

1931

No. 11207

SUBJECT

CO 533/412

Enclosures. (Appendix A  
B)

Previous

Subsequent

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APPENDIX A.

PAPERS PUT IN BY MR. BENTLEY.

1. Memorandum handed in at opening of Enquiry.
  2. Criticism of the Magisterial Proceedings.
  3. Criticism of the Trial.
  4. Copy of letters: Mr. Bentley to Registrar, Appeal Court, dated 2.1.29.
  5. " " " Registrar, Appeal Court to Mr. Bentley, Dated 4.1.29.
  6. " " " Mr. Bentley to Registrar, Appeal Court, dated.7.1.29.
  7. " " " do. dated 9.1.29.
  8. " " " Registrar, Appeal Court to Actg. Attorney General, dated.9.1.29.
  9. " " " Mr. Bentley to Commissioner of Police, dated 11.1.29.
  10. " " " Registrar, Appeal Court to Actg. Attorney General,dated 11.1.29.
  11. " " " Mr. Bentley to Attorney General, dated 14.1.29.
  12. " " " Crown Counsel to Mr. Bentley,dated 16.1.29.
  13. " " " Commissioner of Police to Mr. Bentley, dated 18.1.29.
  14. " " " Registrar, Appeal Court to Mr. Bentley, dated 20.1.29.
  15. " " " Mr. Bentley to Attorney General, dated 24.1.29.
  16. " " " Crown Counsel to Mr. Bentley,dated 27.2.29.
  17. " " " Resident Commissioner, Kitale to Crown Counsel, Kampala, dated 2.3.29.
  18. " " " Attorney General to Mr. Bentley, dated 7.5.29.
  19. Copy of sworn statement of Busiku.
  20. Mr. Bentley's Memorandum on System.
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TO THE COMMISSIONERS APPOINTED  
RE THE WAGISHU - NANDI MURDER CASE.

Gentlemen,

I am interested in this case because to me it is a concrete and striking illustration of how the present system of administering the Criminal Law among the natives of this Colony fails.

From the time when the original Police Investigation was made in April, 1928 to the time when the four accused were acquitted in September, 1929, the different stages of the case which I wish to discuss in detail unfold a story of maladministration of justice as the result of which four innocent natives very nearly lost their lives.

I approach the whole matter as one for sixteen years a Magistrate under the Sudan Administration and as one conversant with a different system to that which prevails in Kenya.

The different headings under which I ask your leave to discuss this matter are as follows:-

1. THE POLICE INVESTIGATION AT KITALE.
2. THE MAGISTRATES' COURT PROCEEDINGS AT KITALE.
3. THE TREATMENT OF THE WITNESSES & ACCUSED BY THE POLICE.
4. THE TRIAL AT KITALE.
5. THE APPEAL FROM THE DEATH SENTENCE.
6. THE APPEAL COURT IN NAIROBI.
7. THE APPEAL COURT IN KAMPALA.
8. THE DELAY & HOW THE RETRIAL TOOK PLACE.
9. THE RETRIAL IN NAIROBI.
10. THE ATTITUDE OF THE LEGAL AUTHORITIES IN KENYA.
11. GENERAL COMMENTS.

Before opening this discussion I would briefly outline the story of the crime.

On April 14th, 1928 the body of an elderly Nandi named Arab Bendit was found buried in the mud alongside the stream on my farm by two of my Wagishu labourers, who with two others were later tried and sentenced to death for the murder.

The Nandi had been murdered on the preceding day. He had been hit several times over the head, and there were also found signs of injury to the anus.

The body was found at a spot several hundred yards away from my Wagishu labour lines.

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There were no Nandi employed on my farm at the time.

The cousin of deceased was first of all arrested and after several hours detention was released. Four of my Wagishu were then arrested.

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A resume of facts connected with this case, showing dates, is in my file and marked **A**

I have attached at the end of these papers a letter in which I ask for compensation for the four natives concerned and for myself.

## THE POLICE INVESTIGATION.

This was completed about eight days after the discovery of the corpse. The Police Officers who took part in the investigation were Messrs. Ridgeway and Dale.

Both these officers visited my farm, where, after the body of deceased had been first of all washed, an identification parade was ordered and boys from the adjacent farms filed past the body with the idea that deceased should be identified.

The strange part of this parade was that the cousin of deceased behaved in a suspicious manner. He had for instance to be pushed up to the corpse. He said he did not know deceased; that perhaps the deceased was a Masai or a Suk. He must have known perfectly well who he was.

At any rate, his manner was so suspicious, that the Police Officer had his hut broken into, and the hut was searched.

My head boy Mahomed Malik was present at the time of this search. A spear was found with blood on it, and according to my Headman, a part of the floor of the hut had been quite freshly plastered with cow dung.

The owner of the hut was arrested and detained for I believe a day. The spear was sent into Kitale, and any trace there had been of blood on it was washed away in a rain storm; so that no more mention was made of this spear till Mr. Dale questioned Mr. Dale about it at the retrial in September, 1929.

Now it was common knowledge that deceased and the cousin mentioned were on bad terms, and according to Mr. Dale's statement at the retrial, he knew that deceased had asked for leave, on the day of the crime to go and visit his cousin.

It is a fair presumption that deceased did visit his cousin.

Meanwhile two Police askaris making further enquiries on my farm, named Wokuma and George, elicited what they considered incriminating information against two of my Wagishu from a small child, aged five, named Nandutu.

How they intimidated this child, I have described elsewhere, vide my letter 25/11/29 to Registrar, Supreme Court, and there is not the least doubt that she was frightened out of her life. As a result of her answer "Ndio" to all their questions, two of the accused Okobe and Mafaby (accused Nos. 1 and 2) were taken to Kitale.

The child Nandutu was taken with them.

The next day Tubo, Wenga and Okiriang were taken to Kitale.

Two days after Busiku, Matander, Kadosy (accused Nos. 3 and 4) and Masaba were taken.

These people were lodged in the Police lines for roughly a week, in fact they were detained in Kitale till they were called before the Magistrate. One or two days after Busiku and the others had gone to Kitale, the Police took the hoes found in the huts of accused Nos. 1 and 2. These hoes

Mahomed Malik will swear had been used to disinter the corpse.

The strange thing about this Police investigation is that Mahomed Malik who first reported the murder to the Police, and for three days helped the Police, never had his statement written down on the farm or was called for to the Police Office in Kitale.

It is obvious this Sudanese could have given much useful evidence, all of which as it happens was in favour of accused, vide Mahomed Malik's statement in my file marked "F".

For two days while Mahomed Malik was helping the Police Officers, they were partly engaged on the tracks across the farm.

On the first day Mr. Dale was accompanied by Mr. H.E.D. Townsend and on the second day Messrs. Ridgeway and Dale were accompanied by Mr. Thurburn.

On this second day Mr. Dale and Mr. Thurburn were present when deceased's cousin's hut was broken open.

At this time the owner of the hut was not present. Later Mr. Dale told Mahomed Malik to tell the askari George to apprehend this Nandi and take him to Kitale.

All the floor of the hut had been freshly plastered with cow dung.

On the day when the Nandi hut was broken into, Mr. Dale with Mahomed Malik visited Mr. Roberts. While Mr. Dale was on the farm, he had with him Mahomed Malik practically all the time and according to this boy, Mr. Dale told him that he had no doubt that the murder was the work of a Nandi and that Mr. Roberts had mentioned something about an "Ndito" who had perhaps been the cause of the crime.

At the time the hut was broken open and the spear examined, Mr. Dale first drew attention to the blood on it and showed the blood to both Mr. Thurburn and Mahomed Malik.

Mahomed Malik is able to give his own sworn statement re tracking evidence. A particular point about this evidence is that some heavy object had been dragged over the ground and that it was the work of one person and not more than one.

In view of the straightforwardness of Mahomed Malik's statement, I trust that he will be accorded a hearing before the Commission, when I think that it will appear very strange that this boy was never called before the Police inquiry or before the Magistrate's Court.

With regard to the bloodstains on the vest of the accused No. 4, referred to before the Magistrate and at the trial, Kudosi (accused No. 4) has always said (1) that when first taken into Kitale he was wearing a vest with "sowara" bloodstains on it, (2) that askari Wokuma pointed these out to Mr. Dale, (3) that Wokuma deprived him of his vest for two days during which time it was kept in a box in the guard room, (4) that it was returned to Kudosi before the magisterial inquiry, (5) that he wore it during this inquiry, (6) that later

after he had worn it out while in prison he got hold of another vest from a friend.

Mention is made of this matter under the heading "The Magisterial Inquiry"

It is evident however, and should be stated here that the Police attached very little importance to this bloodstained vest for the blood was never analysed and yet at the trial the matter was brought up by Mr. Dale in his evidence in the form of a strong "innuendo" that the bloodstains were connected with the murder of the Nandi.

It will be obvious to anyone reading carefully through the papers of this case, that the Police were obsessed with the idea that the Wagishu were guilty; and that for this reason they tried their utmost to gain a conviction. To such an extent were the Police obsessed in this way, that all through the earlier stages of the case they seem to have refused to admit the idea that there could be any evidence in favour of accused.

I submit in conclusion that the way this investigation was handled by the Police was most unfair to the four accused Wagishu.

The Police first of all quite rightly suspected deceased's cousin, but they were then sidetracked after the two askaris George and Wokuma had interviewed and intimidated the small child Nandutu.

It is not easy to minimise the unfairness of this investigation because it will be found that the later proceedings before the Magistrate and at the trial are built up on this investigation and follow each in their turn the trend of the Police argument to show that the four accused Wagishu were guilty, with no hint that there was anything wrong ever being allowed to creep in.

O.B.

THE MAGISTERIAL INQUIRY HELD BY MR. GILLESPIE.

AT KITALE ON APRIL 24th, 1920.

I have already written a criticism of these proceedings marked "AA" and will merely accentuate certain points about them. The criticism mentioned should be read in conjunction with the following:-

1. The unfairness in the case of backward natives of calling the wife and small child of one of the accused to incriminate him, particularly as the wife is a half imbecile and the child about five years old.
2. The unfairness of witnesses not being allowed to make statements as distinct from answering questions put to them by the Police Officer in charge of the prosecution.
3. No hint is made during these proceedings that those connected with the case were in any way ill treated.
4. The suggestion that there was an "ngoma" in Busiku's house is untrue and unfair.
5. The omission to call Mshoued Malik and other witnesses for the defence.
6. The statement of Busiku on page 8 of criticism "AA" re the motive for the crime.
7. The fact that the Magistrate could have credited the minute details re the crime from Busiku and Wenge despite the fact that the night of the crime was a dark one and Wenge a half imbecile woman.
8. The story re the cockerel.
9. The absence from the farm of Wajeba at the time of the crime.
10. A small child's minute description of the crime.
11. No reference was made re the way in which two Police askaris first elicited information on my farm from the small child Nandata.
12. The fact that because certain witnesses called by the Police for the prosecution (p.7) do not help it, are therefore called "reluctant" and treated as hostile witnesses. The fair and obvious thing would have been to call such witnesses for the defence.
13. It is clear (p.8) that accused did not understand how they could help themselves in asking certain witnesses questions.
14. It is surely questionable whether P.C. Dale should conduct the prosecution and put questions from the Prosecution point of view and then himself give evidence.



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improbability of Wagishu killing a Nandi - the absurdity of the supposed motive for the crime; **estrangement** between deceased and his cousin (they were on notoriously bad terms)

My letter of 5/9/28 to the Attorney General should be read in conjunction with the above.

On page 9 of my criticism of the Magisterial proceedings, I mention that seven witnesses should have been called for the defence. The name of Mahomed Malik should be added to this list. I do not attach importance to the fact that accused evidently said they wished to call no one.

They must have felt that the Court was against them, particularly in view of what had happened behind the scenes in their examination by the Police.

Re the magisterial proceedings, it seems clear that as the evidence which should have been called for the defence was never called Mr. Gillespie was influenced by the Police against the accused in a marked degree, and would mention that when after the trial I asked Mr. Gillespie to leave to put my point of view before him, his attitude was far from sympathetic and savoured of evasion. He pointed out that a competent court had taken the case, and suggested my interference was unnecessary.

The Magistrate did not show any sign during the proceedings of assisting the accused, but rather merely confirmed the Police point of view of the case.

It surely was the business of the Magistrate not to follow blindly the Police presentation of the case, but to bring to light evidence for the defence which was at hand.

In the inquiry before the Magistrate, there is no mention in the proceedings that Mr. Dale said anything about the two hoes produced as exhibits.

There is ~~no~~ mention of these hoes by Busiku and Wenge. Nothing seems to have been said re any particular kind of earth or clay adhering to them. Busiku stated that one belonged to first accused and the other to second accused.

Wenge said the same thing in other words and the mention made re these hoes was as to ~~what~~ they belonged to.

That Mr. Dale said nothing about these two hoes before Mr. Gillespie is instructive; for later at the trial, when any earth which had adhered to them would have lost value as evidence (the colour perhaps having changed) a great point is made about them, in that they showed signs of mud adhering to them of the same kind as found in the stream where the corpse was found.

Later in my criticism of the trial proceedings I have shown how futile any evidence re this mud on the hoes was for certain reasons.

