

ANALYSIS OF THE LAW GOVERNING E-COMMERCE IN TANZANIA

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REQUIRMENTS FOR THE MASTER OF LAWS IN INFORMATION
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CERTIFICATION

The Undersigned certifies that he has read and hereby recommending for acceptance by the Open University of Tanzania a Dissertation titled in “**Analysis of the Law Governing E-Commerce in Tanzania**”Fulfillment of the Requirements for Award of the Degree of Master of Laws (LLM IT & T) of the Open University of Tanzania.

.....

Prof. David Mellor
(Supervisor)

.....

Date

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DECLARATION

I, **Humphrey Chuwa**, do hereby declare that this research report is my own work. It has not been submitted anywhere for any degree award in any high learning Institution. The author bears all liability correctness of the information presented in this work.

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Date

DEDICATION

This piece of work is dedicated to my family; to my Parents Mr & Mrs Aloyce Alphonse Chuwa, my beloved wife Aquiline, my sisters Mary, Lilian and Suzanne Harry. Dedication extended to my wonderful son Hans and daughter Joy (Shangwe), my nieces Godfrey Ngowi, Bahati Ngowi, and all my friends who supported me in one way or another. Lastly, but not the least to my late young brother Richard Aloyce Chuwa, the late grandfather Alphonse Chuwa, the late grandfather Peter Mushi, and the late grandmother Maria Alphonse Chuwa. Lastly, to all my late friends who played essential part for me to be where I am today.

Special dedication to my late friends, Joseph Raphael (tupaa), the late Godwin Marimbo, the late Godfrey Ogendo and the late Juma Dimoso. My Almighty God rest their souls in ever lasting peace. To all my family, friends and cherished ones both deceased and alive it's my honour to dedicate this hard piece of work to you all. As I recognise your moral, mental and material supports which inspired, strengthen and encouraged me to walk through valleys and mountains to stand where I am standing today. I will forever cherish all the wonderful and worst memories which continue to bind us together, stronger and much wiser.

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ABSTRACT

Technology is an essential tool in development of any nation; electronic commerce is currently booming in Tanzania and the rest of the world. There have been dramatic increase in transaction and trades which use or performed electronically. The current laws under the commercial laws in Tanzania, as identified in this study, assume the existence of paper based records and documents should bear signatures for legal recognition. Still in Tanzania there is no legal framework that support this new era. It is dangerous to accept that without having proper laws to guide that kind of development. The study guides the reader in understand the current structure of e-commerce and the proposed one with their benefits and challenges. The study also discussed some cases and crimes related to e-commerce and ICT which were directed to the court of law but it's sad because the judgments were not balance due to lack of laws concern e-commerce in Tanzania. Furthermore, the study come up with a conclusion and recommendations; generally there is a need for a re-examination and revision of the fundamental principles of the commercial laws in Tanzania to accommodate business and contract conducted in electronic form. Also legislature should work with experts, consumers and e-commerce users to come up with number of legal support in order to maintain and improve e-commerce and technology as whole. The study recommends enactment of a comprehensive legislation which gives electronic transactions legal recognition, including evidence generated in electronic form. The proposed legal framework for recognition of electronic evidence in Tanzania would create the dependability and certainty for computer -related transactions vital for growth of e-commerce.

LISTS OF LEGISLATIONS AND POLICIES

The Bill of Exchange Act, [Cap 214, R.E 2002]

The Evidence Act, [Cap 6, R.E 2002]

The Law of Interpretation Act, [Cap, 1 R.E.2002]

The law of Contract Act, [Cap 345, R.E. 2002]

The Sales of Goods Act, [Cap 215, R.E 2002]

Tanzania Revenue Authority Act; Act No. 11 of 1995

The Electronic and Postal Communications Act, Act No. 3 of 2010

Tanzania Communications Regulatory Authority Act No. 12 of 2003

Tanzania Revenue Authority Act; Act No. 11 of 1995

National Information and Communications Technology Policy, 2003

National Telecommunications Policy, 1997

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Entores v Miles Far East Corporation [1953] 2 QB 327

R. v. Brown, [1996] 1 All ER 545

R v. Moore, Ex Parte Myers and Webster's Dictionary, (1884) 10 VLR 322

Robinson v Graves [1935] 1 KB 579, 587

Saunders v. Anglia Building Society, [1971] AC 1004

St Alban's City and District Council v International Computers [1996] 4 All ER 481

Tanzania Cotton Marketing Board v. Corgecot Cotton Company SA, [1997] T.L.R.

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Trust Bank Tanzania Ltd. v. Le-marsh Enterprises Ltd., Joseph Mbui Magari, and

Lawrence Macharia, (The High Court of Tanzania (Commercial Division)at

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ABBREVIATIONS

TERMS	Long Forms
AICC	Arusha International Conference Center
ATM	Automatic Teller Machine
E-Commerce	Electronic Commerce
E-Communication	Electronic Communication.
EDP	Electronic Data Processing.
E-Signature	Electronic Signature
i.e	In other words
ICT	Information Computer Technology.
LRCT	Law Reform Commission of Tanzania.
M-pesa	Mobile Money.
UN	United Nations.
WWW	World Wide Web.
GDP	Gross Domestic Product
EDI	Electronic Data Interchange.
TEA	Tanzania Evidence Act (1967).
TCC	Tanzania Communication Commission.
TCRA	Tanzania Communication Regulatory Authority.
EFD	Electronic Fiscal Device
TRA	Tanzania Revenue Authority.
IT	Information Technology.
B2B	Business to Business
C2C	Consumer to Consumer.

B2G	Business to Government.
B2C	Business to Consumer.
IT&T	Information Technology and Telecommunication
TCCIA	Tanzania Chamber of Commerce Industries and Agriculture

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Problems

E-commerce has been the act or process of selling and buying goods or services conducted by using electronic means to enable the process of selling and buying to occur; mostly, instantaneously between the seller/producer and the buyer or consumer.

E-commerce can also be defined as electronic networks to exchange information, products, services and payments for commercial and communication purposes between individuals/consumers and businesses, between businesses themselves, between individuals themselves, within government, or between the public and government and, last, between business and government.”¹ The operation of e-commerce in Tanzania is basically, governed without specific laws enacted by legislatures to regulate the application of commercial transaction done through electronic network.

The firms and public officers are conducted through the use of computers, telephones, fax machines, barcode readers, credit cards, automated teller machines (ATM) and other electronic appliances whether or not using internet. The business has been carried out without exchange of papers based documents, transactions and process of payment usually the buyer pays with a bank card, debit or credit card swiped through a magnetic stripe reader the whole process is in e-commerce.

¹ <http://docweb.pwv.gov.za/Ecomm-Debate/myweb/greenpaper> 12 August 2002

In Tanzania, there have not deliver any piece of legislation specifically enacted by the Tanzania Parliament to deal with e-commerce for regulating, facilitating and controlling the business conducted by the parties who use electronic means such as telephone, computer network, and other electronic means. Tanzania started to have a serious problem after the introduction of mobile money, popular as M-pesa, initiated by Vodacom Tanzania, followed by other mobile companies.

The aim of these electronic services was to facilitate business transactions by simplifying it as well as to serve time which automatically will increase more profit earn and hence boost up the whole national GDP. In Tanzania, the use of electronic means to do business transaction is now common as has been practiced even in the rural areas mostly by the uses of mobile banking. The government also has been benefited through use of e-commerce since it had made it easy for the whole taxation process along with keeping good track of businesses and licenses authorized.

1.2 Statement of the Problem

The research shows how the implementation of e-commerce in Tanzania and its application without any piece of legislation to regulate, governing, and directing its applicability here in Tanzania. In Tanzania, there has not been any piece of legislation cover the e-commerce, and the impact or outcome of the e-commerce. Due to the lack of law regulating in e-commerce transaction there has been numbers of issues raised when parties failed to understand each other regarding to their own contracts entered by using electronic means. Which law(s) will be used by the court of law to decide the controversial matter between the parties? In order to answer the question above one must understand and research the relationship between e-

commerce and law in Tanzania. The situation created by doing business transaction electronically without specific law to deal with that situation, take us to the old saying that “to pour the new wine in the old glass or to pour the old wine in the new glass. The approach to consider here is that we are using the modern means of conducting commercial activities by using our old laws.”

The main concern of this research is to show the relationship between law and e-commerce here in Tanzania and how the two correlate while there has not been specific legislation enacted by the legislative organ here in Tanzania to deal with e-commerce. The united republic of Tanzania Parliament is responsible for enacting the law which will set the rule, structure and the manner on how the e-commerce will be conducted in Tanzania. The enactment of law will show the relation of law between e-commerce and those enacted law, as well as the relationship of e-commerce and law must be discussed in the era of no specific law to govern e-commerce as the law applicable here will be the law governing traditional commercial transaction.

There have not been law made to regulate or to govern any criminal act which will arouse in the business conducted through electronic means. The offenses might be conducted either by one of the party in the said transaction or by complete stranger in the said transaction. In recent years there have been increase number of crimes and criminals in the computer related offenses because of the profits which can be gain by the culprits and the offenses have the nature of white collar crime. In Tanzania, there have no legislation to deal with cyber-crime generally and the computer related offenses. The crimes committed in commercial activities conducted

through online services are very technical and complicated offenses as it involves elite person in any single and particular commission, as well it can involve the people from different jurisdiction, and commission can occur in another jurisdiction. The non-existence of law to deal with this situation is real a disaster as it can be considered as situation whereby a car moved without a sterling wheel.

This research intends to show the reasons why there is no enactment of law to cover or to deal with the e-commerce in Tanzania. The research will also go further to show the situation of conducting e-commerce without law in Tanzania and its effects. The research intends to shows the merits of conducting e-commerce with proper laws to regulate and facilitate it and to show the demerit of conducting e-commerce without any legislation to regulating and controlling e-commerce here in Tanzania. It will be necessary for this research to show the results of relationship between law and e-commerce application here in Tanzania, as well as the results of not having the specific law to regulating, dealing and controlling e-commerce.

1.3 Research Structure

Chapter one covered an introduction with background of the researched topic, Literature review as well as Objective and significance of the study, finally this Chapter will go along with the chosen research methodology. Chapter Two contain an overview of the concept that in Tanzania, there have no any piece of legislation specifically enacted by the Tanzanian Parliament to deal with e-commerce for regulating, facilitating and controlling the online business. The chapter also discussed the hindrance and lack of efficiency in e-commerce due to lack of proper

laws the chapter also looked on consumer awareness and public as whole to develop the concepts and ideas which helped in e-commerce law making and enforcement as the key to its efficiency.

Chapter three presents the relationship between legislation and e-commerce in Tanzania by discussing the current laws and situation of E-Commerce in Tanzania. The chapter goes further to show the relationship of the laws we have here in Tanzania which basically were enacted to deal with traditional commercial situation and not e-commerce situation.

Chapter Four give evaluation of success, setbacks, and Challenges facing e-commerce in Tanzania. The chapter intended to show the difficult available of operation of e-commerce without laws to smoothies its operation together with the situation how could handle the legal battle in the contract or business contacted or formed online. Furthermore chapter gave analysis of findings and the data collected through various methods. Chapter five cover critical analysis of the collected information of a research topic finalizes with Findings, Recommendations and Conclusion. The chapter critically analyzes, discuss and conclude the information collected and provides the solutions and recommendation.

