was entitles to succeed in his action.

Note: The above case observed that if the trees encroached onto adjoining land, whether by branches or roots, and caused damage, an action for nuisance would lie and it was immaterial whether the trees were planted or self-grown.

3.9.3 Negligence

Negligence is one of the most important torts in the law. It was defined by Judge Alderson in case o Blyth V. Birmingham Waterworks Co. (1856) in the words:

"The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

As a tort, negligence consists of the following three elements:

1. The Duty of Care
2. Breach of the Duty of Care
3. Injury to the Plaintiff

The Duty of Care:

Lord Atkin defined a duty of care in Donohue V. Stevenson (1932) as the duty to take reasonable care to avoid acts or omissions reasonably foreseeable as likely to cause injury to your neighbour. This raises the question: who is my neighbour? Lord Atkin goes on to say that your neighbour in law is a person who is so closely and directly affected by your act that you ought reasonably to have him in your contemplation.

In the case of driver every other road user (including his own passenger and also a pedestrian) is his neighbour in law; the driver owes all these other duty of care; the duty to have regard to them and to drive or use his vehicle safely. An employer's neighbour system of work. A patient, too, is a neighbour in law to the hospital authority responsible for his treatment: the hospital owes him a duty to avoid act that might injurious to his health. Also, an occupier of premises owes his visitors a duty to maintain the premises in a safe condition or good state of repair, while a manufacturer or producer of goods owes his consumers a duty to ensure that his goods are free from anything that might cause damage or injury to the consumers.

Professionals like advocates, accountants, doctors, bankers, values, stock brokers e.t.c owe their clients a duty to take reasonable care in the transaction of the client's business, failure to do which may entail liability in negligence. Indeed, the circumstances in which a duty to care may arise, and with it liability in negligence, are numerous and cannot all be enumerated here.

Duty of care and standard of care:

It is important to distinguish between the duty of care and the standard of care. The duty of care, as we have seen, answers the question whether the defendant was under any legal obligation towards the plaintiff. The standard of care, on the other hand, is a yardstick by which the defendant's conduct is measured; it answers the question whether the defendant did what a

reasonable man would have done in the circumstances. Thus, the standard of care required of every person is that of the reasonable man.

The duty of care is said to be breached where the defendant fails to exhibit that standard of care required of him. In order words, the defendant is said to have breached his duty of care where a reasonable man in his position would not have been done what he id.

It remains to consider who is a "reasonable man" Generally, a reasonable man is a man of ordinary prudence. At least one judge has described him is the "man on the city bus". Thus, in looking for the reasonable man we do not look for a person possessed of any special attributes or qualities; but it all depends on the circumstances of each case. In an accident case, for instance, the question to be asked is: What would a reasonable driver, properly directed himself, have done in the circumstances? In which case what has to be borne in mind done in the ordinarily prudent driver, not necessarily one who has been to a driving school. But where a person professes to have some specialized knowledge or skill, e.g. an advocate, accountant or a doctor, the standard of care required of him is not that of the man on the city bus; rather he must do what a reasonable advocate, accountant or doctor, properly directing himself, would have done in the circumstances.

Injury to the Plaintiff

Proof of the existence of a duty of care on the part of the defendant, and its breach by the defendant, and its breach by the defendant, is not enough to establish liability in negligence. The plaintiff must go further and prove that he has suffered damage, or injury, as a result of the defendant's breach of his duty of care. But even then, the plaintiff can only recover damages for injuries suffered if a reasonable man in the defendant's position ought to have foreseen that his act or omission would result in injury to the plaintiff. The test applied is therefore that of foresee ability. Any injury that was not recovered by the plaintiff.

Cases on Negligence Generally:

Donoghue V. Stevenson. (1932)

A man bought from a retailer a bottle of ginger-beer manufactured by the defendant. The man gave the bottle to his lady friend who became ill from drinking the contents. The bottle contained the decomposed remains of a snail. The bottle was opaque so that the noxious was refilling her glass. The consumer sued the manufacturer in negligence. Held: (by the House of Lords): that the manufacturer was liable to the consumer in negligence.

Bourhill V. Young (1943)

The plaintiff, a pregnant woman, heard the noise of a road accident some distance away and walked to the scene. On reaching there she suffered nervous shock and subsequently miscarried. Held: The plaintiff could not recover in negligence because the injury she suffered, 'or the manner in which it was caused, was not foreseeable.

Note: Had the plaintiff not walked to the scene of the accident she would not have suffered the injury complained of. Her injury was therefore not foreseeable. Compare the following two cases:

Dulien v. White & Sons, (1901).

The plaintiff a pregnant woman, was sitting behind the counter of her husband's bar when suddenly a horse was driven into the bar. Fearing for the personal safety she suffered nervous shock and gave birth to a premature baby. Held: The plaintiff was entitled to recover in negligence.

Hambrook V.Stokes, (1925).

The defendants left their lorry at the top of a steep hill. Soon, it began to run away down the hill. The plaintiff's wife, who had left her children round a corner, received a severe nervous shock for fear of her children' safety; and as result, she died. Held: The defendant was liable.

Fatal accidents where the Victims of Negligence is dead:

Negligence sometimes results in the death of the victim. In such cases, obviously the victim himself cannot issue. But this does not mean that the tortfeasor is left free. The action is brought for the benefit of the members of the victim's family and may be instituted by his execute or administrator or by and in the names of the members of his family.

Proof of Negligence:

Like in any other civil action, the burden to prove negligence generally lies on the plaintiff, he must prove that the defendant owed him a duty of care, that the defendant has breached that duty and that he (the plaintiff) has suffered damage in consequence. In certain cases, however, the plaintiff's burden o proof is relieved by the doctrine of 'Res ipsa loquitur', where is applicable.

Res ipsa loquitur literally means: "The facts speak for themselves". This is so where an accident occurs in circumstances in which it ought not to have occurred; e.g. where a car traveling on a straight road in clear weather and good visibility suddenly swerves off the road overturns; where a crane suddenly collapses; where a barrel of flour suddenly drops from a warehouse; where a heavy load suddenly falls off a moving vehicle; e.t.c. in all these (and other like) cases the accident ought not to occur unless there was negligence on the part of someone presumably the defendant. An explanation from the defendant in therefore called for accordingly.

Where the circumstances of a particular case are res ipsa loquitur, there is an inference of negligence on the part of the defendant, i.e. the defendant is initially presumed to have been negligent. Because of this, a provisional burden is put on the defendant to give reasonable explanation as to how the accident might have occurred. In the absence of such explanation there is nothing to rebut the presumption of negligence and the defendant is accordingly held liable

(Embu Public Road Services Ltd. v. Riimi, (1968).

Res ipsa loquitur is a rule of evidence not of law. It merely assist the plaintiff(where applicable) in proving negligence against the defendant But before it can be applied , three conditions must be satisfied:

1. The thing inflicting he injury (e.g. a vehicle) must have been under the control o the defendant or someone over whom the defendant exercises control (e.g. his driver).

2. There must be no evidence or explanation as to why or how the event occurred.
3. The event must be such that it could not have happened without negligence.

Below are some East African cases on res ipsa loquitur:

Msuri Muhhiddin v. Nazzor bin Seif, (1960).

A bus in which the plaintiff was traveling overturned when both the offside rear tyres burst, and as a result the plaintiff suffered personal injuries. There was evidence that the bus was not at the material time being driven at an excessive speed and that the second defendant (the driver) before driving had satisfied himself that the tyres were good with tread still on them and therefore had no reason to believe that they were unsafe. Held; 1) The doctrine of res ipsa loquitur applied and the defendants could only escape liability if they could show that there was no negligence on their part which contributed to the accident or that their was a probable cause of the accident was due to circumstances beyond their control. (2) Since the bus was being driven at a reasonable speed and had been checked to ensure that the tyres were good, the defendants had discharged the burden imposed on them by the doctrine of res ipsa loquitur and could not beheld liable under the doctrine.

Contributory Negligence:

Of all the defences available to a defendant in an action for negligence, contributory negligence deserves special mention. Contributory negligence means any act or conduct of the party injured which may have contributed to the injuries he received.

Previously, where the plaintiff partly contributed to his own injury in addition to the defendant's act, the plaintiff thereby lost his right of action and could not sue the defendant. The common law was changed in England in 1945 by the Law Reform (Contributory Negligence) Act. I n Kenya, it was changed by the Law Reform Act (Cap. 26). The present law provides:

> *"Where any person suffers damages as the results partly of his own fault and partly of the fault of any other persons, a claim in respect of that damages shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect*

thereof shall be reduced to such extent as the court thinks and equitable having regard to the claimant's share in the responsibility for the damages".

The position is the same as in fatal accident cases. If, for instance, the court would have awarded damages of sh. 100,000 but the plaintiff is found to be 30% guilty of contributory negligence, liability, will be apportioned between the plaintiff and defendant. In this case, the recover s h. 70,000 only from the defendant. He cannot recover the remaining sh. 30,000 because he himself was responsible or that part of the damage. The rule of contributory negligence does not apply in the case of young children because they knot be guilty of contributory negligence.

Contributory Negligence of Employees:

The Factories Act (Cap. 514) makes provisions relating to the guarding of dangerous machinery. If a worker is injured because a machine is not properly guarded, he may sue his employer for breach of statutory duty and/or negligence. The Act imposes many duties on employers, but the breach of these duties does not always give a civil remedy. Any omission by the employer will render him liable to his employees, though he can plead contributory negligence as defence.

Negligent Misstatement:

Previously, the general rule was that a person was liable of negligent acts but not for negligent misstatements.

In Candler V. Crane, Christmas & Co. (1951), it was held that an accountant who negligently prepared certain accounts for a particular transaction was under no liability in tort in respect of those accounts, even though a plaintiff in reliance on the accounts invested money in a company and suffered financial injury as a consequence.

At present, any negligent misstatement is also actionable in law of tort if this statement leads to say financial loss incurred by the person who acts believing such a statement. This was made in the case:

3.9.4 Defamation

Meaning of "Defamation"

The tort of defamation is constituted by the publication of a false statement, without justification, which tends to lower the plaintiff's reputation in the estimation of right-thinking members of society or to injure him in his office, trade or profession, or which causes him to be shunned or avoided. No person should therefore publish a false statement which adversely affects the reputation of another, if such statement is without justification; or he may do so only at the risk of incurring liability for defamation. Instances of defamation are given in the cases cited below.

Elements of Defamation:

1. The defendant must have made a false statement. This is important because no action may be maintained by the plaintiff on the basis of a true statement.
2. The statement must be defamatory. This means that it must be such that its effect is to arouse odium, contempt or ridicule from right-thinking members of society. In other words it must tend to lower the reputation of the person referred to in the estimation of such members of society. Thus, where A makes a statement that B has VD or AIDS, or that B is a criminal or a crook, or untrustworthy e.t.c., and right-thinking members of society react to the statement by shunning or avoiding B, or ridiculing him e.t.c., clearly such statement is defamatory and A may only escape liabilitly, if he can successfully rely on one or more of the defences which are discussed below.

Function of the Law Defamation

The law of defamation protects a person reputation. Every person has right to a good name and no one should unduly interfere with this right, it also protects a person's business interest. This is why a false statement which tends to injure the plaintiff in his trade, occupation or profession is a actionable in defamation.

Types of Defamation

a). Slander:

Defamation in a transient or non-permanent form, including defamation by word of mouth, is known as slander. As already pointed out, slander is actionable only upon proof of damage, the plaintiff's action can be sustained only if he proves that he has suffered some damages as a result of the defendant's defamatory statement. In exceptional circumstances are as follows:

1. Where the statement imputes a criminal offence it is punished by imprisonment.
2. Where the statement imputes a contagious disease on the plaintiff:
3. Where the statement imputes unchastity on a woman.
4. Where the statement imputes incompetence on the plaintiff in his trade, occupation or profession.

After a reporter form the defendant newspaper had visited the Lord's Bar a statement appeared in the paper alleging that all the ladies in that bar had V.D. (veneral disease) and that the manager of the bar employed only such ladies. The proprietor of the bar and one of the bar-maids sued. Held: The plaintiffs were entitled to damages and there was not need to prove damage.

b). Libel:

Libel differs from slander in the following respect. First, it is defamation in a permanent or a non-transient form, including written matter like a letter or an article, scandalous pictures (particularly where they are accompanied by a defamatory statement), film or news tapes e.t.c. Where defamatory matter is dictated to a secretary and she subsequently transcribes it, the act of dictation constitutes a slander while the transcript is a libel.

Repetition

Every repetition of defamatory matter constitutes a fresh cause of action and anyone who repeats it may sued. A person who takes part in the distribution of such defamatory matter, whether by way of sale (in the case of a newspaper) or otherwise, is equally liable for defamation.

Defamation of Deceased Persons:

Defamation of a deceased person is not a tort but the person responsible may be a prosecuted criminally if it is intended to hurt the feelings of the deceased's family or near relations.

A number of **defences** are available to a defendant sued for defamation. The most obvious ones arise from the elements of the tort. Thus, a defendant may in appropriate circumstance plead that there was no publication of the matter complained of, or that it does not refer to the plaintiff, or (in ordinary cases of slander) that no damage has been suffered by the plaintiff. In addition, the defendant may avail himself at least one of the general defences e.g. consent of the plaintiff to the publication of the matter complained of. Besides these, there are certain defences which have particular relevance to this tort:

(a) Justification:

Truth, or justification, may be pleaded as a defence where the matter complained of is true and the defendant fails to establish the truth of the matter, the case against him becomes more serious and aggravated damages may be awarded against him.

(b) Fair comment:

Fair comment on a matter of public interest is another defence liable the defendant in a defamation suit. There must be facts truly stated, on the bases of which a comment is made; and the fact must not be mixed up with the comment in such a way that it is difficult to distinguish the one from the other.

(c) Absolute Privilege:

Certain matters are not actionable at all in defamation, and are said to be absolutely privileged. They include statement made by judges or magistrates in the course of judicial proceeding as well as those made by members of parliament in the course of a parliamentary debate, and also communications between spouses.

(d) Qualified Privilege:

An occasion is privilege, according to Pullman v. Hill Ltd. (1891) "when the person who makes the communications has a moral duty to make it to the person to whom he does make it, and the person who received it has an interest in hearing it."An example is where a Head of Department makes a report to his superior about a subordinate official in his Department. He has a duty to make such communication to his superiors and the superiors have a corresponding duty (or interest) to receive it.

e). Apology or Offer of Amends:

The defendant is at liberty to offer to make a suitable correction of the offending statement coupled with an apology and/or notice of persons to whom the statement has been published that the words are alleged to be defamatory of the plaintiff.

Remedies:

The following remedies are available to the aggrieved party on the publication of defamatory statements:

a). Damages:

In actions of defamation, the plaintiff is entitled to recover damages for injury to his reputation and also to his feelings; injury to feelings is usually assumed and the plaintiff should recover damages for mental pain and suffering and anxiety arising out of his fear of the consequences of the publication, in addition to compensation for the insult suffered and the pain of false accusation as well as the irritation and annoyance experienced as a result of the defamation. The extent to which the defamatory matter is circulated is relevant in determining the quantum of the damages. But the plaintiff must take steps to mitigate the damage e occasioned by the defamatory statement he is entitled only to nominal damages: Sekitoleko v. Attorney General (1978). A failure by the defendant to withdraw or retract the defamatory statement, or to publish an apology, entitles the plaintiff to aggravated damages: Adimola v. Uganda Times (1978).

b). Apology:

An apology, particularly where it is not equivocal, is another remedy available to the plaintiff. This is because it has the effect of correcting the impression previously made by the offending statement about the plaintiff.

c). Injunctions:

The court may also grant an injuction i.e. to issue the orders for restraining the publication of a libel. But the plaintiff must for prove that the defamatory statement is untrue and its publication will cause irrepairable damage to him.

Limitation of Action:

The Limitations of actions (cap.22) contains the period limits within which the actions in tort can be brought. This act provides:

i. An action in tort must be brought within three years of the cause of action occurring. Where the damage arising from the tort does not become immediately apparent, the tie begins from the date of damage accruing.
ii. Where the plaintiff is under disability (such as infancy or insanity) at the time when the tort is committed, time does not begin to run until disability ceases.
iii. Where the tort consists of continuing wrong, anew cause of action a rises daily from when the tort is committed, and the plaintiff can recover damages for any damage suffered within the limitation periods.
iv. Where the right of action is based on fraud, or the right action was concealed by fraud, limitation will run from the date of discovery, or from the time of plaintiff could have discovered it within reasonable ordinary diligence.
v. An action to recover a contribution from a joint tortfeasor under the law Reform Act (cap.26) cannot after the end of two years from the date of which that right accrued to the first tortfeasor.
vi. Where there have been successive conversion of goods cease after the end of three years from the date of first conversion

The period of limitation in cases of libel and slander is twelve months (Defamation Act. Cap. 36)

Survival of Actions:

A common law maxin is "actio personalis moritur cum persona."
It means a personal right of actions dies with the person. Thus it was not possible to bring an action for personal wrongs of a deceased person. This general rule was abolished by the Law Reform Act (Cap.26) of Kenya. This act does not apply in cases of defamation, seduction or to claims for damages on the grounds of adultery. In all other cases, the Act provides:

(a) Where an action exists against a person at his death, it survives against his estate, provided that proceedings had been commenced before his death, or that proceedings are taken within six months after his personal representatives have taken out representation.
(b) Where a right of action exists for the benefit of a person, it survives his death, subject to the limitation periods in the limitation of actions Act (Cap.22).

Passing off:

When a person passes of his goods or business as those of another reputable business firm, it is known as a tort of passing off. This tort can take the following forms:

(i) Using the name of a reputable business firm.
(ii) Imitating a trade mark, description, wrapping etc.

The tort results in damaging the business interest of a firm. In these cases, the plaintiff may sue not only for damages, but may ask for an injunction also.

Malicious Falsehood:

This tort is committed when a person makes a false and malicious statements and such statement cause a financial loss to another person. These statements may relate to the proprietary interest of

another person. For example, if 'X' makes an allegation that 'Y' is offering certain goods for sale in infringement of a patent right owned by 'Z' this statement is not true.

The essentials of malicious falsehood are

(a) The statement of false.

(b) There is malice (i.e. ill-motive).

(c) It tends to make others act on the basis of this statement.

Revision questions

i) Explain the function of the law of torts

ii) Describe the nature of tortuous liability

iii) Describe the general defences available to a defendant in case of a breach of tort

Further reading

i) Tudor. J, (1988) *The Law of Kenya,* Kenya literature bureau, Nairobi, Kenya. Pages 192-233

ii) Miller.R,Gaylord.j (1999) F*undamentals of Business Law,* West Educational Publishing Company, USA. Pages 78-100

iii) Hemphill.C Long.J (1994*) Basic Business Law* A Pearson Publishing Company,USA. Pages 128-146

iv) Ogolla J.J (2005) *Business Law,* English Press Nairobi, Kenya. Pages 302-324

v) Saleemi.N.A (2010)*General Principles of Law Simplified*, N.A Saleemi Publishers Limited ,Nairobi, Kenya. Pages 203-267

CHAPTER FOUR

4.0 CONTRACT OF EMPLOYMENT

General Objective

By the end of the lesson the learner should be able to explain the importance of employment act in determining the relations between employers and employees.

Specific objectives

a) *By the end of the lesson the learner should be able to explain the provisions on various types of contracts of employment*
b) *By the end of the lesson the learner should be able to explain the provision on termination of various types of employment contracts*
c) *By the end of the lesson the learner should be able to explain the provision of employment contract on various types of leave entitlement for employees*
d) *By the end of the lesson the learner should be able to explain the provision on pay issues in employment Act*

4.1 Introduction

In Kenya, employment is governed by the general law of contract, as much as by the principles of common law. Thus, employment is basically seen as an individual relationship negotiated by the employee and the employer according to their special needs. Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship. These laws define the terms and conditions of employment, and consist mainly of four Acts of Parliament:

The Employment Act (Cap. 226) and the regulation of Wages and Conditions of Employment Act (Cap. 229) make rules governing wages, housing, leave and rest, health and safety, the special position of juveniles and women and termination of employment. The latter Act, in

addition, sets up a process through which wages and conditions of employment can be regulated by the Minister.

The Factories Act (Cap. 514) deals with the health, safety and welfare of an employee who works in a factory.

The Workmen's Compensation Act (Cap. 236) provides for ways through which an employee who is injured when on duty may be compensated by the employer.

The Employment Act does not make any provisions for wages in general. The minimum wage is dealt with by the Regulations of Wages and Conditions of Employment Act.

4.2 Unlimited and fixed-term contracts of employment

Employment contracts may be for fixed or unlimited periods of time. If an employment contract specifies a fixed period of employment, the contractual relationship is automatically terminated at the end of this period, without being considered a resignation or a dismissal. Under section 15 of the Employment Act, such a contract may be prolonged for a period of service up to 1 month, if the employee is engaged in any journey. Until the very recent past most female civil servants and parastatals staff were employed on fixed term contract.

In general, temporarily and fixed term employed workers enjoy all the rights of an employee working on permanent terms, except those that are excluded explicitly (such as entitlement to pensions) or by the nature of a short term assignment (such as annual leave).

An employment contract, which does not specify a fixed period of duration, is considered to be for an unlimited period of time, but can be terminated by notice of either party. However, in the organized sector collective agreements which give workers tenure limit the employers' ability to discharge and end the employment contract.

Other limitations on terminating an individual labour contract are the principle of good faith and the requirement of non-discriminatory reasons.

Under section 14 (1) of the Employment Act it is a legal requirement that certain contracts of service be made in writing. These are contracts:

- For a continuous period of 6 months;
- Which are not continuous, but for which the periods still add up to six months; and
- In which the task to be performed may last for six months.

Where a contract is in writing, it must carry a signature or a fingerprint of the employee showing that she or he has agreed to its terms. There must also be a witness who is not the employer. It is the duty of the employer to make sure that the contract is written when this is required by the law.

4.3 Special Contracts of Employment

4.3.1 Casual Employment and Piecework employment

Both types of employment are defined under section 2 of the Employment Act. The "casual employee" is "an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time", and Piece-rate "means any work the pay for which is estimated by the amount of work irrespective of the time occupied in its performance". Basically these categories of workers enjoy to a large extent the same rights as other employees, but may be excluded from many benefits, such as leave, medical cover or housing.

4.3.2 Apprenticeship Contracts

Apprenticeship contracts that primarily intend to train young people in a profession are considered contracts of employment. The apprentice therefore enjoys all the rights and suffers all the obligations of an employee, subject to the terms of the contract. The only distinction between an apprentice and an employee is that the 'full' employment of an apprentice depends on his or her successful completion of the training. Apprenticeships in the industrial sector are governed by the Industrial Training Act, which provides that the rules and principles governing the must be applied, unless the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the vocational training being undertaken.

The minimum period of an apprenticeship contract under the Industrial Training Act, section 2, is four years of service.

4.3.3 Probation

Kenyan statutes do not relate to trial periods for individual labour contracts. However, collective agreements generally establish a trial period, after which the worker receives tenure.

Trial periods range between 3 weeks (under the Regulation of Wages (Tailoring Garment Making and Associated Trades) Order) and 3 years (the latter in the civil service). Government workers receive tenure according to the requirements set out in the Civil Servants Law (Appointments) and the Civil Service Rules, which are determined by the Civil Service Department of the Government.

An employer may dismiss the worker during the trial period or at its conclusion, depending on the contract terms. Nevertheless, this termination of contract must be done in good faith. When the dismissal is unfair or causes the worker unusual injury, the court may award him damages.

4.4 Suspension of the contract of employment

Under the Trade Disputes Act the labour contract is suspended if a worker participates in a lawful strike or is affected by a lawful locked out. Therefore, the employee does not violate his or her contractual obligations to his or her employer when he or she participates in a strike. Likewise, lockouts do not terminate the employment relationship. When the labour contract is suspended by worker participation in a strike, the employer is not required to pay wages, since no work has been performed. Industrial Court judgements have held that an employer is not required to pay wages when the labour contract is suspended because of a strike.

4.5 Termination of the Contract of Employment

4.5.1 Termination by Notice

(i) Statutory regulations

Under the Employment Act, section 14 (5) “every contract of service not being a contract to perform some specific work, be deemed to be

(i) Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(ii) where the contract is to pay wages or salaries periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the given of notice in writing."

This sub-section does not apply in cases when the contract itself, or a given collective agreement, requires a longer period of notice. If an employer does not give notice, he or she should pay to the employee an amount equal to his or her wages for that period.

(ii) Rules of the Industrial Court

Practice in the Industrial Court has produced some rules, thereby modifying the strict regulations of the Act. The period of advance notice for employees who have worked for five years or less has generally been adjusted to a minimum of one month. When the employee has worked for more than five years, however, it is at least two months. And the notice must be in writing.

Collective agreements normally contain these rules too.

4.5.2 Summary Dismissal

i. Statutory regulations

Under section 17 of the Employment Act, a summary dismissal is justified after "gross misconduct", when a very serious wrong has been proved. The employee is guilty of such misconduct if he or she (section 17 (a)-(g)):

(a) Is absent from work without permission or good excuse;
(b) Is so intoxicated that cannot do their work properly;
(c) Deliberately neglects or ignores the work, or carries it out improperly;
(d) Uses abusive or insulting language;
(e) Disobeys orders from persons with authority;
(f) Is lawfully arrested for an offence punishable by imprisonment, and is not within 10 days

either released on bail or otherwise lawfully set at liberty;
(g) Commits a criminal offence against the employer or his or her property.

ii. Rules of the Industrial Court

Certain procedures have to be followed when such dismissal is being contemplated. First, the employee has to be informed of the claims of gross misconduct. Secondly, the employee has to be called upon and given the opportunity to defend himself or herself against them. Finally, he or she must be informed in reasonable detail of the decision once it is made, and the grounds upon which this is done. The decision should be made honestly and in good faith. There should be no victimization or any unfair labour practices.