It is merely sufficient here to note the peculiarity of nothing being said of them before Mr. Gillespie at a time when the earth was adhering to them might have been fresher and so of some value in evidence; and the peculiarity that at the trial a great point was made re these

15. No importance was attached to P.C. Dale's evidence re the inflammation of deceased's anus though injury to this part of the body is admittedly not a Wagishu custom.
16. It is clear that during the Police investigation of the tracks on the farm, the Police Officer in charge did not superintend the tracing of the tracks (p.10.)
17. The amazing circumstance that deceased's cousin failed to identify the corpse was never given sufficient prominence.
18. The omission to mention the bloodstained spear found in the house of deceased's cousin.
19. The omission to mention that the cousin of deceased inherits deceased's cattle.
20. In fact, the fact that during these proceedings there was no one present to help the accused. The D.C. showed no sign of doing so.
21. No mention from P.C. Dale that an expert tracker Mohamed Malik showed him a track leading up towards the hut of deceased's cousin.
22. No mention that deceased left Mr. Kruger's farm on the afternoon of the crime to visit his cousin on Mr. Robert's farm.
23. The acceptance by the Magistrate that the accused have no witnesses to call. In view of what transpired later, i.e. the acquittal, it is fairly clear that it was not explained to accused how they could help themselves in this way.
24. The fact that, though the evidence of the three Prosecution witnesses are often minute, the translation of what they said reads in a most unconvincing way.
25. The fact that though (p.16) some six witnesses will all swear they were intimidated by the Police into making statements which would "help the Government" no hint of this fact came out at the proceedings.
26. The fact that on page 9 of these proceedings though reference is made to blood on the vest of one of the accused no analysis of this blood was made nor inquiry made as to how the blood got there.
27. There is circumstantial evidence in favour of the accused which was never mentioned and which should have been mentioned. i.e. nothing was ever found (except certain horse reference, to which was worthless as pointed out in my criticism of the trial proceedings) connecting accused with the crime, e.g. chicken feathers - deceased's blanket, kipandi, implements with which crime was committed - two of the accused first reporting the crime - the improbability of a Nandi visiting Wagishu on my farm - the improbability/

these hoers in pointing to the guilt of two of the accused.

Mention is made by Mr. Dale in his evidence before the Magistrate of his having been shown tracks by two of my Wagishu, but that these were faint tracks and evidently in his evidence he attached no importance to them.

He omitted to say that where these tracks showed such a faint appearance they led over ground where the grass had been burnt.

Mahomed Malik would have sworn that the track through the long grass down by the stream where the grass had not been burnt was a continuation of the track which had come from up above from the direction of deceased's cousin's hut, over ground where the grass had been burnt; that the discrepancy between the appearance of the two tracks was natural owing to the effect of fire on the higher ground which had had no effect near to the stream.

If Mr. Dale omitted to make this point in favour of accused surely there was all the more reason to call in as a witness an expert tracker in Mahomed Malik.

To my mind what absolutely proved the Police presentation before the Magistrate had been negligently prepared is the reference to the shirt worn by the fourth accused.

Masaba, the fifth prosecution witness who was examined by Mr. Dale is treated with the concurrence of the Magistrate as a "hostile witness". (He should naturally have been called as a witness for the defence.)

He is asked if he saw blood on the vest of the fourth accused on the night of the crime. His answer was in the negative and no further reference is made to this matter, and then at the trial in July, Mr. Dale in his evidence on page 3 of the trial proceedings states "on the day I arrested "accused No. 4 and on the day he appeared in the Lower Court "he had on a white flannel vest on which were spots of dry "blood". Now words of indignation rather fail me in describing the unfairness of this reference. By all means had the blood been analysed and found to be human blood, make this a point against accused No. 4, but never to analyse it and then to make reference to it with an obvious innuendo shows a frame of mind hardly consistent with the prosecution of a fair trial.

As I have said elsewhere the blood referred to was the blood of an oribi which fact would have been sworn to by the accused himself, Mahomed Malik and others.

In view of all I have written, I maintain that the inquiry before the Magistrate was a farce and strikingly unfair to the accused.

O.B.

THE POLICE TREATMENT OF WITNESSES AND ACCUSED.

The following is a resume of the evidence which shows there was improper treatment.

1. Busiku's affidavit before Mr. Crampton R.C. (marked "O")
2. The statements of the four accused that they were interviewed individually by the Police and told to confess as they had already been incriminated by the others.
3. The treatment of the small child Nandutu as witnessed by Tubo and others.
4. The striking of the child's mother.
5. The treatment of Masaba.
6. The striking of Okobe and      by the first and second accused.
7. Wenge's statement to me that her husband told her he was going to say he had helped commit the crime, that she should say she witnessed the crime and that as a result they could both return to the farm with no further ado.
8. The statement of Manomed Malik and others that they heard P.C. Dale threaten the woman Wenge with six months' imprisonment outside the Court at the time of the trial if she went back on the statement she made before the Magistrate. My letter of 25/11/28 to the Registrar of the Supreme Court should be read in conjunction with the above.
9. The sentencing of an askari by Mr. Izard, D.C. Kitale to six months' imprisonment for ill-treating the woman witness Wenge. He had already been sentenced to a similar term for a similar offence.

There is a separate memo on the matter of ill treatment in my file marked "M". This gives more detail of what occurred and should be read in conjunction with the above.

O.B.

THE TRIAL PROCEEDINGS.

Accused were tried by Mr. Justice Stephens on July 20th and 21st 1928 i.e. the trial commenced on a Friday afternoon and was finished on Saturday July 21st.

My remarks re the trial are contained in the memo marked "BB" which should be read in conjunction with these remarks, and I would remark here that no real defence for the four accused was ever made; perhaps because the lawyer briefed was unable to understand Swahili.

The witnesses who should have been called for the defence were never called. It was most unfair of the Prosecution to make mention of a bloodstained vest belonging to one of the accused, as the blood had never been analysed and was in fact the blood of an animal.

The Court should have realised the so-called motive for the crime was ridiculous. The judge actually quoted the motive given in evidence in his summing up.

It was taken for granted at the trial that Busiku had given a lembu party and that accused had killed and eaten a cockerel; both of which statements are untrue.

Mr. Dale's remark on page 2 of the trial proceedings re insertion of a stick up the anus with a vicious intent to hurt, being a custom of the Wagishu should never have gone unchallenged.

All witnesses should be allowed to make statements of their evidence as distinct from answering questions, e.g. the commencement of Busiku's evidence - his answers begin with the words "I remember". He is evidently asked questions prefaced with "Do you remember?"

The judge in his summing up repeats there is a custom "against the Nendi", that when a man is killed a cockerel is eaten and a hen in case of a woman being killed. I do not understand this nor the mention of a custom "against the Nendi". This definite statement that there is a custom re a chicken being killed after murder seems strange and unfair. I see no mention that the assessors were questioned on this point. Wenge was a most unsuitable witness to give evidence on such a matter. I have never heard the fact corroborated that to kill a chicken after murder is a Wagishu custom. It seems probable from the Judge's mention of the custom in his summing up, that he believed there is such a custom.

The surprising thing about this trial is that not a word leaked out re unfair handling of the witnesses by the Police.

I suggest in all seriousness that the trial was one-sided and merely a repetition of what occurred before the Police and before the Magistrate.

Neither do I see any sign of the Crown Advocate assisting the Defence, which I understand he should do if he finds the same is in incompetent hands. The Crown advocate himself later admitted that the Defence had been but poorly conducted.

With regard to the trial, what I would urge is that there must be something radically wrong, when four men are

sentenced/

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sentenced to death and at a new trial acquitted.

Even if the defence is imperfectly prepared, are there no safeguards for the accused? They themselves had naturally very little idea of what was happening: the business of the Court being transacted in English and as I pointed out previously, the Assessors would not care to intervene or dare to; their one idea really being as to what reward they would get for assisting Government.

Such points as the exclusiveness of the Nandi tribe or the improbability of a Nandi visiting Wagishu on my farm where no Nandi were employed, which would have struck anyone conversant with local conditions, never seemed to strike anyone in Court.

The deceased knew none of the Wagishu on the farm and the question naturally arises why on earth should he have visited them at night.

These points and those like them, had they been drawn attention to in court, might have put a very different complexion on the case, and might have afforded a hint that the Prosecution evidence had been concocted.

It is easy for the legal authorities to say that the reason for the fiasco was the incompetence of the defence, but I have always argued that other safeguards are required and that those trying these kind of cases should understand native mentality. For what happened. Two witnesses come into court with concocted stories which to anyone acquainted with the conditions prevailing do not ring true, stories with obvious flaws in them and there was no one in Court to detect that anything was wrong so that the statements go unchallenged and parts of them are verbatim mentioned in the judge's summing up. Conviction follows and innocent lives may be sacrificed.

The motive given for the crime is too farcical to stand a moment's serious consideration and yet no one in Court queried or challenged it.

There is further the fact that the night of the crime was admittedly a very dark one. This being so, how could two native witnesses, particularly the half imbecile woman Wenge, have been able to give the minute evidence they did re exactly how and where each of the four accused inflicted blows on the deceased.

There is further the evidence of P.C. Dale on page 4 of the trial proceedings that the hoes produced as exhibits had on their mud similar to the mud found in the pool where the corpse was found. Now apart from the question re whether a Police Officer is competent to give expert evidence on such a point, the fact remains that the two hoes produced in Court were among those used to disinter, on the orders of the Police, the corpse; and further that they were not sent for by the Police till several days had elapsed after the disinterment, during which time they had been used for other work.

This part of the Police preparation of the case is obviously negligent and it was therefore most unfair to accused that the hoes should have been exhibited in Court as evidence against them.

In conclusion, though I realise the seriousness of maintain that the trial in the case

of the Police and magisterial inquiries, was conducted in a most unfair way against the Wagishu accused.

There is practically not a single point of the many which could have helped them brought to light at this trial.

Instead of which, points against them, which in common decency and fairness should never have been mentioned (e.g. the bloodstained shirt of accused No. 4 and the description of the mud on the two hoes produced) were drawn attention to.

Witnesses who should have been called for the defence were never called. Mahomed Malik's evidence which could have helped accused exceedingly, helped to incriminate them.

Such points as these help to explain how one judge passed a death sentence and another stated there was not enough evidence on which even to frame a charge.

One surely must conclude that in cases of this kind, there should be some official in Court who understands Swahili and native mentality, who can help the Court.

It is not too much to say that in this particular trial, the dice were most unfairly loaded against the accused, and that they had no protection.

I repeat what I have said elsewhere they were only saved from the gallows because someone intervened who understood something of native mentality.

O.B.

### THE APPEAL FROM THE DEATH SENTENCE.

I ask in all seriousness does this appeal afford any real protection to accused natives.

The appeals are drawn up by the Prison Officials. Supposing I had not been in Kenya at the time of the appeal in this Wagishu case. The Appeal Court sat in Dar es Salaam. None of the prisoners would have attended because they could not afford the expense entailed.

An advocate is briefed, presumably in Nairobi, with probably no knowledge of the accused or the conditions of the district in which the crime occurred. He is handed a copy of the previous legal proceedings. He may not even interview the accused. He has no idea that improper methods have been employed by the Police unless the Prison Officers have found this out and made a point of it in the appeal.

He has a copy of the trial proceedings to scrutinise; and it is a fact that in the trial proceedings in question, there was no real point on which to base an appeal.

What chance therefore would the accused have had as a result of their appeal, drawn up in the ordinary way, and without my intervention to point out what actually happened.

I have it on excellent authority that nothing in their appeal could have saved these four Wagishu from the gallows.

In this connection it is instructive to remember that even after all the fuss made, just prior to the sitting of the second Appeal Court in Kampala, a letter was sent to me from the Attorney General's office to the effect that the "Appeals would go forward on their merits", and "it was proposed to ask the Court to disregard the allegations" which I had made re Police ill treatment etc.

All the points which could have benefited the accused in the three previous stages of the case, and which had been omitted would probably never have been brought forward on appeal.

For instance Busiku's evidence would have stood, and had accused been able to protest that this was all a fabrication what weight would this have carried.

### 9. THE RETRIAL

With regard to the retrial of the four accused which took place in Nairobi on September 9th and 10th, 1949 I would refer the Commissioners to a criticism I wrote re the same, marked "L".

In this criticism attention is drawn to:-

1. The fact that the Judge described Busiku and Wenge as most skilled liars:
2. The fact that though none of the ten defence witnesses were ever called, the verdict first given was one of discharge as distinct from acquittal.



Re 1. I agree that these witnesses originally perjured themselves, but the whole point is that they were intimidated by the Police into doing so. It seems unfair that if a backward native has been so intimidated to brand him as a skilful liar.

Had the Judge known Wenge, as Mr. Izard D.C. Kitale had cause to know her in a case of an askari ill treating her which he tried, I hardly think he could have used this description about her; for she is positively imbecile.

Re. 2. How, I ask, can a Court bring in a verdict of "discharge" as distinct from "acquittal", when none of the defence witnesses have been called. This seems manifestly unfair. It is common knowledge that two days later, the judge altered the original verdict to one of acquittal, and I believe that my protest on this point to the Attorney General had something to do with the reversal of the verdict.

O.B.

THE APPEAL COURT IN NAIROBI.

This sat in December, 1928.

As pointed out in my description of the conduct of Mr. E.J. Davies of the Legal Department, the Court ordered that I should take the witness Busiku before the local D.C. to make a sworn affidavit that he had perjured himself at the trial in July, because he had been coerced by the police.

The idea of the Court was that such affidavit having been made, a judicial inquiry should follow and give its findings, which findings would then be placed before the next Appeal Court which sat in Kampala in March.

THE APPEAL COURT IN KAMPALA.

A copy of the judgment of this Court is in my file, reference 117. The case was reported in the "Uganda Herald".

The Court ordered a new trial "at which the whole case will be re-vestigated".

The Court returned the certificate of the Attorney General's Department in Kampala as trivial, and stated that I had done exactly what the Nairobi Appeal Court had wished me to do.

C.S.

10.