1.4 Research Question

This research will intend to answer the following questions as follows:-

1.4.1 General Research Question

What is the situation of e-commerce and law in Tanzania?

1.4.2 Specific Research Question

- i. What is the relationship between e-commerce and law in Tanzania?
- ii. What is the effect of lacking the laws to regulating e-commerce in Tanzania?
- iii. What are the merits of having laws to regulating e-commerce in Tanzania?
- iv. How does the court deal with the situation on lacking e-commerce laws in Tanzania?
- v. What should be done to harmonize the situation?

1.5 Research Objectives

The main objective of this study is to examine the effectiveness and comprehensiveness of the e-commerce and law situation in Tanzania. The study aimed to examine the law and the legal machinery used to deal and regulating the traditional and relate those laws with the situation of running or conducting e-commerce. The study also aimed to study the impact country economy without specific laws enacted to governing e-commerce and legal framework governing e-commerce with its relationship with laws, and the effectiveness and effects of conducting e-commerce without any specific law to deal with the situation.

It is the time now to research in this area with the intention of show the important of enacting the specific law to governing e-commerce to legislatures as it's nearly more than ten years now the e-commerce in conducted in various business transaction here in Tanzania. It is important for legislature to be alerted with what is going on in commercial sector for allowing the sector to enter into modern technology without laws to regulating the commercial transaction done or completed in electronic mode, as well as there have no any legal framework or legal machinery to support that

major changes in Tanzania commercial industry. Protection of parties' interests in e-commerce has led to a number of disputes and each party is trying to protect its interest, which will pave the way for legal disputes, and in order to solve legal dispute the laws must be there to help the adjudicator to determine which party breach the law, rules or procedure. The absence of specific laws had major negative impact in the country's economy as the commercial sector is the basis for all economic development in Tanzania.

The researcher's goal was to uncover the gap that has to be filled by legislature by enacting the laws to shape the situation of e-commerce applicability without specific law to regulating e-commerce operations. The research analyses how the e-commerce contribute in the development of commercial activities in Tanzania and business sector as well that is why even the Tanzania government has introducing e-government. The research also is useful to the legislatures as it shows or remind them the need of having specific law to deal with e-commerce, and it will also help the legal students as well as IT student to understand the relationship between law and e-commerce.

1.6 Research Methodology

The study relied on the following types of data collection, interviews, relevant field materials, and questionnaire which were grouped into two: - field research and library research. Thus research report contains both secondary data which was collected in Library and Primary data collected from the field. The research has been conducted in Arusha region; as a sample space to represent the whole country due to

its high application of E-Commerce due to tourist sector and hosting International High courts and trades.

1.6.1 Library Research

Library Research involved study of relevant materials from the Open University of Tanzania, Arusha branch Library, Faculty of Law Library, High Court of Tanzania commercial division, Law and Technology Firms such as Law Associates Advocates, web based business firms. This primary method of data collection will enable me to understand the Literature and come up with a solution for the presented problem and similar matters in Tanzania.

1.6.2 Field Research

The researcher conducted a field research, through open-end interviews, conversation, and open questionnaires, formal and informal meetings to consult person with some background on law and technology dispute resolution. The target people were the one with E-Commerce and law background or both, institutions dealing with dispute resolution and technology industries.

Data analysis mainly accomplished through quantitative, prior to interviews the researcher had a brief meeting with some officials, experts and consumers, and briefed them what the study was all about and what was needed from them that guided them to prepare and come out with necessary documentation and information for the interview. Interview method will be more preferable because it allows two ways conversation that enables to acquire direct information from the interviewee in an interactive manner.

The researcher had the opportunity to question further the interviewee in case response was not clear or satisfying. Furthermore, unstructured interview was mainly used to avoid bias, and limit the information and also made the interviewee free to provide more information. This approach was very helpful and enabled the researcher to probe further and twist the conversations in search for satisfactory answers in addressing research hypothesis.

1.7 Literature Review

The e-commerce and law situation in Tanzania is very vital in the development economic sector, however, in Tanzania unlike to other countries in the world especially developed countries does not have specific law to govern the applicability of e-commerce. E-commerce is still very new and it started gaining momentum only in the recent years in Tanzania. The researcher had difficulties in finding necessary literature under this subject as it is still virgin. There have a few written works available were very comprehensive none of these books covers the e-commerce in Tanzania. The researcher was able to found and went through the literatures hereunder.

The sales of Goods Act², requires that, all contract for selling goods or transferring of properties must be in writing between the seller and the buyer. The Act provides that all contract for selling goods must be in writing in order to be enforceable. This piece of legislation is absolute silence in the sales done through electronic means, the act actual needed to be amended to coup with the changes in science and technology.

² [CAP214,R.E 2002]

Another piece of legislation dealing with commercial activities in Tanzania, is **The Bill Of Exchange Act**,³ the act require any matter which needed to be sign, and the signature must be in writing. The conditions imposed by the act it automatically silence about e-signature and there have a challenge in application of promissory notice electronically.

According to **Mambi, A. J**, in his book “ICT Law Book” is mostly relevant to this research as he stated clearly that the rapid growth of e-commerce over the world has brought challenges and effects Tanzania’s commercial offline laws and other related laws and the society at large given the nature of paper based transactions. However, the issue e-commerce does receive the attention it deserves when e-commercial is being discussed, and his book is, therefore, particularly relevant to Tanzania as one of the developing countries in the process of reforms and acknowledge the operation of e-commerce and traditional commerce. The author’s trenchant analysis of current and future challenges in relation of e-commerce and law situation.

Moreover **Turban, E.**, in his book titled “Electronic Commerce” briefly shows the reasons why the specific laws should be enacted to regulate the electronic contract. The laws must accommodate the rule and regulation of conducting distance selling contracts as the nature of distance selling contracts has got peculiar features contrast to traditional contract. The issue raised by the author is the regulation must shows at what time the offer is said to be made? At what time the acceptance is said to be completed as against the offer and at what is said to be completed as against the

³ [CAP215, R.E. 2002]

acceptor? The contract regarding to e-commerce must be regulated in tender (online tender) and in online auction mart.

Professor Christopher Reed, in his book “Internet and Law: Text Materials” argued about the laws in most countries were developed over a long time during which the physical actors and physical media were the only, at least the primary, mechanisms by which transaction with legal consequences could be affected. Professor Reeds continue to urge that the Internet environment has brought about a “new wine, old bottles” situation. Despite the changes and regulatory reforms made by the country since independence, most of the laws enacted since British colonial rule before 1960s are still in force.

Moreover **Bwana J.**, (as he then was) in his paper titled “Challenges facing Regulation of e-commerce in Tanzania” the learned Judge of Tanzania High Court (as he Then was) traced the background of Tanzania legal system generally from the 19th century. The learned Judge went on to specifically analyzing the commercial laws in Tanzania generally. The paper also was pinpointed the importance of e-commerce in Tanzania and why there should be laws to regulate its operation here in Tanzania. There should be regulatory instrument to secure electronic transaction such as digital signatures, reforms to business laws, dispute settlement and others have not yet been promulgated. Regulation is therefore needed to ensure the smooth operation of e-commerce and creating conducive situation.

As shown in the LRCT 2006, in their report titled “Final Reports in e-commerce and cyber-crime” stated that the current commercial laws are likely to be affected by

rapid e-commerce changes, inviting alternative regulatory approaches that would not impede e-commerce while advancing and ensuring consumer protection interests. There is great liberalization of free market, de-regulation of rules and control in economy and global, privatization, and the rapid development and expansion of technologies, there is high degree needs of new legislation and law enforcement.

True development in many sectors of our country and many other developing countries has been hindered due to lack of proper link between E-Commerce and law enforcement bodies. Globalization manage to pull the world together as village due to help of science and technology. What happen today in one country might have similar effect on the other within almost same time range. United Nations realized that and reform the International trade laws support the E-Commerce. Legal recognition of e-commerce and e-signature is dealt with in Article 8 which state that “communication or contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.” Executive Summary, Seminar done in AICC (1987) concerning contribution of ICT EDP to Economic Development. The paper also urged how can Tanzania enter into that new age? And how can ICT have to offer to its national development program and what strategies, laws and policies can Tanzania set out regarding this new technology.

CHAPTER TWO

2.0 HISTORICAL REVIEW

2.1 Introduction

For any country in the world to increase its development and be competent in all sectors must invest a big time in technology and researches. But how can a developing country like Tanzania entered and continue to cope into this new era? According to economic development seminar done at AICC 1987 its report stated that, "In this fast growing world of high technology and spectacular scientific discoveries, nations young and old struggle, each at frantic pace, to define national goals and ideals. Information has quickened the tempo of national development, redefined the nature of national boundaries and necessitated and urgent acquisition of new skills."

Technology as whole started to take a rapid growth after the invention of computers. The first computer, an ICT 1500 was first installed in 1965 at the ministry of finance. There was insignificant growth in the number of units installed in the country between 1974 and 1980. Importation of computers into Tanzania was greatly affected by the ban of 1974. The 1974 ban was so effective that practically no public organization managed to import a computer until the end of the decade. In the late 1970s organizations were still using computers bought in the 1960s.

In the early 1980s several factors combined to open the doors for the importation of computers again. These were the coming of microcomputers, the obsolescence of existing computers, and the collapse of the East African Community. Up to 1977 Tanzania, along with Kenya and Uganda, was a member of the East African Com-

munity (EAC). The EAC ran all railways, posts and telecommunications, civil aviation directorates, harbors, and an airline for all the member states. Several of these organizations had computerized their operations. When the EAC broke up in 1977, each country had to set up its own organizations to take over the services that had been carried out by the EAC.

For most organizations formed in Tanzania there was a problem because they were taking over systems that had been computerized during the EAC and were now reverting to manual operation. The government was therefore under pressure to buy computers for these new organizations. These organizations had some Tanzanian experts who had worked with the EAC. The government therefore allowed the Tanzania Harbors Authority, Tanzania Posts and Telecommunications, Air Tanzania, and Tanzania Railways to install computers.

2.2 Current E-commerce Situation in Tanzania

In Tanzania, many private companies and some individuals started to import computers and new technologies using their own funds. Although the government continued to monitor the importation, it needs proper laws and regulations to make the whole process beneficial. Now as the whole world has been moved by the technology; firms, governments and cooperates are now moving into paperless exchange of business and information using Electronic Data Interchange (EDI), electronic e-mail, electronic bulletin boards, Electronic Funds Transfer and other network based technologies. Transformation into e-commerce will automate manual processes and paper transactions, but it also helps organizations move to a fully electronic environment. Tanzania has been hanging from an unclear cloud and incon-

sistent policy concern electronic businesses.

The lack of an overall policy and poor monitoring of initiatives, has led to random adoption of different systems and standards, unnecessary duplication of effort, and waste of scarce resources, especially through the loss of potential energies. The previous sentence was stated by national ICT policy. Tanzania has made a remarkable development in ICT with initiatives between both individuals, private as well as public sectors.

2.3 ICT in Banking and Economy

The banking sector is a living proof to number of achievements that ICT has brought by improves customer services with some banks interconnecting their branches and cash-dispensing ATMs. Invasion and growths of mobile banking has been remarkably accepted by Tanzanians.