4.5.3 General rules concerning termination

i. Statutory regulations

Under section 18 (1) every employer is bound to give to an employee a certificate of service upon any termination, but no reference or certificate relating to the character or performance (Sub-section 2).

ii. Rules of the Industrial Court: Unfair Dismissals

It has now been accepted that adherence to all the requirements of the law in giving notice is not enough. Serious conflicts have been generated when an employee's services have been terminated by the employer, on the grounds which appear to the general body of the work force to be spurious in order to get rid of the person.

The Court will intervene where there is a lack of good faith. At times, an employer may give notice to an employee when in fact she or he is dismissing him or her for some reason that may not constitute adequate grounds for summary dismissal. Under these circumstances the Court may investigate whether there is any victimization, bias or unfair labour practice. Disregard of principles of natural justice may also cause the Court to intervene. It is considered to be unfair to base termination on the race, tribe or belief of an employee. The sex of an employee should be considered only to the extent permitted by the law, and in favour of the employee.

Applying these principles, dismissal may be based on other grounds apart from those mentioned in the Employment Act. An employee may be dismissed on medical grounds. But in cases where the ill health affects only a particular type of work, the employee may be given another type of work which is appropriate in the circumstances. (See among others: Industrial Court, Cause No. 11 of 1996 –Kenya Union of Journalists and Nation Newspapers; Cause No. 23of 1972- Kenya Union of Commercial Food & Allied Workers and Kenya Co-operative Creameries Ltd.)

iii. Restrictions imposed by collective agreements

Collective agreements regulate and limit the employers' ability to discharge workers. Grievance procedures and special dismissal procedures enable the union to represent the workers' interest and negotiate the employers' intent to make an individual or collective dismissal. When agreement is not reached the dispute is often settled in arbitration. Some collective agreements grant the employer the prerogative to dismiss a worker after the consultation and negotiation requirements have been met.

iv. Other contractual rights

There are many rights that an employee may have by virtue of the contract, such as leave (annual, maternity, sick or study), allowances (leave, travelling, acting, duty or any other), medical and overtime payments, bonuses and many others. They become relevant when the employment ceases. Their equivalent in money will be calculated and paid to the employee as part of the termination rights.

4.6 Redundancy and severance pay

In the understanding of the Industrial Court the basic principles that would apply in the event of redundancy were already laid down in the first version of the tripartite Industrial Relations Charter. In addition, "redundancy" is defined under the Trade Disputes Act, section 2, as "loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment". Moreover, redundancy and severance pay on redundancy are common features in collective agreements, defining the length of notice to be given to the union, and the notice period in respect of the employees to be declared redundant.

The individual employee is entitled to two basic rights, severance pay and payment in lieu of notice. The rates of payment may depend on the agreement, but many range from fifteen to thirty days basic wage or salary for every completed year of service. Following the jurisprudence of the Industrial Court it has been accepted that an employer whose position improves, and wishes to employ after a financial crisis, must give priority to the employees formerly declared redundant.

4.7 Remedies in case of unjustified dismissal

Under Kenyan legislation there are two basic rights of a dismissed employee where the dismissal is wrongful: the right to reinstatement and the right to compensation. These rights can be granted separately or together. Reinstatement can only be ordered by the Industrial Court under section 15 (1) of the Trade Disputes Act. In rectifying the jurisdiction of the Industrial Court, the power of reinstatement had been given to the Court in the amendment of the Act in 1971. The Court normally considers all the relevant circumstances applying the principles of good faith, to decide whether reinstatement is justified, such as the length of time since dismissal, whether an employee has been employed elsewhere since dismissal, and the willingness of both the employer and the employee to reinstate and to be reinstated.

Under the law of contract, the general remedy for breach of contract is compensation, but the Court may also grant specific performance or rescission. The amount paid will depend on the circumstances of the case, but is generally based on the monthly or annual earnings of the dismissed person. Under the Trade Disputes Act, section 15 (2), the amount awarded must not exceed the actual financial loss suffered by the employee as a result of the wrongful dismissal, or an amount equal to his or her wages for twelve months. In computing the amount of compensation any earning which the employee has received since the dismissal is being taken into account.

4.8 Resignation

Under the Employment Act, sections 14 (5) and 16, the conditions for termination by notice by the employer apply here. Employees who receive monthly payments must inform the employer one month before they intend to stop working. The contract may provide for a shorter or longer

period. If employees do not give notice, they should pay to the employer the equivalent of the wages for the period of notice.

If, in addition, the workers' resignation violates a contractual obligation to work for a specified period they may be liable for damages that the resignation caused the employer. Such cases are few though, and difficult to prove. Courts will not grant the specific performance remedy to an employer, i.e., they will not compel an employee to work, the employers' only remedy being damages. In general, when an employee resigns he or she is not entitled to severance pay.

4.9 Working Time and Rest Time

4.9.1 Hours of work

Under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, the general working hours are 52 per week, but the normal working hours usually consist of 45 hours of work per week, Monday to Friday 8 hours each, 5 hours on Saturday under the special Orders for different sectors subsidiary to the Regulations of Wages and Conditions of Employment Act. Collective agreements may modify the working hours, but generally provide for weekly working hours of 40 up to 52 hours per week.

Under the Employment Act, section 8, every employee is entitled to at least one rest day in every period of seven days. In many sectors the regular rest-day may not be the Sunday, but another day of the week.

4.9.2 Overtime

Under these statutory regulations overtime shall be payable at the rates of one and one-half time hourly rate on weekdays, and at the rate of twice the basic hourly rate on Sundays and public holidays. There are different Regulations of Wages Orders in force, covering different sectors of the economy.

4.9.3 Annual paid leave

Under section 7 of the Employment Act, every employee shall be entitled to no less than twenty-one working days of annual leave with full pay. Where the employee works for less than a year,

the number of days will be reduced accordingly. This is a minimum and many contracts and collective agreements provide for annual leave of between thirty to forty-five days. In average Kenyan employees enjoy annual leave of 24 days.

For a woman who has taken maternity leave (2 months) in a given year, the maternity leave forfeits her annual leave under section 7 (2) of the Employment Act.

4.9.4 Public Holidays

Kenya has currently 10 public holidays – New Year's Day, Good Friday, Easter Monday, Labour Day, Madaraka Day, Mashujaa Day, Eid-ul-Fitr-Day, Christmas Day and Boxing Day - described by the Public Holidays Act. Where any of these holidays fall on a Sunday, the next working day will be a holiday.

4.10 Maternity Leave and Maternity Protection

Under section 7 (2) of the Employment Act, maternity leave is two months with full pay, provided that a women who has taken two months maternity leave forfeits her annual leave in that year.

The Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, specifies the provision under paragraph 13 (ii) and (iii) which read:

(ii) child birth shall not be deemed to be sickness as provided for under paragraph 12, and the employer shall not be inquired to meet medical costs incurred thereon;

(iii) A female employee who takes maternity leave shall not incur any loss of privileges during such period.

Cash benefits and other entitlements during pregnancy, and breaks for breastfeeding are provided in selective collective agreements, without representing a general trend.

4.11 Other Leave Entitlements

4.11.1 Sick Leave

Under the Employment Act, section 7 (3), an employee is entitled to paid sick leave after a period of two consecutive months of service. Thus, the Employment Act, provides the minimum period of entitlement while the Regulation of Wages Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 12, provides the longest period granted by law.

The minimum period of entitlement is seven days with full pay and seven days with half-pay for every twelve months. The longest period of entitlement is thirty days with full pay and fifteen days with half-pay. The employee is however expected to produce a certificate of incapacity to work signed by a duly qualified medical practitioner.

4.11.2 Compassionate Leave

Under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, compassionate leave is granted to allow an employee to attend to personal misfortunes such as death, accidents or sickness concerning relatives and friends. The number of days he or she gets are deducted from the annual leave entitlement for the year.

4.11.3 Study Leave

Under the Civil Service Code of Regulations public employees are entitled to study leave. Neither the Employment Act, nor the Regulations of Wages and Conditions of Employment Act provide for an equivalent. But in practice, many companies and employers grant employees time off to go for courses, or to prepare for examinations.

4.12 Minimum Age and Protection of Young Workers

The Employment Act, in part IV, accords special protection to juveniles. Under section 2 “juveniles” is defined as a “child or young person”; and “’child’ means an individual who has not attained the age of sixteen years”, whereas “young person” means a person who has not attained the age of 18 years.

With the adoption of the Children Act, 2001, a new and conflicting definition has been established of which defines "child" as any human being under the age of 18 years.

The regulations for juveniles, minors under 18, under the Employment Act, are as follows:

Children under 16 should not be employed in any industrial undertaking or to attend machinery, unless they are apprentices or learners. “Industrial undertaking” means any of the following: any activity which relates to surface or underground extraction (like mines and quarries), any factory and any form of construction and installation (like buildings, railways, roads, tunnels, bridges, canals, sewers, drains, gas work, telegraphic, telephonic or electrical installations, or water works), and to transportation and handling of passengers or goods by road, rail or inland waterway. Section 24 (2) (a)-(d) thereby covers most of the potentially hazardous working conditions.

Young persons under 18 must not be employed in any industrial undertaking at night except in cases of emergencies. “Night” means the time from six-thirty p.m. to six-thirty a.m. (section 28). Employers engaging juveniles (under the age of 18) are required to keep a register (section 31): the labour officer may cancel or prohibit the employment (section 34), or order the medical examination of the juvenile (section 32).

Section 3(1) of the Employment (Children) Rules, 1977, allows the employment of children with the prior written permission of an authorized officer, and that the only restrictions are that such employment should not cause the children to reside away from parents without their approval, that permission for work in a bar, hotel, restaurant, etc., needs the consent of the Labour Commissioner and that such permit should be renewed annually.

4.13 Equality

4.13.1 Gender Equality

The Constitution guarantees the right to equality in Art 82(3): “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to

disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

In the tripartite Industrial Relations Charter (1980) the parties agree on abolishing all discrimination among workers on the grounds of race, colour, sex, belief, tribal association or trade union affiliation including discrimination in respect of: (a) Admission to Public or private employment; (b) Labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the country; (c) Conditions of engagement and promotions; (d) Opportunities for vocational training; (e) Conditions of work; (f) Health, safety and welfare measures; (g) Discipline: (h) Participation in the negotiation of collective agreements; (i) Wage rates; which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.

Yet, the Employment Act, Part IV imposes similar restrictions to the employment of women and the employment of juveniles. Under section 28 women must not be employed in any industrial undertaking at night (the time from six-thirty p.m. to six-thirty a.m.) except in cases of emergencies, and in cases where their work is connected with raw materials which are subject to rapid deterioration, and their work is necessary to preserve the material. Another exception exists for women in responsible positions of managerial and technical nature, or employed in health and welfare services, and not normally employed in manual work. The latter categories of women employees can even be employed on underground work, like women in course of their studies and women who have to enter the underground parts of a mine for any other reason than manual work.

4.13.2Workers with disabilities and persons living with HIV/AIDS

Workers with disabilities are mentioned only in the Regulations of Wages and Conditions of Employment Act, section 18 (1), which allows employment below the minimum wage for persons with disabilities. Further regulations to prevent these groups from suffering discrimination do not exist. As the Anti-discriminatory clauses in the current Constitution are enumerative unlike many other constitutions, not prohibiting discrimination on "any other

ground" in Art 82 (3) of the Constitution, these groups are not legally protected against discrimination.

4.14 Pay Issues

4.14.3 Minimum wage

The Employment Act does not make any provisions for wages in general. The Minimum Wage is dealt with by the Regulations of Wages and Conditions of Employment Act and in the Regulation of Wages Order subsidiary to Chapter 229. A tradition has been established according to which the Minister of Labour and Human Resource Development, in exercise of his or her powers conferred to by section 11 of the Regulation of Wages and Conditions of Employment Act, would order the increment of minimum wages to come into effect May 1st of every year.

4.14.2 Protection of wages

Under the Employment Act, section 4, wages should be paid in Kenyan currency to the employee or to an authorized person. The wages may be paid in kind but this must not be in the form of alcohol or drugs. Also, the Act requires that wages be paid in full, except authorized deductions, permitted by the law (under section 6 of the Employment Act).

4.14.3 Housing

Under the Employment Act, section 9, specified under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 4, an employee is either entitled to reasonable housing accommodation, or to housing allowances that enable the employee to obtain reasonable accommodation. The Employment Act does not say what reasonable housing accommodation is, but gives power to the labour officer to enter into any house in which an employee is living and inspect it.

Summary for the topic

- Nature and types of the contracts of employment
- Termination of contract of employment

- Working hours and rest
- Types of leaves
- Gender equality
- Pay issues

Revision Questions

i) Explain the various types of employment contracts

ii) Explain the general rules regarding termination of employment

iii) Describe the various types of leaves that employees are entitled to

For further reading

i) Miller.R,Gaylord.j (1999) F*undamentals of Business Law,* West Educational Publishing Company,USAPages 460-480

ii) Cheeseman (1998) *Business Law*, A Simon and Schutter Company, New Jersey,USAPages772-775

iii) Hemphill.C Long.J (1994*) Basic Business Law* A Pearson Publishing Company,USAPages 409-411

CHAPTER FIVE

5.0 THE LAW OF CONTRACT

General objective

By the end of the lesson the learner should be able to explain the application of the law of contract in business

Specific objectives

By the end of the lesson the learner should be able to

a) explain the essentials of a valid contract

b) explain how contracts are formed

c) explain the vitiating elements that may affect the validity of a contract

d) list down the remedies incase of a breach of contract

5.1 Introduction

The law of contract is the foundation upon which the superstructure of modern business is built. In business transactions quite often promises are made at one time and the performance follows later. The law of contract lay down the legal rules relating to promises, their formation, their performance, and their enforceability.

The law of contract in Kenya was first based on the Contract Act 1872 of India. This Act does not apply now in Kenya except to contracts made before 1st January, 1962. The law of Contract (Cap. 23) states that the English Common law of contract is applicable since 1st January, 1961. Section 2 (10 of this Act provides:

"Save as may be provided by any written law for the time being in force, the common law of contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and the Acts of Parliament of the United Kingdom specified in the Schedule to this Act to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya".

It means that the common law of England relating to contract, subject to modifications, is applicable in Kenya. The date of reception of the common law of contract is 12th August 1897. English decisions after this date are only of persuasive authority.

5.2 The Nature of Contract

A contract is an agreement of promises which is legally binding or enforceable by law. A contract has been defined by Sir William Anson in the words, "A legally binding agreement between two or more parties, by which rights are acquire by one or more to acts to forbearances on the part of the other or others".

The law of contract imposes an obligation on every person to honour his legally enforceable promises, failure to do which renders him liable to compensate the injured party or otherwise attorn for his conduct. What is intended here is to promote commercial relations and since commerce generally entails individual or personal interactions, the obligation imposed by a contract is, in general, created by the parties themselves. The parties must, however, act within the ambit of the law.

5.3 Essential of Valid Contract

The essential elements of valid contract as follows:

1. **Offer and acceptance**

There must be a 'lawful offer' and a 'lawful acceptance' of the offer, thus resulting in an agreement. The adjective 'lawful' implies that the offer and acceptance must satisfy the requirements of the Contract Act in relation thereto.

2. **Intention to create legal relation**

There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of social or domestic nature do not contemplate legal relations, and as they do not give rise to a contract e.g. an agreement to dine at a friend's house or a promise to buy a gift for wife are not contracts because these do not create legal relationship.

In commercial agreements an intention to create legal relations is presumed. Thus, an agreement to buy and sell goods intends to create legal relationship is a contract provided other requisites of valid contract are present.

3. **Lawful Consideration**

Consideration has been defined as the price paid by one party for the promise of the other. An agreement is legally enforceable only when each of the parties to it gives something and gets something. The something given or obtained is the price for the promise and called consideration.

4. **Capacity of parties**

The parties to an agreement must be competent to contract, otherwise it cannot be enforced by a court of law. In order to competent to contract, the parties must be of the age of majority and of sound mind and must not be disqualified from contracting by any law to which they are subject.

5. **Free Consent**

Free consent of all parties to an agreement is another essential element of a valid contract. 'Consent' means that the parties must have agreed upon the same thing in the same sense. There is absence of 'free consent', if the agreement is induced by (i) coercion, (ii) unduce influence, (iii) fraud, (iv) mis-representation, or (v) mistake.

6. **Lawful object**

For the formation of a valid contract, it is also necessary that the parties to an agreement must agree for a lawful object. The object for which the agreement has been entered into must not be

fraudulent or illegal or immoral or opposed to public policy or must not imply injury to the person or property of another.

7. Possibility of Performance

Another essential feature of a valid contract is that it must be capable of performance. If the act is impossible in itself, physically or legally, the agreement cannot be enforced at law.

All the above elements must be present. If one or more elements are absent then the contract may be void, voidable or unenforceable.

5.4 Classification of Types of Contracts

Contracts may be of various types. These may be classified as under:-

1. Express and Implied Contract

An express contract is one in which the parties specifically agree about the nature and terms of their relationship. There is then said to be an express agreement. For example, if A agrees to sell his goods to B for KSH. 10,000/= and B agrees to buy the goods at that price, there is said to be an express contract for the sale of goods at an agreed price.

On the other hand, there is no specific agreement in an implied contract. The conduct of the parties, as well as all the surrounding circumstances, must be taken into account in order to ascertain whether or not a contract exists. Thus where A hires a taxi and boards it there is an implied contract that the taximan shall convex A up to his destination and that A shall pay such fare is usually paid for that trip.

2. Unilateral and Bilateral contracts

A Unilateral Contract is one in which only one party is bound. It is a rare type of contract which arises, for instance, where there is an offer of a reward. Thus, if 'A' offers a reward to anyone who will recover his lost property, no one is bound to recover the lost property but 'A' himself is bound to give the promised reward to any one who might recover the property.

Most contracts are bilateral. A bilateral contract is one in which both parties are bound. Thus, if A agrees to sell his goods to B and B agrees to buy them at a stated price, both parties are bound. A is bound to deliver the goods to B and B is bound to accept them to pay the price.

3. Valid, Void and Voidable Contracts.

A valid contract is an agreement enforceable by law. An agreement becomes enforceable by law when all the essentials of a valid contract discussed above are present. A void contract is an agreement which is not binding or enforceable by law. This is because it has no legal effect at all and is, therefore, not binding on any of parties. A contract is rendered void in certain cases where both parties were mistaken, where it is prohibited by law of where it is entered with out consideration e.t.c.

A voidable contract is one which is enforceable by law of the option of one of the parties. Usually a contract becomes voidable when this consent of one of the parties to the contract is obtained by undue influence, or misrepresentation. Such a contract is voidable at the option of the aggrieved party of the party whose consent was s caused.

Where there is a voidable contract, the party entitled to avoid it must do so within a reasonable time. This may be done by A notifying the other party, B, that he (A) does not intend to be bound by the contract. Where it is no feasible to give notice, e.g. where B is a rogue whose whereabouts are not known A can still effectively terminate the contract by doing everything possible to show that ho does not intend to be bound by the contract. It is sufficient, for instance, to make a report to the police.

Car and Universal Finance Co. V. Caldwell (1965)

X bought a car from the defendant and paid by cheque. X took the car with him. The cheque bounced the next day, but X had disappeared. The defendant reported the matter to the police and the Automobile Association, requesting them to recover the car. Subsequently, X sold the car to Y, who knew X's title to be defective. Y in turn resold the car to the plaintiffs, who bought in good faith. Held: By setting the police and Auto mobile Association in motion, the defendant had clearly shown that he intended to resend the contract; this meant that the ownership of the car

reverted to him and therefore Y had no title to pass to the plaintiffs. The defendant was therefore entitled to recover the car from the plaintiffs.

The right to avoid the contract is lost if the innocent party, upon discovering the true facts, subsequently affirms it. It is also lost where an innocent third party had acquired an interest in the subject matter of the contract, which is likely to be affected by the avoidance of the contract.

Newtons of Wembley, Ltd. V. Williams (1965)
X bought a car from the plaintiff and paid by cheque. He took the car with him. The cheque was dishonoured, but in the meantime X had disappeared. X subsequently resold the car to the defendant, who bought in good faith. The plaintiff sought to recover the car from the defendant. Held: Title to the car had passed to the defendant; it could not therefore be recovered by the plaintiff.

Notes: The facts in the above two cases are similar. In Caldwell's Case the car was recovered because the innocent purchaser acquired it from a seller who had no title since the contract had already been rescinded; the seller had bought from X in bad faith. On the other hand, in Williams's Case the car could not be recovered because the innocent purchaser has acquired it, in good faith, from a person who had right to sell it.

There are many other instances of voidable contracts, e.g. contracts entered, into under a unilateral mistake, duress or undue influence as well as minors' contracts.

4. Specialty Contracts and simple Contracts.

A specialty contract is also known as a contract under seal. It is an instrument in writing signed and sealed by the party to be bound by it and delivered by him to the person for whose benefit it was made. Thus, writing,, signature, sealing and delivery are the four essential characteristics of this type of contract, of which a Deed is the best example (e.g. a Deed of Conveyance under which property is transferred by one person to another). "Delivery" is used here not in the sense of physical delivery; what is required is an intention to be bound; Vincent V. Premo Enterprises

Ltd. (1969). If A executes a deed conveying his property to B, with an expressed intention that he is to be thereby bound, A will be bound even if the deed was never physical delivered to B. A central feature of this type of contract is that its validity is independent of consideration i.e. B need not have furnished anything of value as pre-condition for enforcing A's promise.

A simple contract is an agreement, express or implied, which gives rise to legal obligations. A simple agreement may be in writing or agreed orally, or even be implied from the conduct of parties. A simple contract may be made also made partly orally and partly in writing.

In England, conveyances of land or leases of land for periods of more than three years, transfers of British ships and gratuitous promises must be under seal.

Section 2 (1) of the Law of Contract Act states that no contract in writing shall be void or unenforceable merely on the ground that it is not under deed. But such contracts, if not made under deed must be supported by consideration.

The following **contracts must** be in writing:-

a) Bills of Exchange and Promissory Notes.
b) Representations regarding credit worthiness or character.
c) Acknowledgement of Statute Barred Debts.

The following **contracts must** be **evidenced** by writing:

a) Contracts of Guarantee
b) Contracts for the Sale of Land
c) Contracts for the Sale of Goods over Two Hundred shillings
d) Employment Contracts over one month
e) Hire Purchase Contracts
f) Money Lending Contracts

5). Illegal Contracts and Unenforceable Contracts

An illegal contract is one which is prohibited by law or which contravenes a provision of law or one which ids contrary to public policy. Where both parties are guilty of the illegality they are said to be in *pari delicto* and none of them can enforce the contract. But where only one of the parties is guilty of the illegality, the contract may in certain circumstances be enforced by the innocent party. Thus an agreement to commit murder or assault or robbery would be illegal.

Void and illegal contracts, both cannot be enforced by law but the two differ in some respects. All illegal agreements are void but all void agreements are not necessarily illegal. For example, an agreement with a minor is void as against him but not illegal. Similarly, when an agreement is illegal, other agreements which are incidental or collateral to it are also considered illegal, provided the third parties have the knowledge of the illegal or immoral design of the main transaction. For example, 'A' engages 'B' to murder 'C' and borrows KSH. 5000 from 'D' to pay 'B'. We assume 'D' is aware of the purpose of the loan. Here the agreement between A and B is illegal and the agreement between A and D is collateral to an illegal agreement. As such the loan transaction is illegal and void and D cannot recover the money. But the position will change if D is not aware of the purpose of the loan. In that case, the loan transaction is not collateral to the illegal agreement and is valid contract.

An unenforceable contract is one which though valid, cannot be enforced because none of the parties can sue or be sued to it. For instance, section 6 (1) of the Sale of Goods Act (Cap 31) provides.

"A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf"

Unless the conditions laid down in the above provision are complied with, the contract cannot be enforced. The contract itself is valid but its enforceability depends on whether the above provision has been complied with.

6) Contracts *Uberrimae Fidei*

A contract *uberrimae fidel* is one in which only one of the parties has full knowledge of all materials facts, which he is under a duty to disclose. The best example is an insurance contract. The insured is possessed of all facts which are material to the contract; but the insurer has no possession of these facts and the insured is under a duty to disclose them to him. Contracts *Uberrimae Fidei* are said to be contracts of *Utmost good faith,* particularly on the part of the party under a duty to disclose material fact. Any failure to exhibit good faith, or any show of outright bad faith, amounts to a breach of the contract entitling the other party to be relieved from his own obligation under the contract. Other examples of contracts *Uberrimae Fidei* includes:-

(i) Family settlements (where full disclosure is required);
(ii) Contracts for the sale of land (where the seller must disclose defects relating to title);
(iii) Contracts of partnership (where every partner must exhibit utmost good faith in his dealings with the other partner (s).

7. Contracts of Record

A contract of record consists of the judgment of court. Such contracts are formed by an entry on the court records. The rights and obligations of the parties are put on court record and the resultant relationships between them are said to constitute a contract of record. These contracts includes:

(i) Judgment of a Court:-

The previous rights under a contract are merged in the judgment of a court. This judgment constitutes a contract of records between the parties of the contract. We assume 'R' owes 'T'

Kshs. 2,000/= on a contract. 'T' sues 'R' and court issues a judgment that 'T' must be paid by 'R' KSH. 1,500/= In this case, the previous rights become merged in the judgment of the court.

(ii) Recognizances:

In the criminal cases, the court may bind the accused to be of good behaviour and keep peace. The person so bound acknowledges that a specified sum will be paid by him to the state if he fails to observe the terms of recognizance.

In the contracts of record, the element of consent of both parties is absent. For this reason, these contracts are not true contracts.

8. Executed contract

A contract is said to be executed when both the parties to a contract have completely performed their share of obligation and nothing remains to be done by either the party under the contract. For example, when a bookseller sells a book on cash payment it is an executed contract because both the parties have done what hey were to do under the contract.

9. Executory contract

It is one in which both the obligations are understanding, one on either party to the contract, either wholly or in part, at the time of the formation of the contract. In other words, a contract is said to be executory when either both the parties to a contract have still to perform their share of obligation or there remains something to be done under the contract on both sides.

For example, T agrees to coach R, a C.P.A student, from first day of the next month and R in consideration promises to pay to T Kshs. 1,000 per month, the contract is executory because it is yet to be carried out.