THE ATTITUDE OF THE LEGAL AUTHORITIES IN KENYA

1. Mr. E.J. Davis.

Mr. Davis, acting for the Attorney General, granted me an interview in Nairobi in November, 1928. The meeting lasted some two hours, and during this time I tried to give my reasons for thinking that there had been a miscarriage of justice at the trial of my four Wagishu sentenced to death in July.

In fact I repeated what I had written in my letters to the Legal Authorities of 5/9/28 and 25/11/28.

I should have expected Mr. Davis' attitude to have been sympathetic, acting as he was for the Attorney General, to whom I had appealed as the Fountain Head of Justice, at a time of much anxiety, for the lives of the four accused hung in the balance; and I did not know the ropes and was at the time uncertain how to set about obtaining redress.

Mr. Davis was quite uninfluenced by any of my arguments and in fact I reminded him that though he had been Crown Prosecutor at the trial, he was now acting for the Attorney General.

He was unwilling to believe that the four accused were other than guilty. I remember that he reminded me that a favourite method for anyone engaged as I was, was to attack the police; and I also remember his telling me the question of a motive, according to modern methods of crime investigation, was unimportant.

I also remember his saying that he thought that the accused had not received the benefit of a really good defence.

So I left his office very much fogged, and feeling that any chance of helping the four natives concerned was more difficult than ever.

At the Appeal Court held in Nairobi in December, 1928 I again met Mr. Davis. I had no standing in Court - a fact which was made very plain to me - but I was able to say to the Court that I had come to Nairobi re the case of murder which is now under discussion.

Mr. Davis' attitude on this occasion is apparent from the way he addressed the Court re my petition. His words were reported in the East African Standard at the time - and in his speech to the Court, he advised me as a former Magistrate of experience to confine myself to "what was relevant instead of attacking everyone". He also spoke of the "private enquiry" which I had held and stated that "because I had not briefed a lawyer for the defence, I apparently thought I could conduct the case for the defence better than any lawyer could".

I suggest that such language was not consistent with Mr. Davis' position, and was quite uncalled for, particularly as was said in Court at the time, my only motive in appealing was to seek redress for what I had thought was a miscarriage of justice.

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The Court of Appeal agreed that I should take the Prosecution witness, Busiku, before the local D.C. within a period of fourteen days to make a sworn affidavit that he had perjured himself at the trial at the instigation of the Police.

Now one would have thought that directly after this decision of the Appeal Court, some official of the Legal Department would have informed the D.C. at Kitale officially re what was required to be done so that it should not be incumbent on me alone, a private person, to go before the D.C. with a somewhat unusual application and about a matter of which the D.C. had no official information.

Several times I called at the D.C.'s office to inquire if word had come through from Nairobi, to be told that there was no letter on the subject, so on the 16th day of the 14 allowed I took the boy Busiku before the D.C. Mr. Crampton, and he made a sworn affidavit that he had been bullied and intimidated into perjuring himself to "help the Government".

Now the idea of the Appeal Court making the arrangement they did re this affidavit, was that a judicial inquiry should take place as a result of and that the findings of such Court of inquiry should be used before the next Appeal Court which was to sit in Kampala in March, so that there should be something for the Appeal Court to work upon. However, during the time which elapsed between the receipt of the affidavit in Nairobi and the sitting of the Appeal Court in Kampala no judicial inquiry took place. At this time I wrote several letters to the Legal Department in Nairobi asking what was being done. The letters I wrote were four in number and are on record. One reply was received from Mr. Davis, dated 16th January. In this he mentioned the "complaint" made by Busiku. The word "complaint" is used twice in this letter.

I even wrote at this time to the Registrar to ask if I had done all that was necessary and received a reply dated 26th January quoting Sir Charles Griffen's note on the case and making it clear that I had done what the Court wanted.

Later, some two days before the Appeal Court sat in Kampala, I received a further letter from Mr. Davis dated 27th February which speaks for itself.

I would remind the Commissioners of the anxious time I had been passing through, only too anxious to leave no stone unturned in doing all that was humanly possible.

The night before I left for Uganda the letter mentioned arrived and I remember well the effect that it had on me - that in some way which I could not understand, I had failed and that the trouble I had taken counted for nothing and that nothing could now save the accused from their fate.

I suggest in all seriousness that this letter was most unfair and unbecoming an official in Mr. Davis' position. I suggest too that its wording proved that Mr. Davis resented, as in my opinion he had done from the beginning, my action and interference.

It is conceivable that many placed in my position, on receipt of such a letter, would have thrown up the sponge and continued no further, and that as a result these four men would have been hanged.

Fortunately the letter did not have this effect on me, but

but it should be remembered that a careful perusal of the letter seemed to banish all hope and I remember feeling that the day was lost.

There are only two points I will dwell on in this letter. (1) the quibble about the word "complaint". To quote "all that appears to have been done is that the witness Busiku has made a voluntary statement on oath. This was not regarded as a complaint."

This though in his former letter of January 16th Mr. Davis states he "has perused the complaint put in by the witness Busiku".

What is all this but a quibble and surely it and the other paragraphs in the same letter go to show Mr. Davis was still resentful and that what happened to the four natives was a secondary consideration with him.

The effect of this inaction on the part of the Legal Department in not holding an inquiry as a result of Busiku's affidavit, was to prolong the term of imprisonment for the accused six months.

In the penultimate paragraph of his letter dated 27th February Mr. Davis asserts "you have obviously failed to fulfil your undertaking and it is therefore proposed to ask the Court to disregard the allegations and to deal with the appeals on their merits" - tantamount to saying the accused would not win their appeals.

I merely ask - was such a letter from one in Mr. Davis' position, fair, written as it was to a settler whose sole idea was to try and redress a wrong.

What Mr. Crampton K.C. thought about the matter is on record - vide his letter dated 2nd March and what the Appeal Court thought of things is evident in their judgment, for they described the attitude of the Attorney General's Department in Kenya as trivial, and in exonerating me from any blame, said I had done all I had been told to do.

That Mr. Davis is able to write a letter of this kind is hardly an encouragement to any private person in this country to try and fight for justice when he feels an injustice has been done.

I am left with the conviction that Mr. Davis throughout intentionally tried to make things as difficult as he could for me and that what interested him was to see that my intervention had no effect far more than what happened to the four accused.

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3. The Legal Authorities -- Generally.

With regard to the attitude of the Legal Authorities generally over this Wagishu case, the protracted delay before a retrial took place, as a result of no judicial inquiry being held before the Appeal Court sat in Kampala in March, has already been dealt with.

I will only say here that the four accused remained in close solitary confinement ( a particularly brutal form of punishment for a native ) for 222 days, this though visiting Justices to the Nairobi jail did what they could to have things expedited. In all they were in prison for 16 1/2 months.

The Superintendent of the jail was powerless to have the type of detention for the accused altered, for accused for the period (222 days) mentioned above were technically awaiting execution.

A further point I would make here is the unfairness to accused of the Legal Authorities allowing Mr. Dale of the Kitale Police, who had been in charge of the original Police prosecution, to proceed on leave before the Appeal Court in Kampala gave its decision as to what should happen.

In this connection I wrote to the Commissioner of Police on 11/1/29 and said I understood that Mr. Dale was shortly proceeding on leave; that I hoped a new trial would be ordered ( by the Kampala Appeal Court ) and I queried whether Mr. Dale should not remain in the country till a retrial had been held.

This was in January - the decision of the Appeal Court would be made in the first week in March. My letter was answered by the Commissioner of Police, who wrote on January 18th that he noted what I had said re Mr. Dale; that "the Hon. the Attorney General had been consulted and he (the A.G.) saw no reason to prevent Mr. Dale proceeding "on leave." Mr. Dale therefore proceeded on leave. After his departure, the Appeal Court at Kampala ordered a new trial.

Mr. O.B. Daly was briefed by Government to defend accused. I saw this advocate in Nairobi. He told me that as the Crown intended to produce Mr. Dale's written statement in Court for the Prosecution it was necessary that Mr. Dale should be present in Court for purposes of cross examination.

That such cross examination was of vital importance will be realised when one reads Mr. Daly's questions to Mr. Dale at the retrial held in Nairobi.

I would here refer to the following letters:-

1. From the Attorney General to myself, dated April 30th, 1929 in which he says "if Mr. Daly will at any time agree to dispense with Mr. Dale's presence we can arrange to have the case disposed of without delay." In view of the Crown's intention to produce Mr. Dale's written deposition in Court, how could Mr. Daly dispense with his presence.

- 2. My letter to the Attorney General dated May 3rd 1929, in which I said ( para.2) that I thought it a very monstrous thing that the reason for the trial being held up was Mr. Dale's absence.
- 3. A letter from the Attorney General to myself dated May 7th 1929 in which he says when this Department was consulted re Mr. Dale going on leave, "the case had not yet been decided by the "Court of Appeal", "that there was therefore "no question of a RETRIAL IN CONTEMPLATION and "no adequate reason at that time for stopping "Mr. Dale's leave."

Does all this sound fair to one who was trying to have attention focussed on this case and to have things expedited.

How can the excuse be given that there was no question of a retrial in contemplation. Surely a retrial would fairly obviously be ordered by the Appeal Court in view of my allegations and in view of Busiku's sworn affidavit.

This delay occasioned by the Attorney General's Department allowing Mr. Dale to go on leave, only further served to convince me that a serious attempt was being made to have things expedited.

There are other points re the conduct of the Legal Authorities towards myself, and what is their suggestion to me that I should do for the accused natives.

I had already been put to considerable expense and I suggest that in a matter of this kind, it was the duty of Government to brief counsel, as they actually arranged to do, in the orders of the Appeal Court of December, 1928.

In view of the situation of the court however, at a time when I found things very difficult and did not quite understand how to proceed, in a letter from H.E. to Governor, it is stated as follows (vide H.E.'s letter dated October 22nd, 1929) "H.E. is advised that my proper course is "I wish to do so, is "to brief counsel to appear on behalf of the appellants at "the Appeal." etc.

Mr. Davis of the Legal Department also advised this course and in fact said he had so advised me at the sitting of the Appeal Court.

To me, frankly, it seems that in adopting such a course I was being asked to do more than was necessary and the fact that such suggestion was made only tended to make the matter to which I had set my hand, seem more difficult.

Another point, the meaning of which I have never understood, has been the refusal of the Legal Department to allow either Mr. Daly or myself access to the original Police Court proceedings which were conducted by Mr. Dale.

These papers were asked for at a time when the defence of accused was being prepared, and as I hinted to the Legal Authorities their production in evidence might have meant everything to accused.

Although several letters were written on this matter, the file mentioned was refused, and in a letter from the Registrar

of the Supreme Court, dated August 13th, 1929, he quotes Sec. 139(2) of the Criminal Procedure Ordinance, which refers to Police "Diaries" of a case, and which states "Neither accused nor his agent shall be entitled to call "for such diaries."

This assumes that the original Police investigation may be termed "diaries". I can hardly believe that the section mentioned actually does refer to a Police Court "investigation".

Surely, speaking broadly, it should be the desire of the Legal department, in such a case as the one under discussion, to afford all possible assistance, and I ask pertinently why should the copy of such an investigation have been withheld.

Although touched on in the account of the interview I had with Mr. Davis, I would further make the point here that as things were, much trouble and delay would have been avoided had it been possible to avoid the fact that the original Crown Prosecutor acted for the Attorney General.

I was appealing to the Attorney General, and found myself involved in a discussion with the Crown Prosecutor who had acted as such in the Wagishu trial.

It will, I think, be agreed that I went into his office armed (as my letters of 5/9/28 and 25/11/28 will show) with so much new information, that an ~~objectivity~~ impartially minded man would have been influenced.

He seemed to refuse to be influenced. Mr. Davis was in no way influenced. I rather labour this point, for the effect of this interview might have been to make me feel that perhaps I was wrong after all and take no further trouble.

Had I for instance, been privileged to meet the Attorney General himself, all might well have been different. As things were, I felt I was confronted with serious opposition in an office and at a time when some measure of sympathy seemed more than due.

Nor should it be forgotten that during the early stages of this case, all the advice I ever had from anybody was as follows:- "What on earth do you think you will accomplish - "you are only banging your head up against a brick wall"

This was the attitude for instance, of Mr. Al Mesdia, to whom I first appealed when I heard the result of the trial.

The question of expense is also relevant. Supposing I had not had the means financially with which to fight the case, I should have had to give in and the accused would have met their doom. My conviction re the innocence of accused, my interest in the case itself, my experience as an ex-magistrate, the opportunity to do something and the necessary means all were mine; but this would not be the case with every settler out here.

I labour this point to show the gravity of the Legal Authorities not giving a sympathetic hearing to me, for the fact that no sympathy was shown might have caused me, even with the resources drawn attention to above, to protest no further, and would more than probably have deterred another man with my resources from continuing the fight. It never should have been a fight. As I say the awful fact remains that had I not had the means to keep on hammering, these Wagishu would not be alive today.



Apparently there is a rule prevailing that accused natives under sentence of death have to pay to appeal against their sentence, a sum of Shs. 22/- (vide R.C. Kitale's letter of Aug. 27 1928).

This sounds a small sum, but is I suggest, harsh in the extreme, not only because the ordinary native has rarely any ready money, but one would have thought an appeal in the case of a native, free of cost, an elementary right to him.

O.B.

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PRELIMINARY PROCEEDINGS BEFORE THE MAGISTRATE -

Mr. Gillespie - August, 1928.

I often wonder as I read through the Preliminary Proceedings and those of the actual trial, how often under the system which prevails in Kenya, innocent natives have been sacrificed on the scaffold, and how often innocent natives have been imprisoned. The state of affairs as brought to light from a careful perusal of the Magisterial Proceedings and those of the trial in this case is of so grave a nature as to be almost incredible. Let us try and recapitulate what happened in the early stages of this case.