Vodacom is the first company in Tanzania and second in East Africa to launch and implement the Vodafone m-pesa money transfer platform in April 2008. In 2010, Vodacom re-launched M-Pesa with a simpler pricing model with better management of the distribution network, and a marketing campaign that targeted the rural, poor and unbanked populations. Currently, Vodacom has more than 70,000⁴ m-pesa agents nationwide whom provide services to various customers and most of them now a days make payments through m-pesa for services or goods. Currently, there are four mobile money transfer products on the market: Vodacom M-Pesa, Tigo Pesa, Airtel Money and Ezy Pesa (Zantel Z-Pesa). In addition, most of bank in Tanzania now

⁴ <http://www.vodacom.co.tz>

offer mobile services which allow customers to have access to their account and perform other transactions. Among the services available to the users of mobile banking are domestic and international money transfers, mobile payments like airtime top-ups, merchant payments, utility bill payments, and salary transfers. Also the mobile companies came up with new banking services like balance inquiries, withdrawals, deposits, credit services and now customers can save their money through mobile saving account. According to FITS report analyses that, “Based on rate of access to mobile communication services among Tanzanian households, Tanzania appears to have the potential to expand its m-money market. Sixty-three percent of households own or have access to a mobile phone and 56 percent of households have at least one active SIM card. Even among underprivileged households—rural, unbanked and poor (living on less than \$2 a day) around one-half have access to a mobile phone and own a SIM card.”

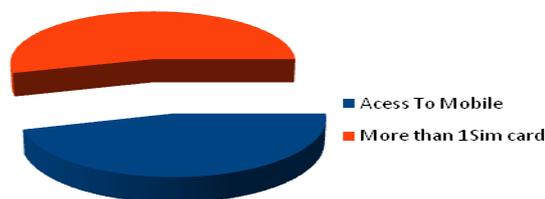


Figure 1.1: Tanzanian Opportunity to Access to Mobile Banking and Money Transfer Services

These initiatives that gradually included Tanzania in the global information society forced the government to recognize the importance of ICT in facilitating other sectors of the economy, enabling them to function properly and efficiently and thus to

contribute to national growth. The first order draft of National ICT policy of Tanzania was formulated in May 2002. The policy which did not have specific name prepared a conjunction with the Tanzania Development vision 2025. The Policy states that its mission is “to coordinate ICT activities in the public and private sectors and to provide a conducive legal and regulatory framework and private infrastructure investments in e-commerce capacity building both in infrastructure and human capital.

The policy aims to provide a conducive legal and regulatory framework and private infrastructure investments in e-commerce capacity building infrastructure and human capital, software and hardware development and production, and promoting regional and international cooperation.”⁵Tanzania government and central banks have not real take big interest in electronic money. Many countries now are on process of adopting digital check which will full fill the same function as paper based check. Delaying in introduction of digital check and other electronic services create loss and delay development since many businesses could not perform transactions which will lead to increase of profits and hence increase in tax.

2.4 ICT Legal and Regulatory Structure in Tanzania

Currently, there is no single law, which specifically regulates ICT in Tanzania. The Tanzanian Communications Regulatory Authority Act, of 2003 comes closest to this function. The 2003 Act establishes the Tanzania Communications Regulatory Authority for the purpose of regulation of telecommunications, broadcasting, and postal services. The Act therefore combines the Tanzanian Communications

⁵ National Policy on ICT, p. 18

Commission (TCC) and the Tanzanian Broadcasting Commission into one body named the Tanzanian Communications Regulatory Authority (TCRA).

The basic functions of the TCRA are issuing or canceling the licenses, monitoring and dispute resolution. It remains clear, however, that regulation of ICT in Tanzania is still at very initial stage, and much needs to be done in the ICT legal framework. The Policy took into account the new needs, rights and vulnerability brought by globalization and by the pervasiveness of the Internet and electronic commerce. The policy was bold that for secure electronic transactions to occur, build trust and sustain it through the legal and regulatory apparatus, taking cognitive of constitutional rights and provisions of criminal, civil and commercial laws.

The Policy acknowledges that Tanzania's legal framework, regulatory capacity and related institutional infrastructure are inadequate in quantity, quality, and diversity and that Tanzania currently lacks technological capacity conducive for e-commerce development and application. It then identifies the need for specific and effective legislative instruments on privacy, security, cyber-crime, ethical and moral conduct, encryption, digital signatures, copyrights, intellectual property rights, fair trade practices and anti-trust practices as some legal issues that should be addressed.

The Policy also assure the government's desire of providing a consolidated, effective legal and regulatory framework that offers an environment conducive to the development of ICT which took into account issues associated with the convergence of e-commerce and information systems, so that new opportunities are created for the citizens of Tanzania, corresponding with their Constitution. Furthermore, its

purpose is to promote business in electronic form in a secure environment and to put in place a legal framework to provide the guiding principles, rules and legislation. On placing the legal framework for e-commerce and ICT, the Policy promises that “the Government will review existing laws and regulations in order to repeal or adjust those that are not conducive to the healthy growth of the ICT industry and enact new ones that take account of issues associated with Internet governance and the convergence of telecommunication, broadcasting and information systems.”⁶

⁶ 3.5.4 The National ICT policy.

CHAPTER THREE

3.0 SIGNIFICANCE OF THE STUDY

There are number of reasons which made this research important and useful, since it analyzed the whole relationship between e-commerce and law situation in Tanzania. The study shows the results of conducting e-commerce without having the law to smoothies the operation of e-commerce in Tanzania, while in the normal circumstances the law should have been enacted first, and the applicability of e-commerce in Tanzania could have offer the positive impact.

The study also intended and was successful in raising awareness and knowledge to some individuals, that the e-commerce has been practiced here in Tanzania without having the law to regulate it and ending up to create the unique situation. The study also went far on examining current commerce and trade laws and relates those laws with the operations of e-commerce in Tanzania. The study went further by expose the faults of not having laws which basically will result to birth of new legal frameworks and machinery to deal with the operation of e-commerce in Tanzania.

3.1 Scope of the Research

The research specifically concerned with examination of situation of operating the e-commerce in Tanzania without having the law to operate its applicability in Tanzania. The study also showed how the e-commerce operation survived to be operated here in Tanzania without having any specific law to regulating its effectiveness in Tanzania. The research took into account the limitation number scope as instructed.

3.2 Limitation of the Study

E-Commerce had been effectively in usage at the beginning of 21st century. It is still new to many firms, business and the whole nation the same as to experts and the necessary knowledge which is still a challenge. Bureaucracy in most Government institution like courts travel on shadow of office privacy. Bureaucracy in some offices was among the challenges and hindrance for the researcher to interview and obtain essential information from some of the intended officials especially those with senior positions in some offices.

The study was somehow delayed because the researcher had to follow up for a permission to conduct the research for a long period that affected the whole data collection process. Much more, there is limited number of sources like books, articles, previous conducted researches, legislations, websites and other literatures to give more broad understanding of the presented problem. Insufficient data from the sources lead to judgemental conclusion on the study. Mostly, in private sectors the confidentiality of data caused the hindrance of attaining the information to the researcher in fear of their competitors. Budget constraints somehow limited the researcher to conduct the research at the highest level. Biased environment was among one of the reasons that affected the researcher in conducting effective research and have relevant data. The time limitation was one of major aspect that limited the field of study.

3.3 Delimitation of the Study

The study based mostly in Arusha area, Tanzania. To come up with best solution and resolve the stated problem and overcome the above limitations the researcher

collected data from few available experts in electronic commerce, technology experts, legislatures, as well as from consumers and frequent users of E-Commerce. Researcher also relied on books like ICT and law articles, presentation and available essential sources. Research also previewed the new amends on favor of E-commerce in constitution and communication laws written out of Tanzania jurisdiction. Also found information from the various ducomented sources. Researcher created friendship enviroment with the targeted person to obtain information and researcher also work hard; most of time work overtime so as to overcome the time limit.

3.4 Types of E-Commerce

There are basically four types of e-commerce but they can be branch out into more types. First is co-operate to co-operate also known as business to business type of e-commerce. This is type of e-commerce which have high percentage in use. In business to business(B2B) markets, buyers and sellers are gathered together into a single online trading community, reducing search costs even further. Also the reduction in the costs of processing transactions (e.g invoices, purchase orders and payment schemes), as B2B allows for the automation of transaction processes and therefore, the quick implementation of the same compared to other channels such as the telephone, physical adress and fax.

Efficiency in trading processes and transactions is also enhanced through the B2B e-market's ability to process sales through online auctions. Furthermore, online processing improves inventory management and logistics.⁷ Through B2B e-markets, suppliers are able to interact and transact directly with buyers, thereby eliminating

⁷ <http://www.wewanttraffic.com/ecommerce/types-of-ecommerce.aspx>

intermediaries and distributors. However, new forms of intermediaries are emerging; moreover, B2B e-markets expand borders for dynamic and negotiated pricing wherein multiple buyers and sellers collectively participate in price-setting and two-way auctions. In such environments, prices can be set through automatic matching of bids and offers.

Another type of e-commerce is Business to Consumer (B2C). Business-to-consumer e-commerce is a trade between companies and consumers, involves customers gathering information; purchasing physical goods, information goods, electronic material or digitized content, such as software, or e-books. This type of e-commerce is the second largest and the earliest form of e-commerce. The most common B2C business models are the online retailing companies such as Amazon, Drugstore.com, ebay.com, Zoom Tanzania and Barnes & Noble. The more common applications of this type of e-commerce are in the areas of purchasing products and information, and personal finance management, which pertains to the management of personal investments and finances with the use of online banking tools.

B2C e-commerce reduces transactions costs particularly search costs by increasing consumer access to information and allowing consumers to find the most competitive price for a product or service. B2C e-commerce also reduces market entry barriers since the cost of putting up and maintaining a Web site is much cheaper than installing a “brick-and-mortar” structure for a firm.⁸ Another type of e-commerce is Business-to-government e-commerce or B2G is generally defined as commerce between companies and the public sector. It refers to the use of the Inter-

⁸ <http://www.wewanttraffic.com/ecommerce/types-of-ecommerce.aspx>

net for public procurement, licensing procedures, and other government-related operations. This kind of e-commerce has two features: first, the public sector assumes a pilot/leading role in establishing e-commerce; and second, it is assumed that the public sector has the greatest need for making its procurement system more effective.

Web-based purchasing trend increase the transparency of the procurement process and reduces the risk of irregularities. To date, however, the size of the B2G e-commerce market as a component of total e-commerce is insignificant, as government e-procurement systems remain undeveloped and confidential. Consumer-to-consumer e-commerce or C2C is another type of e-commerce is simply commerce between private individuals or consumers. This type of e-commerce is characterized by the growth of electronic marketplaces and online auctions, particularly in vertical industries where firms/businesses can bid for what they want from among multiple suppliers. It perhaps has the greatest potential for developing new markets.

This type of e-commerce pin point at least three forms of operations, first the auctions facilitated at a portal, mostly online through real-time bidding on items being sold in the Web or blogs. Another form is peer-to-peer systems, such as the Napster model and social networks like Facebook, twitter, linked and others. It is a protocol for sharing files between users used by chat forums similar to IRC and other file exchange and later money exchange models. Final form is a classified ads at portal sites such as Excite Classifieds and eWanted, Pakwheels.com, it's an interactive, online marketplace where buyers and sellers can negotiate.