10. Quasi-Contracts

This type of contracts have little or no affinity with contract. Such a contract does not arise by virtue of any agreement, express or implied between the parties circumstances. For example, obligation of finder of lost goods to return them to the true owner or liability of person to whom money is paid under mistake to replay it back cannot be said to arise out of a contract even in its remotest sense, as there is neither offer and acceptance nor consent, but these are very much covered under quasi contracts. These are known as quasi contracts because these have certain relations resembling those created by contract. A quasi contract is based upon the equitable principle that person shall not be allowed to retain unjust benefit at the expense of another.

5.5 Formation of a Contract

A contract is formed by an offer by one person and the acceptance of this offer by another person. The intention of both parties must be to create a legal relationship and they must have the legal capacity to make such a contract. There must be also some consideration against the contract between the two parties. The formation of contract involves the following factors:-

a) The offer
b) The Acceptance
c) Consideration
d) Contractual capacity
e) Intention To Create A Legal Relationship

5.5.1 The Offer

An offer is defined as an expression of willingness to enter into a contract on definite terms, as soon as these terms are accepted. It is made by a person known as the offeror and addressed to the offeree. Thus, if A writes to B stating his desire to sell his property to B at a specified price, A is said to have made an offer to B. A is the offeror and B the offeree. An offer may be express (where the offeror specifically makes his intentions known to the offeree, whether in writing or

by word of month), or it may be implied from the conduct of the parties, particularly the offeror. An offer is valid only if its terms are definite, but not where they are vague.

Offer and "Invitation to Treat"

An offer, as defined above, must be distinguished from an invitation to treat, The latter is merely an invitation to make an offer and no contract can result from it alone. The best example is afforded by the display of goods in a shop or supermarket. According to decided cases this amounts to an invitation to treat, not an offer; it is the customer or prospective buyer who makes an offer to the shopkeeper or attendant, or cashier, by picking up the goods and expressing the desire to buy them.

Pharmaceutical Society of Great Bruam V. Boots (1953)

The defendant had a self-service store in which certain listed drugs were displayed on the shelves. It was an offence to sell such drugs unless the sale was done under the supervision of a registered pharmacist. A customer selected some of the drugs from the shelves. The defendants had placed a registered pharmacist on duty at the cash desk near the exit, but not near the shelves. The defendants were charged with the offence of selling listed drugs without the supervision of a registered pharmacist. If the sale took place when the customer picked up the drugs from the shelves, the defendants would be liable; but if the sale took place at the cash desk where the registered pharmacist was stationed, then the defendants were not liable. The court therefore had to determine where the sale took place. Held: The defendants were not liable because the display of goods on the shelves was merely an invitation to treat, not an offer; it was customer who made an offer by selecting the article and taking it to the cashier.

Fisher V. Bell (1960)

A shopkeeper displayed a flick-knife in his shop window with a price tag behind it. He was charged with the offence of offering a flick-knife for sale. The court had to determine whether the shopkeeper's act amounted to offering the flick-knife for sale. Held (Lord Parker, CJ): "It is clear that, according to the ordinally law of contract, the display of an article with a price on it a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract". Since there was no offer for sale, the shopkeeper was not liable.

Another example of an act that amounts to an invitation to treat rather than an offer is to be found in advertisements inviting tenders. The advertiser merely invites tenders for a particular purpose. It is the tenderer who, by his tender, makes an offer to the advertiser and the latter is thereby converted into an offeree; and it is upon the offeree to accept or reject a particular tender. (A tender is an offer for the supply of goods or services).

5.5.2 The Acceptance

An acceptance is an assent to the terms of an offer. It must correspond with the terms of an offer, and it is for this reason that a counter offer, cross-offer or conditional assent is not an acceptance in the legal sense of the word. An acceptance may be made in anyway that is expedient, but sometimes the offer itself may dictate the mode of acceptance. For example, the offeree may be required to notify his acceptance in writing or to lodge it at a named place or to a named person, or to communicate it within a specified period of time, e.t.c. Generally, the prescribed mode of acceptance must be adhered to; it is only in exceptional circumstances that an equally reflective mode of acceptance may be upheld.

An acceptance may be express (where the offeree directly assents to the terms of the offer), or it may be by conduct.

5.5.3 Consideration

The offer and acceptance are not enough to bring about a valid and binding contract. In the case of simple contracts, these are required to be supported by consideration, otherwise the contract is void. Specialty contracts are an exception.

Why does the law insist on consideration before a valid contract can be made? The rationale behind this requirement is that the law of contract generally enforces only bargains and not bare promises for which no value is given. This follows from the fact that, the law of contract is generally intended to promote commercial relations. These are relations which necessarily

impose an element of bargain, an element without which there would be no commerce at all. Indeed, it is on this element that the whole doctrine of consideration is centered.
When we talk of bargain, what we have in mind is an exchange of relationship within the context of a money economy. This is clear from the fact that a party seeking to enforce a contract must prove that consideration has moved from him and that it consists of money or money's worth.

Types of Consideration

a) Executory of Consideration

The word executory is used to denote that the promised act is yet to be done. Thus A promises to sell and deliver to B sacks to charcoal in return for a price to be paid by B. Before delivery of the charcoal, A's promise to B is in the nature of executory consideration for B's promise to pay the price. Similarly, before payment of the price, B's promise to A is in the nature of executory consideration for A's promise.

b) Executed Consideration

The word executed is used here to denote that the promised act has already been done. To take the example given above, after A has delivered the charcoal to B, A is said to have furnished executed consideration for B's promise to pay the price. Similarly, after B has paid the price he is said to have furnished executed consideration for A's promise to sell and deliver to him three sacks of charcoal.

Under a given contract, it is possible for the consideration furnished by one of the party to be executory, while that furnished by the other party is executed. Thus, in the above example if it is agreed that A is to deliver the charcoal in a week's time but that B is to pay the price immediately, at that stage consideration furnished by A is executor while that furnished by B is executed.

The distinction between executory and executed consideration is particularly important while considering performance of the contract by the parties and the remedies available to the innocent

party in the event of a breach of the contract by the other party. Thus where B has furnished executed consideration by paying the price but A has failed to deliver the charcoal B is said to have performed his part of the contract and he is entitled to recover the price from A as also to damages from A for breach of contract; whereas if B's consideration was merely executory but he was willing to pay the price, E would be said t be willing top perform the contract ad he would in this case be entitled to damages alone.

c) Past Consideration.

Once negotiations are over and the parties have struck a bargain, any subsequent or fresh promise made by either party in relation to that bargain is known as past consideration. The law is that for d promise to constitute valid consideration is must have been made during the negotiations. As such ,past consideration is not valid consideration for the bargain in respect of which it is given ; it is in fact no consideration at all ands the promises(promised party) cannot rely on it.

After selling a horse to the plaintiff, the defendant promised the plaintiff in the following terms :" in consideration that the plaintiff at the request of the defendant, had bought of the defendant a certain horse, at and for a certain price, the defendant promised the plaintiff that the said horse was sound and free from vice. But the horse proved not to be "sound and free from vice" ands the plaintiff sued on the above Held: The defendant's promise was given after the d sale and without any fresh consideration; it therefore amounted to past consideration, which the plaintiff could not rely on.

Sufficiency of Consideration

Consideration need not be adequate. Freedom of contract demands that the parties must be free to make their own bargain .No court of law will concern itself with the question whether the price agreed upon is worth the goods supplied. In short, the consideration furnished by one party need not be equal or proportionate to that furnished by the other party. Thus, a creditor's forbearance to sue (i.e. a promise not to sue) may be sufficient consideration for a promise given by the debtor relation to a particular debt.

Alliance Bank, Ltd. v Broom (1864)

The defendant owed plaintiff bankers # 22,000 by way of overdraft. The plaintiffs pressed the defendant for payment, as result of which the defendant promised to give security for the overdraft. The defendant failed to provide the security and on being sued pleaded that the plaintiffs had furnished no consideration for his promise. Held: There was an implicit promise of forbearance for the defendant's promise.

But since by definition consideration indicates value, it must be real and not illusory. Thus, where a person is already legally bound (whether by contract or as a matter of public duty) to do a particular thing, a promise such as subsequently made by him to do that same thing is not consideration which, could support any agreement at all. Thus, a policeman discharging his ordinary duties furnishes no consideration for a promise made by X to pay him for protection. Similarly, a person contractually bound to sail a ship home furnishes no consideration for extra pay if all that is done by him is to discharge his contractual obligation:

5.5.4 Intention to Create a Legal Relationship

A contract apparently supported by consideration will not result in a binding contract unless it was the intention of the parties to enter into, or create legal relationship. It, for example, X, promises to take out Y for lunch and Y accepts ad patiently waits for X, there is no legally binding agreement and Y cannot sue X failure to honour his promise.

It is not always easy to determine whether there was an intention to create legal relations. Where the circumstances expressly or impliedly to create such intention, obviously there will be no binding contract. Thus, where it is provided that a particular transaction is not to give rise to any legal relationship but that is to be "binding in honour only" there is no legally binding agreement an none of the parties to the transaction may bring an action on it: Jones V. Vernons Pools, Ltd. (1938). In Rose and Frank Co.V. J. R. Cromption Brothers, Ltd. (1924) a document signed be the plaintiffs and defendants provided (inter lia): "*This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall nor be subject to legal jurisdiction in the law court... but it is only a define expression and record of the purpose an*

intention of he three parties concerned, to which they each honourably pledge themselves with the fullest confidence- based on past business with each other- that it will be carried through by each of he three parties with mutual loyalty and friendly co-operation". It was held that the parties intention was that thee document should not be legally enforceable, and the plaintiff's action could not therefore be maintained

Complications arise where there is nothing on the face of the transaction to negative an intention to create legal relations. Generally there is a presumption that there was such intention, in the case of commercial agreements. This presumption is rebutted by a provision to the case of social or domestic agreements. Here, there is no presumption of an intention to create legal relations; such intention must be specifically proved, otherwise the person seeking to enforce the agreement will fail in his action:

Balfour V. Balfour (1919)

The plaintiff and defendant were husband and wife. The husband, a civil servant in Ceylon, was on leave and he had gone with his wife to England. Towards the end of the leave the wife was in bad health and had to remain in England, while the husband returned to Ceylon. The husband promised her # 30 per month for maintenance during this time. Later, when the husband defaulted, the wife sued him on his promise. Held: The husband's promise did not give rise to legal relations and so the wife's action could not be maintained.

Merritt V. Merritt (1970)

The plaintiff and defendant were husband and wife. Their matrimonial home was in their joint names, and was subject to a mortgage. The husband left the matrimonial home and went to live with another woman. Later it was agreed that the husband would pay the wife # 40 per month out of which she was to pay the outstanding mortgage payments. The husband signed a document stating that *"In consideration of the fact that you will pay charges in connection with (the matrimonial home), until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property to your sole ownership"*. The wife paid off the entire amount outstanding on the mortgage, but the husband refused to transfer

the house into her sole name. Held: The parties had intended to create legal relations; there was therefore a binding contract which the husband had breached.

Note: Domestic agreements are not restricted to those between spouses. They extend to agreements between parent and child (see, e.g. Jones V. Padavation, (1969) and also those between persons who may not infact be relatives. "*Domestic*" is used here are to simply to distinguish those agreements from those which are of a commercial nature.

5.5.5 Contractual Capacity

An essential ingredient of a valid contract is that the contracting parties must be 'competent to contract'. Every person is competent to contract who is of the age of majority and who is of sound mind, and is not qualified from contracting by any law. Only a person who has contractual capacity be a party to a contract. This includes artificial as well as natural persons.

The general rule is that any person may enter into any kind of contract. But special rules supply to the following persons:-

a) Minors
b) Persons of Unsound Mind and Drunken Persons
c) Married Women
d) Aliens or Non Citizens
e) Corporations
f) Co-operative Societies
g) Trade Unions

These special rules are explained below ;

Minors

Minor's contracts are governed by common law rules as modified by the Infants Relief Act 1874. Under the Contract Act (Cap. 23), contracts in Kenya are governed by the common law of

England relating to contracts as modified (interalia) by "the general statutes in force in England on 12th August 1897. It may therefore, be said that the "Infant Relief Act 1874 applies in Kenya.

A contract made by minors may be binding, voidable of void.

These are discussed as under:-

a) **Binding Contracts**

There are tow types of contracts which are binding on minors.

i) Contract for the Supply of Necessaries

Certain things are regarded as "*necessaries*". These are things without which the minor could hardly live; are therefore things which are essential to his maintenance. Under the Sale of Goods Act "necessaries" are defined as "goods suitable to the condition in life of a particular infant or minor, and to his actual requirements at the time of the sale and delivery". Included here are things like food, clothing, and medicine. But whether a particular commodity falls within the category of necessaries depends on the circumstances of a particular case; and in particular items of luxury are excluded. Thus, while a suit may be an item of necessaries in the case of a minor who hails fro a well to do family it might be an item of luxury to a peasant's son, particularly where there are cheaper alternatives within a peasant's means. Once a particular item has been placed within the category of necessaries the next question is: To what extent can the other contracting party enforce the contract on sale against the minor? Under the above Act, a minor is liable to pay a "reasonable price" for goods which are necessaries. He is not therefore necessarily liable for the actual or contract price, and anyone dealing with a minor should bear this in mind as he is likely to lose in case the minor defaults to payment, particularly where the goods were supplied to minor on credit.

It is clear from the definition above that in reckoning whether or no t particular goods are "necessaries" account must be taken of minor's actual requirements at the time of sale and delivery. It must therefore be proved that the minor was not sufficiently provided with goods in

question at the time when they were sold and delivered to him; otherwise the goods are not necessaries and the contract cannot be enforced against the minor.

Nash v. Inman (1908)

A tailor supplied an infant with 11 fancy waistcoats, but the infant failed to pay. The infant was a university undergraduate. His father gave evidence that the infant was adequately supplied with proper clothes according to his station in life. Held: The clothes were not necessaries and the infant was not liable to pay fro them.

The fact that a minor has a sufficient allowance does no prevent him from contracting for necessaries on credit: Burghart v. Hall (1839). The lender is still entitled to a reasonable price for the necessaries supplied by him.

Where a minor gets a loan o buy necessaries, the lender may recover his loan under the doctrine of subrogation, i.e. he does not recover in his own right as lender but instead he stands in the place of the person who supplied the necessaries and it is only in this latter capacity that he may recover the money. However, he will only be able to recover the money to the extent that it has been used to buy necessaries and only to the extent of a reasonable price for the necessaries.

Besides goods, certain services and expenses are also considered to be necessaries. Examples includes lodging, legal advice, and funeral expenses for the infant.

ii) Beneficial Contracts of Service

Besides contracts for the supply of necessaries, minor is bound by a contract of service whose nature is such that, considered as a whole, it is intended for his benefit:

Clements v. London and N.W. Railway Co. (18940

X, a minor, was employed by a railway company as a porter. He joined the company's insurance scheme and agreed to relinquish his statutory right of suing for personal injury under the Employers Liability Act 1880. Though the Scheme fixed a lower scale of compensation, its terms were generally more favourable than those embodied in the Act; the Scheme covered more

accidents in respect of which compensation was payable. Held: The agreement was generally for the benefit of X and it was therefore binding on him.

De Francesco V. Barnum (1890)

X, a minor of 14 years, joined the plaintiff as an apprentice in order that she might be taught stage dancing. The apprenticeship was to an agreed sum per night, that she would not marry and that she would not accept any other professional engagement without the plaintiff's permission. The plaintiff was not bound to engage X or to maintain her while unemployed; the amount payable for X's services was a trifling sum and moreover, the plaintiff was at liberty to terminate the contract in the event of X being found unfit for stage dancing. Held: The agreement as a whole was unreasonable and completely put X at the mercy of the plaintiff; it was not beneficial to X and was therefore not binding on her.

Thus, whether a particular contract is beneficial to a minor and hence binding on him depends on the circumstances of the case. It is binding only when, considered as a whole, it appears to be advantageous or beneficial to the minor. But where the other party to the contract has more to gain from the minor, the contract and his own interests under the contract outweigh those of the minor, the contract will not be considered as being beneficial to the minor and consequently the minor will be bound by it.

Certain contracts can never be enforced against a minor, however beneficial they may be to him. This is particularly so in the case of trading contract. A minor is never by such contracts:

Cowern V. Nield (1912)

X, a minor, set himself up in business as a hay and straw dealer, Y paid for consignment of hay, which X failed to deliver. Y sued X for the price. Held: Being a minor, X was not bound by the contract entered into with Y, since it was a trading; accordingly X was not liable to repay the price to Y.

According to the above case, beneficial contact entered into with a minor is binding on him only if it is either a contract of service or of apprentices, or something close to this. Thus, in Doyle's

Case given above, the contract in question was held to be very closely connected with a contract since it was designed to develop the minor's skill as a boxer.

b) **Voidable Contracts**

Voidable contracts, as far as minors are concerned, are those contracts which a minor is entitled to repudiate either during minority or within a reasonable time after attaining majority age. Apart from the minor's option to repudiate, a voidable contract is similar to a binding one in that in either case the contract must be beneficial to the minor. But in the case of voidable contracts, the subject matter is generally of a permanent nature and the obligations created by the contract are of a continuous nature. The most outstanding examples are: leases agreements (by which the minor acquires an interest in land); contracts for the purchase of shares (by which the minor in a limited company); and contracts of partnership 9by which the minor becomes a partner in a firm).

Like any other voidable contract, a minor's viodable contract remains binding on him until it is duly terminated by him. He must take timely action to avoid the contract, otherwise he will be bound by its terms:-

Davies V. Beynon- Harris (1931)

X, an infant, leased a flat from the plaintiff two weeks before attaining majority age. Three years later, his rent was in arrears and the plaintiff sued him. Held: X had failed to avoid the lease within a reasonable time after attaining majority age and it was now too late to do so; consequently, he was liable to pay the arrears of rent.

c) Void Contracts

Under section 1 of the Infants Relief Act 1874, the following contracts entered into with minors are declared to be absolutely void:-

i) Contracts for the repayment of money lent or to be lent (i.e. loan contracts).
ii) Contracts for goods supplied or to be supplied other than necessaries;
iii) All accounts stated (or "settled accounts").

None of these three types of contract can be enforced against a minor.

Smith V. King (1892)

X, a minor was indebted to Y, who were stock brokers. After X had attained majority age, Y sued him for the debt. Y then accepted two bills of # 50 each in full settlement of the debt. Y later brought an action against X based on the bills. The acceptance by Y of the two bills amounted to a ratification of a debt contracted by him during minority; such ratification was void under the Infant Relief Act 1874 and X was no therefore liable on the bills.

Valentini V. Canali (1889)

X, a minor leased the defendant's house and agreed to pay #102 for the furniture which was in the house by way of purchase. He effected a down- payment of #68 on the furniture. He then occupied the house and used the furniture for some months, after which he repudiated the lease. He then sought to recover the # 68 from the defendant. Held: X was not liable to pay the balance on the #102; but since he had used the furniture for some months there was no total failure of consideration and accordingly he could not recover the #68.

R. Leslie, Ltd. V. Sheill (1914)

X, a minor, fraudulently told the plaintiff that he (X) was of majority age, thereby inducing the plaintiff to lead him @ 400. X for fraudulent misrepresentation or, alternatively, for money. Held: The contract was absolutely void under the Infants Relief Act 1874; X was not liable to repay the money as the alternative claim against him was an indirect way of enforcing the void contract.

Note: Since a loan contract involving a minor is void, a guarantee of such contract is equally void: Coutts & Co. V. Browne- Lecky (1947).

Persons of Unsound Mind and Drunken Persons

A contract made with a person of unsound mind (PUM) is binding on him only if it was during a lucid interval, i.e. an interval during which he is sane. For this purpose, it is immaterial that the other party may have been aware of the PUM's mental capacity. Apart form this, a contract that is entered into a PUM with a person who knows him to be mentally incapacitated, is voidable at he instance of PUM. However, where the PUM has obtained necessaries under the contract, he is, like a minor, liable to pay a reasonable price for the Sale of Goods Act.

As for a drunken person, his contractual capacity is generally the same as that of a PUM. If the drunkenness is, to the knowledge of the other party, such as to render him incapable of appreciating his acts, a contract entered into in these circumstances is voidable at the instance of the drunken person upon sobering up. But like a minor and PUM, he is liable to pay reasonable price for necessaries: Sale of Goods Act.

Married Women

At common law a married woman could not enter into a contract. But under the Law Reform (Married Women and Tortfeasors) Act, 1935, the married women can sue and be sued in contract in the same way as single women.

Aliens or Non-Citizens

Alien, i.e. a person who is not citizen of Kenya, can sue and be sued. Any enemy alien, i.e. a person resident in a country which is at war with Kenya, cannot sue, but if sued can defend an action.

Corporations

In the case of corporation, its contractual capacity is limited by the provisions of is Memorandum of Association. It can only enter into those contracts authorized by the Memorandum; any other contract is ultra vires and cannot be entered into by the corporation. In case of a statutory corporation, it can only do those things which are expressly or impliedly authorized by statute. Any contracts entered into those which are not authorized by statute are "ultra vires" and therefore, void.

Co-operative Societies

A co-operative society registered under the Co-operative Societies Act (Cap 490) can enter into Contracts, and be sued in accordance with the provisions of the Act.

Trade Unions

Section 25 (1) of the Trade Unions Act (Cap. 233) provides:

"Every trade union shall be liable on any contract entered into by it or by an agent acting on its behalf: provided that a trade union shall not be liable on any contract which is void or unenforceable at law".

A registered trade union may sue and be sued and be prosecuted under its registered name.

5.6 Terms of Contract

In the course of negotiations, a number of statements may be made by each of parties. Some of these eventually form part of the contract, while others are left out. Statements which form part of the contract are known as terms of the contract. Those which are made in the course of negotiations but are ultimately left out of the contract are called representations. A representation is a statement that is not within the contract. If it turns out to be a false representation, either fraudulently or innocently made, it is called a misrepresentation. If the statement is within the contract then there is a further problem of deciding whether it is a classified as express and implied terms.

The terms of a contract are as follows;

The rights and obligations of the parties to a contract depend on the terms of the contract, not on mere presentations. It is therefore always important to determine whether a particular statement is a term or a presentation:

Oscar Chess, Ltd. V. Williams (1957)

The defendant offered the plaintiffs a second-hand Morris as part of the consideration for a hire-purchase contract. The registration book of the Morris stated that the car was a 1948 model, and

this was confirmed by the defendant in good faith. But it turned out later that the car was in fact a 1939 model, which should have been valued at lower figure. The plaintiffs who were car dealers sued the defendant for the difference in value. The court had to determine whether his statement as to the age of the car was a term of the contract or a mere representation.

Held: The statement as to the age of the car was not a term of the contract but a mere representation. The plaintiffs were not therefore entitled to recover the difference in value.

Dick Bentley Productions, Ltd. V. Harold Smith Motors Ltd. (1965)

The defendants sold a Bentley car to the plaintiffs, stating that the car had done only 20,000 miles from the time it was fitted with a replacement engine and gearbox. This statement turned out to be false, the car proved unsatisfactory and the plaintiffs sued. The court had to determine whether the defendant's statement as to mileage was to term of the contract or a mere representation.

Held: The statement as to mileage was a term of the contract; and the plaintiffs were entitles to damages for breach of contract.

Looking at the above decisions together, it is clear that it is not always easy to determine whether a particular statement is a term or a mere representation. Generally a statement made by a person possessed of special knowledge or skill is treated seriously, to the extent of being considered a term of the contract; while a statement made by a person not position and will usually be regard as a mere representation. Thus, in Oscar Chess, Ltd. V. Williams the purchasers of the car (the plaintiffs) were themselves car dealers and as such were in a position to ascertain the age of the car independently of any statement made by the defendant.

As car dealers they were possessed of some special knowledge or skill; the defendant's statement would not therefore mean much to them and it was rightly held to be mere representation. On the other hand, in Dick Bentley Case, the defendants had been in possession of the car and were on a better position, compared to the plaintiffs, to tell the mileage which had been done by the car; their statement therefore had to be a term of the contract.

Besides the state of knowledge or skill of the respective parties, the question whether a particular statement is a term or a mere representation may be determined in another way. Where the

parties make an oral agreement, which is subsequently reduced to writing, only those statements which are incorporated in the written agreement will be regarded as terms of the contract, while the oral statements left out of he noted, however, that much depends on the peculiar circumstances each case and no hard and fast rule can be laid down.

Express and Implied Terms

Parties to a contract are free to make their own bargain under the banner of "freedom of contract" They may therefore agree on any terms, as long as these are covered by law. But standard form contracts are in exception. In this type of contract, one of the parties virtually dictates all the terms of the contract, which are contained in a special document presented to the other party for signature- e.g. insurance contracts.

Express terms are those which are specifically (or expressly) agreed upon by the parties, whether orally, in writing, or partly orally and partly in writing.

In the absence of specific (or express) agreement on my matter in a particular contract, certain terms may be treated by law as governing the matter in question. These are known as implied terms. Terms may be implied in a contract by statute (e.g. the Sale of Goods Act implied certain terms in every contract of sales of goods); by custom (e.g. trade customs); or by court (e.g. in contracts of employment in master/servant relationship). Sometimes, an implied term is excluded in the express terms of the contract.

Conditions and Warranties

Not all terms of a contract carry the same weight. Some are important than the others. Those which are regarded as major terms of the contract are known as conditions, while those which are minor or of less consequence are called warranties. The distinction between conditions and warranties is best illustrated by the effect which a breach of each one of them has on the contract. In a contract of sale of goods, for example, a breach of condition by one party entitles the other (innocent) party to treat himself as discharged from his obligations under the contract, while a breach of warranty by one party only entitles the other (injured) party to damages, but not to as right to regard himself discharge from his obligations under the contract.

Both conditions and warranties may be express or implied. But conditions are further sub-divided into condition precedent and condition subsequent.