A murdered man was found on Saturday morning in April, 1928, buried in the stream on my farm. Deceased's brother was suspected and quite rightly; so two days later his hut was broken into and a spear found inside with blood on it - this man was detained in custody for a day. Meanwhile two Police Askaris arrived on my farm, and finding a small child of five years old in my waghishu lines - the daughter of one of the four men later put on their trial and sentenced to death - intimidated her to such an extent that according to them, they extracted from her answers which incriminated her <sup>father</sup> and three other boys. The Police, according to Mr. Dale of the Kitale Police, having at this point obtained fresh evidence, the "brother" mentioned was released.

The following boys were then taken to Kitale: Masaba, Sangora wenge, Nundutu, Rubo, Mukhorry, Wakidiany, Paridy, and with them the four accused. These boys remained in Kitale under process of examination, some of them two or three days; some of them seven. They were intimidated and pressed to assist the Government and to make the statements which would assist the Government. Two of the accused agreed in a half-hearted way to turn King's evidence, and three of the witnesses were intimidated into saying they had seen the four accused commit the crime - these including the wife of

one of the accused and his child of five years of age.

Starvation and threats of imprisonment were resorted to by the Police Askari named Wokama. An Askari named George who was later sentenced to six months imprisonment for causing hurt to the woman witness Wenge, further assisted in the process of intimidation by beating those whose answers he did not consider satisfactory. With regard to accused, all of whom had no food for two days, they were intimidated individually with the idea that if any of them gave evidence against the other three, he would be released. The two who agreed to do so were the more stupid of the four. The other two held out throughout their ordeal that they had taken no part in the crime. While things were so, the case before the Magistrate was opened on April 24th, 1928.

busiku, one of the boys who had spent a week in Kitale, and who had been severely intimidated by the askari Wokuma, was first called for the prosecution. He says his house is near the "school" (There is no school nor was there any school O.B.) (This word "school" has crept in as a result of Mr. Dale asking witness if his house was near an anthill, Sugu in Swahili - this shows the careless way the proceedings were taken). "A man named Nakaimo was with me." Nakaimo was not on the farm at this time; but away in the Wagishu Country (Uganda O.B.), Namanda, Wachobi and Manura came to drink tembo (none of these three men were ever called before the Court O.B.).

"Baridy also came (This is true O.B.)

"Namakori also came." (This refers to Mukhory).

"Also 3rd and 4th accused" (This is true O.B.).

"Wenge was also in my house" So was Mandutu" (the child.)

Witness is led to say that the child was there, so that his statement should correspond with the child's statement. In fact the child slept with her grandmother Sambura, and was never there, and did not leave her hut during the night.

This ...

This Sambura who was never called into Court will swear to.

"The child did not drink much" (in any case there would not have been much for her to drink)

"This is Rubawa's musical instrument" (Rubawa is not the name of anyone owning a musical instrument, but the owner referred to is probably a driver named ELPOW.O.B.).

"My friends danced" (No one danced O.B.).

(I have never in seven years seen a Wagisnu dancing on my farm. O.B.).

"Then the Nandi came - a little old - not very old - he came to see Mr. Roberts' Nandi Herd).

I wonder, considering the Nandi never came, how witness knew this or "that he came from Mr. J.C.Kruger's farm". No native could describe this farmer as "Mr. J.C.Kruger, but as Swana Johnny" (O.B.). As the Police could only get incriminating statements from Wenge, Mandutu the witness, he is led to say that all the others who had come and drank tembo had left. Then the crime is minutely described by witness - each of the accused taking a hand in it. This though the night was dark ! ! !

Among other details witness says "1st and 2nd accused and wakidiany1 who lives with 1st accused came out" (Wakindiany1 lived with 2nd accused not with 1st accused) (O.B.) The first accused lived with his wife Wenge. The police tried originally to get evidence from wakidiany1, but failed. O.B.). There follows the statement that 2nd accused cried out "Beat this man and kill him completely, because there used to be a Nandi here who stole our Swana's cattle "(that a Wagisnu could have said, so is nonsense.O.B.).

"The Nandi had a blanket, earrings, etc." (considering the nandi was never present, it is obvious that witness was led to lie in this way and as to how the Nandi was actually beaten. O.B.).

"I found the mother of 1st accused's wife's mother Wenge" (I wonder who this woman is meant to be - The only other woman in the case is Sambura, Wenge's mother, who never appeared at witness' hut at all, nor did Mandutu the child her granddaughter, for they slept together and never came out. Is it likely a....

a small child would have been outside her hut at night on this occasion (O.B.).

At the end of the statement, accused are allowed to ask witness questions ! Accused Nos. 1 and 2 stated "the witness was speaking the truth" (why as the Mandi was never present did they agree with the witness' statement ! because they had been made to do so by the Police. O.B.).

(The 3rd and 4th accused entirely denied complicity - but - and this is a very important point - the questions asked by 3rd and 4th accused as well as witness' answers should be put down in black and white by the Magistrate ! This is never done and if one only reads the answers, one does not get the actual meaning. (O.B.).

wenge is then called.

The wife of first accused (is i. v. be supposed a woman will come forward and inculpate her husband, unless she has been tricked - as she actually was - into doing so (O.B.)) (Her statement (so called) is in the form of answers to questions. The same method is used with all the other witnesses, and is quite unfair. O.B.) E.G. the Police ask "do you remember the day the Mandi died on the farm" Witness answers "yes". What is put down in the proceedings is "I remember the day the Mandi died on our farm." Why, if this method of question and answer is adopted is the question not put down plus the witness' answer. The witness then describes the murder minutely. She could not possibly have remembered these minute details on a dark night.

The truth about her is that her husband (1st accused) was sick and for this reason she came to Busiku's hut with a basin to get some tembo for him. All her statement is concocted and prepared for her and obtained from her in the form of answers to questions. For it is clear she was told by the Police that if she gave the statement they wanted, she and her husband would return to the farm! When questioned by her husband (at bottom of p.5) she admits that he was sick. On top of p.6.

"I did not see the Mandi bringing any of the ingredients  
 "or tembo to 1st witness before the tembo drinking." (I  
 do not know the meaning of this remark. O.B.), She mentions  
 Mukhoory on top of p.6. It is true he was present. He  
 lived in the hut of Busiku. He was intimidated by the Police  
 at Kitale, but refused to say he saw a Mandi murdered. In  
 other words he told the Police the truth.

"3 went to bury the body - the 3rd and 4th  
 "accused and Wakidianza".

(This is nonsense. In any case Wakidianza  
 was never even charged. The story about  
 the cock is likewise nonsense, and  
 put into witness' head by the Police.  
 Witness says the cock belonged to her husband.  
 This can be proved to be false. Why should  
 she mention it unless put up by the police to  
 doing so. O.B.).

2nd accused asks this woman no questions ! As a  
 matter of fact 2nd accused never appeared on the scene at  
 all; so it is quite obvious he did not understand the  
 advantage of asking witness questions. This same remark would  
 apply to any accused - they would not understand how they  
 could help themselves in this way.

Witness further relates there was a man named  
 Wachori. This detail is elicited so that the statement  
 corroborates that of Busiku, who also said Wachori was present.  
 There has never been anyone on this farm with a name anything  
 like this, except a Wagishu named WAJOBA. Wajoba was  
 definitely absent in the Cherangani at time of crime. So  
 why should witness have mentioned him? because she was told  
 to do so in answer to the question. She says "Wachori" is  
 not on the farm now" (quite true - he never was O.B.).  
 She mentions bottom of p.6. the possibility of her husband  
 falling into the fire on account of sickness. (He does not  
 strike one as being fit enough to take part in a murder. (O.B.).  
 At the end of her evidence Wenge turns to 4th accused - a  
 man of her own tribe, and because she has been intimidated by  
 the Police, tells him in answer to his question that she has not  
 told any lies whatever !

Now ...

Now I am certain did 4th accused ask her if envy prompted her statement most probably he used the word "iteena". This again shows how important it is the question should be written down. If envy is meant, then I ask envy of what?

Mandutu the child is then called. She should never have been called to incriminate her father. She is too young to have been called at all. The first question asked her is "Do you remember the ngoma on the farm" She answers "Yes". There was no ngoma. Ngoma implies festivity and dancing. The word "Ngoma" in other words is put into her mouth. She also in answer to questions gives a minute description of the crime. As she was not present, and as no Nandi was present, how can her false statements be explained except by the fact that the Police intimidated her into giving false evidence? She says "she slept in 1st witness' hut with an old woman". She did nothing of the kind. She slept with her grandmother Sambura in another hut; and is made to say she slept in Busiku's hut, so that her statement agrees with his (Busiku's). She says her father was present - but did not strike the Nandi, and that 2nd accused did not hit him! Both these men never appeared on the scene at all. I wonder what question was asked her when she replied "My father was present". Quite possibly she was asked whether her father was in the lines!

The questions asked witnesses should be put down in black and white.

N.E. Accused asks this witness no questions. Rather naturally, for they better than anyone could understand how valueless all she said was.

To show how absurd it was to call this child the witnesses including Mohamed Malik and Tubo, who heard this child first interrogated, on my farm by police askaris, should be called to explain what happened; for they state the child was so frightened that she said "yes" to any question asked her!

4th witness Wakidanzu called. This man the police

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in Kitale before the Magisterial Inquiry tried to intimidate (he will swear to this) but failed. In fact he comes into Court to tell the truth, and as his answers do not help the Prosecution, Mr. Dale naively asks the Magistrate if he may treat him as a hostile witness - with which the Magistrate concurs: "His answers are reluctant" etc. Of course they are reluctant. Mr. Dale prosecuting and finding the witness adamant, calls him hostile. Is this fair or just?

It is true witness lived in the same hut as 2nd accused, and because he said he saw or heard nothing unusual he should have been called for the Defence. Instead of which he is called for the Prosecution and then called hostile. He denies all knowledge of the crime for that he helped to bury deceased as stated by 2nd witness. Others who were there could have also sworn they saw no Nandi and no murder. These include Mukhoory, Mambuda, Baridi, Mwiria, Nebellais (he had been beaten), Masaba and Sambura. All these should have been called for the Defence - unless it was the idea of the Police and the Court to go baldheaded for a conviction.

5th witness called Masaba. The Police had also during original investigation tried to intimidate him and failed. They had also tried to induce him to say he saw the murder done through busiku, for Masaba will swear the Police tried to make him give false evidence; and that busiku (who had been told to do so by askari wokuma) also tried to make him give such evidence. The point about Masaba is that he slept in the same hut as 3rd and 4th accused, and had the Nandi been murdered as suggested, could possibly have been a valuable witness for the Prosecution.

A boy named Nebellais also slept in this hut; but was never called to Court.

The witness states he saw no Nandi and no murder



murder, nor anything unusual about 3rd and 4th accused when they came to sleep after drinking tembo. This being so, again Mr. Dale asks if he may treat this witness also as hostile. "May I have the privilege of examining this man "as a hostile witness" ? Is this fair? Does a trial not demand if it is fair that this witness be called for the Defence ?

It is interesting to notice the question put by 4th accused to this witness. 4th accused finding himself effectually trapped, tries to escape by incriminating 1st witness who has incriminated him and others. And in answer to his question, witness replies "I did not see 1st witness "or Mukhoory or Baridi kill the man". Both this witness and witness No. 4. Wakidanzzi were imprisoned in the Police Lines at Kitale for 3 days after the magisterial hearing.

The Doctor then gives evidence.

The Court is then re-opened 28.4.28.

Prosecution bring in Mukhoory.

This man lived with Busiku (1st witness). Accused are asked if they wish to call him and all reply "No." They cannot have understood what was meant. Of course he could have helped them had they questioned him. I do not understand why if the prosecution produce him, the accused are first of all asked if they want to call him as witness and then Mr. Dale is asked if he wishes to call him, and he replies "No." Why ? Because he did not help the prosecution but the defence. The Police had tried to intimidate him but had failed, so he should have been called for the defence.

Mr. Dale then produces ODOWOI, saying he does not wish to call him. 1st, 2nd and 3rd accused say likewise. 4th accused says he wishes to call him, but nothing is put down in the proceedings (p.10) re why he wished to call him. I cannot discover who Odowoi is. I have never heard of him, and have asked 4th accused if he called him and he tells me he has never heard of him.

Then Mr. Dale produces Baridy. He says he does not wish to call him, and so do all accused. Baridy like Masaba Wakidianzi and Mukhoory would have said nothing to assist the prosecution, for he would have sworn he saw no Nandi and no crime committed. So that he doesnot appear again. Why not ? Why not call him for the defence ?

Mr. Dale, who had all through conducted the prosecution, then gives evidence as a witness. Is this fair ? Is this legal ? If this is the custom in a Magistrate's Court, surely it should be abolished, for it would lead to the gravest abuse. He should have been called as witness, and if so, should not have been allowed to conduct the prosecution or vice versa. Mr. Dale says, as he said at the trial, that the anus of deceased was inflamed. He has ever heard of a Wagisha inflicting injury to the anus of a victim, nor was there any evidence adduced to this effect. At the trial later witness said in his opinion a sharp instrument had been inserted up the anus. (This is a well known custom with the Nandi when killing an animal O.B.).