Consumer to consumer e-commerce has many benefits. The business model of C2C is very interesting. The primary benefit which consumers get is reduction in cost as compared to buying space of their ads on other e-commerce sites which seem to be quite expensive. People interested in selling their items can post their respective items for free or with minimal charge depending on the website they use. This leads to formation of a profitable customer base.⁹

C2C websites form a perfect platform for buyers and sellers who wish to buy and sell products of similar interest. This leads to increase in visitor to customer conversion ratio. Another benefit is that business owners can easily afford the low cost of maintaining C2C websites and earn good profits instead of buying or rent a shop which could cost a lot. Another major plus point these websites have is that personal items like watch ,shoes etc. can be purchased and sold with ease which is not in case of other types of e-commerce. Consumer-to-business (C2B) is another type of e-commerce transactions involve reverse auctions, which empower the consumer to drive transactions. A concrete example of this when competing airlines gives a traveller best travel and ticket offers in response to the traveller's post and self-service when want to fly.

3.5 Benefits of E-commerce

There has been growth of employment opportunities particularly in software application area in banking, shopping, education, health, agriculture, business, and teleworking as well as software development.

⁹ <http://The Financial inclusion Tracker surveys Project, February 2013>

In addition, several large banks, multinationals and large companies make extensive use of networked computers, some with Internet access available on the networks. The reduction of search costs, as buyers need not go through multiple intermediaries to search for information about suppliers, products and prices as in a traditional supply chain. In terms of effort, time and money spent, the Internet is a more efficient information channel than its traditional counterpart.

E-markets themselves can be considered as intermediaries because they come between suppliers and customers in the supply chain. Among the more evident benefits of e-markets is the increase in price transparency. Increased price transparency has the effect of pulling down price differentials in the market. In this context, buyers are provided much more time to compare prices and make better buying decisions. The gathering of a large number of buyers and sellers in a single e-market reveals market price information and transaction processing to participants.

The Internet allows for the publication of information on a single purchase or transaction, making the information readily accessible and available to all members of the e-market. In the e-marketplace, the requirements of both buyers and sellers are thus aggregated to reach competitive prices, which are lower than those resulting from individual actions. The rapid growth of e-markets creates traditional supply-side cost-based economies of scale. Furthermore, the bringing together of a significant number of buyers and sellers provides the demand-side economies of scale or network effects. Each additional incremental participant in the e-market creates value for all participants in the demand side. More participants form a critical mass, which is key in attracting more users to an e-market.

3.6 E-commerce Shortcomings

There are a couple of shortcomings due to transferring from manual ways to electronic ways. The shortcomings of e-commerce include the following; first is the cost and justification of the devices. Technology comes with some cost especially at the beginning stage where one has to purchase and install the devices, at most cases are very expensive. Also security and privacy are not guaranteed when using e-commerce services since there have been a lot of hacking and stolen information which are stored electronically compare to manual system.

Also it is hard to build user trust since many transactions are done without counterparts know each other. Additionally, use of electronic ways may be hindered due to channel conflicts and frequent breakage of network because many devices are not stable that lead into delay of works. Much more some people are more physical; they prefer to touch, feel and see it physically these are options that e-commerce can not accommodate. Doing transaction on websites requires co-operation between the buyer and seller.

It has been noted many times that these two sides do not co-operate with each other after a transaction has been made. They do not share the transaction information which may be via credit or debit card or internet banking. This can result in online fraud since the buyer and seller are not very well versed with each other. This can lead to lawsuit being imposed on either ends or also on the site if it has not mentioned the disclaimer in its terms and conditions. At worst case is Tanzania does not have legal support concerning e-commerce when situation turns into law suit.

3.7 E-commerce and Current Laws

Tanzania had various pieces of legislation and sub legislation specifically applicable to regulating the commercial activities in Tanzania. “There is no doubt that the current commercial laws are likely to be affected by these rapid e-commerce changes, inviting alternative regulatory approaches that would not impede e-commerce while advancing and ensuring consumer protection interest.”¹⁰

The applicable laws that regulate commercial activities in Tanzania, including the law relating to contract, sales of goods, bill of exchange, companies, and the land laws. These laws were specifically deal with manual or offline commercial transactions. The law relating to contracts, that is The Law of Contract Act, [CAP 345 R.E. 2002] was enacted since 1961, but The Sales of Goods Act, [CAP 214, R.E. 2002] was enacted since 1931, together with The Bill Of Exchange Act, [CAP 215, R.E. 2002]. These pieces of legislations are real creating unfavorable situation in operation of e-commerce in Tanzania, as we already knows that during 1960’s was the time when computers was innovated and those pieces of legislations which basically were inherited from the British colonial rulers.

The current laws which regulating the operation of commercial activities in Tanzania, does not establish legal machinery to deal with e-commerce. The legal machineries are always established by law, but in case there have no law to deal with certain situations, just like e-commerce sector, there have not been legal machineries to make the establishment of e-commerce legal machineries. “Only few local

¹⁰The law Reform Commission of Tanzania, Final Report on e-commerce and cyber-crime, 2006

websites recently began offering limited e-business services. However these services are constrained by the lack of a national payment system, local credit cards, and a legislative framework appropriate for e- business. These constraints need to be addressed urgently. Most significantly, the legal framework does not provide adequate safeguards to create an environment of trust for e- business transactions to take place. Consequently, financial institutions are not able to set up provisions for supporting e- transactions for their own, and each other's clients."¹¹

In Tanzania, there have no legal organ or laws which will licensing those who open the websites specifically for the purpose of commercial activities. The current laws available was enacted to deal with the commercial activities conducted manual or offline. The laws and government organs responsible for regulating commercial activities in Tanzania clearly shows that there have a loose space in laws which needed to be filed by the authorities' responsible to do so by enacting the laws with will make the operation of e-commerce in Tanzania smooth and reliable.

The situation of e-commerce and laws in Tanzania is similar to the situation elaborated by professor Reeds, the professor argued about the laws in most countries were developed over a long time during which the physical actors and physical media were the only, at least the primary, mechanisms by which transaction with legal consequences could be affected. Despite the changes and regulatory reforms made by the country since independence, most of the laws enacted since British colonial rule before 1960s are still in force.¹²

¹¹ Policy, p.5

¹² Reeds, C., Internet laws; Text and Materials 2ed. p. 148

The Sales of Goods Act¹³ under section 5 provides that "... a contract of sale may be made in writing..." the provision did not put a mandatory requirement for a contract of sale to be made in writing as the provision allow a contract of sale even to be made orally. Examining this provision does not prohibit or hinder the application of e-commerce, and this perception will be certain to lay person. The provision can be certain to lay person, simply because the lay person does not have an idea of characteristics or features of law, the one of characteristics or features of law is certainty.

The law must be certain, but the provision of law stated above is now uncertain simply because of development in the sector of Information Communication Telecommunication, before that development, the provision was certain, precise and clear. Most written contract contain the standard clause which states that no amendments to the contract will be valid or binding unless reduced to writing and signed by both parties, which makes it formal.¹⁴

The laws must be amended to work parallel with the development in ICT sector which pave the way for improving commercial sector electronically. The laws was enough to regulate the application of commercial transaction in case there have no transformation to e-commerce. The e-commerce transformation from traditional commerce was the cause of creating holes in commercial laws here in Tanzania. The current situation in Tanzania is require the enactment of laws to regulate e-commerce, is no way of stopping electronic transactions until the law are enforced.

¹³ [CAP 214, R.E. 2002]

¹³ <http://www.perkincole.com/resource/ecommerce/prc.htm>

¹⁴ [http:// www.lrct.go.tz/.../position-paper/Positionpaperone-COMMERCEadobe](http://www.lrct.go.tz/.../position-paper/Positionpaperone-COMMERCEadobe).

3.8 Protection in E-commerce Transactions

Trading on web base is through the transmission of electronic data from the one part to other mostly is between suppliers or producers of goods or services and the buyers, vice versa is true. In view of the openness and accessibility of the internet the protection of such data has been a constant source of concern for internet users and consequently has remained a threat to e-commerce.¹⁵

Legislatures in developed countries came up with protective legislation for online trading consumers. There is no legislation on the protection of data presently in Tanzania, and the situation portends a great danger for consumers in e-commerce. The laws in Tanzania neither cover distance selling contracts nor recognize Cyber space or digital signatures. What the laws say is that, the contract must be in writing and duly signed or authenticated before a witness. With e-commerce this arrangement is no longer applicable hence affecting the former laws which have to face changes and reforms to accommodate e-commerce principles. There is a great need for our country to introduce distance selling regulations. These laws will focus on protecting consumers who purchase goods and services over the Internet.¹⁶

3.9 Purchase Power in E-commerce

Payment system in e-commerce has to be electronic wise too. For the goods and services bought through the internet poses unique problems because of the fact that the parties may be miles apart. The problems associated with internet payment are in relation to the inability of the internet to guarantee the safety of such payments and

¹⁵ Gringas and Nabarro, *Laws of the Internet*, p. 249

¹⁶ Dinakin, *Law and Practice of International Trade*, p.36

the possibility of duplicating payment, since a computer could potentially become a forger of digital banknotes.¹⁷

Goods and services bought or supplied through the internet can be paid for through the internet in the same way that the internet can be used to make offers and accept offers.¹⁸ The currently imposed methods of payments of goods bought through the internet include the use of credit cards, smart cards, digital or electronic cheques or cash, and debit cards and mobile money services such as M-pesa, Airtel money, Tigo pesa. There have been some problems in the application of mobile money services in making payment through electronic commercial transactions.

The problem arises because the mobile money service was designed for the purposes of transfer money from one client to another but increase in banking service as create load of function and some dysfunctions. Many business has suffer loses when accept payment from client through mobile money services as this technology is not yet full develop and lack of proper expert. Currently, the mobile money services have introduces the payment of services in fuel stations, and payment of motor vehicle registration to TRA. Some consumer mistakes which where not be able to detected and verified due to technology shortcoming have cost both consumers and mobile companies.

The use of credit cards is still not very popular in developing countries, because e-commerce itself is still at its infancy, and the practice is therefore for the sellers to

¹⁷ Gringas and Nabarro, *Laws of the Internet*, p. 31

¹⁸ Lynch and Lundquist, *Digital Money*, p.38

obtain bank guarantees in such transactions. If the goods are supplied and payment is not forthcoming through the bank's guarantee, the seller has a right of action against the issuing bank that has guaranteed payments.¹⁹ Credit card fraud is among top crimes that developed nations deal with in this present age, before this service rapidly grow in Tanzania, legislature has to deal with legal framework to control and regulate its impacts.

Vendors or sellers often insist on receiving and validating payments before providing services or releasing goods to customers, and it is therefore suggested that terms to this effect should be incorporated as part of the standard form agreements in e-commerce. In Tanzania there have no specific laws to deal with the payment methods for commercial activities done online although now a days the government has introducing the e-government. The e-government is including the payments of money to government to be paid through online including various taxes such as VAT now should be paid through Electronic Fiscal Device (EFD) and currently the TRA has introduce the new service of paying the Motor Vehicle Registration through Mobile services.

3.10 Correlation Between E-Commerce and Imposed Laws

Laws are created to regulate the applicability of certain situation and sometimes target certain areas. Tanzania has number of laws enacted to regulate the operation of commercial activities. After revolution in Information technology and telecommunication sector in the world, which, of course, Tanzania was not isolated in that development of ICT globally, and found herself as part of that development.