A condition precedent is one which must be satisfied before a contract can become effective or operational: until such condition is satisfied the existence or operation of the contract is suspended and none of the parties has any enforceable right in the meantime:

Pym V. Campbell (1856)
The plaintiff and defendant entered into a written agreement under which the defendant agreed to buy a share in the plaintiff's invention. But it was understood that the agreement was subject to an approval of the invention by X, an engineer. X later disapproved the invention and the defendant refused to proceed with the agreement. The plaintiff sued. Held: In the absence of X's approval there was no effective agreement and the plaintiff's action could not therefore be maintained.

Again, if A enters into a contract with B is to construct a number of residential houses for A, and A is required to obtain permission from the City Council before the construction work can commence, out the obligation imposed on B by the contract.

A condition subsequent, on the other hand, is a condition whose occurrence may affect he rights of the parties under a contract which is already in operation. For instance, where there is a provision hat a contract is to remain valid until a stated event occurs, the occurrence of the event is a condition subsequent which terminates the contract.

5.7 Is an illiterate person protected by law?
The answer is yes, and the relevant protection is to be found in the illiterates Protection Act. The Act defines an illiterate as *"a person who is unable to read and understand the script or language in which the document is written or printed as the case may be"*. The document must be read over and explained to the illiterate in a language he understands; after this the illiterate, if he is satisfied, appends his mark to it in the presence of a witness whose true and full name and

address must be stated; and after the illiterate has appended his mark his name must be written on the document by the witness. Similarly, any person who writes such document must give his true and full name and address. In either case, there is a presumption that the instructions of the illiterates have been complied with and that the document was read over and explained to him .The burden is on the illiterate to rebut this presumption. He should, for instance, insist on the document being read over to him, other wise he will be bound by it.

5.8 Vitiating Elements or Factors

A contract supported by consideration, in which there is an intention to enter into legal effect where if is affected by a vitiating factor. A vitiating factor (or element) is one which tends to affect the validity of the contract. The vitiating elements consist of:-

a) Mistake

b) Misrepresentation

c) Duress (or Coercion)

d) Undue Influence

e) Illegality

These are explained below

Mistake

Mistake may be defined as an erroneous belief concerning something. It may be of two kinds:

i) Mistake of law

ii) Mistake of fact

Mistake of law

Mistake of law may be further classified as;

i) Mistake of general law of the country,

ii) Mistake of foreign law

iii) Mistake of private rights of a party relating to property and goods.

A mistake of law can never be pleaded as a defence. But mistake of foreign law and mistake of private rights may be treated as mistake of fact.

Mistake of fact

A mistake of fact is also known as an operative mistake. Under common law an operative mistake renders a contract void ab initio, ie. where an operative mistake is proved the legal position is that the parties are in the same position as if the contract was never entered into; the contract was void, right from the beginning

The traditional approach is to divide mistakes into three distinct categories: common mistake, mutual, and unilateral mistake.

These are explained below:-

i) Common Mistake

A common mistake is made where both parties assume a particular state of affairs, whereas the reality is the other way round. Both parties therefore make exactly the same mistake. A contract entered into as a result of common mistake is a nullity (or null and void) at common law:

Conturier V. Hastie (1853)

A contract was entered into for the sale of goods which at the time of the contract were supposed to be in transit aboard a certain ship.

None of the parties knew that the goods had deteriorated and that by the time of the contract they had in fact been disposed of already by the master of the ship. Held: Both parties had contemplated that the goods were in existence at the time of the contract; ad since the goods were not actually in existence at that time, the contract was void and the buyer was not liable to pay the price.

ii) Mutual Mistake

Mutual to a particular matter, one party may assume a totally different thing, so that the other party assumes a totally different thing, so that they both misunderstand one another. They are then said to have made a mutual mistake. The mistake is different for each party, exactly the same mistake. A contract made under mutual mistake may not be a nullity, depending on the circumstance of the case (compare common mistake where the contract is automatically nullity):

Scott V. Littledole (1858)

In a contract of sale of goods by sample, the plaintiff bought from the defendants 100 chests of tea, which were then lying in a specified place. The plaintiff thought he was buying the tea contained in the 100 chests, but the defendants thought they were selling to the plaintiff only tea of the same quality as the samples. The tea in the chests turned out to be of a higher quality than the samples submitted to the defendants and the defendant refused to deliver it to the plaintiff. Held: There was a valid contract between the plaintiff and defendant, and the defendant was liable to deliver the 100 chests.

Note: The above case is sometimes cited as authority for saying that mistake as to quality is not an operative mistake.

iii) Unilateral Mistake

If one of the parties to a contract, and the other parties aware of this fact, there is said to e a unilateral mistake (compare mutual mistake where one party's mistake is not known to the party). Instances of unilateral mistake is not common in fraud cases where one party misrepresents his identity to the other, thereby inducing the other party into contracting with him in the false belief that he is contracting the person whose identity has been given.

Misrepresentation

At representation means a statement of fact made by one party to the other, either before or at the time of contract, relating to some matter essential to the formation of the contract, with an intention to induce the other party to enter into contract, with an intention to induce the other

party to enter into the contract. It may be expressed by spoken or written or implied from the acts or conducts of the parties) e.g. non-disclosure of a fact).

A representation when wrongly made, either innocently or intentionally, is termed as a misrepresentation. To put in differently, misrepresentation may be either innocent or intentional or deliberate with intent to deceive the other party. In law, for the former kind, the term 'Misrepresentation' and for the latter the term "fraud" is used.

Types of Misrepresentation

There are three types of misrepresentation. These are:-

i) Fraudulent Misrepresentation

A fraudulent misrepresentation is a statement made without honest belief in its truth or recklessly without caring whether it is true or not. This type of misrepresentation therefore requires proof of fraud or dishonest; and once proved it is actionable at common law.

ii) Negligent Misrepresentation

An innocent is one made honestly or without fault on the part of the representor. This type if misrepresentation is not actionable at common law, and the representee has no remedy at all.

Remedies for Misrepresentation

Misrepresentation renders a contract voidable at the instance of the representee (the innocent party). Consequently, the remedy of rescission is available to him. Besides, he is also entitled to damages for loss that may have been suffered by him as result of the misrepresentation.

Duress

Duress refers to actual violence or threats violence calculated to produce fear in the mind of the person threatened. The requirement of agreement in the establishment of a contractual relationship presupposes that each of the parties is free contracting agent. But the freedom of the party subjected to duress (or coercion) is obviously restricted. Duress as such, is a vitiating factor which is actionable at common law (and is sometimes referred to as legal duress).

For a threat to amount to duress, it must be a threat to the person, not to goods. It must also relate to an unlawful thing; a threat to do a lawful thing is immaterial, subject only to the requirements of public policy. Also, the threat must have induced the threatened party to enter into the contract.

The dominant view is that contract entered into under duress (or coercion) is voidable at the instance of the party coerced.

Undue Influence

"A contract is said to be induced be undue influence where, (i) the relations subsisting between the parties are such that one of the parties is in a position dominate the will of the other, and ii) he uses the position to obtain an unfair advantage over the other".

Undue influence is another factor which tends to restrict the freedom of a party in entering into a particular contract. It is based on the equitable principle that no person may take an unfair advantage of the inequalities between him and another party so as to force an agreement on the other party.

A person who seeks to rely on undue influence as a defence must prove that the other party has in fact influence over him and that he would not otherwise have entered into the contract. But where a confidential (or fiduciary) relationship exists between the parties, undue influence is presumed, and the burden is shifted on to the other party to prove hat there has been no undue influence on his part. The following are relations in which undue influence is presumed:-

1. Parent and Child
2. Doctor and Patient
3. Trustee and Beneficiary
4. Advocate and Client
5. Guardian and Ward
6. Religious Adviser and Disciple

It should be noted that Husband/Wife relationships do not raise the presumption of undue influence; undue influence must in this case be specifically proved by the party seeking to rely on it.

Where undue influence is sufficiently proved to have existed at the time of the contract, the contract is voidable at the instance of the party unduly influenced and may on this ground be set aside.

Williams V. Bayley (1866)

Like any other voidable contract, a contract entered into under undue influence cannot be set aside where its subject-matter has come into hands of a bona fide purchaser, where it has been subsequently affirmed, if there has been undue delay on the party entitled to avoid the contract.

Illegality

An illegality contract is one which is prohibited by law e.g. making a contract to break into a house to steel goods is an illegal contract.

Besides statute, there are certain contracts which are prohibited by, and therefore illegal at common law. These are contracts which offend against public policy, i.e. those which are prejudicial to public morality and public well-being. They are as follows:-

1. Contracts to commit a crime, tort or fraud;
2. Contracts that are prejudicial to the administration of justice;
3. Contracts liable to corrupt public life;
4. Contracts that are prejudicial to public safety;
5. Contracts to defraud the revenue;
6. Contracts that are sexually immoral;
7. Contracts that are prejudicial to the country's foreign relations.

5.9 Discharge Of Contract

A contract is said to be discharged (or terminated) when the parties to it are freed from their mutual obligations. In other words, when the rights and obligations arising out of a contract are distinguished, the contract is said to be discharged or terminated. A contract may discharge in any of the following ways:-

a) Discharge by performance
b) Discharge by Agreement
c) Discharge by Frustration
d) Discharge by Breach
e) Discharge by Operation of Law

Discharge by Performance

When a contract is duly performed by both the parties, the contract comes to happy ending and nothing more remains. The contract, such a case, is discharged or terminated by due performance. But if one party performs his promise, he alone is discharged. Such a party gets a right of action against the other party who is guilty of breach.

Performance of a contract is the principal and most usual mode of discharge of a contract. Performance may be: (1) Actual performance; or (2) Attempted performance or Tender.

1. Actual performance

When each party to a contract fulfils his obligation arising under the contract within the time and in the manner prescribed an amounts to actual performance of the contract and the contract comes to an end or stands discharged

2. Attempted performance or tender

When the promisor offers to perform his obligation under the contract, but is unable to do so because the promise does not accept the performance, it is called *"attempted performance or tender"*. Thus *"tender"* is not actual performance but is only at *"offer to perform"* the obligation under the contract. A valid tender of performance is equivalent to performance.

For performance to discharge a contract, the general rule is that it must be precise and exact. Circumstances do exist, however, n which a partial performance by one party may not entitle the other party to consider himself as discharged, e.g. in cases of substantial performance or of divisible contracts like those in which delivery of goods is to be done in installments: in these cases the performing party is entitled to payment for what has been done by him under the contract.

The effect of refusal to accept a properly made 'offer of performance' is that the contract is deemed to have been performed by the promisor i.e. tenderer and the promise can be sued for breach contract. A valid tender, thus, discharges contract. However, tender of money does not discharge the contract. The money will have to be paid even after refusal of tender.

Discharge by Agreement

Where a contract is still executory, i.e. where each of the parties is yet to perform his contractual obligation, the parties may mutually agree to release each other from their contractual obligation: each party's promise to release the other is consideration for the other party's promise to release him.

Where one party has fully performed his part of the contract, he may agree to release the other party from his contractual obligation. In this case, however, the discharge is effective only if made under seal or where the party being discharged has furnished consideration for it; otherwise the party giving the discharge will not be bound and the other party remains liable .A unilateral discharge, supported by valuable consideration, is known as an Accord and Satisfaction. *"The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative'*

Discharge by Frustration

A contract is said to be frustrated if an event occurs which brings its further fulfillment to an abrupt end; and upon the occurrence of the frustrating event the contract is immediately terminated and the parties discharged. But the doctrine of frustration only relates to the future. This means that the parties are discharged from their future obligation under the contract but

remain liable for whatever rights that may have accrued before the frustration. Thus, goods supplied or services rendered before the frustration must be paid for, although the parties are both excused from further performance of the contract.

Parties to a contract are under a duty to fulfill their respective obligations created by the contract. The fact that an event or events may subsequently occur, introducing hardships or difficulties in the performance of the contract is not in itself sufficient to discharge the contract:

It is difficult to determine the frustrating events. Some examples of frustrating events are given below:-

i) Destruction of subject Matter

"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing excuse the performance". This statement of law was made by Blackburn J. in the case given below:-

Taylor V. Caldwell (1862)

A let a music-hall to B in order that B might use it for holding concerts on specified days. Before the concerts could be held the music- hall was accidentally destroyed by fire. B sued A for breach of contract. Held: The destruction of the music-hall had frustrated the contract and B's action could not be maintained.

ii) **Death or Incapacity**

Just as the destruction of the subject-matter of the contract terminates it, the death or serious indisposition of a party whose personal services were contemplated by the contract will similarly terminate it. Thus, if A, a doctor, contracts to care for all my medical needs, his death is a frustrating event which automatically terminates the contract. Again, if A contracts to stage a series of shows during the months of June-September but is in May sentenced to imprisonment for one year, or becomes insane permanently or for a substantial part of the period in question,

the contract will similarly be discharged by frustration- the frustrating event being constituted by the imprisonment or insanity.

ii) Frustration of Common Venture

Where both parties contemplate a particular object as forming the basis of their contract, such object constitutes their common venture. The law is that if the common venture subsequently becomes incapable of fulfillment the contract is frustrated:

Krall V. Henry (1903)

The plaintiff agreed to let a room to the defendant for the day when Edward VII was to be crowned. Though not spelt out in the agreement itself, both parties understood that the purpose of the letting was to enable the defendant view the coronation process. The King subsequently became ill and the coronation was cancelled. Held: The cancellation of the coronation discharged both parties from their contractual obligation, because the process was the foundation of the contract and its cancellation meant that the substantial purpose of the contract could no longer be achieved.

Discharge by Breach

Breach of contract by a party thereto is also a method of discharge of a contract, because "Breach" also brings to an end the obligations created by a contract on the part of each of the parties. Of course the aggrieved party i.e. the party not at fault can sue for damages for breach of contract as per law; but the contract as such stands terminated.

A breach of contract may take place when a party:

i) Repudiates his liability before performance is due.

ii) Disables himself from performing his promise.

iii) Fails to perform his obligations.

Discharge by Operation Of Law

A contract may be discharged by operation of law in certain cases. Some important instances are as under:-

i) Lapse of Time

If a contract is made for a specific period then after the expiry of that period the contract is discharged e.g. partnership deed, employment contract e.t.c.

ii) Death

The death of either party to a contract discharges the contract where personal services are involved.

iii) Substitution

If a contract is substituted with another contract then the first contract is discharged.

iv) Bankruptcy

When a person becomes bankrupt, all his rights and obligations pass to his trustee in bankruptcy. But a trustee is not liable on contracts of personal services to be rendered by the bankrupt.

5.10 Remedies for Breach of Contract

Whenever there is a breach of contract, the injured party becomes entitled for some remedies. These remedies are:-

a) Damages
b) Quantums Meruit
c) Specific Performance
d) Injunction
e) Rescission

These are explained below

Damages

Damages are a monetary compensation allowed to the injured party of the loss or injury suffered by him as a result of the breach of contract. The fundamental principle underlying damages is not punishment but compensation. By awarding damages the court aims to put the injured party into the position in which he would have been, had there been performance and not breach, and not to

punish the defaulter party. As a general rule, *"Compensation must be commensurate with the injury or loss sustained, arising naturally from the breach". "If actual loss is not proved, no damages will be awarded".*

The damages recoverable for breach of contract are governed by the rule in Hadley V. Baxendale (1894) which is as follows:-

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the possible result of the reach of it".

This is the general rule. The plaintiff can only recover for loss arising naturally from the defendant's breach or for such loss as was in the contemplation of both parties at the time when the contract was made. In this way, it is sought to do justice to both parties. In fact the above case goes on to explain that where a contract is made under special circumstances it is the duty of the party seeking to rely on those special circumstances to communicate them to the other party; and in the absence of such communication any loss arising from the special circumstances is not recoverable:

Hadley V. Baxendale (1854)

A miller sent a broken crankshaft by a carrier to deliver to an engineer for copying and to make a new one. The miller informed the carrier that the matter was urgent and that there should be no delay. The carrier accepted the consignment on those terms. The miller did not inform the carrier that the mill would be idle and unable to work. The carrier had no reason to believe that the delayed delivery of the crankshaft was an essential mechanism of the mill. The carrier delayed delivery of the crankshaft to the engineer; and as a consequence, the mill was idle for longer than it need have been.

Held: that the carrier was not liable for the loss of profits during the period of the delay.

The Heron II (1969)

The defendant's ship, the Heron II, was chartered by the plaintiff to carry sugar from Constanza to Basrah, and the ship was to take an agreed route. But the defendant deviated and took a longer route and as a result delivery of the sugar was delayed by 9 days. In the meantime the market price of sugar had fallen and the plaintiff lost a profit of # 4,000. Held: The loss of profits was recoverable by the plaintiff, because fluctuations in market prices are in the normal course of things and the loss suffered by the plaintiff must have been in the contemplation of both parties as a probable result of a breach of the contract.

Quantum Meruit

The third remedy for a breach of contract available to an injured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum meruit literally means *"as much as is earned"* or "*in proportion to the work done"*. This remedy may be availed of either without claiming damages (i.e. claiming reasonable compensation only for the work done) or in addition to claiming damages for breach (i.e. claiming reasonable compensation for part performance and damages for the remaining unperformed part).

The aggrieved party may file a suit upon quantum meruit and may claim payment in proportion to work done or goods supplied.

The court must then determine a reasonable sum to be paid for those goods or services; and the plaintiffs is said to have brought his suit on a quantum meruit. In the case of contracts for the sale of goods, this remedy has been codified by the Sale of Goods Act. It provides; *"where the price is not determined, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case"*. The plaintiff may also sue on a quantum meruit where the original contract has been replaced by a new one and work has been done by him under the new one. As Lord Atkin has said: "If I order from a wine merchant twelve bottles of whisky and two of brandy, and i accept them i must pay a reasonable price for the brandy": Steven V. Bromley & Son (1919).

A claim under quantum meruit sum does not apply, however, where the contract requires complete performance as a condition of payment e.g. a contract to do one piece of work in its entirety in consideration for lump-sum payment.

Sumpter V. Hedges (1898)
S agreed to build a house for a certain sum on H's land. When the house was half finished S ran out of money and could not complete. H refused payment, and S brought an action on a quantum meruit for the value of materials used and the labour he had expended. Held: that the claim must fail. The contract was to do certain work for a lump sum which was not payable until completion. H had no choice but to accept the work.

Specific Performance
This is an equitable remedy. Specific performance means the actual carrying out of the contract as agreed. Under certain circumstances an aggrieved party may file a suit for specific performance, i.e. for a decree by the court directing the defendant to actually perform the promise that he has made.

A decree for specific performance is not granted for contracts of all types. It is only where it is just and equitable so to do i.e. where the legal remedy is inadequate or defective, that the courts issue a decree for specific performance.

Specific performance is not granted as a rule, in the following cases:-

i) Where monetary compensation is an adequate relief. Thus the courts refuse specific performance of a contract to lend or to borrow money or where the contract is for the sale of goods easily procurable elsewhere.

ii) Where the court cannot supervise the actual execution of the contract, e.g. a building construction contract. Moreover, in most cases damages afford an adequate remedy.

iii) Where the contract is for personal services, e.g. a contract to marry or to paint a picture. In such contracts *"injunction"* (i.e. an order which forbids the defendant to perform a like personal service for other persons) is granted in place of specific performance.

iv) Where one of the parties to the agreement does not possess competency to contract and hence cannot be sued for breach of contract. Thus a minor cannot succeed in an action for specific performance.

Injunction

"Injunction" is an order of a court restraining a person from doing a particular act. It is a mode of securing the specific performance of the negative terms of the contract. To put it differently, where a party is in breach of negative term of the contract (i.e. where he is doing something which he promised not to do), the court may, by issuing an injunction, restrains him from doing, what he promised not to do. Thus *"injunction"* is a preventive relief. It is particularly appropriate in cases of *"anticipatory breach of contract"* where damages would not be an adequate relief.

Illustration: A agreed to sing at B's theatre for three months from 1st April and to sing for no one else during that period. Subsequently, she contracted to sing at C's theatre and refused to sing at B's theatre. On a suit by B, the court refused to order specific performance of her positive engagement to sing at the plaintiff's theatre, but granted an injunction restraining A from singing elsewhere and awarded damages to B to compensate him for the loss caused by A's refusal (Lumley vs. Wagner).

Rescission

When there is a breach of contract by one party, the other party may rescind the contract and need not perform his part of obligations under the contract and may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for decision of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

Illustration: A contracts to supply 100 kg of tea leaves for sh. 1,500 to B on 15th April. If A does not supply the tea leaves on the appointed day, B need not pay the price. B may treat the contract as rescinded and may sit quietly at home. B may also file a "suit for rescission" and claim damages.

Thus, applying to the court for *"rescission of the contract"* is necessary for claiming damages for breach or for availing any other remedy. In practice a *"suit for rescission"* is accompanied by a *"suit for damages"* .

Summary for the topic

- Essentials of a valid contract
- Classification of various types of contracts
- Formation of contract
- Contractual capacity
- Vitiating elements of contract
- Discharge of the contract
- Remedies for a breach of contract

Revision questions

i) Explain the essentials of a valid contract

ii) Describe the various types of contracts

iii) Explain the contractual capacity of minors

iv) Describe the vitiating elements of a contract

Further reading

(i) Tudor. J, (1988) *The Law of Kenya,* Kenya literature bureau, Nairobi, Kenya. Pages 143-190

(ii) Saleemi.N.A (2010)*General Principles of Law Simplified*, N.A Saleemi Publishers Limited ,Nairobi, Kenya. Pages 96-201

(iii) Ogolla J.J (2005) *Business Law,* English Press Nairobi, Kenya. Pages 73-156

(iv) Laibuta (2006) *Principles of Commercial Law,* Africa Publishing Limited. Pages 43-108

(v) Miller.R,Gaylord.j (1999) F*undamentals of Business Law,* West Educational Publishing Company,USA. Pages 147-316

SAMPLE CAT

a) Explain the differences between civil wrongs and criminal wrongs 5 marks

b) Describe ways in which law promotes business activities in Kenya 5 marks

c) Distinguish between natural persons and artificial persons 4 marks

d) Describe ways in which corporations are formed 4 marks

e) The defendant had a number of artificial lakes on his land. An unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff's. Advice the defendant who is being sued 5 marks

f) One of the local advertising companies has erected a billboard next to Mr. Wambua's land on a road reserve. However the billboard has protruded 10 inches to Mr. Wambua's land. Advice Mr. Wambua 5 marks

g) Peter has being working with company x as a permanent and pensionable employee. Recently he received an offer from a competitor company and he is being offered double the salary. Advice him 5 marks

h) A has agreed to sell his goods to B for ksh 5,000/= and B has agreed to buy the goods at that price, Describe this kind of a contract 2 marks

CHAPTER SIX

6.0 LAW OF AGENCY

General objective

By the end of the lesson the learner should be able to explain the application of the law of agency in business

Specific objectives

By the end of the lesson the learner should be able to

a) explain the various classes of agents

b) explain the various ways in which agents are created

c) explain the rights and duties of agents and principals

d) explain circumstances in which agencies are terminated

Agency law is special branch of the law of contract. Ac cording to the provision of the law of contract Act (Cap. 23), the English common law of contract is applicable in Kenya. The date of reception of the common law of contract of England is 12th August 1897. English decisions after this date are only of persuasive authority. the agency law of England based on common law of contract is also applicable in Kenya.

6.1 Introduction

"An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such is done, or who is represented, is called the principal". The contract which creates the relationship of 'principal' and 'agency' is called an 'agency' thus where A appoints B to buy ten bugs of sugar on his behalf, A is the 'principal and B is the 'agency' and the contract between the two is the 'agency if, pursuance of the contract of agency, the 'agent' purchase the bags of sugar from C, a wholesale dealer are brought into direct contractual relations.

Under a contract of agency the agent is authorized to establish privity of contract between the principal (his employer) and a third party. As such as the function of an third parties. In a way.

Therefore an agent is merely a connecting link. After entering into a contract on behalf of the principal with third party, the agent drops out and ceases to be a party to the contract and the contract bind the principal and the third party as if they have made it themselves

Capacity of Agent

An agent is supposed to create contractual relations between his principal and the third party. The principal and the third party must possess contractual capacity and it is not necessary whether the agent himself has contractual capacity or not. It means even a minor can be appointed as an agent and he can bind his principal in a contract with a third person.

6.2 Classes of Agents

The agency may b e classified from the point of view of:

(a) The extent of their authority;

(b) The nature of work performance by them.

Various classes of agents are as follows

6.2.1 The Extent of their Authority

1. General agent:

A general agent is one who is employed to do all act connected with a particular business or employment, e.g., a manager of a firm. He can bind the principal by doing any thing which falls within the ordinary scope of that business, whether he is actually authorized for any particular act or not, is immaterial, provided the third party bonafide. Third parties may assume that such an agent has power to do all that which usual for a general agent to do in the business concerned.

2. Special agent:

A special agent is one who is employed to do some particular act or represent his principal in some particular transaction, e.g., an agent employed to sell a motor car. As soon as the act is performed, the authority of such an agent comes to an end. If a special agent does anything outside his authority, the principal that the agent has unlimited powers. They should, therefore,

make proper enquiry as to the Extent of his authority before entering out of any contract with him.

3. Universal agent:

A universal agent is said to be one whole authority is unlimited i.e., who is authorized to do all act which the principal can lawfully do and can delegate. He enjoys extensive powers to transact every kind of business on behalf of his principal. This type of agency is very rare.

6.2.2 Nature of work

1. Brokers:

A broker is an agent who represents a buyer or seller in negotiating a purchase or sale without physically handling the good involved. He is only concerned with making bargains and contact between other parties. A broker receives a commission or brokerage for his service. Each broker tend to specialize in a particular line of good and services. As an intermediary, broker has very following features;

(i) He is concerned with bargains and connecting the buyer to the seller, he dose not possess the goods and has limited powers over the price and terms of sale. He dose not sell his own name.

(ii) A broker has no authority to receive payment and discharge good sold as they are not in possession, and cannot change the principal's term and price. Insurance brokers, taxi brokers whose boss is the principal

2. Factors:

A factor is an agent who sells good in his possession and under his control on behalf of his principal. He is referred to as a commission salesman. Unlike the broker, a factor possesses the good sells in his own name, to a reasonable extent and pledge the goods. A factor has a general line on the goods in his possession for all charges and expenses incurred by him.