Witness states (bottom of p.11) he lost the trail near some wood ash, and left 1st and 4th accused (who at the time were helping him) to try and follow the spoor as rain was near. Was it not this officer's duty to have there and then tried to follow the trail even though rain was near :

"On the evening of the 16th, on information received, accused Nos. 1 and 2 were arrested and on further information on 18th accused No. 3 and 4." On whose information ? I ask. I will answer. On Nandutu's information i.e., that of a child of 5. Why is the informant not named specifically ? Neither Busiku nor Wenge gave what is called information till they had spent 7 days in Kitale. The informant about the 4 therefore can only be Nandutu. Mr. Dale should have been questioned on this point.

Mr. ....

Mr. Dale then mentions he was shown a faint track by accused Nos. 1 and 4 leading towards the hut of deceased's brother. He does not mention that Mahomed Malik (my Sudanese headman) helped to show him this track. Or that he is an expert tracker. (O.B.) But it is very evident that though witness seeks to minimise the importance of this "very faint" track as shown him by accused Nos. 1 and 4 that he attached importance to it; for as it led towards the isolated hut of deceased's brother, Mr. Dale had the door of the hut broken open, and the hut searched by his sakari and Mahomed. Mr. Dale further conveniently omits that a spear was found in the hut with blood on it, and that this was sent to Kitale and the blood washed off it, so that the sakari was never heard of again till Mr. Dale on Sept. 1. 1929 at the re-trial, asked witness about it, when he naively admitted the blood had been washed off it.

At bottom of p.12 Mr. Dale says kipketer, brother of deceased "filed past the body but gave no information." And with this one sentence he passes over a fact which is about as damning as it could have been against the brother (who is obviously the murderer. O.B.) I wonder why no more was said re this amazing circumstance. The brother who had worked for years on the same farm as deceased, failed to identify him. Mr. Dale knew at the time he was giving his evidence that the brother had behaved in a suspicious manner - had to be pushed up to the corpse, etc., - his manner was so suspicious that he had him arrested. At this he said later at the trial in July, when questioned about it - though not before he was questioned: Why did not Mr. Dale give these details re the brother's manner, etc., at the hearing before the magistrate. Why did he say nothing re finding a blood-stained spear? Was it just to omit these details? If Mr. Dale was intent on convicting the four accused and did not mind how he obtained their conviction, then I can understand omitting details which ...

which incriminated someone else. Why did Mr. Dale not mention the help he received from Mohamed Malik re the tracks and in other ways? For he knew that he was an expert tracker. It would not have taken him long to find this out. And why did he not call Mohamed before the Court, if not for the defence as he should have called him, at any rate to assist the Court to get at the truth. Mohamed was carefully kept in the background. So was Sambura the child Mandutu's grandmother, who would have sworn the child slept with her and never left the hut on the night of the crime! So was YUSUF, the man who from Mr. J.C. Kruger's farm would have sworn deceased left the farm early on the day of the crime to go and see his "brother". It is no good Dale saying he was not aware of this, for he admitted to Mr. Daly in Nairobi on September 9th at the retrial that he knew it. Why in fact were the following not called for the defence - Mohamed Malik, Yusuf, Sambura, Mukheory, Masaba, Baridy, Wakidanyai, Nebelliao, Manura and Namanda. The huts of accused and witness were all in a line, and except hut No. 8 were fairly close together.

The geography of the huts is as follows:-



Inmates of the huts were as follows:-

- No. 1 Empty.
- 2 Busiku and Mukheory.
- 3 Empty.
- 4 2nd accused and Wakidanyai.
- 5 1st accused and wife Wenge.
- 6 Sambura and Mandutu (Child)
- 7 Empty.
- 8 Accused 3 and 4 Masaba and Nebelliao.

It is quite obvious to me why the people mentioned were not called for the defence. Because they would have helped to destroy the weight of the prosecution evidence.

another ...

Another way of putting this is to say - and considering the circumstances the language is not too strong - that on their way to the scaffold, the accused were merely detained en route to be (1) interrogated by the Police; (2) to attend the magistrate's court; (3) to attend the trial; and (4) for the framing of their appeal. For as the two Superintendents of the Nairobi Prison have told me, nothing could have saved them from the gallows - for there was nothing apparent in the proceedings of the enquiry and the trial, on which to base an appeal. One thing alone saved them from execution - the writer's intervention.

I have said above Mr. Dale merely remarked at the enquiry to the "brother" that he (p.12 bottom, led past "the body out gave no information". Did this not strike Mr. Dale as curious? Of course it did, for at the trial he admitted it is under examination. When I heard of this failure on the part of the brother to identify deceased, it struck me as so amazing and so curious that I began to make enquiries, and I not heard of this refusal to identify, I doubt if I should have intervened. It was this one singular circumstance which brought about my intervention. And yet as I say Mr. Dale made light of it in the enquiry and until examined, at the trial also.

These 4 accused were deliberately hurried to the scaffold. I consider and always have done that in a case of this kind in Kenya, where the High Court Judge knows nothing of Swahili or native mentality, the original Police investigation and the Magisterial enquiry are of more importance than the actual trial. For by the time the accused have emerged from the ordeal of the investigation and the enquiry, they are definitely on their way to execution. Particularly is this the case if no one at the trial except the Police (who I think I have proved were intent on conviction) understands Swahili or native mentality and particularly ...

particularly if the lawyer briefed by the Crown for the defence is incompetent - as was the case.

To resume - Case re-opened 30.4.28.

Busiku recalled and speaks as to Wagishu customs after murder. "It is the custom for a murderer to kill a sheep. If he has no sheep he kills a fowl." "This is nonsense. This categorical description of Wagishu custom is put into the witness' mouth. All he could possibly or conceivably have said - a man after murdering another might kill something. Mr. Gillespie, the Magistrate, should have known better than to put down in writing Busiku's hard and fast description of Wagishu custom. At the trial this description is amplified into the following: "If a man is killed a cockerell is eaten - if a woman, a hen". This is imagination gone mad!

.....

The accused are then asked for their statements. They all say they have no witnesses to call. Just try and think what this means. They have after 16 months and 2 days been acquitted. They were very nearly executed. The Judge at the retrial remarked there is no evidence against them on which to frame a charge!

They say they have no witnesses. They are all shenzi Wagishu. Dear God, was it not the solemn duty of the Police or failing them the Magistrate, to call witnesses for them. The Magistrate had actually had before him some of those who should have been called for the defence. Supposing that the Police are so obsessed with the idea of obtaining a conviction, that they omit to call witnesses for the defence - what in the name of fairplay can the Magistrate be thinking of to tacitly agree with accused that there are no witnesses to help them. Is this a solemn judicial enquiry, or a tragedy pantomime.

with all the points omitted in the Police evidence

which ...

which could have helped them (e.g. the fact that Mandutu slept with her grandmother Sambura on the night of the crime; the fact that Yusuf knew deceased went to visit his brother on the day of the crime; the blood-stained spear found in the "brother's hut; and many other facts of the same significance including the brother's failure to identify deceased.) can it be believed that the Magistrate in his position was indifferent. Anyone who like myself has had experience of enquiries of this kind and of trials for murder, etc. must often have heard the accused saying "They have no witnesses to call". And is one to suppose that hearing this from the accused, nothing more is to be done? Anyone with any humane feeling in him, will necessarily insist that witnesses be called. It is no good the Magistrate saying "what could I do the accused refused to call witnesses." The reply is that accused are raw, backward, shenzi natives, Wagishu in fact, and that it is the Magistrate's duty to help them against even themselves.

One may well ask what is wrong. When one Judge in July, 1928, pronounces sentence of death, and another Judge in September, 1929 states there is not a scintilla of evidence on which even to frame a charge against the accused.

The explanation for this amazing discrepancy between the two verdicts is to be found partly in the description I have given of the enquiry before Mr. Gillespie; an enquiry conducted on such unfair lines and in a way so contrary to our ideas of British Justice, that anything could evolve as a result. What has been described may well be described as the injustice which lurks under the guise of justice - the most appalling kind of injustice in this world.

... same. Accused No. 1 is asked for his statement. He (above) is the oldest and most stupid of all four accused. He admits he saw the bandi; that he had been beaten ...

beaten ...

beaten, etc. and persists that he was a sick man and took no part in the crime. The trial at Nairobi on September 9th and 10th has proved these 4 accused are innocent and has acquitted them. And yet this wretched native continues his part in the tragedy in stating that two of the accused dragged the body, etc. It should not be forgotten that the Police had arranged with him to turn King's evidence, promising him he should go free if he did so. Okobe realising he has been trapped, and would not go free whatever he said, protested that he was sick, but in view of all that has gone before admitted that the Mandi was murdered at his hut, and that 2 of the accused committed the crime! I saw the body "my head ached." "It was very dark; accused Nos. 2 and 4 "dragged the body, etc., etc.," When accused states he saw the Mandi, a very much suspect he was asked "did you see the Mandi" and he knowing what he was expected to reply - answered "Yes". Second accused is then called, and having a little more sense and pluck than accused no. 1 states he took no part in the crime. He says "he was awakened by shouts as of people "coming from tembo". I wonder if he spoke of this shouting as of people coming from tembo voluntarily. Third accused, the most intelligent of the four, finding he has been trapped, in despair accuses the first witness Busiku of the murder - this in return for Busiku accusing him. I suppose he, like the other three, after seeing how the Court and the Police had treated the boys who could have helped him, e.g. Muxbory, Masaba, etc., realised the hopelessness of calling them in his defence. Had I been this accused, I should have felt just the same as he did about calling witnesses to help me. The fourth accused merely speaks of the malice of those "who have taken an oath for nothing".

NOTE.

I understand in the proceedings do reply from accused - whether they plead guilty or otherwise; or even if they are asked as to their plea! They are then committed for trial, and the enquiry ends.



I should mention that all those connected with the case, the four accused, Busiku, Wenge, Nandutu, Masaba, Mukhoory, and Wakidiyani, all swear and can prove they were intimidated into making the statements which would help the Government, in their own words "Saidia ya Burkali".

One point more which I have omitted. Accused No. 4 was evidently wearing a vest with blood on it. He was never asked to account for this. Had he been he could have done so. But Masaba the 6th witness is asked if he noticed the blood on the vest and replied "No" (p. 9.) As the obvious inference at this enquiry and again at the trial was that the blood was that of the deceased Mudi, surely in the case of common sense (apart from justice and fairplay) it was the duty of the Police to have the blood analysed. Did they do so? No. Why? God alone knows. At the trial later, the same point was made about this blood stained vest; and as the suggestion was not rebutted as it should have been very naturally it carried weight; though Mr. E.J. Davies, the Crown Prosecutor at the trial, told me later he did not dwell on this point, nor attach importance to it. How do we know the Judge did not? In any case the blood was that of a dead orib. which the 4th accused had carried 2 or 3 days before the enquiry was held; and had the blood been analysed, this fact would have been substantiated. It is sworn to by Mohamed Malik that the boy carried the oribi as alleged.

It is something to be thankful for that through intervention I have saved these four innocent natives from the scaffold; and good may yet come of the tragedy so narrowly averted if the system which allows the dice to be loaded against accused natives, in the way I have described, be radically altered. I will conclude my remarks about this enquiry, by again suggesting as I did at the commencement, that under the system which prevails, many innocent lives have probably been sacrificed.

sgd. G.P.

The four Wagishu who had been arrested in April, were put on trial before Mr. Justice Stephens July 20<sup>th</sup>.

The trial commenced on a Friday afternoon and was concluded on Saturday, July 21<sup>st</sup>.

Mr. E.J. Davies prosecuted for the Crown, and Mr. J. Martin of Kitale, conducted the defence.

The four accused were charged with murder and sentenced to death. They pleaded not guilty.

In answer to the charge, they replied as follows:-

Accused No. 1. I did not kill him, I saw him after he had been killed.

Accused No. 2. I did not kill. I found him dead.

Accused No. 3. I did not kill. I saw the body. I called Samed to see it.

Accused No. 4. I did not kill. I saw the track where the body had been dragged, and I thought it was an animal and I followed and saw the body.

After the first witness the District Doctor had given evidence re the wounds inflicted on the deceased. Mr. J. Dale Inspector of Police was called, and in his evidence stated that the anus of deceased was red as if bruised - continuing he said "in his experience in other cases of a similar nature with this tribe, it often happens they put a stick up the anus, with a vicious intent to hurt." He was referring presumably to the Wagishu tribe. I challenge this statement, for the custom described is the custom of the Hamar, Masai and Sabal tribes, with regard to animals, particularly cattle, and certainly not the custom of the Wagishu. From a local Police Officer, this point naturally carried weight with the Judge, particularly as it was not rebutted. Mr. Dale then stated he followed the tracks in the direction of the Wagishu huts, he does not say that he was assisted in following the tracks, nor that my headman, who is an expert tracker from the Sudan showed where he had found the same tracks, leading right past the Wagishu huts in the direction of a neighbouring farm; and in fact took him along this line. He then described the identification parade,

Parade, but quite to say until examined, that among the other natives who were unable to identify deceased, was his own cousin, who there is an almost certain presumption was with deceased several hours before the commission of the crime.

Later this same witness states that accused "No. 4. appeared in the lower court wearing a white flannel vest, on which were spots of dry blood: that now he appears with a red vest on" What is meant by this reference to blood on the vest of one of the accused. Presumably that the blood was that of the deceased. Otherwise I see no point in the mention of it. And if a point is made of this why was the vest not taken by the Police Officer when first he saw it, and the blood stains properly diagnosed to see if they were human blood or not. Without much trouble, the prosecution and the defence would have ascertained that the blood on the vest was the blood of an oribi which had been shot on the farm several days before the enquiry before the magistrate and that accused No.4 had carried the dead animal. This witness at the Preliminary inquiry did not lay any stress on this blood stained vest, but contented himself with asking a witness (Masaba) whether he had noticed the blood. It is therefore strange that at the trial he makes a definite assertion about the blood on the vest, with the idea of incriminating accused No. 4.