¹⁹ Dinakin, Law and Practice of International Trade, p.36

This new era basically paved the way or enabled the commercial activities to be conducted instantaneously, with low costs, so as to cause efficiency to users and the commercial activities done through the help of ICT can simply be referred to as e-commerce. “The rapid growth of e-commerce over the world has brought challenges and affects Tanzania’s commercial offline laws and other related laws and society at large given the nature of paper-based transactions.”²⁰

The introduction of fiber optic international submarine cables in 2009-2010 is set to revolutionize the market which up to that point completely depended on expensive satellite connections. In similar ways, the government has embarked on a national fiber backbone rollout to connect population centers around the country. However, the cost of international Internet bandwidth has not yet come down much and the speed is not as quickly as expected.²¹

In Tanzania, still the operation of e-commerce is governed by what can be called a gentlemen agreement, as there is no specific law to be applicable in resolving the conflict between the parties in case the parties failed to resolve the conflict amicably, also, there is a lacuna in law in case of providing procedures of conducting and handling online commercial transactions.

3.11 Relationship Between E-commerce and Courts of Law

The emergence of e-commerce and its growing popularity have provoked fundamental evidential issues especially in relation to the proof of transactions conducted through ICT. The peculiarity of these issues and the confusion that has

²⁰ Bender, D., *Computer Law Journal*, 703

²¹ <http://www.internetworldstats.com/af/tz.htm>

also greeted their interpretation by the courts have exposed the inability of the Tanzanian Law on Evidence to cope with the admissibility of the avalanche of electronically-generated evidence that is the hallmark of electronic commercial transactions.

E-commerce transactions are paperless transactions made through electronic devices. These are in contradistinction to paper-based transactions that are embodied in a permanent form and typically expressed in figures and documents usually authenticated by signatures. Such transactions can therefore not be altered without an alteration on the face of the document. The cyber laws from the developed countries jurisdictions came as a response to the call made under the UNCITRAL Model Law on e-commerce. The Preamble to this instrument requires countries to harmonize their laws to give legal recognition to electronic transactions for the aim of promoting e-commerce. In this respect, various countries adopted this piece of legislation while others enacted their laws in this respect based on the principles of the Model Law.²²

In Tanzania, the landmark case here is the case of Trust Bank Tanzania Ltd. v. Le-marsh Enterprises Ltd., Joseph Mbui Magari, and Lawrence Macharia,²³ in this case “the court admitted evidence from a computer print-out and go further step to directed the legislators to consider some key factors from the UK legislation when amending or enacting the law that will amend the evidence Act to recognize electronic evidence”.

²² books.google.com/.../Electronic_transactions_and_the_law_of_e.html?id.

²³ The High Court of Tanzania (Commercial Division) at Dar es Salaam Commercial case no.4 of 2000 (Unreported)

Following the decision of the Court and the Law Reform Commission Report on the legal framework for e-commerce and cyber-crimes, the government of Tanzania in 2007 amended the Evidence Act²⁴ to accommodate electronic evidence. The amendments were made through the Written Laws also known as Miscellaneous Amendments. This law seems to allow the admissibility of Electronic Evidence. Section 76 of the Evidence Act was amended by this legislation by adding definition after the word “Bankers books”. The new amendment law has further brought fundamental changes as far as the legal status and admissibility of electronic records are concerned. This can be observed under the additional section of the new Act to the Evidence Act whereby electronic records or data message are given legal status and can be admissible as evidence before the court.²⁵

3.12 Data Protection

There is a threat where the use of data processing techniques through computer and electronic devices has been put into questions whether it met security and privacy assurance.²⁶ There is no law in Tanzania which protects data or databases in Tanzania. The main concern here could be the right to privacy, data protection and danger of information misuse. Numbers of e-commerce users are faced with a number of risks arising from the general lack of understanding of the operations of ICT. This has been prove by number of legal issues which have been largely taken care of in more advanced and sophisticated countries, but which issues are still being grappled with in developing countries such as Tanzania, where e-commerce trading is some-

²⁴ [CAP 6, R.E.2002]

²⁵ Act no. 15/2007

²⁶ Lloyd J., Information Technology Law, p.41

thing fairly new.²⁷

The communication between the two parties should be protected (data protection), the formation of a contract on the internet, the legal means of effecting payment in e-commerce, which court has to assume jurisdiction in the event of a dispute between parties to law suits concern ICT and what law or laws will govern the transactions. Laws should aim specifically to cyber-crimes that are threatening e-commerce, and also the mode of proving internet-related transactions. In the English case of *R. v Brown*²⁸ Lord Hoffman lucidly captured the thrust of the problems associated with data protection in e-commerce as follows: “Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business is under technological threat.”

3.13 Risk of E-commerce Through Spam

Spam is the act of sending large number of unsolicited mails with an intention to scam the other part through manipulation. The hackers usually at first obtain some basic information and will make a way to obtain the pass code, passwords or verification in order for them to complete the scam. Lack of knowledge lead many users of e-commerce to be scammed, the hacker use mostly bank cards, debit cards, Visa card, credit cards, or account No and other relative information to steal from the

²⁷ https://www.itu.int/osg/spu/cybersecurity/contributions/Tanzania_Ulanga_paper.pdf

²⁸ [1996] 1 All ER 545

owners. Currently, spam and crime through e-commerce has been increase in corresponding to increase in number of users. Legal framework and strengthening the systems are much requires ensuring safety and privacy of the users.

3.14 Cyber Attacks

Tanzania is embarking on deployment of e-government and more and more organizations are adopting the internet as medium of transmission for the core business functions. The e-mail is replacing the fax and physical mailing as the main medium of transmission. The organizations that heavily depend of the internet and computer network are at risk from cyber-attacks which could be deliberate attempts to disrupt services or even more sophisticated attacks. The government needs to make sure proper laws are in line to punish every act of cyber-attack or scam so to reduce the risk in order for many people and the whole nation to benefit from this.

3.15 Computer Crime and E-commerce

Cyber-crimes pose many challenges to electronic commerce and have indeed made internet transactions insecure and vulnerable to manipulation by persons who are not parties to the transactions. The extent to which internet crime has ravaged the commercial world was succinctly captured by learned authors as follows: “It is also predictable that the proliferation of commerce on the internet will be matched by an expansion of crime on the internet. The rise in the use of digital cash and credit cards over the internet provides a greater incentive to hack than ever before.”²⁹

²⁹ Gringas and Nabarro, *Laws of the Internet*, p. 211

Conceptually, internet crime means the commission of unlawful acts using the computer either as a tool or a target, or as both.³⁰ It is not defined in any legislation in Tanzania. The most common internet crimes include hacking and cracking, identity theft, the sale of illegal or stolen articles on the internet, packet sniffing, and the creation of malicious codes such as viruses. These offenses are crimes in most advanced countries because of statutory regulations. In Tanzania, however, these activities are not crimes, because there is no legislation in the country that makes them unlawful.

The Draft Law addresses most of the issues that have been identified as constituting crimes in cyberspace, and which consequently threaten electronic commerce. It contains provisions that are similar to or the same as the relevant provisions of the laws on this subject matter in the advanced jurisdictions. The problems and general trepidation associated with cyber-crimes will be reduced. Herein lies the helplessness of consumers in electronic commerce in Tanzania, who may be victims of one or more of these cyber-crimes. The solution to cyber-crimes in Tanzania is still at the stage of a Draft Law which is presently pending before the Law Reform Commission of Tanzania.

3.16 Challenges of E-Commerce Operating Without Corresponding Laws

What does e-commerce have to offer to its national development programme and what strategies and policies can Tanzania set out regarding this new high Information technology? The issue of jurisdiction is a vital one in e-commerce. The question has

³⁰ Wall D., Crime and Internet, p.5

always been which court assumes jurisdiction in resolving a dispute arising from a contract between the parties, in view of the fact that the parties may be residing in different jurisdictions with different legal systems due to the nature of e-commerce.

The relation is basically relate to Private International Law, and the relevant Convention is the Brussels Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters. The Convention is applicable to those countries that have ratified it and accommodate its provisions into their municipal laws.³¹ However, there have no any evidence that the Convention has been ratified in Tanzania, as there have no any evidence to support its ratification. In relation to internet contracts, the general rule is that jurisdiction is determined by reference to the place or country where the contract is performed.³²

Where there are many jurisdictions where the contract is performed, the relevant jurisdiction is the jurisdiction where the dispute arises. The place of domicile may also determine the court that will have jurisdiction. Where the parties are domiciled in a contracting state under the Brussels Convention, the rules of the Convention are applicable, while the rules of common law are applicable where the parties are not domiciled within a contracting state.³³ Also, a person's domicile must be assessed from the legal perspective to determine whether or not he is domiciled in a contracting state.³⁴

³¹ Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1958

³² Davies, P., Contract Formation, 100

³³ E.g., for internet contracts made in the UK, the provisions of s 41(7) of The Civil Jurisdiction and Judgment Act, 1982 are applied to determine whether the defendant is domiciled outside the contracting state

³⁴ art 13 and 14 of the Brussels Convention

The trend in e-commerce has therefore been to paste on the website that an agreement resulting from viewing a website is not a contract for the sale of goods or supply of services. This is obviously done to avoid the rule in favor of consumers. It has, however, been held that classification of a contract as a contract of sale of goods or supply of services should be determined by examining the terms of the contracts to discover the substances.³⁵ The implication therefore is that there will be a frequent reversal of the general rule in favor of consumers, namely that litigation will take place only where the consumers reside, since most website owners are either suppliers of goods and services or professionals.

The courts have the powers to look at the content and substance of a transaction in the event of a dispute, to determine whether it is contract of purchase or supply of goods and services.³⁶ The postal rule is inapplicable to an e-mail contract. The place where the e-mail contract is made is the acceptor's place, and that is the relevant place for purpose of jurisdiction, in IT terminologies is known as IP address. The question of choice of law is particularly difficult in the case of International computer networks where, because of dispersed location and rapid movement of data and geographically dispersed processing activities, several connecting factors could occur in a computer manner involving elements of legal application.³⁷

The rules on a worldwide website differ from the rules relating to an e-mail contract in that there is no binding contract until notice is received by the seller and the

³⁵ *Robinson v Graves* [1935] 1 KB 579, 587

³⁶ *St Alban's City and District Council v International Computers* [1996] 4 All ER 481

³⁷ *Entores v Miles Far East Corporation* [1953] 2 QB 327

contract is made where the seller receives notification of the acceptance, which is equally relevant for purposes of jurisdiction.³⁸

An important aspect of jurisdiction in e-commerce is the choice of law to be applicable in disputes arising from consumer contracts concluded over the internet. The complexity involved in the choice of applicable law could be explained as: The question of choice of law is particularly difficult in the case of International computer networks where, because of dispersed location and rapid movement of data and geographically dispersed processing activities, several connecting factors could occur in a computer manner.³⁹

The rules on a worldwide website differ from the rules relating to an e-mail contract in that there is no binding contract until notice of acceptance is received by the seller and the contract is made where the seller receives notification of the acceptance, which is equally relevant for purposes of jurisdiction. There are still more difficulties with regulation of cyberspace by the laws of a single jurisdiction. It is important to emphasize, however, that freedom of contract is an established principle in the Law of Obligations and that the parties to an internet contract can therefore agree on the terms and conditions of the contract including the choice of laws which will be amend to govern the transactions.