3. Commission Agent

A commission agent is a person who is employed to buy or sell good for the best possible price. He get commission as his remuneration. Mostly, commission agent are employed by foreign employed by being merchants. Their business is to receive orders from foreign buyers to buy goods from the local manufactures and traders. They act in their own name but for the account for their foreign principals. In addition to purchasing good for his principal, the commission agent undertakes the work connected with the dispatch of goods such as booking space in ships, preparation of bills of lading, undergoing customs formalities and insuring good against risks.

4. Del Credere Agent

A del credere agent is employed to sell the good of his principal. He give undertaking to his principal to make good the losses that may arise from the failure of parties to whom he sell goods under the agency business. Over and above the usual commission , the principal has to give del credere agent an extra remuneration called del credere commission for giving the undertaking that the principle will not have to incur any loss arising from the failure of buyer to pay their dues.

5. Forwarding Agents:

Forwarding Agents are persons who act as agents of either exporters or importers. They are employed to collect and deriver good on behalf of others. When they act as agents of exporters, they collect the good and attend to the packing and marketing and despatch of the good to the proper destination. When they act as an agents of importers, they take delivery of the good at the port of importation, examine their quantity and quality and attend to their proper warehousing or transportation to the place of business of importers. Forwarding agents posses specialized knowledge of customs and other formality connected with import and export trades. They render a great service to the exporter and the importers by relieving them of the difficult task of collecting and forwarding the goods.

6. Auctioneers:

An auctioneer is an agent employed usually to sell good at a public auction. Where the auctioneer is appointed to sell good " without reserve", he has the implement authority to sell to the highest bidder. He has a line on the goods in his possession for his charges.

7. Non-Mercantile Agents

They in clued advocates, attorneys, insurance agents etc

6.3 Creation of Agency

Agency may be created in any one of the following ways:

(i) By Express Agreement

(ii) By Implied Agreement.

(iii) By Necessity.

(iv) By Ratification.

These are explained as under:

6.3.1 Agency by Express Agreement:

Normally agency is created by an express agreement, specifying the scope of the authority of agent the agent may, in such as case, be appointed either by word of mouth or by an agreement in writing . however, in certain cases, e.g. to execute a deed for sale or purchase of land, the agent must be appointed by executing a formal 'power of anttorney' on stamped paper.

6.3.2 Agency by Implied Agreement:

Implied agency arises when there is no express agreement appointing a person as an agent, but instead the existence of agency is inferred from the circumstances of the relationship between parties. Such an agency may take the following forms:

(a) Agency by estoppel

(b) Agency by holding out;

Agency by Estoppel;

Such agency is based on the 'doctrine of stoppel' which may briefly be stated thus, "where a person by his words or conduct has willfully led another to believe that certain set of circumstances or fact exists, and that other person has acted on that belief, he is stopped or precluded from denying the truth of such statements, although such a state of things did not in fact exist."

When an agent has, without authority, done act or incurred obligations to third persons on behalf of his principal, the principal is bound by such third act or obligations, if he has by his words or conduct induced such third persons to believe that such a principal will be stopped from denying subsequently his agent's authority.

An agency by estoppels is created when the all alleged principal by his conduct or by words spoken or written, leads willfully the other contracting party into a honest belief that the supposed agent's had authority to act as such and bind the principal. Such a agent's authority, although the agent did not in fact possess any authority whatever

Illustrations:

(a) T tells M in the presence and within the hearing of N that he (T) IS N's agent. N goes not contradict this statement and keeps quit. Later on M enters into a transaction with T believing honestly that is N's agent. N is bound by this transaction and he will be stopped from denying the existence Notice that by virtue of the doctrine of estoppels an apparent or ostensible agency becomes as effective as an agency deliberately created.

(b) A consigns good to B for sale and gives instruction not to sell under a fixed price. C being ignorant of B's instruction, enters into a contract with A to buy the goods at price lower than the reserved price A is bound by the contract.

Agency by holding out:

Such an agency is based on the "doctrine of holding out" which is apart of the law of estoppel. In this case also the alleged principal is bound by the act of the supposed agents, if he has induced their persons to believe that they are done with his authority. But unlike an agency by estoppels; an 'agency by holding out requires some affirmative or positive act or conduct by the principal to establish agency subsequently. Thus, where an employer has been accustomed to pay

for goods bought out his behalf by his employee fraudulently after he has left the employment. To be his agent (paying for purchases made by the employee on previous occasion) estops him from denying that his authority was not still in existence.

It may be noted that where the agent is 'held out' as having only a ' limited authority' to do acts, the principal is not bound by an act outside the authority.

6.3.3 Agency by Necessity

In certain circumstances, the law confers an authority on one person to act as agent for another without any regard to the consent of the principal: such an agency is called an agency of necessity. Bowstead has rightly observed; "An agency by necessity is conferred by law in certain cases to preserve the property or interest, to act before the instruction of the creation of the relationship of principal and agent". Thus, the conditions which enable a person to act as another are as follows:

(i) There should be a real necessity for acting on behalf of the principal.

(ii) It should impossible to communicate with the principal within the time available.

(iii) The alleged should act bonafide in the interests of the principal.

Generally the ' Agency by necessity' arises in the following cases;

(i) Where the agent exceeds his authority, bonafide, in an emergency; for example, where 'A consign fruit to B at Nairobi with directions to send them to C at London, and B finding that the fruit are perishing rapidly, sells them at Nairobi itself for the best price obtainable, the sale bind the principal and the agent cannot be held liable for exceeding his authority as under the circumstance of of th case there arises agency of necessity.

(ii) Where the of good acting as a bailee, dose anything to protect or preserve the goods, in an emergency, although there is no express authority in that regard. Thus a master of a ship is entitled, in cases of accident or emergency, becomes an agent of necessity, for example, if a public carrier develps an agine trouble, the driver can pledge a part of the goods loaded thereon in order to rause the money necessary for repairs and the pledge will be binding on the owner of goods. Notice in these case it is not practicable to communicate with the principal.

(iii) Where a husband improperly leave his wife without providing proper means for her survival. In a special circumstance the case of husband and wife also provides an instance of agency by necessity. When the wife has been deserted by the husband and thus forced to live separate from him, the wife is regarded as the agent of necessity of the husband and she has the authority of pledging her husband's credit for necessaries even against her husband's wishes. However, this rule does not apply where the wife improperly leaves the husband.

It is relevant to state that in the ordinary course of things there is an implied agency between the husband and wife and the wife is presumed to have implied authority to pledge her husband's credit for necessaries suiting to the couple's joint style of living. But a husband enjoys no corresponding right to pledge his wife's credit for necessaries.

6.3.4 Agency by Ratification:

Ratification means the subsequent adoption and acceptance of an act originally done without instructions or authority. Thus where a principal affirms or adopts the unauthorized act of his agent, he is said to have ratified that act and there comes into an agency by ratification retrospective

Illustration

Buys 5 bags of wheat on behalf of B.B did not appoint A as his agent. B may, upon hearing of the transaction, accept or reject it. If B accepts it, the act is ratified and A becomes his agent retrospective effect.

Ratification relates back to time of contact: By ratifying the unauthorized act of the agent, the principal becomes bound by the act as if it had been originally done by his authority. Thus ratification amounts to 'prior authority '. It relate back to the original making of the moment the agent acted and not from the time when the principal ratified.

Illustration

The managing director of company, purporting to act as agent on company's behalf, but without its authority, accept an office made by L, the defendant, for the purchase of some sugar works

belonging to them L, subsequently withdrew the office but the company ratified the managing director's acceptance. Held; L was bound. The ratification, related back to the time of managing director's accepted cannot be withdrawn.

Ratification may be express or implied. Ratification may be express or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations:

(a) A , without authority, buys for B, Afterwards B sells them to C on his own account. B 's conduct implies a ratification of the purchase made by A for him.

(b) A, without B's Authority, lends B's money to C. afterwards B accept interest on the money from C.B's conduct implies a ratification of the loan.

Essential of a valid Ratification

A valid Ratification must fulfill the following conditions;

1. The agent must purport to act as agent for a principal who is in contemplation. The agent must expressly contract as an agent for a principal in the knowledge of third parties. The principal must be named or must be 'identifiable' ands it is not sufficient to indicate simply that he is acting as agent of some one. The word 'identifiable' here means that there must be such a description of the principal as shall amount to a reasonable designation of the principal cannot step in and ratify acts done by a third person.

2. There should be an act capable of ratification. The act to be ratified must be an act capable of ratification. The act to be ratified must be a lawful one. The act to be ratified must be a lawful one. There can be no ratification of an illegal act or an act which is void. Thus, the shareholders of a company cannot ratify an 'ultra Vires' contract made by the directors.
3. The principal must be in existence. For a valid ratification it is essential that the principal must be in existence at the time when the original contract is made, because right and obligations cannot attach to s non-existent person.

4. The principal must be competent to contract. The principal; must have contractual capacity both at the time of original contract and at the time of ratification.

5. The principal must have full knowledge of material fact. No valid ratification can be made by a person whose knowledge of facts of the case is materially defective. Thus to constitute a valid ratification. The principal must. At the time of ratification, have full knowledge of all the material facts.

6. Whole transaction must be ratified. Ratification must be of the whole contract, once a part is accepted, it is an implied acceptance of the whole. There cannot be partial rejection and partial ratification. The principal cannot reject the burdens attached and accept only the benefits.

7. Within reasonable time. A ratification to be effective must be made within a reasonable time after the original contract is made. Where a time is expressly fixed for the performance of the contract, ratification must be made within that time.

8. Ratification must not injure a third person. A ratification cannot be effective where its effect is to subject a third person.

6.4 Event of Agent's Authority

The authority of an agent means his capacity to bind the principal to third parties. The agent can bind the principal only if the acts within the scope of his authority. The scope of an authority is determined by his:

1. **Actual authority:**

An agent can do all such acts as have been assigned to him either expressly or impliedly and thereby bind the principal to third parties by act done within the scope of his 'actual' or 'real' authority. The authority is said to be express when it is given by word it is inferred from the authority is said to be implied when it is inferred from the circumstance of the case or the ordinary course of dealings.

2. **Ostensible or apparent authority:**

An agent also sold bind the principal to third parties by act done within his apparent authority; (although the act is in excess of his authority); provided the third party acts bonafide and without knowledge of the limitation of the agent's apparent authority. Thus 'actual' and 'apparent' authority stands on the same footing.

Ostensible authority means an authority which the third parties dealing with the agent can presume to be with the agent in relation to a particular business ordinarily. In other words, such an authority implies authority to do an act usually necessary in the course of conducting similar business in accordance with the customs and usages of the particular place, trade or market. Thus if is the usual practice of hotel managers to purchase liquors and cigarettes, then purchases of this nature shall be deemed within the scope of the manager's apparent authority and the principal will be bound by such purchases, notwithstanding limitations, as between the principal and agent, put upon that authority.

3. **Authority in emergency:**

An agent has the authority, in an emergency; to do all such act for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case, under similar circumstances.

6.5 Duties Of Agent

An agent has the following duties towards the principal:

1. **Duty to follow principal's directions or customs:**

The first duty of every agent is to act within the scope of the authority conferred upon him and form the agency work according to the direction given by the principal. When the agent act otherwise, if any loss be sustained, he must make it good to the principal, and profit accrues, he must account for it.

Illustration:

(a) Where the principal instructed the agent to warehouse the good at particular place and the agent warehoused them at a different warehouse which was equary safe, and the goods were destroyed by fire without negligence, it was held that the agent was liable for the loss because any departure from the instructions make the agent absolutely liable.

(b) An agent being instructed to insure goods neglects to do so. He is liable to compensate the principal in the event of their being lost.\if the principal has not given any express or implied directions, then it is the duty of the agent

(c) To follow the custom prevailing in the same kind of business at the agent makes any departure, he does so at his own risk. He must make good any loss so sustain by the principal.

Illustration

(a) A, an agent, engaged in carrying on for B a business, in which it is the custom to invest from time to time at interest, the money which may be in hand, omits to make such investments, A must make good to B the interest usually obtained by such investment.

(b) B a broker, in whose business it is not the custom to sell on credit, sell goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A, irrespective of his good intentions.

2. Duty to carry out the work with reasonable skill and diligence:

The agent must conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. Further, the agent must act which reasonable diligence and to the best of his skill.

If the agent does not work with reasonable care, skill (unless the principal has notice of his want skill) and diligence, he must make compensation to his principal in respect of direct

consequences' of his own neglect, want of skill or misconduct. But he is not so liable for indirect or remote losses.

Illustration:

(a) A an agent for the sale of goods, having without authority to sell goods on credit, sells to B on credit, without making the proper sand usual enquiries as to the solvency of B, B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(b) A, an insurance broker, employed by the usual clauses are insterted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing lost can be recovered from the underwriters. A is bound to make good the loss to B.

3. Duty to render accounts:

It is the duty of an agent to keep proper accounts of his principal's money or property and render them to him on demand, or periodically if so provided in the agreement

4. Duty to communicate:

It is the duty of an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions, before taking any in facing the difficult or emergency.

5. Duty not deal on his own account:

An agent must not deal on his own account in the business of agency; i.e., he must not himself by from or sell to his principal goods he is asked to sell or buy on behalf of his principal without obtaining the consent of his principal after disclosing all material facts to him. If the agent violates this rule, the principal; may repudiate the transaction where it can be shown that the any material fact has been knowingly concealed by the agent, to the principa**l** is also entitled to claim from the agent any benefit which may have result to him from the transaction.

6. **Duty not to make any profit out of his agency except his remuneration**:

An agent stands in a fiduciary relation to his principal and therefore he must not make any profit (secret profit) out of his agency. He must pay to his principal all moneys (including illegal gratification, if any) received by him on principal's account. He can, however, deduct all moneys due to him self in respect of his remuneration, or/and expenses properly incurred. If his acts are not bonafide, he will lose his remuneration and will have to account for the secret profit to his principal.

7. **Duty on termination of agency by principal's death or insanity:**

When an agency is terminated by the principal dying or becoming of unsound mind, the agent must take, on behalf of the representatives of his late principal, all reasonable step for the protection and preservation of the interests entrusted to him.

8. **Duty not delegate authority:**

An agent cannot delegate his powers or duties to other persons except in the following circumstances:

(i) Where the principal has expressly permitted delegation of such power.

(ii) Where the principal has impliedly, by his conduct, allowed such delegated. Of authority, e.g. where the principal knows that the agent intends to delegate his authority but does not object to it.

(iii) Where by the ordinary custom of trade, a sub-agent may be employed. Thus stock exchange member brokers generally appoint clerk to transact business on behalf of their clients.

(iv) Where the very nature of agency makes it necessary to appoint a sub-agent. For example, a manager of a shop may employ sale assistant.

(v) Where the acts to done are purely ministerial and do not involve the exercise of discretion, e.g. clerical or routine work.

(vi) Where unforeseen emergencies arise rendering appointment of the sub-agent necessary.

6.6 Rights of Agent

An agent has the following rights against the principal

Right to receive remuneration:

The agent is entitled to receive his agree remuneration, or if nothing is agreed, to a reasonable remuneration, unless he agrees to act gratuitously. In the absence of any special contract, the right to claim remuneration arise only when the agent has done what he had undertaken to do. It is important that the agent can claim remuneration once he has completed his work even though the contract is ever executed on account of breach either by the principal or the third party. For example, where an agent is appointed to secure orders for the manufacturer, he can claim to commission on orders actually obtained by him although the manufacturer is unable to execute them owing to a strike by the workmen.

Effect of misconduct:

An agent who is guilt of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of business which he has misconduct. In addition, he is liable to compensate the principal for any loss caused by the misconduct.

1. **Right of retainer:**

An agent has the right to retain, out of any sums received on account of the principal, all moneys due to himself in respect of his remuneration, or advances made or expenses properly incurred by him in conducting the business of agency.

2. **Right of lien:**

An agent has also the right to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

3. **Right to be indemnified against consequences of lawful acts:**

An agent has also the right to be indemnified against the consequences of all lawful act done by him in exercise of the authority conferred upon him.

Illustration:

B, at London, under instructions A of Nairobi, contracts with C to deliver certain goods to him. A does not send the goods to B and C for breach of contact. B informs A of the suit, and A authorizes him the suit. B defends the suit and compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

4. **Right to be indemnified against consequences of act done in good faith**:

An agent has a right to be indemnified against the consequences of an act done in good faith thought it turns out to be injurious to the right of third persons:

Illustration:

B, at the request of A, sells goods in the possession of A but which A had right to dispose of. B does not know this and hand over the proceeds of the sale to A. afterwards C, the true owner of the goods, sues B and recovers the value of the goods and cost. A is liable to indemnify B for what he has been compelled to pay to c and B's own expenses.

5. **Right to compensation**:

The agent of a right to be compensate for injuries sustained by him due to the principal's neglect or want of skill.

6.7 Right and duties of principal:

The duties of an agent are indirectly the rights of a principal and the rights of an agent are indirectly the duties of a principal. the duty and rights of an agent have already been discussed in this chapter

Principal's and liability for principal:

The extent of principal's liability to third parties for the acts of the agent is determined by the following rule:

(a) The principal is liable for all act of the agent within the scope of his actual and apparent (ostensible) authority.

(b) When agent exceeds his actual or apparent authority, the principal has option either disown the unauthorized act or to ratify the same.

(c) The principal is liable for misrepresentation made or fraud committed by the agent acting within the scope of his actual or apparent authority.

Liability of Unnamed principal:

Unnamed principal means a principal whose existence is disclosed by the agent but the name is not disclosed, once it is disclosed by the agent that he is an agent the contract made by the agent that he is an agent, the contract made by the agent binds the principal and the agent drop out of the transaction despite the fact that the principal for whom he acted has not been named. On being discovered, the legal position of the unnamed principal is the same as where the principal is named, unless there is a trade custom making the agent personally liable e.g. in case of stock exchange transactions, a jobber can make a broker personally liable. If, however, the agent declines to disclose the identity of the principal, he because personally liable on the contact. Also if the agent could not disclose the identity of the principal, say, because of his sudden death, his state will be liable to third parties, in both these cases the agent himself is deemed as a contracting party and therefore he is made liable to the third parties.

Liability of Undisclosed principal:

Where an agent having authority to contact on behalf of another, makes the contract in his own name (as for he is the principal himself), concealing not only the name of his principal but also the fact that there is a principal, his principal is called "undisclosed principal." In such a case neither the existence nor the name of the principal is disclosed and the agent gives an impression to the third party as if he himself is the contracting party although the agent has authority in fact and contract on behalf of another.

In the case of an undisclosed principal, the mutual right and liability of the principal, the agent and the third party are as follows:

1. Since the agent has contracted in his own name, he is liable to the third party personality. The agent may be sued on the contract and he has the third right to sue the third party, if the

2. If the third party comes to know existence of the principal before obtaining judgment against the agent, he may sue either the principal or the agent or both.

Illustration:

A, enter into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C, A may sue either B or C, or both, for the price of the cotton.
It may be noted that the principal and agent is "joint and several" in such a case. If the third party elects to use and the claim remain partially he may afterwards sue principal for the balance. Further, if the third party decides to use the principal, he must allow the principal the benefit of all payment received by him from the agent.

3. The principal if he likes, may intervene and sue the third party for on performance of the contract. But he cannot exercise this right to the prejudice of the third party has as against the principal, the same rights as he would have had as against the agent if the agent had been the principal, e.g. right of set off can be claimed by the third party. Further the principal must allow the third party benefit of all payments made by the third party to the agent. " The principal if he requires performance of the contract, can only obtain such performance subject to the rights and obligation subsisting between the agent and the other party to the contract"

Illustration

A, who awes sh. 500 to B, sell sh. 1,00 worth of rice to Bb. A Is acting as agent of C in the transaction, but B has no knowledge nor reasonable ground of suspicios that such is the case. C cannot compel B to make the rice without allowing him to set-off A's debt.

4. If the principal discloses himself before the contract is competed, the third party may refuse to fulfill the contract, if he can show that if he had know who was the principal in the contract or if he had known that the agent was not a principal, he would not entered into contract.

Personal liability of agent to third party

It has already been observed that an agent is appointed to bring the principal into contractual relations with third parties and the act of the agent are the act of the principal. As a rule, therefore, an agent cannot personally enforce contracts entered into by him on behalf of the principal, nor can he be personally held liable for them, unless there is a contract to the contrary. The principal is the right person to enforce such contracts and to be held liable therefore.

There are, however, certain exception to this rule, where an agent presumed to be personally liable, unless a contract to the contrary exists.

At the every out set it is worth noting that in certain cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. In other words, the liability of the principal and the agent is joint and several' in some cases. Even where the agent is personally liable, the principal is also liable to third parties and hence the saying. "the law which super adds the liability of an agent dose not detract from the liability of the principal." The third party dealing within an agent who is personally liable can choose between (a) suing both principal and agent jointly,(b) electing to sue one of them. It is important that a judgment obtained against one only and remaining unsatisfied is on a second suit against the other party, i.e., if the third party sues the agent and obtains no satisfaction he may afterwards sue the principal because the ability is 'joint and several'.

An agent is presumed to be personally liable, unless a contract to the contrary exists, in the following cases.

1. Where the agent expressly agrees:

If an agent, while contracting with a third party, expressly agrees to be personally liable on the contract, he can held personally liable for any breach of contract.

2. Where the agent act a foreign principal:

Where an agent contract for the sale or purchase of good for a merchant residing abroad, he is presumed to be personally

3. Where the agent acts for unnamed principal,

Where an agent act an unnamed principal, he is personally liable to the third party, if he declines to disclose the identity of the principal, say, because of his sudden death.

4. Where the agent act as disclosed principal:

Where an agent acts for an undisclosed principal and contracts in his a party comes to know the existence of the principal, he may hold either the agent or the principal or both of them liable.

5. Where the agent acts for a principal who cannot be sued:

An agent is also presumed to incur personal liability where he contacts on behalf of principal who, though disclosed, cannot be sued. For example, where an agent act for an ambassador or foreign sovereign, he is personally liable. Similarly, where promoters contract for a projected company, they are held personally liable for that, as the company, being non-existent at the time of the contract, cannot be used.

6. Where the agent exceeds his authority:

When an agent in excess of his real as well as apparent authority, and in this way commits a breach of warranty of authority, he will be personally liable to the third party for the otherwise for the whole transaction.

7. Where there is trade usage or custom:

An agent also incurs personal liability where there is a trade usage or custom to that effect. For example, a jobber may hold a broker personally liable ass per the custom of trade in a stock exchange.

8. Where agent's authority is coupled with interest:

Where the contract with the third party relate to a subject- matter in which the agent has a special interest because he is really a principal for interest.

It should be noticed that in seconds, third, fifth and sixth cases mentioned above, the third party can hold only the agent personally liable and the principal.

6.8 Termination Of Agency

An agency may be terminated in any of the following ways:

A. By act of the parties, or
B. By operation of law.

We will consider these method one after the other.

6.8.1 Termination by act of the parties:

An agency comes to an end by act of the parties in the following cases.

1. Agreement:

An agency, like any other contract, can be terminated at any time by the mutual agreement the principal and the agent.

2. Revocation by the principal:

The principal can revoke the authority of the agent at any time before the agent has exercised his authority so as to bind the principal, unless the agency is irrevocable. Further, revocation may be expressed or implied in the conduct of the principal. Thus where A empowers B to let A's house and afterwards lets the house himself, it is an implied revocation of B's authority revocation of authority by the principal is, however, subject to the following conductions:

(i) In the case of a continuous agency, the principal may revoke it for the future. It cannot be revoked with regard to act already in the agency. Again, before revoking the authority for the future, reasonable notice of the same should be given to the agent and also to third parties. If reasonable notice is not given, the principal will be liable to compensate the agent for damages resulting thereby (i.e. for the agent's loss of salary if on immediate job is available), and be bound by the act of the agent with respect to third parties.

(ii) Where an agency has been created for a fixed period and the principal revokes the authority of the agent the expire of the period, without sufficient cause, the principal is bound to pay compensation on the resulting loss, even if the authority is revoked after reasonable notice.

An agency is irrevocable in the following cases:

(a) Where the agent has himself an interest the subject matter of agency of emergency is said to be coupled with interest. Such an agency is created with the object of protecting or securing any interest of the agent. So where a creditor is employed for valuable consideration as an agent to collect rent due to the principal (debtor) for adjusting the amount towards his debt, the principal thereby confers the amount towards his debt, the principal thereby confers the interest on the agent and the authority cannot be revoked unilaterally during the subsistence of the interest, in the absence of an exposed to the contrary

(b) Where an agent has incurred a personal liability in accordance with the terms of the contract of agency, the principal cannot be allowed to revoke the agency leaving the agent exposed to risk or liability he has incurred.

3. Renunciation by the agent:

An agency may also be terminated by an express renunciation by the agent because a person cannot be compelled to continue as agent because a person cannot be compelled to continue as agent against his will. But he must give a reasonable notice of renunciation to the principal, otherwise he wil be liable to compensate the principal for any damage resulting thereby. If the agency is for a fixed period and the agent renounced it without sufficient cause before the expiry of the period, he shall have to compensate the principal for the resulting loss, if any.

6.8.2 Termination by Operation of law:

An agency automatically be operation of law in the following cases:

1. Completion of the business of agency:

An agency automatically comes to an end when the business of agency is completed. Thus, for example, an agency for the sale of a particular property terminates on the completion of the sale. Similarly, where a lawyer is appointed to plead in a suit, his authority comes to an end with judgment.

2. Expiry of time:

If the agent is appointed for a fixed term, the expiration of the term puts an end to the agency, even though the business of the agency may not have been completed.

3. Death of the principal or the agent:

An agency is terminated automatically on the death of the principal or the agent. After coming to know about the principal's death although the agency terminate but the agent must take all reasonable steps for the protection of the interests of the late principal entrusted to him.