The witness then speaks of following further tracks towards a wagon road: and states that "the nearest habitation at the end of this track was an isolated hut: that the owner of the hut was discovered to be the brother of the deceased". He omits until examined to say that this brother had denied knowledge of deceased when confronted with his corpse at the identification parade.

Why I ask this omission about the "brother" of

of deceased? Why no statement until examination that the Police had first of all suspected and arrested him! It so happens that there is evidence from the farm on which deceased worked, that he left the farm earlier than usual on the day of the crime to go and visit his brother! This evidence was never given though the witness admitted when cross examined by Mr. Daly at the re-trial, that he was aware of it! Nor was evidence of enmity between the two "brothers" ever called. The Police could just as easily have got such evidence as I did; and I contend it was the duty of the police in view of the Brother's amazing attitude at the identification parade, to exhaust every possible chance of ascertaining his guilt or otherwise.

No mention made by the Police Officer at the trial that a spear was found in the brother's hut, with blood on it; and that the same spear was sent into Kitale, and that torrents of rain fell en route and effectually washed away the blood.

There is then mention made of two hoes which were found in my Wagisru lines; that they had on them mud similar to that in the pool (i.e. where the corpse was found) Is a Police Officer, unless he has been a very observant farmer in this District, competent to speak in this way of the nature of mud found on farm implements. I lay stress on this because the point made was not rebutted by the Defence: though my headboy who has Egyptian fellah blood in his veins would have sworn that the mud on the hoes was not the same mud as that of the mud pools: for according to him the mud down by the stream dries out white and the mud found on the hoes produced had dried out a different colour. Under examination, the Officer added, "the same kind of mud might have been found from any other part of the swamp; except that the swamp had not been cut up only where the deceased was found." The swampy ground adjoins the stream for several miles, and also this was never examined in toto. I do not understand the

46  
remark that it had only been cut up in one place.

At the conclusion of his evidence, this Officer stated that deceased's brother had failed to identify the corpse, and has been arrested on suspicion on account of his manner; and further that he found no signs of a struggle near the Wagishu lines, two very big points in favour of the accused.

and this Police Officer also informed the court that 2 of the accused had first of all reported the discovery of the Corpse to my headman: I consider it would have been fairer to them; from what I know of Wagishu, if any of them had murdered a man, they would keep as far as they could from the place where they had buried him and instead of reporting the murder, would most probably have absconded.

On page 3 the Officer states he lost the track near the wagishu lines, somewhere about 40 to 50 yards from the centre of their lines, and a pile of wood ash was there. The distance from the wood ash pit has been measured and is at least 200 yards distant from the centre of the lines.

This Officer says at the preliminary enquiry that he after losing the trail left 1st and 4th accused to try and follow the spoor as rain was near. he does not make this admission at the trial.

I consider he should have remained on the spot with 1st and 4th accused and done all he could to trace the track. he says towards the end of Page 3, that he left to attend the post-mortem. In other words at the enquiry and at the trial, he gives two different reasons for leaving.

he then on Page 4, criticises the tracks shown him by accused 1 and 4 on the next day, saying they were narrow tracks, and not similar to the tracks he had already followed from the pool.

I wonder why in this connection, the Officer does not refer to Mohamed Malik, who was with him when he followed the track on Sunday, and who is an expert tracker. why does he minimise

the ...

the importance of this track from the wood ash pit by making no mention of the tracker Mohamed. He speaks of accused Nos. 1 and 4, showing him the track on Sunday, and naturally might not have attached importance to it, for wagiansu are not natural trackers.

The case was very different if Mohamed Malik was assisting and showing a track to the Officer. And it is of course obvious that he did realise the importance of what Mohamed showed him, because the track he was shown on Sunday led towards an isolated Mandi hut which the Officer had broken open. It was in this hut a blood stained spear was found.

I suggest that had this Officer given his evidence fairly, and not merely with the idea of obtaining a conviction, he would have laid more stress on this track towards the isolated Mandi hut than he did, and would have mentioned the spear found inside, as he admitted when cross examined by Mr. Dale at the re-trial.

The third prosecution witness called was my tractor driver MUBIKU. I defy anyone to read through carefully the so called evidence which he gave, without remarking that it does not ring true - no circumstantial evidence of any value was ever adduced - but this was the oral evidence together with that of the next witness Wenge, on which accused were convicted.

Though the evidence does not ring true, a feature of it is its attempt to describe very minutely exactly what happened e.g. which of the accused struck the separate blows and exactly where such blows were inflicted. All this though it is known positively that it was a very dark night.

I am not going into the details of the statement of this witness but one question with regard to it is pertinent. How can any Court have sat and listened to such a statement and believed it. I suggest that if an European finds himself mixed up in an affray on a dark night, he would find it more than difficult to describe just how and where each of four assailants inflicted blows on their victim.

Much more difficult would it have been for a Native in Court to describe such details.

The statement in fact is so minute in its detail, that I imagine anyone reading it would suspect its truth. That the Judge evidently believed it, appears from the fact that he omitted passages from it in his judgment. The most amazing thing about this statement is the fact that the Defence Counsel never interrogated the witness re whether he had told his employer (myself) that he had seen no hand in the lines, and no murder done: that in fact the evidence he had given before the Magistrate was false. I do not understand this. To say the least of it, the credibility of this witness could have been severely shaken if it had been proved (as it could have been) that he told me after the enquiry before the Magistrate that he had been intimidated into making the statement. As I have put down in my reports to the Attorney General after the trial, I was particularly fair in the way I questioned the boy. I told him that all that was wanted was the truth; that if he had seen the murder committed, he should say so and not otherwise. I asked him point blank if he had seen the murder committed, and after hesitation he said "No" and gave a description of how he had been treated by a certain police askari during seven days detention in Kitale. There are further points about this witness. After he had given evidence before the Magistrate, he told no one on the farm that he had said he had seen the murder committed. He kept discreetly silent and to show his frame of mind before the actual trial, he asked my Headman the night before what he thought he had better say on the morrow: "that he had seen the murder committed", or "that he had not seen it". He has since made a sworn statement before the R.C. at Kitale in which he says he said what he did at the trial, after being intimidated by the Police.

The Prosecution have always made a point that he would more naturally tell the truth to a Court of Justice than to his employer ...

employer. I do not believe this, the witness knew quite well it was immaterial to me whether the accused were innocent or guilty.

The boy was severely intimidated in the first instance. He knew that the police knew he had brewed some tembo and was anxious to escape the consequences. He could therefore be the more easily intimidated. Incidentally this boy was in a position to stop any fighting had there been any; for he has authority with the other boys. He admits under examination that he did nothing; nor attempted to do anything.

The 4th accused called was a woman named Wenge, the wife of one of the accused.

Before the magistrate this woman had followed the last witness in saying she has seen the 4 Ws murder the Wandi. She gave much the same evidence at the trial, though she denied that her husband took any part in the murder.

This woman has been described by the magistrate in Kitale "as of low standard of mentality as to appear almost "mentally deficient". "She is of the type that is easily "bewildered despite the care and deliberation with which "questions were put to her she frequently contradicted "herself". These remarks were made about her in a case in which the Crown Prosecuted a policeman for causing hurt to the woman, before the trial. With regard to her evidence I maintain that this is as unconvincing as that of Busikus and equally minute and descriptive.

A feature of the evidence is the mention of a cockerel being eaten by the four accused after the crime. This cockerel ~~was~~ first came to light as the result of the police interrogating the small child of 5, the daughter of Wenge and first accused.



I have always maintained that the cockered story was pure moonshine, had an enquiry been made it would have been found that no chicken was, as stated, killed or eaten. But the police made a great point of it and so did the Judge at the trial. It is suggested that it is a Wagishu custom to kill and eat a cockered after committing murder. This is not a Wagishu custom, and in any case someone versed in Wagishu custom should have been called at the trial. Incidentally no trace of a chicken having been eaten, e. g. feathers, etc. was ever found.

I suppose under certain circumstances witnesses of the type of Wenge have to appear in Court, but it is obvious from her low type all she ever said should be admitted with very great caution, if she had never been intimidated. I question in any case whether it was fair to call her against her husband. There is one fact however which to my mind should not be omitted when discussing this woman's evidence. In company with my Wagishu head boy, I came across this woman on the farm some days after the trial. I asked the headman who she was and he told me she had been one of the Crown witnesses. He called her up and at my bidding asked her if she had ever seen the murder committed. She answered immediately "No." I then had her asked why she had said she had witnessed the crime. She equally frankly answered as follows: "I said I saw the murder committed because my husband told me to say so, for he said he had arranged with the Police to say he had helped in the murder, and that I should confirm his statement in which case we could return to the farm without more ado." Now this amazing statement corresponds with what I have heard from the accused and from Busiku, re the way those connected with the case were intimidated and tricked by the Police during the investigation at Kitale. And it is relevant here to state ...

state that my headman from the Sudan swears he heard this woman threatened by the Police Officer Mr. Dale with imprisonment if she went back on her statement made before the Magistrate, while waiting outside the Court at the Trial. Apart from all this, I repeat that her evidence on the face of it, is so unconvincing and so confused, and the woman obviously of so low a type, "as to appear almost mentally deficient" that I wonder any serious attention was paid to what she said.

Then the child Mandutu aged 5, daughter of the last witness was called. She refused to say anything to incriminate anyone. It is surely questionable whether a native child of this age should be called into a Court of Justice to give evidence on so grave a charge, particularly when one of the accused was her father. With regard to the child it has now been proved beyond question in a case before the Magistrate at Kitale, in which the Police prosecuted an askari for causing hurt to the child's mother, that the mother was beaten in front of the child. The askari responsible was sentenced to six-months' imprisonment. This beating occurred when the father and another of accused were first taken handcuffed to Kitale; i.e. at the inception of the investigation. Does anyone suppose, this being so, that a child of 5 years of age was not frightened out of its life.

The askari responsible, who on a former occasion had been sentenced to six months' imprisonment for ill-treating witnesses in another case was remonstrated with by my headman for striking the mother. And if this was the state of affairs at the beginning of the investigation on my farm I suggest an unscrupulous askari could have elicited from the child exactly what he wanted her to say, when he had her with him in the Kitale Police lines.

It will be noticed that nothing was said by Counsel for the defence re the fact that the woman or child had been frightened. In fact this suggestion is not made at all at the trial ...

trial as though she were a quite competent witness, her evidence is quoted by the Judge in his summing up. The sixth witness called by the Prosecution was a boy called Masaba. All that need be said about him is that he should have been called by the Defence; for he sleeps in the same hut as two of the accused. He said he never heard or saw anything to do with the murder, and in fact noticed nothing unusual. The same evidence would have been given by Mukhoory, Sambara and Okiriang (who sleeps in the same hut as another of the accused) had they been called for the Defence. Incidentally, Masaba was sick at the time, and when the Police commenced investigations an askari pulled him out of his hut and beat him.

The Defence was then opened.

Two witnesses were called - my Chinese headman and a boy named Mazooli. He the latter he was called to say he was not on the farm at the time of the murder; this because the witness Masiku had said a boy of this name was present at the murder. The Chinese, whose name is Mohamed Malik could have given invaluable evidence in favour of the accused. As distinct from native witnesses, he has no axe or any kind of grind, and it was immaterial to him as to me whether the accused were guilty or otherwise. He gave his evidence in the form of answers to questions, as distinct from a statement. Had he been allowed to make the statement he has always made to me I believe the accused would have long ago been at liberty. When I read over his evidence I asked him why it was so meaningless. He then said he was only allowed to answer questions which were put to him by the Judge, who, at the end of his interrogation asked him if he knew the accused were guilty and being answered in the negative called him a liar, and he retired without a single question being asked him by Counsel for the Defence! This omission is particularly amazing, for I had already told Counsel of the value of the evidence the witness could give from the ...

moment when 2 of the accused reported finding the corpse to him this witness should have been allowed to make the statement which throughout was all in favour of accused. I will only dwell here on the tracking evidence he should have given. The witness is an expert tracker. He has been with me over 20 years, mostly in the Sudan, and knows the tracks of every boy on my farm. In the Sudan where tracking is an art, in a case of this kind the tracking evidence of this witness would have been admitted. In this country, nothing is understood about it. This is a poor reason for refusing to thoroughly question a witness about it in a trial for murder. It is a common practice in the Sudan, in the case of murder, to call tracking evidence. In such cases every attempt may be made to confuse the tracker and if he emerges from the ordeal, without his evidence being shaken, such evidence becomes about as valid as the evidence of finger prints in this country. To a tracker of this kind, what Mahomed Malik had to do, in following up the trail of a corpse in grass, was child's play. He merely had to follow the line of the trail from the spot where the body was found. This he did to the wood ash heap mentioned by the 2nd Prosecution witness and further on to the wagon road, right away from the wagishu lines. In fact such evidence had it been given pointed to the guilt of the deceased's brother, who as has been said, denied knowledge of him at the identification parade.

Mention is made by the 2nd Prosecution witness, the Police Officer, that the track found leading from the mud hole to the wood ash heap was distinct, though the track from the woodash to the wagon road was not similar, i.e. not so distinct. The witness Mahomed Malik has always stated the 2 tracks looked different; for the simple reason that down by the stream the grass had never been burnt, and a corpse being trailed through it would naturally be more apparent than up above, i.e. from the woodash pit to the wagon road where

grass ...

grass had been burnt. The witness has always contended to me and would have sworn to the same effect in Court, that something heavy had been dragged from the wagon road down to the stream - thus clearly pointing to the fact that the Wagishu had nothing to do with trailing the corpse.