³⁸ The Rome Convention on the Law Applicable to Contractual Obligations 1980

³⁹ Gringas and Nabarro, *Laws of the Internet*, p. 45

CHAPTER FOUR

4.0 E-COMMERCE SITUATION IN TANZANIA

4.1 A Critical Analysis of ICT Policy

The Policy emphasizes introduction of the legal and regulatory framework that would be conducive for development of ICT in Tanzania. Basically, reviewing exist laws and regulations in order to repeal or amend those that are not conducive to the growth of ICT.⁴⁰ Uses of ICT and e-commerce at most expect thorough research with the intent of identifying the laws that have been affected by ICT and the new areas that will require a completely new piece of legislation. The study dig deep into the impact which e-commerce has caused on the law of evidence, with the aim of coming up with recommendations that may lead to creating a legal frame work that gives electronic evidence legal recognition.

At the next chapter the researcher shares recommendations with the support of both literature and field survey, that the kind of reform suitable for Tanzania is to have a comprehensive legislation which addresses all aspects of e-commerce. The proposed legislation should be able to make amendment to all the laws that have been affected by advancement of ICT. The proposed legislation should be able to make amendment to all the laws that have been affected by advancement of ICT. The importance of proposed new laws is the need to have a legal framework that enhances predictability for parties transacting business that uses the modern technologies, regardless of the medium used

⁴⁰ ICT National Policy, part 3.5,

4.2 Current Situation of E-commerce in Tanzania

The considering point across the Tanzania ICT industry is the lack of clear legal framework and government Implementation. In certain areas, lack of any government coordination has created competitive sectors in the market, while other sectors, such as public data operators, are currently dysfunctional. As it was pointed out earlier that Tanzania has not made any progress in enacting any legislation to regulate electronic transactions, including electronic evidence. However, there have been some initiatives that may ultimately lead to having a legal frame for regulation of ICT in general, and particularly of electronic commerce.

The initiatives can be grouped into three forms. These are legislative, judicial and administrative. On legislative initiatives, there are ongoing efforts by the Law Reform Commission of Tanzania, which has so far made a study on introduction of the legal framework to regulate ICT in Tanzania. The draft discussion paper in this respect was a subject of discussion in a series of stakeholders' workshops. In these workshops, the stakeholders said that Tanzania definitely needs a law on ICT and that in fact it should have been in place many years ago.⁴¹

One of the unstated themes of Tanzanian ICT policy is that a competitive market would have provided more efficient services and reduces the burden on government.

In other words that explain that the data communication sector has been thrown open

⁴¹Mutagahywa, B. Kajiba, J "Connectivity and E-commerce in Tanzania" Economic and Social Research Foundation (ESRF), Tanzania, 2000 accessed at <http://www.eldis.org/static/DOC9183.htm> on September 20, 2006 afrol.com "Internet use Grows in Tanzania Despite of Government Policy" Accessed at http://www.afrol.com/News2001/tan003_internet_growth.htm> last visited on 23 November 2004 National ICT Policy, part 2.4.2

to whomever could afford the license fees. The belief in competition without legal laws at operations lead to untrue operating of businesses and increase of crimes which could not be punish with specific e-commerce laws.

Tanzania regulatory body sees itself primarily as a generator of revenues for the government; it does not currently play, nor foresee itself as a valuable key player in creating a conducive legal framework in the ICT sector. Moreover, there is no local manufacture of ICT equipment in Tanzania: all local dealers or agents import these products. There are no national standards guiding the imports of either hardware or software. Few individuals and local companies are developing computer application packages. Most of the software used by both public and private sectors are imported at considerable cost. The use of open-source software is on the lower side. Much more, Tanzania has little high standard skilled capacity to support the ICT industry in terms of developing, selling, training or supporting hardware and software.

Only few registered local websites and blogs recently began offering limited e-business services. However these services are constrained by the lack of a national payment system, local credit cards, and a legislative framework appropriate for e-business. Recently the government came up with electronic purchasing transaction and issuing of receipts to customers which will improve taxation process but have not done for online businesses. These are constraints that need to be addressed urgently. Most significantly, the legal framework does not provide adequate safeguards to create an environment of trust for e-business transactions to take place. Consequently, financial institutions are not able to set up provisions for supporting e-transactions for their own and each other's clients.

Chapter Four is continuing to give evaluation of success, setbacks, and Challenges facing e-commerce in Tanzania. The chapter intends to show the difficult available on operating e-commerce without laws to smoothies its operation together with the situation how could handle the legal battle in the contract or business contacted or formed online.

4.3 Legal Transaction Authentication

Law broadly can be categorized under two heads, namely: substantive law and procedural law. The substantive law defines what facts go to constitute a right or liability. The procedural law, on the other hand is the means by which substantive law is applied to particular cases. The law of evidence is a procedural law. The fundamental principles of the law of evidence are as follows: firstly, evidence should be confined to the matter or facts in issue; secondly, hearsay evidence should not be admitted; and thirdly, the best evidence must be given in all cases. Presentation of materials and documents in trials can be one form of evidence and courts identify signatures as authentication of documents for the purpose of clarity.

A signature may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another. If the purpose of signature in commercial transactions, *Black's Law Dictionary*⁴² further states, “in commercial law, any name, word, or mark used with intention to authenticate a writing constitutes a signature.”

⁴²Black's Law Dictionary at p. 963

The definition in the case of *R v. Moore, Ex Parte Myers* and Webster's Dictionary⁴³ is adopted in this study. However, the ideal proposed definition is that a signature is an act of writing, processing, encrypting, logically associating or affixing a person's name, initials, symbol, sound or data on a document or record by hand, typing, printing or by using any other device for marking, stamping, scanning, photographing, or processing for purposes of authenticating such document or record.

This definition illustrates the manner of affixing a signature as well as the function of the signature, namely to authenticate the genuineness of the document or record. As will be argued in this study, electronic signatures will as well be capable of performing this function. Moreover, the intention of having terms like "record", "data", "encrypt", "process", "sound", and "associate" in the definition is to encompass electronic or digital signatures. The effect would be that, once a statute requires a signature, this requirement would be met if an electronic or digital signature is used. The more modern judicial approach to the validity of signatures concentrates on the function rather than the form of a signature. Under these cases a signature will be valid, irrespective of the form it takes, if it performs the functions which the law requires of a signature.

These cases suggest that the primary function of signatures is for authentication purposes. In other words, the function of signatures is primarily evidential. In some historical cases were stated that the validity of a particular signature method is found by referring to the function it performs. The signature will thus be valid if it provides

⁴³(1884) 10 VLR 322

evidence of authentication of the document by the signatory. Any signature method must be able to evidence the identity of signatory, intention to sign and intention to adopt the document. The question before us is whether electronic signatures can achieve these functions.

There are various ways of signing electronic documents. For example, the use of computer graphics and scanning equipment to create a digital image for a person's signature, for instance, so that this image is reproduced at the end of a word-processed letter. It can as well be anything attached to or associated with electronic data, which is able to serve as a method of identification.⁴⁴ In other words electronic signature is a generic, technology-neutral term that refers to the universe of all of the various methods by which one can "sign" an electronic record. Although all electronic signatures are represented digitally by binary numbers (i.e., as a series of ones and zeroes), they can take many forms and can be created by many different technologies.

Examples of electronic signatures include a name typed at the end of an e-mail message by the sender; a digitized image of a handwritten signature that is attached to an electronic document, sometimes created via a biometrics-based technology called signature dynamics secret code or Person Identification Number (PIN), such as that used with Automatic Teller Machine (ATM) cards and credit cards, to identify the sender to the recipient; a code or "handle" that the sender of a message uses to identify himself; a unique biometrics-based identifier, such as a fingerprint or a retinal scan; and a digital signature.

⁴⁴Black's Law Dictionary at p. 963

Another simple method shows a name and details in an electronic contract on a more secure electronic signature is produced by performing a mathematical function on the document, or part of it, which identifies the signatory and authenticates the contents of the document. The classified electronic signature produces more complex methods of electronic signatures. This kind of electronic signature is commonly referred to as a digital signature. Digital signatures use what is known as public key cryptography, which employs an algorithm using two different but mathematically related keys, one for creating a digital signature and another key for verifying a digital signature.

Keys are used to encrypt information. Encrypting information means "scrambling it up" so that only a person with the appropriate key can make it readable again. Therefore, in order for a digital signature to qualify as such, it must meet the following conditions. First, it should be unique to the subscriber creating it. Second, it should be capable of identifying such subscriber. Third, it should be created in a particular manner using a means under the exclusive control of the subscriber. Fourth, it should be linked to the electronic record to which it relates in such a manner that if the record were altered, the digital signature would be invalidated.

Effective innovated electronic signature technologies can prove that electronic signatures are actually harder to forge than manuscript signatures. The only function which electronic signatures cannot provide is that of making a visible mark on a document. Its mark is in digital form. However, it is correctly contended that a signature, whether electronic or on paper, is first and foremost a symbol that distinguishes a signature.

4.4 laws Functional Requirements of E-Commerce

In order for a signature to be valid and effective, it must provide evidence of three things: the identity of the signatory, the intention of signing and the intention to adopt the contents of the document as his own. Manuscript signatures meet these functional requirements in a number of ways. Identity is established by comparing the signature on the document with other signatures, which can be proved, by extrinsic evidence, to have been written by the signatory.⁴⁵ The assumption is that manuscript signatures are unique, and that therefore such a comparison is all that is necessary to provide evidence of identity. In practice, manuscript signatures are usually acknowledged by the signatory once they are shown to him, and extrinsic evidence is only required where it is alleged that the signature has been forged. Intention to sign is normally presumed, because the act of affixing a manuscript signature to a document is universally recognized as signing.

Intention to adopt the contents of the document is similarly presumed because it is general knowledge that affixing a manuscript signature to a document has that effect. In both cases, the burden of displacing the presumption is on the signatory. Electronic signatures can equally meet the law's functional requirements, but in rather different ways. To begin with, the signature itself does not provide sufficient evidence of the signatory's identity. To establish this, further evidence is required which links the signature key or other signature device used to the signatory himself. In practice, the recipient of an electronically signed document wishes to be able to rely on the signature without further checking, and so a number of organizations known as Certifica-

⁴⁵Sulner, H. F., H. F. Disputed Documents: New Methods for Examining Questioned Documents p.10

tion Authorities have been set up. These bodies take traditional evidence of identity, (e.g., by examining passports), and, in the case of public key encryption signatures check those signatures.

Did that analysis prove that the most raised question that electronic signature fails to meet the evidential requirements because of a successful forgery cannot be detected easily is true? The answer is, no. The reason is that no such requirement is imposed for paper-based signatures. Thus, while handwritten signatures in most cases serve merely to indicate the signer's intent, signatures in an electronic environment typically serve three critical purposes for the parties engaged in an e-commerce transaction: to identify the sender, to indicate the sender's intent and to ensure the integrity of the document signed.⁴⁶

4.5 Legal Framework of E-Commerce Situations in Tanzania

Legal and regulatory framework of e-commerce in Tanzania is still emerging just like most of developing nations. There is no elaborated legal and regulatory framework for electronic commerce in Tanzania presently. The fact should, however, be mentioned that as e-commerce is a species of commercial transactions, though a special one, there are pockets of commercial legislation and decided cases that directly or indirectly affect it in Tanzania.⁴⁷ On the international scene, a major recognition and regulation of electronic commerce began with the adoption of the UNCITRAL Model Law on Electronic Commerce in 1996.