4. **Insanity of the principal or the agent:**

An agency also stand terminated when the principal becomes of an unsound mind. Here also it is the duty of an agent to protect the interest of the former principal by taking all reasonable steps. Likewise when the agent becomes insane, during the agency, his authority terminates at once and the agency comes to an end. It is interesting to mention that a person of unsound mind can be initially appointed as an agent.

5. **Destruction of the subject-matter:**

An agency which is created to deal with certain subject-matterwill terminated by the destruction of the subject-matter. For example, where the agency was created for the sale of a house and the house is destroyed by fire the agency ands.

6. **Dissolution of a company:**

If the principal or agent is an incorporated company, the agency automatically ceases to exist on dissolution of the company.

7. **Principal or agent becomes alien enemy:**

If the principal and agent are nationals of two different contract of agency is terminated. The outbreak of war renders the continuance of the principal and agent relationship unlawful because now the principal or agent becomes an alien enemy.

8. **Bankruptcy of the principal**:

An agency is also terminated by the insolvency of the principal.

Summary of the topic

- Classes of agents
- Creation of agency
- Duties and responsibilities of agents
- Duties and responsibilities of principals
- Termination of agency

Revision questions

i) *Explain the various ways of classifying agents*

ii) *Describe the various classes of agents*

iii) *Explain the rights and duties of agents*

Further reading

i) Saleemi.N.A (2010)*General Principles of Law Simplified*, N.A Saleemi Publishers Limited ,Nairobi, Kenya. Pages 338-363

ii) Ogolla J.J (2005) *Business Law,* English Press Nairobi, Kenya. Pages 164-175

iii) Laibuta (2006) *Principles of Commercial Law,* Africa Publishing Limited. Pages 286-321

CHAPTER SIX

7.0 SALE OF GOODS ACT

General objective

By the end of the lesson the learner should be able to explain the importance of the Sale of Goods Act to businesses

Specific objectives

By the end of the lesson the learner should be able to

a) *distinguish between a sale and an agreement to sell*

b) *explain the implied conditions and warranties in every contract of sale*

c) *explain the doctrine of caveat emptor*

d) *explain the rights of sellers and buyers as provided for by the Act*

The law relating to the sale of goods is contained in the Sale of Goods Act (Cap. 31). This Act is mainly based on English Sales of Goods Act 1893. At the same time, the general rules of contract law apply to contracts for the sale of goods.

Definition

Section 3(1) of the Act defines a contract for the sale of goods as:

"A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price".

The essential characteristics of a contract of sale of goods are as follows:

1. There must be two distinct parties to a contract of sale viz, a buyer and a seller.

2. There must be a transfer of property. Property here means 'ownership'. A seller must either transfer or agree to transfer the property in goods to the buyer.
3. There subject-matter of the contract of sale must be goods. 'Goods' includes all chattels personal other than things in action and money, and all emblezments, industrial, growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. It means every kind of movable property other than actionable claims and money, are called as goods.
4. The consideration for a contract of sale must be money consideration called the price. If goods are sold or exchanged for other goods the transaction is barter and not sale of goods.
5. There term contract of sale includes both a sale and an 'agreement to sell'.

7.1 Distinction between Sale and Agreement to Sell.

Section 3(4) of Act provides that:

"Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale: but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell".

The following are the main points of distinction between a 'sale' and 'an agreement to sell'.

1. **Transfer of property (ownership):**

   In a 'sale' the property in goods passes to the buyer immediately at the time of making the contract. In other words, a sale implies immediately conveyance of property so that the seller ceases to be the owner of the goods and the buyer becomes the owner thereof.

   In 'an agreement to sell' there is no transfer of property to the buyer at the time of the contract. The conveyance of property takes place later so that the seller continues to be the owner until the agreement to sell becomes a sale either by the expiry of certain time or the fulfillment of some condition.

2. **Risk of loss:**

The general rule is that unless agreed, the risk of loss prima facie passes with property. Thus in case of sale, if the goods are destroyed the loss fails on the buyer even though the goods may never have come into his possession because the property in the goods has already passed to the buyer. On the other hand, in case of an agreement to sell where the ownership in the goods is yet to pass from the seller to the buyer, such loss has to be borne by the seller even though the goods are in the possession of the buyer.

3. **Consequences of breach:**

In case of sale, if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his possession. In case of an agreement to sell, if the buyer fails to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the possession of buyer.

4. **Right of resale:**

In a sale, the property is with the buyer and as such the seller (in possession of goods after sale) cannot resell the goods. If he does so, the subsequent buyer having knowledge of the previous sale does not acquire a title to the goods.

In an agreement to sell, the property in the goods remains with the seller and as such he can dispose of the goods as he likes and the original buyer can sue him for the breach of contract only. In this case, the subsequent buyer gets a good title to the goods irrespective of his knowledge of previous sale.

5. **Insolvency of buyer before he pays for the goods:**

In a sale, if the buyer is adjudged insolvent before he pays for the goods, the seller, in the absence of a ‘right of lien’ over the goods, must deliver the goods to the Official Receiver or Assignee. The seller is entitled only to a rateable dividend for the price of the goods. But in an agreement to sell, in these circumstance, the seller may refuse to deliver the goods to the Official Receiver or Assignee unless paid for, as ownership has not passed to the buyer.

6. **Insolvency of seller if the buyer has already paid the price;**

In a sale, if the seller is adjudged insolvent, the buyer is entitled to recover the goods from the Official Receiver or Assignee, as the property in the goods rests with the buyer. On the other hand, in an agreement to sell, if the buyer has already paid the price and the seller is adjudged insolvent, the buyer can only claim a rateable dividend. (as creditor) and not the goods because property in them still rests with the seller.

Distinction between Sale and Contract for Work and Material:

A distinction has to be made between a contract of sale and contract for work and material. The Sale of Goods Act does not apply to contracts for work and material. When property in the goods is intended to be transferred and goods are ultimately to be the buyer, it is a contract of sale even though some labour on the part of the seller of the goods may be necessary. Where, however, the essence of the contract is rendering of service and exercise of skill and no goods are delivered as such, it is a contract of work and material and not of sale.

Illustrations:

a) A dentist agreed to make a set of false teeth for a lady and fit it into her mouth. Held: it is a contract for the sale of goods (Lee vs. Griffin).
b) An order for making and fixing curtains in a house is a contract of sale of goods, though it involves some work and labour in fixing the same (Love vs. Norman Wright (Builders) Ltd).
c) G engaged an artist to paint a portrait and supplied the necessary canvas and paint. Held: it is a contract for work and labour as the substance of the contract is the application of the skill and labour in the production of the portrait (Robinson vs. Graves). If the canvas and paint are also to be supplied by the painter, it will become a contract of sale of goods.

The distinction between a sale and a contract for work and material is important due to the following two reasons:

1. A contract for work and material does not require to be in writing; while a contract for the sale of goods in Kenya must be in writing if the value of goods is shs. 200 or more.
2. The implied conditions and warranties under the sale of Goods Act do not apply to contracts of work and material.

7.2 Capacity to Buy and Sell:

Section 4 of the Act deals with the capacity to buy and sell. Under this section, the capacity to buy and sell is governed by the general law concerning capacity to contract and to transfer and acquire property. Infants and persons of unsound mind must pay a reasonable price for necessaries and not necessarily the agreed price.

Necessaries are defined by section 4(20 as goods suitable to the condition in life of such or minor or other person, and to his actual requirements at the time of sale and delivery.

7.3 Form of Contract:

Section 5 of the Act states that a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may by implied by the conduct of parties. Under section of the Act, a contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

7.4 Subject Matter of Contract:

Sections 7, 8 and 9 the Act relate to the subject matter of contract. Goods form the subject matter of a contract of sale. Goods may be existing goods or future goods. These are explained as under:

7.4.1 Existing Goods:

Goods which are physically in existence and which are in seller‘s ownership and /or possession, at the time of entering the contract of sale are called ‘existing goods’. Where seller is in possession, say as an agent or a pledge, he has a right to sell them.

Existing goods may again be either ‘specific’ or ‘unascertained ‘.

7.4.2 Future Goods:

Goods to be manufactured, produced or acquired by the seller after the making of the contract of sale are called ‘future goods’. These goods may be either not yet in existence or be in existence but not yet acquired by the seller. It is worth noting that there can be present sale of future goods because property cannot pass in what is not owned by the seller at the time of the contract. So even if the parties purport to effect a present sale of future goods, in law it operates as an ‘agreement to sell’.

7.4.3 Contingent Goods:

Goods, the acquisition of which by the seller depends upon an uncertain contingency are called ‘contingent goods’. Obviously they are a type of future goods and therefore a ‘contract for the sale of contingent goods also operates as ‘an agreement to sell’ and not a ‘sale’ so far as he question of passing of property to the buyer is concerned. In other words, like the future goods in the case of contingent goods also the property does not pass to the buyer at the time of making the contract. It is important to note that a contract of sale of contingent goods is enforceable only if the event on the happening of which the performance of the contract is dependent happens, otherwise the contract becomes void.

Perishable Goods:

Under section 8,where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, contract is void.

Section 9 of the Act states where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer , the agreement is thereby avoided.

The Price:

The money consideration for a sale of goods is known as "price" .The price is an essential element in every contract of sale of goods, that is ,no valid sale can take place without a price. The price should be paid pr promised to be paid in legal tender money, unless otherwise agreed. It may be paid in the form of a cheque, draft, bank deposit etc.For, it is not the mode of payment of a price but the agreement to pay a price in money that is requisite to constitute a valid contract of sale.

Under section 10 of the Act, the price may be expressly fixed by the parties in the contract of sale, or may provide for the method in which the price is to be fixed. Where the price id not stated in the contract, nor is any provision made for its determination, the buyer must pay a reasonable price, and what is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 11 of the Act provides that the price may also be left t be fixed by the valuation of a third party, provided he accepts the duty and performs it. But if the third party fails to make such valuation, the agreement is avoided. If in pursuance of the contract the goods or any part thereof have been delivered by the seller and accepted by the buyer, he must pay a reasonable price for them .I n case the third party is prevented from making the valuation by the seller or the buyer, the innocent party may maintain an action for damages against the party in fault.

7.5 Implied Conditions And Warranties.

A contract of sale of goods contains various or stipulations regarding the quality the goods, the price and the mode of its payment, the delivery of goods and its time and place. But all of them are not of equal importance. Some of these stipulations may be major terms which go to the very root of the contract, and their breach may frustrate the very purpose of the contract, while others

may be minor terms which are not so vital that their breach may seem to be a breach of the contract as such. In law of sale, major terms are called ‘ conditions’ and minor terms are called ‘ warranties’.

Conditions Defined:

A ‘condition ‘ is a stipulation essential to the main purpose of the contract , the breach of which gives the aggrieved party right to repudiate the contract itself(sec .13(2).In addition , he may maintain an action for damages for loss suffered , if any , on the footing that the whole contract is broken and the seller is guilty of non –delivery.

Warranty Defined:

A ‘ warranty ‘ is a stipulation collateral to the main purpose of the contract, the breach of which gives the aggrieved party a right to sue for damages only ,and not to avoid the contract itself .(Sec.13(3).

Under the Act, a buyer may elect to waive the condition or may elect to treat the breach of such condition as breach of warranty and not as a ground for treating the contract as repudiated, (Sec. 13(1).

Express and Implied Conditions and Warranties:

Conditions and warranties may be either express or implied. They are said to be express when at the will of the parties they are inserted in the contract, and they are said to be implied when the law presumes their existence in the contract automatically though they have not been put into it in express words. Implied conditions and warranties may, however, be negative or varied by express agreement, or by course of dealing between the parties, or by usage of trade. This provision is merely an application of the general maxim of law,” what is expressly done puts an end to what is tacit or implied’, and ‘custom and agreement over rule implied conditions and warranties.

7.5.1 Implied Conditions.

Unless otherwise agreed, the law incorporates into a contract of sale of goods the following implied conditions:

Right to sell (sec .14(a):

In every contract of sale, the first implied condition on the part of the seller is that, in the case of a sale he has the right to sell the goods and that in the case of an agreement to sell, he will have a right to sell the foods at the time when the property is to pass. Ordinarily the seller has the right to sell the goods if either he is the owner of the goods or he is owner's agent. As a result of this condition, it the seller's title turns out to be detective the buyer is entitled to reject the goods and to recover his price. Notice that in the case of breach of condition as to title, the buyer has no option to treat the breach of warranty and accept the goods to the true owner. He can of course recover the price from the seller because of a total failure of consideration.

Illustration.

R purchased a motorcar from D and used the same for several months had no title to the car and therefore, R was compelled to return the car to the true owner sued D to recover back the price which he had already paid. He was held entitled to recover the whole of the price paid by him despite the fact he had used the car for some months (Rowland vs Divall 1923).

Condition in a sale by description (S.15)

"Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description....." Lord Blackburn observed "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is into bound to take it". It is important that the goods must correspond with the description whether it is a sale of specific goods or of unascertained goods. Further, the fact that the buyer has examined the goods will not effect his right to reject the goods, if the deviation of the goods from

the description is such which could not have been discovered by casual examination, i.e. if the goods show any latent defects.

The description may be in terms of the qualities or characteristics of the goods, e.g. long staple cotton, white maize basmati rice or may simply mention the trade mark, brand name or type of packing, e.t.c.

Illustration

a) Where there was a contract or the supply of 'new single cars' and one of the cars supplied having already run a considerable mileage was not new, there was a breach of condition on the part of the seller and buyer was held entitled to reject the car (Andrews Bros. Vs Singer & Co;. 1934).

b) M agreed to supply to L 3,000 tins of canned fruit, to be packed in cases each containing 24 tins. M tendered a substantial portion in cases containing 24 tins. I t was held that the mode of packing constituted a part of the description and, therefore, L was entitled to reject the whole consignment (Re Moore & Co. and Laundaure & Co.1921).

3. Condition in a sale by sample; (S.17)

When under a contract of sale, goods are to be supplied according to a sample agreed upon, the implied conditions are:

i. That the bulk shall have a reasonable with the sample in quality:

ii. That the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

iii. That goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the ample. In other words, there should not be any latent defect in the goods. If the defect is patent one, that is, easily discoverable by

Illustrations

1. Two parcels of wheat were sold by sample. The buyer went to examine the bulk a week after. One parcel was shown to him but the seller refused to show the other parcel which was not there in the warehouse. Held: the buyer was entitled to rescind the contract (Lorymer vs. Smith 1822).

2. Some mixed worested coatings were sold by sample. The goods when supplied corresponded to the sample but it was found that owning to a latent defect in the cloth, coats made out of it would not stand ordinary wear and were therefore unsaleable, the same defect existed in the sample also but could not be detected on a reasonable examination. Held: the buyer was entitled to reject the cloth (Drummond & Sons vs. Van Lugen (1887).

4. Condition in a sale by sample as ell as by description: (S.15)

When goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond both with the description. If the goods supplied correspond only with the sample and not with the description or vice versa, the buyer in entitled to reject the goods. The bulk of the goods must correspond the both.

Illustrations:

a) There was a contract of sale by sample of seeds described as ‘common English sainfion’. The contract contained a term excluding all warranties express or implied. The seed was sown and when the crop was ready it was discovered that the seed supplied and the sample shown were a different and inferior variety known as ‘gaint sanfion’. It was held that there was a breach of condition and exemption clause did not protect the sellers. The buyer was, therefore, entitled to recover damages (Willis vs. Pratt 1911).

b) N agreed to sell G some oil described as 'foreign refined or warranty as to quality of fitness for any particular purpose of goods supplied; the rule of law being 'Caveat Emptor', that is, let the buyer beware. But an implied condition is deemed to exist on the part of the seller that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them, if the following conditions are satisfied:

i. The buyer, expressly or impliedly, should make known to the seller the particular purpose for which the goods are required: and;

ii. The buyer should rely on the seller's skill or judgment; and;

iii. The goods sold must be of a description which the seller deals in the ordinary course of his business whether he be the manufacturer or not.

The purpose must be made known expressly if the goods to be supplied can be used for several purposes, otherwise the condition as to 'fitness will not be implied and the buyer will have no right to reject the goods merely because they are unfit for the specific purpose he had in mind.

Illustration:

A buyer ordered for the Hessian cloth, which is generally used for packing purposes, without specifying the purpose for which he wanted the same. The cloth was supplied accordingly. On receiving the cloth the buyer found that it was not suitable for packing food products as it had unusual smell. Held: that the buyer had no right to reject the cloth as it was suitable for packing purposes alright. The buyer ought to have disclosed his particular purpose to the seller in order to make him liable for the breach of implied condition as to fitness (Re Andrew Yule & Co, 1932).

The purpose need not be told expressly if the goods are fit for one particular purpose only or if the nature of the goods itself tells the purpose by implication. In such cases the purpose is deemed to be made known to the seller impliedly.

Illustration:

a) A, a draper, who had no special knowledge of hot water bottles, went to the shop of a chemist and asked for a hot water bottle. He was shown an American rubber bottle which the chemist said would not stand boiling water, but was meant for hot water, A bought the bottle. A few days, while being used, it burst and injured his wife. It was found that the bottle was not fit for use as a hot water bottle. It was held that since the bottle could be used only for one particular purpose, there was a breach of implied condition as to fitness and the seller was liable to pay damages (Priest vs. Last, 1903).

b) Where a buyer demands tinned fruit juice, it is implied from the nature of the product itself that he wants it for consumption and if later on it is found poisonous matter, there is a breach of implied condition as to fitness and the seller is liable in damages.

6. Condition as to merchantability [S.16 (b)]

This condition is implied only where the sale is by description. We have already seen that there is an implied condition in such cases, that the goods should correspond with the description. This sub-section lays down another implied condition in such cases, that is, that the goods should be of 'merchantable quality'. But for making this condition applicable, not only that the sale must be by description, but the following conditions must also be satisfied:

i. The seller should be a dealer in goods of that description, whether he be the manufacturer or not; and:

ii. The buyer must not have any opportunity of examining the goods or there must be some latent defect in the goods which would bot the apparent on reasonable examination of the same.

If the buyer had an opportunity of making the examination but he avoids to examine or if he has examined the goods, there is no implied condition as to merchantability as regards defects which such examination ought to have revealed.

The phrase 'merchantable quality' means that the goods are of such quality and in such condition that a reasonable man, acting reasonably, would accept them under the circumstances of the case

in performance of his offer to buy those goods, whether he buys them for his own use or to sell again. Stated briefly, in order to be 'merchantable' the goods must be such as are reasonable under the description by which they are known in the market.

Illustrations:

a) Where the underwears supplied contained certain chemicals which could cause skin disease to a person wearing them next to skin it was held that because of such a defect the underwears were not of merchantable quality and the buyer was entitled to reject the goods (Grant Knitting Mills Ld. 1936).

b) Where A purchases a certain quantity of black yarn from B, a dealer in yarn, and finds it damaged by white ants, the condition as to merchantability has been broken and A is entitled to reject it as unmerchantable.

7.5.2 Implied Warranties:

Unless other wise agreed, the law also incorporates into a contract of sale of goods the following implied warranties:

1. Warranty of quiet possession:[S.14(b)]

In every contract of sale, the first implied warranty on the part of the seller is that 'the buyer shall have and enjoy quiet possession of the goods." If the quiet possession of the buyer is in anyway disturbed by a person having a superior right from the seller. Since disturbance of quiet possession is likely to arise only where the seller's title to goods is defective.

Illustration:

The plaintiff, a lady, purchased a second hand typewriter from the defendant. She thereafter spent some money on its repair and used it for some months. Unknown to the parties, the

typewriter was a stolen one and the plaintiff was compelled to return the same to its true owner. She was held entitled to recover from the sellers for the breach of this warranty damages reflecting not merely the price paid but also the cost of repair (Moson Vs. burningham" 1949).

2. **Warranty of freedom form encumbranced: [Sec.14 (c)]**

   The second implied warranty on the part of the seller is that "the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made". If the goods are afterwards found to be subject to a charge and the buyer has to discharge the same, there is breach of warranty and buyer is entitled to damages. It is to be emphasized that the breach of this warranty occurs only when the buyer in fact discharges the amount of the encumbrance, and he had no notice of that at the time of the contract of sale. If the buyer knows about the encumbrance on the goods at the time of entering into the contract, he becomes bound by the same and he is not entitles to claim compensation from the seller for discharging the same.

Illustration:

A, the owner of the watch, pledges it with B. After a week, A obtains possession of the watch from B for some limited purpose and sells I to C. B approaches C tells him about the pledge affair. C has to make payment of the pledge amount to B. There is breach of this warranty and C is entitled to claim compensation from A. (Notice that in the instant case the buyer (i.e. C) cannot allege breach of implied condition as to title against the seller (i.e. A) because the seller in fact had a title to the goods, through subject to the rights of the pledge).

3. **Warranty of disclosing the dangerous nature of goods to the ignorant buyer:**

   The third implied warranty on the part of the seller is that in case the goods are of dangerous nature he will warn the ignorant buyer of the probable danger. If there is breach of this warranty the buyer is entitled to claim compensation for the injury caused to him.

7.6 Doctrine of Caveat Emptor:

The maxim of 'caveat emptor' means "let the buyer beware". According to the doctrine of caveat emptor, it is the duty of the buyer to be careful while purchasing goods of his requirement and, in the absence of any enquiry from the buyer, the seller is not bound to disclose every defect in goods of which he may be aware. The buyer must examine the gods thoroughly and must see that the goods he buys are suitable for the purpose for which he wants them. If the goods turn out to be defective or do not suit his purpose, the buyer cannot hold the seller liable for he same , as there is no implied undertaking by the seller that he shall supply such goods as suit the buyer's p[purpose. If therefore, while making purchases of goods the buyer depends upon his own skill and makes a bad choice, he must curse himself for his folly, in the absence of any misrepresentation of fraud or guarantee by the seller.

Illustration:

A, purchases a horse from B. A needed the horse for riding but he did not mention this fact to B. The horse is not suitable for riding but is dutiable only for being driven in the carriage. Caveat emptor being the rule, A can neither reject the horse nor can he claim any compensation from B.

Exceptions

The doctrine of 'caveat emptor' is subject to the following exceptions:

1. Where the seller makes a mis-representation and the buyer relies on it, the doctrine of caveat emptor does not apply. Such a contract being voidable at the option of the innocent party, the buyer has a right to rescind the contract.

2. Where the seller makes a false representation amounting to fraud and the buyer relies on it, or where the seller actively conceals a defect in the goods so that the same could not be discovered on a reasonable examination, the doctrine of caveat emptor does not apply. Such a contract is also viodable at the option of the buyer and the buyer is entitled to avoid the contract and also claim damages for fraud.

3. Where the goods are purchased by description and they do not correspond with the description.

4. Where the goods are purchased by description from a seller who deals in such class of goods and they are not of 'merchantable quality', the doctrine of caveat emptor does not apply.

5. Where the goods are bought by sample, the doctrine of caveat emptor does not apply if the bulk dos not correspond with the sample, or if the buyer is not provided an opportunity to compare he bulk with the sample, or if there is nay hidden or latent defect in the goods.

6. Where the goods are bought by sample as well as by description and the bulk of the goods does not correspond both with the sample and with the description, the buyer is entitled to reject the goods.

7. Where the buyer makes known to the seller the purpose for which he requires the goods and relies upon the seller's skill nod judgment but the goods supplied are unfit for the specified purpose, the principle of caveat emptor does not protect the seller and he is liable in damages.

8. Where the trade usage attaches an implied condition or warranty as to quality or fitness and the seller deviates from that, the doctrine of caveat emptor does not apply and the seller is liable in damages.

7.7 Transfer of Property in Goods

The phrase "transfer of property in goods" means transfer of ownership of the goods. 'Property in goods' is different from possession of goods. Possession refers to the custody over the goods. So the property in goods may pass from the seller to the buyer but the goods may be in possession of the seller either as unpaid seller or as a bailee for the buyer. In other cases the

property in goods may still be with the seller although the goods may be in possession of the buyer or his agent or a carrier for transmission to the buyer.
The precise moment of time at which property in goods passes from the seller to the buyer is of great importance from various points of view:

Rules Regarding Transfer of Property:

We shall be studying the rules regarding transfer of property under the following two heads:

Transfer of property in specific or ascertained goods.

Transfer of property in unascertained and future goods.

7.7.1 Transfer of property in specific or Ascertained Goods:

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer as such time as he parties to the contract intend it to be transferred. For the purpose of the ascertained the intention of the parties and the circumstances of the case (Sec . 19(1) (2)]. Thus, in the case of specific good, the transfer of property takes place when the parties intend to pass it. The parties may intend to pass the property at once at the time of making of the contract or when the goods are delivered or when the goods are paid for.
It is only when the intention of the parties cannot be judged from their contract or conduct or other circumstances that the rules laid down in Section 20 apply. These rules are as follows:

1. When goods are in deliverable state: [S.20 (a)]

When there is an unconditional (i.e. not subject to any condition precedent to be fulfilled by the parties) contract for the sale of specific goosa in a delivereable state, the property in the goods passes to the buyer as soon as the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of goods, or both are postponed.

Illustrations:

a) A, buys a bicycle for sh. 3,000 on a month's credit and asks the shopkeeper to send it to his house. The shopkeeper agrees to do so. The bicycle immediately becomes the property of A.

b) P buys a table for sh. 1000 on a week's credit and arranges to take delivery of the table the next day. A fire broke out in the furniture mart the same evening and the table is destroyed. The property in the table has passed to P and he is bound to pay the price.

The goods are said to be in 'deliverable state' when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. For example, in illustration (b) above, if the seller has to polish the table to make it acceptable to the buyer, it is not in a deliverable state until it is so polished, and the buyer does not acquire property at the time of the contract.

2. When goods have to be put into a deliverable state: (Sec. 20 (b)]
   When there is a contract for the sale of specific goods and the seller is bound to do 'something here means an act like packing the goods, or loading them on rail or ship, or filling them in containers or polishing them in order to give a finished shape, etc. it is to be noted that merely putting the things in a deliverable state would not result in the transfer of property in the good from

It is further necessary that the buyer must have notice thereof, i.e. the fact that the goods have been put in a deliverable state must come to the knowledge of the buyer in some way or the other.