In his evidence the witness - Mohamed Malik - is reported to have said that he lost the track near the accused's hut; a fact which is damning to the accused. The witness tells me he said nothing of the kind; that what he did say was when following the track he had reached the woodash heap when he was called away to attend the postmortem. This is a very good instance of the difference in taking down evidence in the form of answers to questions and in evidence given in the form of an uninterrupted statement.

There are other points which could have been brought out in the evidence of this witness some of which are as follows:- (1) rebutting evidence re the bloodstained shirt mentioned by the 2nd Prosecution witness; and (2) re the character of the mud found on the hoes exhibited at the trial; (3) the finding of blood on a spear in the deceased's brother's hut; (4) the reporting of the crime by 2 of the accused; (5) the attitude of the witness Busiku; and (6) evidence of intimidation by the Police towards those connected with the case. But as has been said, Counsel for the defence asked this witness no questions making I submit the proceedings look very unlike those of a trial for murder.

The defence was then closed, and the opinions of the assessors were given to the effect that all accused were guilty. With regard to assessors, some time after the trial I attended a similar one in Kitale, where as a coincidence 4 natives were accused of murder. There was

the ...

the same story of a cockerel having been eaten and in many ways the case was a parallel one. But what I remember distinctly was the Judge through an interpreter informing the 3 assessors that he considered all the 4 accused were guilty but that no. 1 should be found guilty and that nos. 2, 3 and 4 should be found not guilty. I remember the 3 assessors then being asked their opinions, and like parrots repeating what had been said to them. I found out afterwards that accused No. 1 who had been sentenced to death, had had his sentence commuted to one of one year's imprisonment. In his appeal he had been able to show that unfair methods had been used by the Police in their investigation. Reverting to the trial under discussion, the Judge then summed up. I submit with all respect that this summing up was unfair and biased as against the 4 accused. The first part of the Judgment deals with the evidence of Busiku and Wenge, and repeats verbatim much of what both said. Commencing with the statement that Busiku gave a tembo party! No such tembo party was ever given. Busiku had brewed a debbyfull of beer from which several of his friends came and helped themselves. There was no suggestion of a party, e.g. dancing, intoxication, etc.,

Parts of the statement of Busiku are then repeated. "A Nandi came to the hut. They told him the tembo was finished and he went out. Accused Nos. 3 and 4 followed him," and then follows an account of the beating. I suggest if this account of Busiku re the beating is given in the judgment it would have been fairer to all concerned had the following conversation (as related by Busiku in his evidence) also been repeated; i.e. 1 (Busiku) said now you are killing this Nandi, what has he eaten. They (accused) said we were playing, but he is dead now, what can we do. Surely it is but fair if the parts of the statement which incriminate accused have attention directed to them, that a part of the

evidence ...

evidence which suggests a game was being indulged in would have equal attention directed to it. Another in the repetition of Nanku's statement the following occurs in the judgment - Answered No. 2 said "beat him very much as there used to be a Nandi here named Saisi who stole Mr. Bentley's "Cattle". This is the only suggestion of a motive for the crime given in the case; is it likely, I ask any reasonable person, that a Wagishu would set on a Nandi because some time ago another Nandi stole their Swana's cattle. Are the Wagishu to such an extent solicitous of their employer's interests as to indulge in murder. I suggest that the Judge, if he is a fit and proper person, with a correct and proper appreciation of the mentality of a Wagishu, might have questioned this so-called motive as farcical, instead of merely repeating it.

There follows in the judgment a repetition of much of the statement of Nanku in which occurs the following sentence: "There is a custom among the Nandi to kill and eat a chicken after murder - a cockerel in the case of a man being killed and a hen in the case of a woman being killed". This in any case is nonsense. (I can only imagine this is a misprint in the proceedings for the word "Wagishu" but I do not know, for an equally stupid mistake occurs in the report of the police officer's evidence i.e. that it is a wagishu custom to insert a stick in the anus of a victim).

but the point is was Nanku a fit and proper person to describe wagishu custom after murder? That the Judge believed so. A illuminating insight into wagishu custom seems clear, or he would not have given attention to it in his judgment. There follows a statement that it was possible to get Nandi's child of 2 years old to give evidence about what happened in the court below, and the answer to that but I am surprised that any court of justice should have...

to take evidence from such a child, with any understanding of its mentality or state of fear.

The Police Officer's statement is then referred to and the following evidence stated "On Sunday 15th April accused Nos. 1 and 4 showed the new tracks continued from the woodash, but it was a narrow track and not similar to the track from the woodash to the mud pool. Where he lost the broader track would be about 50 yards from the huts of accused. Why in fairness to accused if it is insinuated as above that the track was lost near the huts of accused and so incriminated them, is there no mention of the remark made by Mohamed Malik "the track followed towards Bwana Robert's farm" (i.e. to the wagon road near where the brother of deceased lived in an is... hut).

Why again had the original police Court proceedings not been referred to, why was the statement given by Mohamed Malik to Mr. Dale that he had followed the track up to the wagon road and shown by him to Mr. Dale not mentioned and again that the difference in the appearance of the track was accounted for by the burning of the grass up above, and not down by the stream.

The evidence of the doctor is next touched on, but no mention is made of the inflammation of the anus mentioned by the Police Officer. This, as it is a Nandi custom to inflict injury in this way and not a Wagishu custom, would have been a point in favour of accused.

The Judgment concludes I agree with the assessors that all the four accused took part in the killing of this Nandi. I find them all guilty of murder. Sentence of death was then passed. Now in criticism of the conviction, I ask most seriously, why was no proper attention paid to the motive which inspired the crime. All we have is the reference in the Judgment that the motive was as remarked by Bahiku because one of the Nandi tribe had formerly



stolen their bwana's cattle. No hint during the trial is made that accused were badly intoxicated, a fact which might have accounted for this crime! It is difficult to believe that a Judge can have accepted this solicitation for their bwana's interests as the motive or reason for the crime! Or did the Judge perhaps consider the question of motive was unimportant. Whatever he thought, I suggest he should have given the question of motive more prominence in his mind; for I maintain in a case of this kind a sufficient and convincing motive must be found. It is almost as important as proving an actual death. And if no such motive can be found, is this not sufficient to cause the Judge in charge of such a case to begin to distrust the oral evidence of the 2 witnesses concerned, particularly such evidence did not ring true! And again I defy any reasonable person who has a knowledge of the native to read through the evidence of these two witnesses without feeling very uneasy as to its truth. The very fact that Busiku gave such a minute description of the different blows delivered on a night which was dark would cause I imagine misgiving in the mind of a reasonable person. And again that a strange Nandi should ever have visited my wagishu huts at night is to say the least of it curious. This apparently never struck the Judge; no questions were asked on this point! It makes one wonder if the Judge happens to know the Nandi are an exclusive tribe, and if he does not understand a point like this which after all is very relevant, is he the kind of judge to conduct the trial satisfactorily.

I suggest that had there been an European Jury or European assessors chosen from the settlers, intimate with local details of this kind, they would never have allowed this question of motive to pass unanswered, and would have likewise wanted to learn what took a Nandi down to my Wagishu lines on a farm where no Nandi is employed.

It is also not without interest to note that though repeated in the judgment that a track was lost near the wagishu lines, there is no repetition of the fact that according to the Police Officer (witness No. 2) no sign of a track was found leading from the wagishu huts to the spot where the track was traced to at the woodash heap; nor were any signs found of a struggle near the huts; nor any trace in the wagishu lines of the handi's blanket, etc., or of feathers, etc., of the fowl said to have been eaten.

In conclusion I would ask is there, even supposing these 4 wagishu for the sake of argument were the handi's assailants, sufficient evidence to find all four guilty of murder. Can it be argued after reading through the amazing statement given by Musiku that it is proved that accused were intent on murder, or were aware that death would probably result from their attack? If the major part of Musiku's evidence is credible, why is it not his statement that accused told him they were playing equally credible; and if this latter remark is equally credible how can the verdict of murder be fair?

And again Musiku distinctly states he did not see accused no. 2 actually deliver a blow, though he heard him incite the other 3 to beat him. I see no intent to murder on the part of no. 2 even if he did incite the others. But they were all bracketed together and sentenced to death, and this is the result of two of the most amazing incoherent statements I have ever heard given in Court. (On top of all this Musiku in November 1921 made a sworn statement at Kitale before the Magistrate that his evidence at the trial was all false and 8 months later the accused still languished in prison; the enquiry before a Senior Official of the Administration which was their due having been denied them. Finally, I repeat that the state of affairs as shown up in this trial is farcical and most unfair and requires

instant...

instant revision, so that for the future those in charge of such a trial particularly the Judge and Counsel for the Defence and Prosecution should have knowledge of the language of the country, of the mentality of the natives and of the local custom prevalent in the district in which a crime occurs. (C.B.).

Reverting to the trial I ask in all seriousness why were the witnesses who should have been called for the defence not called? I have asked the same question with regard to the preliminary inquiry. At the inquiry the Police and the Magistrate were obviously to blame for this omission. At the trial the lawyer briefed for the defence was primarily to blame. I am convinced that he had not properly prepared his case. I had told him all I could and he naturally knew there were witnesses who could have assisted the accused. His omission to call them was to my mind criminal negligence. I submit that Mr. Martin having failed to assist accused in this way, it was the bounden duty of Mr. Davies (for the Crown) to have assisted them. It is a fact that in Kenya the Counsel for the Crown acts in a double capacity. Though he prosecutes he should at the same time see to it that accused are assisted. Is there any suggestion in these proceedings that he acted in his double capacity.

It is brought out in the evidence that the several huts which figured in the case were grouped together. Would it not therefore occur to Mr. Davies that there were possibly other natives present? and when he found out that there were, should he not have seen that they were called? The reply is that it was his duty to have found this out and had all witnesses possible called.

The Police should have acted in the same way. With regard to the preliminary inquiry there were witnesses who could have been called in defence. It is a fact that the Police are concerned with the view of obtaining a conviction (as is the

...of the case before the  
...admitted to assist the Defence in this  
way.

It will be noticed from Mr. Dale's conduct at the inquiry that though he actually called natives before the Magistrate who were inmates of the huts round which the crime was alleged to have been committed and though they said they had seen nothing unusual on the night of the crime, he failed to call them for the Defence.

I then come to the Judge.

As it appeared nobody's business to call witnesses for the Defence should it not have occurred to him there might possibly be some. And if he asked accused if there were witnesses who could help them, and they replied "no" as natives are in the habit of doing when on trial, should this have been sufficient for him. He should have insisted that witnesses were called; after satisfying himself that there were such witnesses. If the trial had been properly conducted the following witnesses should have been called for the defence:

- |   |   |   |
|---|---|---|
| Nebellio<br>Nekidiavi<br>Mukhoory<br>Masabo | } | who lived in the same hut as accused.   |
| Manura &<br>Mamanda                         | } | who drank tembo with busiku on the night of the murder.   |
| Sambuza                                     |   | who slept in the same hut as the child Mandutu.   |
| Mr. Thurburn                                |   | who would have sworn something heavy had been dragged through the grass right up to the waggon road.                                    |
| Yusef                                       |   | who knew that deceased had gone to visit his brother on the day of the crime.   |
| Tubo & others                               |   | who could have described how the child Mandutu was intimidated.   |
| Jiboon                                      |   | the Nandi girl, whose statement originally incriminated the brother of the deceased.  |
|   |   | the child, should have been called to explain his (L) tracking of the corpse, & his finding a blood-stained spear in the brother's hut. |

... (5) the truth re the bloodstained vest of  
the accused, and he should have been questioned  
on many other points which were never touched  
on in this evidence!

What sort of a trial is this which leads all the guns  
for the prosecution, and all points for the Defense?  
... it is a trial...

COPY.

KITALE.

2nd January, 1929.

x A week ago roughly.

The Registrar,  
The Appeal Court of East Africa,  
NAIROBI.

Dear Sir,

Re: the case of Appeal in the Supreme Court Criminal Case No. 61 of 1928, as instructed by the Appeal Court, I took Busiku, the witness x before the Magistrate here, when his statement that he had seen nothing of the murder (which he had described at the trial) was taken on oath.

I trust same has been sent to you.

Can you kindly let me have a copy of the Report I submitted to the Appeal Court, and a copy of the letter to the Attorney General which I had attached to the report. I had to pay Shgs. 50/- here to have this typed so I hope you will meet me in this way.

Yours truly,

SD: O. Bentley.

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64  
H. M. COURT OF APPEAL  
FOR EASTERN AFRICA.

P.O. Box 11.

Nairobi, 4th January, 1928.

C. Bentley Esq.,  
KITALE.

Sir,

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.

I have the honour to acknowledge the receipt of your letter of the 2nd, inst. and in reply I have to state that I have received a certified copy of the sworn statement made by Busiku before the Resident Commissioner, Kitale.

Copy of the report submitted by      will be supplied to you in due course. Will you please remit to us Shgs. 34/- being copying charges therefor.

I have the honour to be,

Sir,

Your obedient servant,

SD: E. G. O'FARRELL  
for REGISTRAR.

H. M. Court of Appeal for Eastern Africa.

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COPY.

65

1929.

The Registrar,  
High Appeal Court of Eastern Africa,  
FAIROBIA.

Dear Sir,

I should esteem it a favour if you will kindly keep me informed re what is being done re the Appeal Criminal Case 63 of 1928.

I have already asked you to let me have a copy of the Report I sent to the Appeal Court and of my letter to the Attorney General, which was attached to the Report.

The U.C. Police here is at present taking statements from witnesses re the Police action of which I have complained.

Will you inform me if there is anything further I have to do in the matter.

With thanks,

Yours truly,

SM: O. BENTLEY.