⁴⁶Saunders v. Anglia Building Society [1971] AC 1004.

⁴⁷The Sales of Good Act, [CAP 214, R.E 2002]

In Tanzania and East Africa Counties, concrete efforts at regulating e-commerce-related activities are still at the stage of Draft before the East African Parliament. The nature of the subject matter addressed in electronic commerce laws means that the impact may be horizontal across all sectors of business and the private sector, as well as public administrations. While such a broad scope may be welcomed, it may not always be appropriate in all the circumstances. The legislation may, therefore, include a provision specifically detailing the areas in which the law is intended to apply. In general, for example, there will be a desire for it to be applicable in areas of civil and commercial law. Electronic transactions laws are not generally applicable to the field of criminal area, particularly criminal procedure, since this may have unintended consequences.⁴⁸

A cardinal aim of the Model Law was to ensure that the practices of Member States in the area of electronic commerce, as an emerging practice in commercial transactions, should be uniform and of acceptable standard. Thus, Member States were enjoined to enact laws and institutions that conformed substantially to the provisions of the Model Law. The East Africa Draft on Cyber Laws provides the legal and institutional framework for combating cybercrime in East Africa countries and the member states including Tanzania shall adhere the draft after being passed by East Africa Legislature organ.

Provisions are also made for payment of compensation to victims of cyber-crimes. The draft also makes provisions for the establishment of a Cyber Crime and Cyber Security Agency, which is given wide powers to investigate arrest and prosecute

⁴⁸ 2.1.1 Draft EAC Legal Framework for Cyber laws, November 2008

cyber-crimes. It is also important to note the Tanzania National Policy on Information Technology (IT), which has as one of its numerous objectives the cultivation of a culture of electronic commerce which makes business transactions easy, quick and cost effective for both national and international transactions.⁴⁹

4.6 Choice of Law

Choice of law in e-contracts is a special problem. It involves the need to safeguard the sanctity of contract, on the one hand, and the need to protect consumers from the risks available in online contracting on the other. E-contracts, where goods ordered by a consumer, pursuant to an on-line contract, either fail to be supplied or, if they are, find the goods to be defective, raise this problem in an acute form. In Tanzania a number of online purchasers of used motor vehicles from Japan have been defrauded by bogus suppliers.⁵⁰ According to a statement from the Tanzanian embassy in Japan, Tanzanian nationals have lost a total of US\$91,554 due to fraud. Most of them failed to obtain legal redress either due to the costs involved or due to the nature of their contracts with the suppliers or the inadequacies of the existing contract law.

4.7 E-commerce Barriers in Tanzania

There are obviously other problems that need to be explicitly addressed if e-commerce is to be a success in Tanzania. One such relates to financial infrastructure. Although this is an area worth independent research, a financial service environment that is secure and user-friendly is a pertinent issue in the development of e-

⁴⁹ Tanzania ICT policy, p.5

⁵⁰ <http://www.freemedia.co.tz/daima/habari.php?id=10104>(as accessed on 5/2/2010)

commerce.⁵¹ Although the card based technology (used in ATMs) has gained momentum in Tanzania, this service is only used in the major cities. Major reforms in this area are still needed including allowing the wide application of credit card and other schemes within the financial sector. Financial reforms must also take into account the need to speedup rural integration into the new economy by expanding the domain of banking industry into the rural areas, as well as introducing new mechanisms of encouraging savings among the people in both rural and urban areas. More research on the banking laws and their inadequacy or adequacy in regulating a country wide usage of credit or debit card is, however, needed.

Overall, this study identifies seven major areas in the Tanzanian law of contract that are problematic, and which need to be addressed in the light of the current use of the Internet and other related technologies. These areas are: contract formation and the requirement of consensus ad idem, formalities, online mistakes or input errors, proof, consumer protection, jurisdiction of the courts, and choice of law.

4.8 Finding Analysis

The Tanzania Chamber of Commerce, Industry and Agriculture in private sector focal point in monitoring and facilitate trades with the support from Government. TCCIA is governed by a board of directors, national executive council and an annual general meeting. TCCIA collects suggestions and information from Chamber members for consideration or action. Board of chamber sets general policy which is implemented by the senior staff. Tanzania Chamber of Commerce, Industry and Agriculture is one of major user and operator of e-commerce in Tanzania spread

⁵¹ <http://delivery.acm.org/10.1145/1410000/1409939/a28-boynton.pdf>

throughout Tanzania mainland and islands with more than 24 branches. ACCIA hosts an extensive E-Library with invaluable materials that if used effectively will help business community to gain different knowledge that would prosper their businesses.

Tanzania Chamber of Commerce, Industry and Agriculture has established an online directory of companies listing their services and products as well as the procedures involved in acquiring such services and product. AICCA is the first chamber of commerce in East Africa to provide and acquire of information in finger prints through mobile text messages through 15539. Furthermore, Tanzania Chamber of commerce, Industry and Agriculture has established an online virtual market place that will help its members to host their products information for possible market access. Tanzania Chamber of Commerce, Industry and Agriculture has established a forum where all business leads related information of people looking for buying, selling or business ventures to/from abroad are posted. TCCIA has designed a reporting and monitoring system that will enable business community to report any suspected barriers to trade through short messages (SMS) which will be taken up to respective MDAs for action.

Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA) in collaboration with WABANTU (T) Ltd in issuing electronic membership ID Cards to members who will be able to access number of services at discounted costs. TCCIA have exclusive deals and special discounts provide additional value for its members, ranging from access of information electronically mostly to business opportunities, markets, network connections, training and services/products.

ACCIA has linked Tanzania trades to world trade organization and most of business are conducted and performed in form of electronic commerce. TCCIA's one of challenges in performing its duties is lack of specific laws in e-commerce while most of other nations have already developed into that stage. In WTO businesses face price fluctuations, market fragile and other catastrophes which sometimes are not natural but greedy man made and manipulate to get fat profits; Tanzania lack laws to support and protect our traders when they fall into that pit.

According to ACCIA, “World trade expanded in 2011 by 5.0%, a sharp deceleration from the 2010 rebound of 13.8%, and growth slow further to 3.7% in 2012, WTO economist’s project. They attributed the slowdown to the global economy losing momentum due to a number of shocks, including the European sovereign debt crisis. According to question no I2, as regards to question No. 13 “Do the existing Tanzania regulations satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?” The responded received from 22 respondents out of 30 showed that 73.33% of TCCIA staffs are not satisfied while 10% are satisfied and 16.67% they are not sure. 62% members of TCCIA are not satisfied with existing laws, 30% they are not aware of that and 8% think existing regulations and laws are fine. “Do the existing Tanzania regulations satisfy the requirements of consumer protection in e-commerce transaction in Tanzania?”

Table 4.1: E-Commerce Existing Laws and Regulation Satisfaction Respond

	Satisfied	Unsatisfied	No clue
TCCIA members.	10.00%	73.33%	16.67%
Staffs of TCCIA	8.00%	62.00%	30.00%

Source: TCCIA

Both members and staffs of TCCIA prefer electronic commerce over manual system by 98%. This is a good response and it's inspiring as the world innovating to massive changes through technology. Convincing number of respondents showed great awareness of e-commerce as a means of increasing efficiency and profit in commerce. There was small fear concern e-commerce among interviewers due to lack of customer protection and support.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The rapid growth of e-commerce globally has put Tanzania in the position of facing challenges to various commercial laws and other related laws. The legal system is mainly based on common law. Regulatory steps to secure electronic transactions such as digital signatures, amendments to contract law, dispute settlement and others have not yet been put to action. The basic commercial laws in Tanzania are derived from the 19th century. The laws were designed to facilitate paper-based transactions. Despite the changes and regulatory reforms made by the country since Independence, most of the laws were formed since British Colonial rule before the 1960s are still in force. Not only do existing laws and legal instruments need to be re-evaluated, but also dispute resolution mechanisms need to be reviewed to determine how they can be adapted to meet the needs of electronic commerce. However, there have been deliberate efforts by the Government and other institutions to increase general e-commerce awareness and to propose legal framework changes to favor the adoption of e-commerce.

Dispute-resolution mechanisms, which are consistent with the electronic medium and make use of its potential, pose some new legal questions. Some of them require domestic and international legislative action; others can be resolved through private action by those directly involved in commercial transactions or professional bodies.

The electronic medium, and in particular the facility of rapid communication with all parts of the world, offers new possibilities to accelerate the proceedings for dispute

settlement. It also offers new dimensions for dispute avoidance and resolution, in particular through the possibilities of consulting interested and concerned circles, for instance through collective procedures as they may be developed in user groups.

There is a wide spectrum of dispute-resolution methods and mechanisms which may be adapted for use in electronic commerce. In view of the variety and complexity of the situations which may arise, it is suggested that a flexible two-tier system of summary proceedings with a possible appeal in arbitration is a suitable solution which with procedural fairness combines speed of communication and efficiency. Electronic commerce poses a great challenge to the way businesses are currently conducted. The discussion in this chapter reveals that dramatic changes in e-commerce necessarily require parallel changes in the legal framework to address those changes.

Courts and legislature have taken serious steps in modernizing and harmonizing e-commerce legal frameworks, much has yet to be done. The initiatives taken have a very limited scope and are far from satisfactory for online business, especially in the area of settlement of disputes arising from online trades. One more important challenge to the legal bodies is to ensure that current and future developments in the area are adopted and implemented within nation's legal frameworks for the expansion of e-commerce trading transactions. The court is the organ which has a duty of applying rules of evidence and authentication to sift facts presented to it before it arrives at a conclusion. In this respect, the rules of evidence determine which fact is relevant and thus admissible in court.

It is the argument of the authors that, while in paper-based transactions hand-written signatures serve as a means of authentication, in an electronic environment, modern methods of authentication of documents by digital signature, should be admissible. The word “sign” is defined under The Interpretation of Laws Act,⁵² as follows: “sign” with its grammatical variations and cognate expressions, includes with reference to a person who is unable to write his name, “mark”, with its grammatical variations and cognate expressions”. This definition leaves much to be desired. In the first place, it defines the term “sign” in respect of a person who is not able to write, leaving out those who can write.

It is not precise whether a person who is able to write is covered under this definition. Secondly, the Act does not define the term “signature”. However, the analysis of the above statutes together with many others which provide for writing and signature, is that transactions must be authenticated by affixing a personal signature on a piece of paper. The reason is that a “mark,” as stated earlier in this study, has to be placed on something tangible: in this case, a piece of paper. Thus, in the eyes of an ordinary person this requires ink on paper that result in producing something visible and that which alters the thing marked. It is doubtful whether electronic signatures can meet the requirement of a manuscript signature.⁵³

The above analysis reveals that even before the amendment of the TEA to accommodate new methods of presentation of evidence, courts have not remained silent on technological advancement. They have been trying to accommodate and

⁵² [CAP,1 R.E2002]

⁵³ Lloyd, I. J. *Information Technology*, 3rd ed. Butterworth p. 571

extend some principles of the law of evidence to support changes in the technology. A good example is *Tanzania Cotton Marketing Board v. Corgecot Cotton Company SA*⁵⁴ the Court of Appeal stated as follows: “While it is an undisputed fact that under Rule 4 of the Arbitration Rules, 1957, the award is to be forwarded to the Registrar of the High Court by registered post, the words ‘registered post’ should be interpreted widely enough to take into account the current development in communication technology that has taken place....” The court thus went on to extend the definition of ‘registered post’ to include postage by DHL. Applying the same principle, it is argued here that this is an opportune moment; the court is invited to hold that “current development in communication technology” includes the Internet and Email, in which case an award, decrees, pleadings, agreements and other legal documents may be communicated through the mentioned media.