Illustration:

A, agrees to sell to B the whole of turpentine oil lying in a cistern. It is further agreed that the oil is to be put into casks by A and the B is to take them away. Some of the casks are filled in he presence of B, but before any are removed or the remainder filled, the whole is destroyed accidentally by fire. B must bear the loss of oil which had been put into the casks because in all

these casks the property has passed to him as nothing further remained to be done to them by the seller. But the property in the casks not filled up remained in the seller, at whose risk they continued (Rugg vs 1809).

i. **When the goods have to be measured etc. to ascertain price: [Sec. 20 (c)]**
When there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing done and the buyer has notice thereof.

Illustration:

A, sold to B 289 bales of goat skins, each bale containing five dozens, and the price was for certain sum per dozen skins. It was the duty of A to could the goats skins in each bale. Before A could do the same, the bales were destroyed by fire. Held: that the property in the goods had not passed to the buyer (i.e. B) as something still remained to be done by the seller (i.e. A) for ascertaining the price, and as such the loss caused by fire had to be borne by the seller (i.e. A) (Zagury vs. Furnell 1809).

It may e noted that if the seller has done all what he was required to do under the contract and nothing remains to be by him, the property passes to the buyer even if the buyer has to do something for his own satisfaction.

Illustration:

A contracted with B to sell him 975 bags of rice, the whole content of a certain ‘golah’. B paid the entire price but agreed to remove the rice after weighing (for his own satisfaction) before a certain date. After delivery was taken of a part of the rice the other part was destroyed by fire. Held: the ownership had passed to the buyer because nothing remained to be done by the seller

to ascertain the price, and therefore B, the buyer, suffer the loss (Shoshi Mohum Pal Vs Nobo Kristo Poddar).

ii. **When goods are delivered on approval: [S. 20(d)]**

When goods are delivered to the buyer on approval or 'on sale or return', or on other similar terms, the property therein passes to the buyer:

a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction e.g., pledges the goods or resells them.

b) If he does not signify his approval or acceptance to the seller but retains the goods, without giving notice of rejection, beyond the time fixed for the return of goods, or if no time has been fixed, beyond a reasonable time.

Illustrations:

a) A, delivered a horse to B on the terms of 'sale or return, within 8 days'. The horse died on the third day without any fault on the part of B. Held: A was to bear the loss as the horse was still his property when it perished (Elphick vs Barnes 1880).

b) A, delivered a horse to B on trial for 8 days. B continued to retain the horse even after the expiry of 8 days without giving notice of rejection to A. B had automatically become the owner of the horse on the expiry of 8 days.

7.7.2 Transfer of Property in Unascertained and Future Goods:

The rule relating to transfer of property in ascertained and future goods is contained in Section 20 (e) (i) & (ii). This section provides that where goods contracted to be sold are not ascertained or where they are future goods, the property in goods does not pass to the buyer unless and until the goods are ascertained or unconditionally appropriated to the contract so as to bring them in a

deliverable state, either by the seller with the assent of the buyer or by the buyer with assent of the seller. Such assent may be expressed or implied, and may bee given either before or after the appropriation is made.

It must be noted that the above rule (as contained in section 20 (e) (i) & (ii) is a fundamental rule and it applies irrespective of what the parties intended. Until goods are ascertained or appropriated there is merely 'an agreement to sell'. Thus a sale of ten quintals of wheat from a granary containing a large quantity has not the effect of transferring property in the ten quintals to the purchaser. It amounts only to 'an agreement to sell'. It is only when ten quintals are appropriated to the contract by the seller and the buyer has notice thereof, that property shall pass from the seller to the buyer.

The process of ascertainment or appropriation consists in earmarking or setting apart goods as subject-matter of the contract. It involves separating, weighing measuring, counting or similar acts done in relation to goods with an intention to identify and determine the specific goods to be delivered under the contract. The distinction between 'ascertainment' and 'appropriation' is that whereas 'ascertainment' can be a unilateral act of the seller, that is, he alone may set apart the goods, 'appropriation' involves the element of mutual consent of the seller and the buyer.

Reservation of right of disposal: (Sec.21)

Reservation of right of disposal means reserving a right to dispose to the goods until certain conditions (like payment of the price) are fulfilled. When the seller reserves such a right expressly while making a contract or while making appropriation of unascertained goods. He may also reserve this right by implication, for example, when the seller while transporting goods takes the railway receipt or the bill of lading in his own name or where the seller has taken the R/R or B/L in the name of the buyer but has delivered the same to his bank with the instructions that the document is to be delivered to the buyer only when he makes payment of the price or accepts the bill of exchange, the right of disposal is said to be reserved impliedly.

7.8 Transfer of Title on Sale:

The general rule relating to the transfer of title on sale is that *"the seller cannot transfer to the buyer of goods a better title than he himself has"*. If the tile of the seller is defective the buyer's title will also be subject to the same defect. Section 23 also lays down to the same effect and provides that *"where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had....."* This rule is expressed by the maxim, "nemo det quod no habet," which means that no one can give what he has not got.

The general rule aims at protecting the interests of the true owner and is deemed necessary in the larger interest of society. So if a thief disposes of stolen property, the buyer acquires no title though he may have purchased the goods bonafide, for value, and the real owner of the goods in entitled to recover possession of goods without paying anything to the buyer. Similarly, where a hirer of goods under a hire-purchase agreement sells them before he had paid all the installments, the buyer though acting in good faith, does not acquire the property in the goods against the true owner and, on default of payment by the hirer

The true owner can recover the goods from the buyer (Whiteley & Co. Vs. Hilt 1918).
Thus a buyer cannot get a good title to the goods unless he purchases goods from a person who is the owner thereof or who sells them under the authority or with the consent of the owner.

7.8.1 Transfer of title by Non-Owners:

The above general rule as to title is subject to the following exceptions where the buyer gets a better title to the goods than what the seller himself possesses:

1. **An unauthorized sale by a mercantile agent:**

   A mercantile agent means an agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to raise money on the security of goods. Thus as a rule a mercantile agent having authority

to sell goods coveys a good title to the buyer. But by virtue of this provision, a mercantile agent can convey a good title to the buyer.

2. **Transfer of title by estoppels:**

In the words of Lord Halsbury: "Estoppel arises when you are precluded from denying the truth of anything, which you have represented as a fact, although it is not a fact". Thus, estoppels means that a person who by his conduct or words leads another to believe that certain state of affairs existed, would be stopped from denying later on that such a state of affairs did not exist. The basis of estoppels is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which he has permitted another person to believe to be true. In such circumstances, the buyer gets a better title.

3. **Sale by person in possession under voidable contract:**

When a person has obtained possession of the goods under voidable contract and he sells those goods before the contract has been rescinded, the buyer of such goods acquires a goods title to them provided the buyer acts in good faith and without notice of seller's defect of title.

4. **Sale by seller in possession after sale:**

Where a seller, after having sold the goods continues to be in possession of the goods or of the documents of title to them and again sells or pledge them either himself or though a mercantile agent, he will convey a good title to the buyer or the pledge provided the buyer or the pledge acts in good faith and without notice of the previous sale. For the application of this exception it is essential that the possession of the seller must be as seller and not as hirer or bailee.

5. **Sale by buyer in possession after 'agreement to buy'.**

Where a buyer has agreed to buy the goods and has obtained possession of the same or the documents of title to them with the consent of the seller, resells or pledges the goods either himself or through a mercantile agent, he will convey a good title to the buyer or the pledge provided the person receiving the goods acts in good faith and without notice of any lien or other right of the original seller in respect of those goods.

6. **Resale by unpaid seller:**
   When an unpaid seller, who has exercised his right of lien or stoppage in transit, resells the goods (of which ownership has passed to the buyer), the subsequent

7.9 Performance of the Contract

"It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the term of the contract of sale". [Sec. 28). Thus, the performance with the terms of the contract of delivery of goods by the seller and acceptance of the delivery of goods and payment for them by the buyer, in accordance with the contract. The parties are free to provide any terms they like in their contract about the time and place and manner of delivery of goods, acceptance thereof and payment of the price. But if the parties are silent and do not provide any thing regarding these matters in the contract then the rules contained in the Sale of Goods Act are applicable.

7.9.1 Delivery:

Delivery of goods means voluntary transfer of possession of goods from one person to another (Sec. 2). If transfer of possession of goods is not voluntary i.e. possession is obtained under pistol point or by theft, there is no delivery:

Rules to Delivery of Goods:

Rules of delivery of goods are given in section 30 of the Act. These are as follows:

1. Place of delivery:

The place of delivery may be stated in the contract of sale, and where it is so stated, the goods must be delivered at the named place during business hours on a working day* But where no place is mentioned in the contract, the following rules must be followed:

i. In the case of sale, the goods are to be delivered at the place at which they are at the time of the sale.

ii. In 'an agreement to sell". The goods are to be delivered at the place where they are at the time of the agreement to sell.

iii. In the case of future goods are to be delivered at the place at which they are manufactured or produced.

2. Time of delivery:

Where tender the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable, time. Further, demand of delivery by the buyer or the tender of delivery by the seller should be made at a reasonable hour. What is a reasonable hour is a question of fact.

3. Delivery of goods where they are in possession of third party:

Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf Such a delivery is known as 'constructive delivery" or "delivery by attornment" requires the consent of all the three parties, the seller, the buyer and the person having possession of the goods. Where the Seller hands over the 'del)very order" to the buyer, there is no delivery unless the seller's agent holding the goods has assented thereto.

4. Expenses of delivery:

Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable spate must be borne by the seller.

Delivery of Wrong Quantity

Under section 31 of the act, a seller is duty bound to deliver the goods to the buyer statically in accordance with the terms of the contract. A defective delivery i.e. delivery of a quantity less or more than that contracted for or delivery of goods mixed with the goods of a different description not included in the contract, entitles the buyer:

i. To reject the whole, or
ii. To accept the whole, or
iii. To accept the quantity and quality he ordered and reject the rest of the goods so delivered.

Remember that in case of rejection of goods because of defective delivery the buyer is not bound to return them to the seller, but it is sufficient is he intimidates to the seller that he refuses to accept them/. Further, right to reject the goods is no equivalent to right to cancel the contract. If the buyer rejects the goods, the seller has a right to tender again goods of contract quality and quantity subject to the terms tender again goods of contract and the buyer is bound to accept the same.

Where the buyer accepts the goods, he must pay what he (as actually accepted, at the contract rate. In case the buyer has accepted short delivery he is entitled to claim damages for the same from the seller.

Delivery by Installments:

Section 32 of the Act deals with the delivery by installments. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments. If the parties so agree then only the delivery of the goods may be by installments.

When the parties agree that the delivery is to be made by installment is to be separately paid for, and either buyer or seller commits a breach of contract in respect of one or more installments, there arises a question as to whether such a breach amounts to a breach of the whole of the contract or a breach of only a part of it? The answer to this question depends upon the terms of the contract and the circumstance of the case.

Generally, failure to deliver or pay for one installment does not amount to a breach of the whole contract, unless from the special circumstances of the case (e.g. the factory is closed because of a labour strike of the buyer becomes insolvent) it can inferred that similar breaches will be repeated.

7.9.2 Acceptance:

Under section 36 of the Act, the buyer is deemed to have accepted the goods in the following circumstances:

a) When he intimidates to the seller that he has accepted this goods.
b) When the goods have been delivered to him, and he does not act to the goods which is inconsistent with the ownership of seller.
c) When he retains the goods, after the lapse of a reasonable time, without intimating to the seller that he has rejected them.

Section 37 states that where the buyer rejects the goods having the right to do so, he is not bound to return them to the seller. However, he must intimate to the seller that he refuses to accept.

Under section 38, if the seller is ready and willing to deliver the goods but the buyer does not take delivery within a reasonable time the buyer is liable to the seller for any loss occasioned by

his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

7.10 Rights of Unpaid Seller.

Unpaid seller Defined:

The seller of goods is deemed to be an 'unpaid seller' (a) when the whole of the price has not been paid or tendered ; or (b) where a bill of exchange or other negotiable instrument has been received as a conditional payment, i.e.. subject to the realization thereof, and the same has been dishonoured.

Rights of an unpaid Seller:

An unpaid seller has two-fold rights, viz:

(a) Rights of unpaid seller against the goods, and;

(b) Rights of unpaid seller against the buyer personally.

7.11 Rights of Unpaid Seller against the Goods:

The seller has the following rights against the goods not withstanding the fact that the property in the goods has passed to the buyer:

1. Right of lien;
2. Right of stoppage of goods in transit;
3. Right of resale

1. Right of lien (Sec 41):

'Lien' is the right to retain possession of goods and refuse to deliver them to the buyer until the price due in respect of them is paid or tendered. An unpaid seller in possession of goods sold is entitled to exercise his lien on the goods in the following cases:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent, even though the period of credit may not have yet expired.

In the case of buyer's insolvency, the lien exists even though goods had been sold on credit and the period of credit has not yet expired. When the goods are sold on credit the presumption is that the buyer shall keep his credit goods. If, therefore, before payment the buyer becomes insolvent, the seller is entitled to exercise this right and hold the goods as security for the price.

The unpaid seller's lien is possessory lien. i.e the lien can be exercised as long as the seller remains in possession of the goods. He may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Termination of Lien:

Section 43 states that the unpaid seller of goods loses his lien in the following cases:

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission the buyer without reserving the right of disposal of the goods; or

(b) When the buyer or his agent lawfully obtains possession of the goods; or

(c) When the seller expressly or impliedly waives his right of lien. An implied waiver takes place when the seller grants fresh term of credit or allows the buyer to accept a bill of exchange payable at a future date or assents to a sub-sale which the buyer may have made.

2. Right of Stoppage of Goods in Transit or Stoppage in Transit:

The right of stoppage in transit means the right of stopping further transit of the goods wile they are with a carrier for the purpose of transmission to the buyer, resuming possession of them and retaining possession until payment or tender of the price. Thus, in a sense this right is an extension of the right of lien because it entitles the seller to regain possession even when the seller has parted with the possession of the goods:

When can this right be exercised? (Sec. 44)

An unpaid seller can exercise this right only when:

a) The buyer becomes insolvent. The buyer is said to be insolvent when he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he Is declared an insolvent or not; and.

b) The property has passed to the buyer. If Property has not passed to buyer then this right is termed as the “right of withholding delivery” and.

c) The goods are in the course of transit. This means that goods must be neither with the seller nor the buyer no with their agent. They should be in the custody of a carrier as an independent middleman (i.e. in his own right as a carrier) e.g. railways and common carriers whore business is to transport goods of others. the carrier must not be either 3eller’s agent or buyer’s agent. Because if he is seller’s agent, the goods are still in the hands of seller in the exe Of law and hence there is no transit, and if he is buyer’s agent, the buyer gets delivery in the eye of law and hence question of stoppage does not arise.

Duration of transit (Section 45)

Since the right of stoppage in transit can be exercised only so long as the goods are in the course of transit, it becomes necessary to know as to when he transit begins and when it comes to an end. When the transit comes to an end, the right to stoppage cannot be exercised.

According to Section 45, goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent takes delivery of them. Thus the transit continues so long as the goods are not delivered to t(e bu9ep or his agent no matter whether they are lying at the destination with the carrier awaiting transmission or are an actual transit. The goods are still deemed to be in transit if they are rejected by the buyer and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

The transit is deemed to be at an end and the seller cannot exercise his right of stoppage in the following cases:

a) When the buyer or his agent takes delivery of the Goods after the goods have reached destination.

b) When the buyer or his agent obtains delivery of the goods before their arrival at the appointed destination.

c) When the goods have arrived a Destination and the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf.

d) When the goods arrived at their destination but the buyer instead of taking delivery requests the carrier to carry the goods to more further destination and the carrier agreed to take them to the new destination.

e) When the carrier wrongfully refuses to deliver the goods to the buyer or h)s agent.

f) When part delivery of the goods has been made to the buyer with an intention of delivering the whole of the goods, transit will be at end for the remainder of the goods also which Are yet in the course of the transit.

How right of stoppage is exercised? (Sec 46)

The unpaid seller may exercise his right of stoppage in transit either:

a) by taking actual possession of the goods ,or

b) by giving notice of his claim to the carrier or other bailee in whose possession the goods are.

Such notice may be given either (a) to the person in actual possession of the goods, or (b) to his principal. In the latter case, notice must be given well in advance to enable the principal to communicate with his agent or servant in time, so as to prevent delivery to the buyer.

It is the duty of the carrier, after receiving due notice, not to deliver the goods to the buyer but to redeliver them to, or according to the directions of the seller. If by mistake he delivers the goods to the buyer, he can be made liable for conversion. The expenses of redelivery are to be borne by the seller.

Lien and Stoppage in Transit Distinguished:

The main points of distinction between these two rights of an unpaid seller are as follows*

1. The seller's lien attaches when the buyer is in default, whether he be solvent or insolvent. The right of stoppage in transit arises only when the buyer is insolvent.
2. Lien is available only when the goods are in actual possession of the seller while right of stoppage is available when the seller has parted with possession and the goods are in the custody of an independent carrier.

3. The right of lien comes to an end once the seller hands over possession of the goods to the carrier for the purpose of transmission to the buyer. One the other hand, the right of stoppage in transit commences after the seller has delivered the goods to a carrier for the purposes of transmission to the buyer and continues until the buyer has acquired their possession.

4. The right of lien consists in retaining the possession of the goods while the right of stoppage consists in regaining possession of the goods.

Effects of Rights of lien and Stoppage in Transit.

The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer might have made .For example ,P sells certain goods to R and delivers them to a carrier for transmission to R. Before the goods reach their destination P comes to know that R has become insolvent. In the meanwhile R sells those goods to Q. The sale of goods between R and Q will not affect the right of P to stop them in transit.

But there are two exceptional cases when these two rights of the unpaid seller are affected by as ale or other disposition of the goods by the buyer. These exceptions are:

i. When the seller has assented to the sale or other disposition which the buyer may have made.

ii. When a document of title of goods(e.g a bill of lading or railway receipt) has been issued or transferred to a buyer and the buyer transfers the document to a person who takes the document in good faith and for consideration ,then:

(a) if such last mentioned transfer was by way of sale ,the unpaid seller's right of lien or stoppage in transit is defeated, and

(b) if such last mentioned transfer was by way of pledge , the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of pledge. But in this case the unpaid seller may require the pledge to satisfy his claim against the buyer first out of any other goods or securities of the buyer in the hands of the pledgee.

3. Rights of Resale:

The right of resale is a very valuable right given to an unpaid seller. In the absence of this right, the unpaid seller's other rights against the goods, namely ,'lien' and stoppage in transit, would not have been of much use because these rights only entitle the unpaid seller to retain the goods until paid by the buyer. If the buyer continues to remain in default, then should the seller be expected to retain the goods indefinitely, specially when the goods are perishable? Obviously, this cannot be the intention of the law. Section 48 therefore, gives to the unpaid seller a limited right to resell the goods in the following cases:

a) where the goods are a perishable nature ; or
b) where such a right is expressly reserved in the contract in case the buyer should make a default ; or
c) where the seller has given a notice to the buyer of his intention to resell and the buyer does not pay or tender the price within a reasonable time.

If on a resale there is a loss to the seller, he can recover it from the defaulting buyer. But if there is a surplus on the resale, the seller can keep it with him because the buyer cannot be allowed to take advantage of his own wrong. If, however, no notice of resale (as required in case (c) above) is given to the buyer, the right of seller to claim loss and retain surplus, if any is reversed. In other words, if the unpaid seller fails to give notice of resale to the buyer, where neither the goods are of perishable nature nor such a right was expressly reserved, he cannot recover the loss from the buyer and is under an obligation to hand over the surplus, if any ,to the buyer ,arising form the resale. Thus it will be seen that giving of notice to the buyer, when so required, is very necessary to make him liable for the breach of contact. It is so because such a notice gives an opportunity to the buyer either to pay the price and have the goods, or, if he cannot pay to supervise the sale to see that the same is properly made.

It is important that absence of notice, when so required ,affects the rights of the unpaid seller himself only as discussed above ad it does not affect the title of the subsequent buyer who

will acquire a good title to the goods. Section 48(3) 3pecially declares " where an unpaid seller who has exercised his right of lien or stoppage in transit resells the goods , the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the resale has been given to the original buyer".

7.12 Rights of Unpaid Seller against the Buyer Personally.

The unpaid seller, in addition to his rights against the goods as discussed above, has the following three rights of action against the buyer personally:

1. Suit for price: (Sec.49)

Where property in goods has passed to the buyer; or where the sale price is payable ' on a day certain', although the property in goods has not passed; and the buyer wrongfully neglects or refuses to pay the price according to the terms of the contract, the seller is entitled to sue the buyer of price, irrespective of the delivery of goods.

2. Suit for damages for non-acceptance: (Sec.50)

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him damages for non acceptance .The seller's remedy in this case is a suit for damages rather than an action for the full price of the goods.

7.13 Rights of The Buyer.

The buyer has the following rights against the seller for breach of contract:

1. Suit for damages for non –delivery: (Sec.51)

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non delivery. The measure of damages shall be the estimated loss

directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. If the goods in question have a ready market the measure of damages is primary facie to be ascertained by the difference between the contract price and market price eon the date of breach.

2. Suit for specific performance: (Sec.52)

Where there is breach of a contract for the sale for specific or ascertained goods, the buyer may file a suit for the specific performance of the contract. This remedy is discretionary and will only be granted when damage would not be an adequate remedy ,for instance ,the subject-matter of the contract is rare goods, say, a picture by a dead painter.

3. Suit for damages for breach of warranty: (Sec .53)

Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat breach of condition as breach of warranty, the buyer is entitled to file a suit for damages of the price has already been paid. But if the buyer has not yet paid the price ha may ask the seller for a reasonable reduction in price.

4. Suit for rescission of contract and for damages for breach of 'condition':

The breach of 'condition' entitles the buyer to treat the contract as repudiated.
Accordingly, where there is a breach of rescission of the contract. Also, he may claim damages for loss suffered on the footing that the whole contract is broken and the seller is guilty of non delivery.

5. Suit for recovery of the price together with interest: (Sec:54)

If the buyer has already paid the price of the goods to the seller and the goods are not delivered or they are stolen one, he can sue the seller for the refund of the price and also for the interest at reasonable rate from the date of payment to the date of refund.

7.14 Auction Sale

In an auction sale, the auctioneer invites bids from prospective purchasers and sells the goods to the highest bidder. Section 58 lays down the following rules relating to an auction sale:

1. Where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.
2. The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, say, by saying words like "one, two three" and until such announcement is made, any bidder may retract his bid. On the other hand, the auctioneer is also not bound to accept the highest bid id he feels that is much below his expectation. Of course, his not accepting the highest bid would injure his business reputation because if it is the custom of trade that goods must be sold to the highest bidder.
3. The seller or any one person on his behalf can bid at the auction, provided such a right to bid has been expressly reserved at the time of notifying the auction sale.
4. The sale may be notified to be subject to a reserved or upset price. It is a price below which the auctioneer will not sell, and if he by mistake knocks down the lot for less than the reserved price, no valid contract comes into existence and he can refuse to deliver the goods to the highest bidder

Summary of the topic

- Differences between sale and agreement to sell
- Subject matter of the contract
- Implied conditions and warranties
- Doctrine of caveat emptor
- Transfer of property in goods
- Transfer of title on sale
- Rights of both the buyer and the seller
- Auction sale

Revision questions

i) *Define a contract of Sale of Goods. Distinguish between sale and agreement to sell.*

ii) *Distinguish between sale and contract for work and material.*

iii) *List and explain the conditions warranties which are implied in a contract of sale of goods by the sale of Goods act (Cap. 31) Laws of Kenya*

iv) *What is meant by transfer of property in goods. Explain the rules regarding:*

v) *Transfer of property in specific goods.*

vi) *Transfer of property in unascertained and future goods.*

vii) *What do you understand by delivery of goods under the Sale of Goods Act, Cap. 31 of the law of Kenya?*

viii) *Briefly discuss any FOUR grounds that would justify a buyer to refuse delivery of goods under sale of goods agreement.*

ix) *What is the nature of purpose of a lien in a contract of sale goods? Distinguish between possessory and equitable liens.*

x) *With reference to a contract for the sale of goods, and in the absence of any special agreement, when does the property in the goods pass to the buyer?*

xi) *List and explain the remedies for breach of a contract of sale of goods.*

xii) *When a seller of goods deemed to be an unpaid seller? What are his rights: (i) against the goods and (ii) the buyer?*

xiii) *What are the rights of an unpaid seller of goods against the buyer?*

xiv) *Mutiso had sold his car to Karanja for Sh. 14,000 and the car was to be delivered within four days. After two days Smith offers Mutiso Sh. 16,000 for the car which Mutiso accepts. Smith takes immediate delivery of the car. Smith was not aware of the previous sale to Karanja. Advice Karanja of his legal if any against (i) Mutiso, and (ii) Smith*

xv) *Discuss the conditions implied in the Kenya sale of Goods Act relating to fitness for particular purpose of the goods sold.*

Further reading

i) Saleemi.N.A (2010)General Principles of Law Simplified, N.A Saleemi Publishers Limited ,Nairobi, Kenya. Pages 300-337

ii) Ogolla J.J (2005) Business Law, English Press Nairobi, Kenya. Pages 190-213

iii) Laibuta (2006) Principles of Commercial Law, Africa Publishing Limited. Pages 110-177

CHAPTER EIGHT

8.0 HIRE PURCHASE

General objective

By the end of the lesson the learner should be able to explain the importance of hire purchase Act to businesses

Specific objectives

By the end of the lesson the learner should be able to

a) *explain the requirements of hire purchase agreement*
b) *explain the implied conditions in every hire purchase agreement*
c) *explain the termination of hire purchase agreement*
d) *explain the provision on recovery of possession by the seller*

The law relating to hire parches agreement has been contained in the Hire purchase Act (Cap. 507). This Act has been based mainly on English Hire Purchase Acts.

8.1 Introduction

The Hire Purchase Act (cap. 507) defines some terms relating to hire purchase transactions as under:

"Hire purchase Agreement " means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in goods will or may pass to the bailee.