In 2000, the Commercial Division of the High Court applied the reasoning above in *Trust Bank Tanzania Ltd v. Le Marsh Enterprises Ltd and Others*,⁵⁵ Nsekela J. (as he then was), underscoring the need for the Judiciary to be ready to adopt changes caused by technological revolution engulfing the world, proceeded to extend the definition of banker’s books to include evidence emanating from computers subject to the same safeguards applicable to other banker’s books under section 78 and 79 of TEA. It is argued in this research that the courts should apply the same line of argument to accommodate electronic evidence and modern rules of authentication by use of electronic signatures under rules of evidence in Tanzania. The Law Reform Commission of Tanzania took further important steps in developing legal bills

⁵⁴ [1997] T.L.R. 165

⁵⁵ H.C., (Com.Div.) at DSM, C.C. No. 4 of 2000, (unreported)

concern e-commerce situation in Tanzania. The Commission prepared four Proposed Draft Bills based on functional equivalence from the final Report on E-Commerce and-cyber and computer-related crimes.

According to Mr. Mambi the Final Report plus the proposed Draft Bills have been submitted to the Minister of Justice and Constitutional Affairs for further steps. The four Bills are Electronic Evidence Bill, the Electronic Transactions and Communications Bill, the Cyber-and Computer-Related Crimes Bill and the Data and Privacy Protection Bill.⁵⁶As it has been observed the world economy is currently shifting from paper-based to a paperless economy. In the paperless economy, firms, governments and consumers are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents.

The advantages of shifting the global information communications technology revolution include productivity, savings on time and costs, speeding up and facilitation of transactions, access to superior and more up-to-date information, easier and cheaper communication both domestically and internationally and, in the particular context of e-commerce, access to a wider, and indeed, a global economic market at relatively little cost. With regard to the benefits of information communications technology, particularly from the perspective of developing countries such as Tanzania, the United Nations recognizes that information communications technology could be a contributing factor to achieving its Millennium Development goal of the reduction of poverty and of economic

⁵⁶Mambi, A, "The Status of Cyber Laws in Tanzania" Paper presented in the Cyber Laws Workshop for East Africa, Kampala ,April 24-28 2006

development generally. For these reasons, it is very important to address the challenges that the information communications technology revolution poses for national legal systems and to consider ways to maximize the opportunities that it opens up at the same time. The main challenges brought about by electronic transactions revolve around the requirement of writing and signatures on documents and records for legal recognition.

ICT development is an unavoidable necessary change in the way business transactions are currently conducted, the main challenge posed by these developments, in turn, is the necessity of parallel changes in national legal framework to accommodate the changes. The law of evidence and rules of authentication in legal transactions are essential in Tanzania. It was found out that the law of evidence governs modes and methods for provision of facts and information to enable a judicial conclusion. It was further revealed that electronic evidence is a new method of presenting evidence in court. It is therefore imperative that a clear legal framework should be established for this newly developing method and type of evidence and that it should be incorporated in the existing law of evidence.

Judicial intervention was also discussed in deep within this study. It was found out that courts have not remained silent to the new techniques of presentation of evidence. The amendment of the banker's book to include a computer-generated statement is one proof of this fact. The impact of ICT on rules of evidence under the Evidence Act was explored, and it was observed that the best evidence rule and rules governing authentication of documents under the TEA have been affected by the

advancement of ICT. The conclusion is that principles governing admissibility of paper-based documents and rules of authentication under the Act can hardly be applied to documents in electronic form. The reason is based on the nature of electronic evidence that is not tangible, not visible, not permanent, easy to manipulate and on some occasions, automatically generated by computers or computerized devices.

The legal framework for admissibility of electronic evidence was also examined. Due to the fact that Tanzania still lacks sufficient legal framework for recognition of electronic transactions. As observed, the impact was addressed by way of legislation. Courts in the countries reviewed have been able to extend principles governing paper-based transactions to govern transactions in electronic form.

In Tanzania, there are various other ongoing initiatives to have a law that recognizes electronic transactions, including electronic evidence, in place. Some of these are the introduction of the ICT policy which, as observed, did not fully address how the legal framework in this respect should be put in place, apart from mentioning a need to reform the existing pieces of legislations and enacting specific ones to accommodate electronic transactions. The other two initiatives are commendable. The first one is led by the Law Reform Commission of Tanzania, which is carrying out a review of the laws affected by ICT with a view to recommending legislative intervention and the second one is by the Judiciary which has started to respond to the impact as a result of advancement of ICT by giving “banker’s book” a wide interpretation to include a computer-generated bank statement.

5.2 Recommendations

For the legislative process, two approaches are recommended. The first is to enact a comprehensive piece of legislation on ICT and electronic evidence to provide for admissibility of electronic records and documents as well as electronic signatures. It is proposed in this study that there should also be a specific statute to govern electronic signatures. This is because this area is very wide, and it needs special attention. A good example is the UNCITRAL Model Law on Electronic Signatures. This approach has also been adopted in the United States of America where there are a number of statutes specifically regulating electronic signatures. The laws to be enacted could then amend all other laws touching upon and/or requiring electronic records.

The second approach is judicial response. It is recommended that judges should continue to play a pivotal role in extending the existing principles should continue to play a pivotal role in extending the existing principles of laws governing paper-based documents and authentication to cover documents and signatures in electronic form. It is recommended that the judges should categorically hold that evidence in a computer hard disk flash disk; compact disk or floppy disk is relevant and admissible to prove or disprove a fact in issue in legal proceedings. The effect of this is to allow parties to present in court not only computer printouts but also a piece of information in the above-mentioned devices.

With the absence of a computer forensic, a person knowledgeable with the operation of the two computer programs could have been called to testify in proof that a computer was reliable could be provided by calling a witness who was familiar with

its operation in the sense of knowing what the computer was required to do and who could say that it was doing it properly, and such a witness needs not be someone responsible for the operation of the computer.

Furthermore, the significance of having a legal framework for recognition of electronic evidence in Tanzania is that it would create a conducive environment of predictability and certainty in computer-related transactions, including electronic commerce. By doing so, parties employing computer technologies would be assured that the law will ultimately protect transactions that they engage in. As the law stands now, electronic transactions in Tanzania remain doubtful and uncertain undertakings to fully and freely engage in.

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APPENDICES
OPEN UNIVERSITY OF DAR ES SALAAM
MASTERS DEGREE IN LAW IN IT &T

Appendix 1: Questionnaire

Dear Sirs/Madam/Colleague,

Thank you for let me introduces myself to you. I (Humphrey Aloyce Chuwa) a competent student of Open University of Tanzania, looking forward to achieve Master Degree in Law in IT&T. Part of the course requirement is to conduct a research and write a report on a selected topic and I was delighted to explore about “The e-commerce and Law, situation in Tanzania”. Although the use of e-commerce in public and private sectors of the developed world is far advanced and supported with perfect laws to regulate it, in the developing world, and in particular Tanzania is still under growth with no piece of legislation to support it.

The objective of my study is to assess the impact of using electronic commerce for both in public and private sectors without having any legal supporting structure. This study will bring to light the effective laws that legislature have to propose to improve usage and opportunities to electronic businesses while this also will help to increase economy and national GDP. Enclosed here please find a questionnaire form which will be very essential after the proper fill to come up with the solution(s).

This study is of one month duration ending in 15th August, 2014. Your early response to the questionnaire will be highly appreciated. Please note that the information received will be treated in confidence.

I wish to thank you in advance for your cooperation and assistance.

Yours Sincerely,

Humphrey Chuwa.

Appendix ii: Implementation of E-Commerce without Any Piece of Legislation to Support IT

Tick where appropriate

Secondary Ed.	Certificate	Diploma	Degree	Any other Qualification

1. Which of the following qualification do you have? (Tick)

2. What do you consider is a nature of your work?

a) Legal related

b) ICT related ()

c) Both

c) Other, Please specify _____

3. Do you know anything about e-commerce?

a) Yes

b) No ()

If yes, how much do you know about laws protecting e-commerce transaction?

a) I know everything about consumer protection in e-commerce transaction.

b) I have average knowledge about consumer protection in e-commerce transaction.

c) I have little knowledge about consumer protection in e-commerce transaction.()

4. Do you use computer or any electronic device to facilitate your business frequently for your daily activities?

Yes ()

No ()

If No, give reasons.

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5. Do you use computers or electronic device for only specific tasks?

Yes ()

No ()

If yes, which jobs?

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.....6. Do you prefer using e-commerce compare to the manual ways?

Yes ()

No ()

7. What are the pros of using e-commerce?

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8. Does you have convincing knowledge of handling business electronically or does your work place have experts on that?

Yes ()

No ()

If No, what knowledge do you lack to make e-commerce effective?

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9. What challenges do you face in operating e-commerce in Tanzania?

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(b) Does any of challenges caused due to lack of specific laws to control it?

Yes ()

No

If yes please explain in detail

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10. Are there any recommendations you would like to direct them to legislature concern e-commerce law making?

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11. Have you heard of Tanzania Laws and Regulations on consumer protection?

a) Yes

b) No ()

12. Do the existing Tanzania and Regulations satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?

a) Yes

b) No

c) Partly satisfies ()

If yes, please answer the question below.

12 b). Why do you think the existing Tanzania Laws and regulations satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?

a) Because they contain some provisions of law which are sufficient to protect electronic transacted consumers.

b) Because they meet all the requirements for consumer protection ()

If the answer to the question 6 above was No please answer the question below

12 c). Why do you think the existing and regulation do not or partly satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?

a) Because they do not contain provisions of law which protect consumers.

b) Because the provision of law which protect the consumers in the e-commerce transaction are very few and have shortcomings ()

13. Does the existing National Information and Communications technologies Policy satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?

- a) Yes
- b) No
- c) Partly satisfies ()

If the answer is yes

14. Why do you think the existing National Information and Communications technologies Policy satisfy the requirements of consumer protection in the e-commerce transaction in Tanzania?

- a) Because it contains few elements which are sufficient to protect consumers in e-commerce transaction in Tanzania.
- b) Because it meets all the requirements for consumer protection in e-commerce.()

If it was No please answer the question below.

15. Why do you think the existing National Information and Communications technologies Policy does not or partly satisfy the requirements of consumer protection in the e-commerce transaction Tanzania?

- a) Because it does not have any elements of consumer protection.
- b) Because elements of consumer protection are not sufficient to protect e-commerce transaction consumers.
- c) Because the policy is just a guideline and a framework for the sector it does not have to contain requirements of consumer protection. ()

16. Are you frequent user of mobile payment transactions or mobile banking?

- a) Yes
- b) No ()

If yes, what are the benefits and shortcomings of using those services?

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17. While using mobile banking or mobile money transfer have you encountered or heard situation which are legally crime but just couldn't take place due to lack of proper law?

If yes can you briefly explain the situation and recommend the legal making body

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