"*Hire Purchase business*" means a business, whether carried on alone or with other business, of entering into hire purchase agreements, whatever the hire-purchase price under any agreement;

"*Hire Purchase Price*" means the total sum payable by the hirer under a hire-purchase agreement in order to compete the purchase of goods to which the agreement relates, including any sum payable y the hirer by way of a deposit of other initial payment:

"*Contract of guarantee*" means a contract made at the express or implied request of the hire, t guarantee the performance of the hirer's obligation under the hire purchase agreement.

8.1 Nature of Hire Purchase Agreement:

Under the hire purchase system, the buyer agrees to pay for the commodity in installments. On signing the agreement, the buyer can take possession of the commodity and use it. But the ownership in the articles rests with the seller until the buyer pays the final installment. if the buyer ails to pay any installment, the seller is entitled to take back the article and the buyer will have not claim over the installments he has already paid. The amount paid will be treated as hire charges for the article. Hence the sale becomes complete only when the buyer pays the final installment. On payment of the final installment, the ownership of the article passes from the seller to the buyer. Till then the agreement is one for hiring.

Section 3(1) provides that this Act applies to those hire purchase agreements under which the hire purchase price does not exceed the sun of Eighty thousand shillings other than a hire purchase agreement in which the hirer is a body corporate. This monetary limitation does not apply so as to affect the definition of *"hire purchase business*".

Credit Sale is different from hire purchase agreement. Credit sale arises when there is an agreement for the sale of goods on credit basis. In this case also, the purchase price may be paid in future sometimes in for or five installments. In the case of credit sale goods become the property of the buyer with the payment of the first installment. Incase of failure to keep up with installments, the seller cannot repossess product but may sue the buyer in Court for unpaid amount. Sellers may at time request for post-dated cheques. This system is also known as deferred payment system. A hire-purchase agreement to buy, but only an option is given to the hirer to buy, while under credit sale there is an agreement to buy and no option to return the goods.

8.3 Requirements of Hire-Purchase Agreement

Under the provisions of section 6 of the Act, before a business purchase agreement is entered into, a statement of the cash price must be furnished by the owner to the hirer, otherwise the contract and the guarantee or security based on it will not be enforceable. The agreement which is required to be registered must be signed by the hirer; it must contain a notice relating to the hirer's statement of:

The hire-purchase and cash price.

The amount of the installments and the dates of payment.

A description of the goods sufficient to identify them.

Under this section of the hirer. An owner shall not be entitled enforce a hire purchase agreement or any contract of guarantee, if the statutory requirements are not fulfilled. However, the Court may dispense with any of such requirements on being satisfied that the hirer has not been prejudiced.

8.4 Registration:

Section 5(1) of the Act requires that every hire-purchase agreement must be delivered for registration to the Registrar within thirty days after making the agreement.

On registration of a hire purchase agreement, the registrar shall deliver to the owner a certificate of registration. If a hire-purchase agreement is not registered then.

a) No person shall be entitled to enforce the agreement against the hirer or against the guarantor and the owner shall not be entitled to enforce any right to recover the goods form the hirer; and
b) No security given by the hirer or by a guarantor shall be enforceable against the hirer or the guarantor by any holder thereof:

8.5 Implied terms of Hire Purchase Agreement:

Section 8 of the Act contains the following implied conditions and warranties of a hire-purchase agreement:

a) a condition that the owner will have a right to sell the goods at the time when the property is to pass;
b) a warranty that the hirer shall have and enjoy quiet possession of goods;
c) A warranty that the goods will be free from any charge or encumbrance in favour of a third party at the time when the property is to pass; and
d) Except where the goods are second-hand goods and the agreement contains a statement to that effect, a condition that the goods will be of merchantable quality;
e) Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be implied a condition that the goods will be reasonably that purpose.

The terms implied by the Act as (a), (b) and (c) above cannot be modified or exclude by an express agreement. But the implied condition of fitness for particular purpose (e) above) can be excluded if the owner can show that before the agreement was made the relevant provision was brought to the notice of the hirer and its effect was made clear to him. The condition as to merchantability does not apply where the goods let are second-hand goods. But in case it is not stated in the note or memorandum that the goods are second-hand, then the condition will be implied.

8.6 Termination of Agreement:

Under section 12 of the Act, the hirer may terminate the agreement at any time before the final payment becomes due. The hire may terminate the agreement by returning the goods to the owner and giving him written notice of termination of the agreement. Where a hire terminate the agreement, he is liable to pay all the instalments due by that time, together with the sum, if any, as will make his total payment not less than one-half of the total hire purchase price, unless a lesser sum is specified in the agreement. The hirer will be also liable to pay damage if he has failed to take reasonable care of the goods. He must return the goods at his own expense to the premises from which they were originally supplied to him or to such other place directed by the owner.

8.7 Completion of agreement:

Section 13 provides that a hirer may give notice in writing to the owner to complete the hire-purchase agreement before the due date in this case; the hirer will be required to pay the net balance due to the owner under the agreement on a specified day. The right of completing the agreement by the hirer can be exercised as under:

a) At any time hiring the continuance of the agreement;
b) Within twenty eight days after the owner has taken possession of goods. In this case, the hirer should pay to the owner the expenses incurred by him in taking possession, storage or repair of goods in addition to the net balance due.

8.8 Recovery of Possession:

Section 15 of the Act provided protection to the hirer against a claim by the owner for the recovery of possession of goods. Under this section, if the hirer has already paid a sum equal to or in excess of two-thirds of the hire-purchase price, the owner must not take any step to recover possession of the goods in the event of default. He can recover these goods only through the decision of the court or if the contract has been terminated by the hirer.

If the owner retakes the possession of goods against this rule then the contract shall be considered as terminated and in this case:

a) the hirer shall be released from all liability under the agreement and shall be entitled to recover form the owner by suit all sums paid by the hirer under the agreement of under any security given to him in respect therefore; and
b) a guarantor shall be entitled to recover from the owner by suit all sums paid by him under the contract of guarantee or under ay security given by him in respect thereof.

If a suit is filed by the owner then on the hearing of the suit, the court can make one of the following orders:

a) for the delivery of all goods to the owner; or
b) for delivery of part of goods to the owner and transfer to the hirer the owner's title to the remainder of the goods; or

c) for the delivery of all the goods to the owner, and postpone the operation of the order on condition that the hirer or any guarantor pays the unpaid balance of the hire-purchase price at specific time.

8.9 False Information:

Section 34 provides that any person who knowingly gives false information in any proposal form or document completed for the purpose of entering into hire-purchase agreement is guilty of an offence and liable to a fine not exceeding five thousand shillings.

Summary of the topic

- Requirements of hire purchase agreement
- Implied terms of hire purchase agreement
- Termination of hire purchase agreement
- Recovery of possession

Revision questions

i) Explain the requirements of the hire purchase agreement

ii) Describe the implied terms of hire purchase agreement

iii) Explain the provisions of the hire purchase Act on termination of the hire purchase agreement

iv) Explain the provisions of the hire purchase Act on

v) *Recovery of goods by the seller*

Further reading

i) Saleemi.N.A (2010)General Principles of Law Simplified, N.A Saleemi Publishers Limited , Nairobi, Kenya. Pages 381-386

ii) Ogolla J.J (2005) Business Law, English Press Nairobi, Kenya. Pages 217-227

iii) Laibuta (2006) Principles of Commercial Law, Africa Publishing Limited. Pages 179-199

CHAPTER NINE

9.0 NEGOTIABLE INSTRUMENTS

General objective

By the end of the lesson the learner should be able to explain the provision of the law relating to dealing in negotiable instruments

Specific objectives

By the end of the lesson the learner should be able to

a) *explain the meaning of negotiable instruments*
b) *list down the negotiable instruments recognized by law*
c) *explain essentials of a bill of exchange*
d) *differentiate between cheques and bills of exchange*

9.1 Introduction

The law relating to 'negotiable instruments' is contained in the Bills of Exchange Act(cap 270 and the Cheque Act (cap.35). These Acts deal with three kinds of negotiable instruments. i.e. Bills of Exchange, cheques and Promissory Notes.

Meaning of Negotiable Instrument:

The word negotiable means "transferable by delivery,' and the word instrument means a written document by which a right is created in favour of some person. Thus, the term "negotiable instrument" literally means a written document transferable by delivery.'

A negotiable instrument can be called as chose in action. This means that such instrument confers certain rights, which are incapable of physical possession and which can only be enforced by legal action, not by physically taking possession of anything. For example, If a cheque is written in the name of a specific person, the cheque gives him a right to this sum of money without giving him the money itself in physical terms.

9.2 Characteristics of Negotiable Instruments:

The main characteristics of negotiable instruments are as under:

Easy negotiability:

They are transferable from one person to another without any formality. In other, words, the property or right of ownership) in case it is payable to order) or by delivery merely (in case it is payable to bearer), and no further evidence of transfer is needed.

Transferee can sue in his own name without giving notice to the debtor.

A bill, note or a cheque represents a debt, ie. An "actionable claim" and implies the right of the creditor to recover something from his debtor. The creditor can either recover this amount himself or can transfer of a negotiable instrument is entitle to sue on the instrument in his own name in case of dishonour, without giving notice to the debtor of the fact that he has become holder.

Better title to a bonafide transferee for value

A bonafide transferee of a negotiable instrument for value (technically called as a holder in due course) gets the instrument "free from all defects." He is not affected by any defect of title of the transferor or any prior party. Thus, the general rule of the law of transfer applicable in the case of ordinary chattels that "nobody can transfer a better title than that of his own' does not apply to negotiable instrument.

Presumptions on all negotiable instruments

Certain presumptions apply to all negotiable instruments. These presumptions may be that every negotiable instrument:

i. Was made, drawn or accepted for consideration;

ii. Was made or drawn on a date preparing on the instrument;

iii. Was transferred before its maturity date; and so on.

9.3 Negotiable Instruments Recognized By Statute

The following instruments have been recognized as negotiable instruments by statute, usage or custom:

i. Bills of Exchange
ii. Cheques
iii. Promissory Notes
iv. Treasury Bills
v. Bearer debentures
vi. Divided warrants
vii. Share warrants

The following are not negotiable instruments:

i) Money Orders
ii) Postal Orders
iii) Share certificates
iv) Letters of Credit
v) Fixed Deposit Receipts

The Bills of Exchange Act (cap.27) recognizes the following negotiable instruments ;

Bills of Exchange

Cheques

Promissory Notes

These three negotiable instruments are discussed below

9.4 Bills of exchange

Definition:

Section 3(1) of the Bills of Exchange Act defines the bills as:

" A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer".

Section 3(2) of the Act states that any instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

9.4.1 Parties to a bill of exchange:

There are three parties to a bill of exchange. These are: drawer, drawee and payee.

i. The person who makes the bill is called the "drawer'

ii. The person who is directed to pay is called the "drawee".

iii. The person to whom the payment is to be made is called the "payee".

The drawer or endorsee (if the bill is endorsed to the payee) is called the "holder". The holder must present the bill to the drawee for his acceptance. When the drawee accepts the bill, by writing the words "accepted" and then signing, he is called the acceptor".

9.4.2 Essentials of a bill:

To be a valid bill of exchange, an instrument must comply with the following requirements:

i. It must contain an "order to pay'. A mere request to pay on account will not amount to an order. But an order may be expressed in polite language. The use of the word "please pay' does not prevent an instrument from being an order.

ii. The order to pay must b e unconditional. It means there must be no other condition attached to the payment.

iii. It must be addressed by one person to another person.

iv. The drawer, drawee and payee must be certain.

v. The sum payable must be certain.

vi. It must be in writing and signed by the drawer.

vii. If it is not payable on demand then the time of payment must be fixed or determinable. A determinable event is one which is bound to happen but the time of happening may be uncertain e.g the death of the drawee's father.

9.4.3 Holder of A bill:

The bills of Exchange Act defines a holder as "the payee or endorsee of a bill or note who is in possession of it or the bearer thereof".

S.2 The question of who is a "holder" of a bill largely depends on the type of bill in question. In case of an order bill, it is the payee or endorsee in possession of the bill; while in the case of a bearer bill it is the bearer who by definition is the person in possession of a bill or note payable to bearer.

The act draws a distinction between **two types of holders**: a holder for value and a holder in due course.

Holder for value:

To understand what is meant by "holder for value" we must first understand who is a "holder and what is meant by value. We have already seen that a holder is defined as the payee or endorsee in possession of a bill or the bearer thereof. 'Value" on the other hand, "means value consideration"

S.2 A holder for value is therefore a payee or endorsee in possession of a bill, or the bearer of a bill, who has furnished valuable consideration for it.

The holder of a bill is, under certain circumstances, deemed to be a holder for value. In addition, where "the holder a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he ahs a lien" s.27(3).

Holder in Due course:

A holder in due course is defined by section 29 as a holder who has taken a bill complete and regular on the face of it, under the following condition, namely:

i. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact:

ii. That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

The above definition requires further consideration. First, the bill in question must be" complete and regular on the face of it". This means that a holder of an inchoate instrument or of a bill that is wanting in any material respect – e.g where it is undated – cannot be a holder in due course. (although such folder has a right to fill in the date, he is not thereby constituted into a holder in due course). Also, where an endorser does not sign his full names, this is an irregularity which denies his endorsee the status of holder in due course.

Secondly, a person can only be a holder in due course if he became a holder of the bill before it was overdue. A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time; and what is an unreasonable length of time is a question of fact.

S.36 (3). According to bankers" practice a cheque, which by definition is a bill of exchange payable on demand, becomes "stale" after it has been in circulation for six months). Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

In other words the 'nemo dat rule' applies to overdue bills and any person taking such bill takes it at his own risk; there is no assurance of good title to the bill.

The burden is on any one who claims that a particular bill is overdue to prove this fact, otherwise, section 36(4) provides. "Except where an endorsement bears date after maturity of the bill, every negotiation is prima facie deemed to have been affected before the bill was overdue."

9.4.4 Negotiation of a bill

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. S 31(1). Thus where A is the holder of a bill and he transfers it to B so as to constitute B holder of the bill, A is said to have negotiated the bill to B. The manner in which a bill is negotiated depends on whether it is a bearer bill or an order bill.

Bearer Bill:

"Bill payable to bearer is negotiated by delivery". S.31(2). It will be recalled that under the Act, delivery means the transfer of possession, actual or constructive, from one person to another: S.2 thus, where A is the bearer or holder of a bearer bill, and he wishes t negotiate it to B, the negotiation may be effected by A transferring possession of the bill from himself to B. Nothing more need be done. The negotiation is completed as soon as the bill is handed over to and received by B.

Order bill

Mere delivery is not sufficient to negotiate an order bill. Such bill is, under section 31(3) negotiated "by the endorsement of the holder completed by delivery", Thus, if A. the holder of an order bill, wishes to negotiate it to B, A can only do this by writing on the back of the bill (e.g "pay B", accompanied by his signature or by simply signing it and then delivering the bill to B. Merely delivering the bill to B without an endorsement is not sufficient. However, it is provided that "where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transfereor had in the bill and the transferee in addition acquires the right to have the endorsement of the transferor" S.31(4) This means that where A delivers an order bill to B for value but without endorsing it, B has a right to enforce the bill against A; but as regards third parties, the bill may be enforced by B against them only to the extent of A's title. If A had a defective title to the bill, B acquired no valid title and cannot enforce it against third parties.

9.4.5 Requisites of a valid Endorsement:

i. For an endorsement to operate as a negotiation, it must comply with the following conditions, (S.32):

a. It must be written on the bill itself and be signed by the endoser; the simple of the endorser on the bill, without additional words, is sufficient; while an endorsement written on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself:

b. It must be an endorsement of the entire bill; a partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negation of the bill:

c. Where a bill is payable to the order of two or more payees or endorsees who are not partners, all must endorse, unless the one endorsing has authority to edorse for the others;

d. Where, in a bill payable to order the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding, if he thinks fit, his proper signature;

e. Where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved:

f. An endorsement may be done in blank or special; it may also contain terms making it restrictive.

9.4.6 Liabilities of parties

The liabilities of parties to a bill are as follows;

The Acceptor:

Under section 54, the acceptor of a bill, by accepting it:

engages that he will pay it according to the tenor of his acceptance and

is precluded from denying to a holder in due course;

a) the existence of the drawer, the genuineness of his signature, and his capacity of the drawer to endorser, but not the genuineness or validity of his endorsement;

b) In the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement:

c) In the case of a bill payable to the order of third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement.

(b) The Drawer:

Under section 55(1) the drawer of a bill by drawing it:

i. Engages that on due presentment it shall be accepted and paid according to its tenor and that if it be dishonored he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken:

ii. Is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

The Endorser:

Under section 55(2) the endorser of a bill by endorsing it:

i. engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or a subsequent endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken:

ii. Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawers signature and all previous endorsements;

iii. Is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title thereto.

Discharge of Bill

A bill is discharged in the following circumstances:

1. By payments in due course by or on behalf of the drawee or acceptor."payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective. [s. 59(1).

2. When the acceptor is or becomes the holder of the bill at or after its maturity, in his own right (s.61).

3. When the holder at or after its maturity absolutely and unconditionally renounces his rights against the acceptor. The renunciation must be made in writing unless the bill is delivered up to the acceptor (s.62).

4. Where it is intentionally cancelled by the holder or his agent and the cancellation is apparent there on: s. 63(1). The cancellation, of a signature on the bill has a similar effect: s.63 (2).however, a cancellation made unintentionally, or under a mistake , or without the authority of the holder is inoperative: s.63(3).

9.5 Cheques

Nature of a cheque:

A cheque is defined as "a bill of exchange drawn on banker payable on demand ": s.73 (1). A cheque, as such, is a bill of exchange. It is a bill payable on demand, and, subject to certain exceptions, the provisions of the act applicable to a bill of exchange payable on demand equally apply to a cheques. 73(2).

But unlike other bills, the drawee of a cheque must necessarily be a banker; and this gives rise to a banker- customer relationship between the drawer and drawee,, with special rules to govern such relationship, the nature of this relationship, and the duties it imposes on the parties, are considered below.

9.5.1 Differences between Cheques and other bills

1. Cheques may be crossed , and are usually crossed, but it is unsual to cross other bills, (but dividend warrants may be crossed:s. 96)

2. The rules relating to acceptance do not apply to cheques.(under section 39 presentment for acceptance is necessary only where a bill is payable after sight, or expressly stipulates that it shall be presented for acceptance, or where it is drawn payable elsewhere than at the residence or place of business of the drawee. Cheques are therefore excluded).
3. We have seen that where a bill is not duly presented for payment, the drawer and endorsers are discharged. But in the case of a cheque, a delay in presenting it for payment does not discharge the drawer or person on whose account it is drawn unless such delay is proved to have caused actual damage to him and the discharge is only to the extent of such damages:s.74.
4. A cheque is always drawn on a banker but a bill may be drawn on anyone including the bank.
5. In the case of a bill, three days period of grace is allowed, while no grace is given in the case of cheques.
6. The notice of dishonour of a bill is necessary but no notice is necessary in the case of a cheque.

9.5.2 Banker/Customer Relationship:

The relationship between a banker and his customer is a matter of contract. The banker is in the position of a debtor, and the customer in that of a creditor: the customer advances his money to the banker on the understanding that the latter will repay it on demand.

Duties of the Customer:

The duty owed by a customer to his banker is the **duty of care.**

This duty usually arises when the customer is drawing a cheque. He is then "bound to take usual and reasonable precautions to prevent forgery".

"whereas it is the duty of the customer of bank in issuing a cheque to the bank to take reasonable care so as not to mislead the bank, that duty must be immediately connected with the transaction itself. There is no duty on the part of the customer to take precaution in the general course of carrying on his business to prevent forgeries on the part of its servants or thefts".

Duties of the banker

i. A banker must honour his customer's cheques as long as there is a sufficient and available credit balance.The banker's authority to pay is determined or revoked either by countermand (i.e stoppage) of payment or by notice of the customer's death: s.75. The authority to pay may also be revoked by other circumstances, such as notice of the customer's mental incapacity or bankruptcy.

ii. The duty not to pay without the customer's authority enjoins the banker to take reasonable care in honouring his customer's cheques.

iii. "A bank owes a contractual duty to its customers and in the discharge of that duty a bank must take reasonable care in honouring cheques especially open cheques to be paid on the counter. A bank must ensure that the drawer's signature on the cheque strictly conforms with the specimen signature given when the account was opened. When the drawers signature, on the cheque differs from the specimen signature the payment should be refused with comments like "signature differs"

iv. If, in breach of the above duty, the bank acts negligently and wrongfully debits the customers account, the customer may successfully sue the bank and have his account re-credited with the amount wrongfully paid out:

v. It is also the banker's duty to collect his customer's cheques, provided they are banked with him for collection.

vi. Finally, where a customer gives his documents to his banked for safe custody, the duties of a banker are thereby imposed on the banker and he must then take reasonable care of the documents.

9.5.3 Crossed cheques

A crossed cheque is one which bears a crossing. A crossed cheque may be crossed generally or crossed specially.

Effect of crossing:

A crossing is a material part of the cheque and it is not lawful for any person to obliterate or, except as authorized by the act, to add to or alter the crossing: S.78

Unlike an open cheque, a crossed cheque cannot be paid over the counter but must be paid to a banker. This means that the payee of such a cheque may take it to his banker for collection; it is the latter banker who will receive payment from the drawee bank on behalf of the payee. Where the cheque is crossed specially, it is only the banker named by the crossing who is entitled to receive payment of the same. A paying banker who fails to effect payment of a crossed cheque in this manner may incur liability to the true owner of the cheque, S.79 (2)

The effect of the words "not negotiable" is given by section 81: "Where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

9.6 Promissory Notes

9.6.1 Nature of a promissory Note

Section 84(1) defines a promissory note in the words:

A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to the bearer"

Section 90(1) of the Act provides that "the provisions of the Act relating to bills of exchange apply to promissory notes, with the necessary modifications to promissory notes.

9.6.2 Differences between promissory notes and Bills of exchange

a) A bill is an 'order to pay" while a promissory note" is a promise to pay".

b) A bill of exchange requires three parties i.e. the drawer, the drawee and the payee. But a promissory note only requires two parties i.e the maker and the payee (or promissory and promise).

Summary of the topic

- Characteristics of negotiable instruments
- Parties to a bill of exchange
- Negotiation of a bill
- Discharge of a bill
- Differences between bills of exchange and cheques
- Differences between promissory notes and bills of exchang

Revision questions

i) Explain the meaning of negotiable instruments

ii) Describe the characteristics of negotiable instruments

iii) Describe the various types of holders to a bill

iv) Explain the differences between cheques and other negotiable instruments

v) distinguish between promissory note and bills of exchange

For further reading

i) Miller.R,Gaylord.j (1999) F*undamentals of Business Law,* West Educational Publishing Company,USA. Pages 337-362

ii) Saleemi .N.S (1999) *Commercial Law Simplified* N.A Saleemi Publishers Nairobi, Kenya. Pages 229-270

iii) Cheeseman (1998) *Business Law*, A Simon and Schutter Company, New Jersey,USA .pages 373-428

iv) Abbot. K, Penddle. N, Wardman. K *Business law. pages*

v) Ogolla J.J (2005) *Business Law,* English Press Nairobi, Kenya. Pages 228-252

vi) Saleemi.N.A (2010)*General Principles of Law Simplified*, N.A Saleemi Publishers Limited ,Nairobi, Kenya. Pages 404-446

SAMPLE EXAMINATION PAPER

Mount Kenya University

UNIT NAME: BUSINESS LAW

UNIT CODE: BBM 123

TIME: 2 HRS

Instructions:

Attempt question **ONE** and any other **TWO** questions

Question One

(a) Outline four divisions of civil law (4 mks)

(b) Mr Nge'no wants to start matatu business. However his friends have been discouraging him citing the collapse of insurance companies .advice him (4 mks)

(c) Explain the main defense to an action for trespass to land (4 mks)

(d) Highlight four contracts that must be evidenced in writing (4 mks)

(e) Explain the difference between criminal wrong and civil wrong (6 mks)

(f) Distinguish between express and implied contracts (4 mks)

(g) Outline four ways in which agency may be created (4 mks)

Question Two

(a) Explain the purpose of law (10 mks)

(b) Explain five general defenses available to a defendant in every action of tort where applicable (10 mks)

Question Three

(a) Explain five essentials of a valid contract (10 mks)

(b) Explain five factors involved in the formation of a contract (10 mks)

Question Four

(a) Explain five rights of agents (10 mks)

(b) Explain the duties of agents (10 mks)

Question Five

(a) Outline and discuss the implied conditions in every contract of sale of goods (10 mks)

(b) Explain the exceptions of the 'nemo dat quod non habet' rule as provided for by the sale of goods act (10 mks)

Mount Kenya University

UNIT CODE: BBM 123

NIT NAME: BUSINESS LAW

TIME: 2 HOURS

INSTRUCTIONS

Attempt question **one** and any other **two** questions

QUESTION ONE

(a)Distinguish between public law and private law. **(4marks)**

(b)Briefly explain the differences between hire purchase and credit sale **(4marks)**

(c)Briefly explain the doctrine of caveat emptor **(4marks)**

(d)Outline the functions of the law of torts. **(4marks)**

(e)Outline four essentials of a valid contract **(4marks)**

(f)Explain two classes of agents on the basis of extent of their authority. **(4marks)**

(g)Outline six sources of law in Kenya. **(6marks)**

QUESTION TWO

(a)Explain the major differences between criminal wrong and civil wrong. **10marks)**

(b)Explain six factors involved in the formation of a contract (**10marks)**

QUESTION THREE

a) Explain five general defenses available to a defendant in every action of tort, where they are appropriate (**10marks)**

(b)Explain the main remedies in respect of trespass to land**.** **(10marks)**

QUESTION FOUR

(a)Outline and discuss the implied conditions in every contract of sale of goods

(10marks)

(b)Explain the " nemo dat quod non habet" rule as provided by the Sale of Goods Act

(10marks)

QUESTION FIVE

(a)Explain five ways in which an agency comes to an end by operation of the law.

(10marks)

(b)Explain five duties of agents **(10marks)**