P.S. I had a thought of going home this year but my arrangement must depend on what the Appeal Court orders.

SM: C.E.



COPY.

KITALE.

9th January, 1929.

The Registrar,  
N. M. Appeal Court of Eastern Africa,  
N. A. I. R. O. B. A.

Dear Sir,

I shall be obliged if you will tell me if possible what is going to be done by the Appeal Court re Criminal Case No. 31 of 1928.

I ask this because though I wish to go home after seven years absence, in April or May, I do not want to be absent from the trial if a new trial is ordered.

Is it true that no decision will be come to till the next sitting of the Appeal Court, and if so, when will this be.

I should be glad to give me some idea of when I shall be able to get home, as before doing so, I want to assist accused as far as possible.

Are the Appeal Courts still considering the matter?

Yours faithfully,

SF: J. BENTLEY

COPY.

H. M. COURT OF APPEAL FOR  
EASTERN AFRICA.

P.O. Box: 41.

Nairobi, 9th January, 1929.

The Honourable,  
The Acting Attorney General,  
NAIROBI.

Sir,

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.

Okube s/o Osore and 3 others Vs. Rex.

I have the honour to forward herewith, copy of  
a letter of 7th inst. received by me from Mr. O. Bentley,  
Kitale, and shall be glad if you will be good enough to reply  
to him direct.

I have the honour to be,

Sir,

Your obedient servant,

SD: E. G. O'FARRELL,  
For Registrar.

H. M. Court of Appeal for E. A.

Copy forwarded to Mr. O. Bentley, Kitale, for his  
information.

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COPY.

KITALE.

11th January, 1929.

Confidential.

The Commissioner of Police,

NAIROBI.

Dear Sir,

The statements of boys on this farm re allegations against the Kitale Police, during a murder investigation, made last April, have now been taken by Mr. Finch.

I think it is clear that at any rate one Police Askari was at fault in using force on Wagishu witnesses in the case.

In the report I put before the Appeal Court recently I stated that my Sudanese headman had informed me that Mr. Dale had threatened a woman witness named Wenge at the Supreme Court Trial.

I expect this merely resolves itself into one man's word against another's and in any case, as I told you in Nairobi I do not want to get Mr. Dale into trouble.

The point all along has been to try and show that if any kind of coercion was used on these Wagishu witnesses, their evidence would be most untrustworthy in a trial for murder.

The askari who did, it seems clear, use force is now in prison for a similar offence (and for another), and I consider that my case - that witnesses were improperly handled is sufficiently proved if the case of this particular askari is dealt with without incriminating anyone else.

I understand that Mr. Dale is shortly going on leave.

I am hoping that a new trial will be ordered. Whether he should remain in Kenya till such trial has been held I do not know, but should like to repeat that in view of all the circumstances, I personally do not wish to press the point that he acted unfairly.

I wish to go home shortly myself, but do not feel I can go till the Appeal Court have given their decision.

Yours truly,

MR. O. BENTLEY.

COPY.

H. M. COURT OF APPEAL FOR EASTERN AFRICA

P.O. Box. 41.

Nairobi. 11th January, 1929.

The Honourable,  
The Acting Attorney General,  
N A I R O B I.

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.

Okube s/o Oboro and others ---appellants.

v.

Her --- ---Respo. ent.

in continuation of my letter No. 20 of the 9th  
Inst. I beg to forward herewith copy of another letter from  
Mr. G. Bentley of Kitale to be dealt with by you.

Yours faithfully,  
SD: G. O'FARRELL,

for REGISTRAR,  
H.M. Court of Appeal for E.A.

Copy forwarded to Mr. G. Bentley, Kitale, for his information.

11/11

COPY.

KITALE.

14th January, 1929.

The Attorney General,  
N A I R O P I.

Dear Sir,

Will you kindly inform me what action, if any, is to be taken re the Appeal in Case No. 61 of 1928, Criminal.

I wish to book a passage for England, but I do not wish to leave until this matter is settled in some way, for as things are, the accused have no one to assist them here (at a new trial, should such trial be ordered) except myself, Mr. Martin, the local lawyer, being absent.

An enquiry has recently been concluded here re Police methods in obtaining evidence in the case, which does not show that such methods, as I pointed out at the time of the Appeal, were unjust.

Yours truly,

SD: O. BENTLEY.

For the Police.

COPY.

THE ATTORNEY GENERAL'S OFFICE,

P.O.Box. 112.

NAIROBI, KENYA.

15th January, 1929.

No. L. 2014/34/15.

Sir,

ORIGINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.  
Ogube s/o Ohero and three others vs. Rex.

I have the honour to acknowledge the receipt of your letter dated the 14th January, 1929, relative to the appeals under reference.

The Appeals are set down for re-hearing on the 4th of March, 1929, at Kampala, and the result of the appeals would appear to depend upon the result of the prosecution, which I understand, has already been instituted at Kitale.

Even if the prosecution is successful it is difficult to forecast the attitude which the Court of Appeal will adopt. The Court may order a new trial or quash the convictions.

I have perused the complaint put in by the witness Busiku and I incline to the view that if the allegations made in the complaint are found to be substantially true, the Court will probably quash the convictions.

I have the honour to be,

Sir,

Your obedient servant,  
SD: E.J. Davies,  
Crown Counsel,  
for Ag. Attorney General.

Mr. C. Bentley,

ORIGINAL

COPY.

KENYA POLICE,

Office of the Commissioner,

P.O.Box. 63,

Nairobi.

18th January, 1929.

Ref. No.  
P.40/3048/29

O. Hentley, Esq.,  
Kitale.

I have the honour to acknowledge receipt of your letter dated the 11th instant.

Full report in this case has not been received.

I note what you say in regard to Asst. Inspector Dale.

The Honourable the Acting Attorney General has been consulted and he saw no reason to prevent Asst. Inspector Dale from proceeding on leave.

The matter is still in the hands of the Honourable the Acting Attorney General.

SD: ?

Commissioner of Police.

Copy to:-

Asst. Superintendent of Police, Kitale.

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COPY.

H. M. COURT OF APPEAL

For EASTERN AFRICA

Nairobi. 25th January 1929.

O. Bentley, Esq.,  
KITALE.

Sir,

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.

Okube s/o Oboro and 3 others Vs. Rex.  
Ref. Your letters of 7th and 9th inst.

I am directed by His Honour the Acting President  
H.M. Court of Appeal for Eastern Africa, (Sir Charles  
Griffin, K.C.) to inform you that the note of His Honour's  
case file is as follows:-

"Mr. Bentley undertakes to take Susiku  
"to Kitale within 15 days to lodge a  
"complaint or withdraw his statement. Case  
"adjourned to next sessions (Uganda).  
(Intd. C.C.C. 29.12.28.)"

The Appeal will, therefore, presumably come on  
at Kampala on the 4th March, the date fixed for the next  
sessions.

I have the honour to be,

Sir,

Your obedient servant,

SD: E. G. O'FARRELL,  
For Registrar.

H.M. Court of Appeal for E.A.



PRIVATE

February 24th, 1929.

The Attorney General,

KAMPALA.

Dear Sir,

In answer to your letter no. L.2014.04.15 of January 16th, I write to ask what action is to be taken by Government.

Is action to be taken before the Appeal Court sits, or only as a result of its sitting?

Do you consider that any good purpose will be served in attending the Appeal Court at Kampala on March 4th.

I am not anxious to incur further expense in this matter, but, having gone so far I wish to do what I still can for the accused and if I can help them in being present in Kampala, I shall be there. Will you kindly therefore let me know as soon as possible.

Yours truly,

SIR J. DENTLEY.

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COPI.

THE ATTORNEY GENERAL'S OFFICE,

NAIROBI.

27th February, 1929.

Ref. No. 2014/54/30.

Sir,

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.

Okube s/o Ochoro and 3 others versus Rex.

I have the honour to acknowledge the receipt of your letter dated the 24th. instant, relative to the appeals under reference.

2. I am to state that no action being taken by this department prior to the hearing of the appeals in Uganda on the 4th of March.

3. From enquiries I have made it appear that no complaint for the purpose of instituting a prosecution has been made by you on behalf of the witnesses whom you allege were intimidated.

4. It was indicated to you by the Court in Nairobi in the clearest possible terms that the adjournment of the appeal was granted upon your undertaking to have a complaint laid before the magistrate so that the allegations should be properly investigated.

5. All that appears to have been done is that the witness Busiku has made a voluntary statement on oath. This was not regarded as a complaint and it is difficult to believe that the Magistrate would not have regarded it as such if any request had been made by you to that end.

G. You ...

G. BENTLEY, ESQ.,

K I T A L E.

6. You will of course appreciate that the statement made by Busiku, without investigation places the Court of Appeal in no better position to deal with the allegations made by you that it was in at the hearing of the Appeals in Nairobi.

7. You have obviously failed to fulfil your undertaking and it is therefore proposed to ask the Court to disregard the allegations and to deal with the appeals on their merits.

8. If you have any explanations or any further representations to make to the Court, you should attend at the hearing of the appeals. The Court will sit at Entebbe on the 14th. of March and at Kampala on the following days.

I have the honour to be,

Sir,

Your obedient servant,

SD: E.J.Davies.

Crown Counsel.

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COFY.

RESIDENT COMMISSIONER'S OFFICE,

Ref.No.16/7.

K I T A L E,  
2nd March, 1929.

The Crown Counsel,  
Kampala.

CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928.  
Okube s/o Ogoro and 3 others Vs. Rex.

Mr. O. Bentley has asked me to give him a letter to the Court stating his position, as it appears to him, in the above case.

At the hearing of the appeal in Nairobi in December Mr. Bentley was instructed by the Court to obtain a sworn statement from Busiku. This he did and the statement was forwarded to the Registrar. In the Attorney General's No. K. 2014/54/15 of 16th January he mentioned that he had read the complaint. In the preceding paras. he mentions a prosecution which he understands to be proceeding at Kitale in connection with the Appeal. Mr. Bentley did not understand that there was any question that any prosecution must be instituted by him. In a further letter from the Attorney General, No. 2014/54/30 of February 27th. received by Mr. Bentley on March 1st. it is alleged that Mr. Bentley has failed in his undertakings by not making a complaint before the Magistrate. Mr. Bentley informs me that he considers that he did all that he was instructed to do by the Court when he obtained Busiku's sworn statement and that any subsequent action should have been taken by Government i. e. by your Department.

This under the circumstances seems only reasonable and with the information then at his disposal I do not see how he could have acted otherwise.

Mr. Bentley desires to have the opportunity of explaining his side of the matter in the Appeal Court.

SD: D. R. CRAMPTON.  
RESIDENT COMMISSIONER.

COPY.

THE ATTORNEY GENERAL'S OFFICE,

P.O. Box. 112.

Nairobi.

Kenya.

Ref. No.

7th May, 1929.

L. 2014/54/44.

Dear Mr. Bentley,

In reference to your letter of the 3rd instant, a member of this Department will be on circuit at Kitale on the 10th inst. and I have asked him to go into the question of instituting proceedings against Makaria who are alleged by you to have intimidated the Crown witnesses into giving false evidence. If it is found desirable to institute such proceedings it is possible that the evidence may be such as to enable me to consider the question of entering a nolle prosequi. I am sure that the Crown Counsel (Mr. Howell) will be glad to have any assistance you can give him.

As regards your comments on Mr. Dale's being allowed to proceed on leave, I thought I had made it clear to you that when this Department was consulted in the matter the case had not yet been decided by the Court of Appeal. There was therefore no question of a retrial in contemplation, and no adequate reason at that time for stopping Mr. Dale's leave. The fact that Mr. Dale is now on leave, and that consequently a retrial is delayed, is of course unfortunate, but in the circumstances I cannot, so far as this Department, is concerned, accept any responsibility in the matter. Mr. Dale, is, I understand due to return to the Colony in August.

Yours faithfully,  
ED: W. C. HUGGARD.  
ATTORNEY GENERAL.

OSWALD BENTLEY, ESQ.,

KITALE.

Busigo s/o Wandoti duly affirmed:-

The above native was asked by me if he desired to make a voluntary statement about a murder which occurred on Mr. Bentley's farm in April last and stated that he did desire to do so.

On that day the labourers on the farm found the body of a Nandi buried in the mud of the stream. This was about 8 months ago. The Headman Mahomed reported to Mr. Thornburn who lives near. Two European Police and one native policeman came to investigate. The body was taken out and cleaned and then all the people on the farm were called to identify the corpse. We were told by the Police to keep the body in a hut until Sunday. On Monday the body was buried and the Police arrested two Bugishu labourers Mafabi and O. K. In the same case the askari, whose name I do not know, whom I could recognise, and the child of Okube a girl of about 8 years of age, took an empty hut, and I heard the askari frightening the child who eventually said that her father Okube had killed the Nandi. Two days later she was called in to Kitale to give evidence. I was kept six days in Kitale and slept in the police lines. One day an askari called Wakuma Masawa said to me "you and other killed the man". I denied it and then he said "why do you deny it when the others have already admitted killing the man?". After two days as he kept on talking to me like this I got frightened and told him something. He then took me to the Police Bwana who said "if you don't speak the truth I will imprison you for a year." I was frightened and told the police that I had seen the Nandi murdered by certain people. This was untrue and I was frightened because I was frightened. I gave the same evidence in Court for the same reason. When I made the statement to the Police Bwana the askari Wakuma was present. I told the Bwana the same thing I had told Wakuma. The latter had frightened me.

The evidence I gave in the Court and in the Judge's Court that I saw the murder committed by the four Bugishu Mafabi, Okube, Kutosi and Matanda was untrue. I did not see any murder committed. I gave false evidence because I was afraid as the askari Wakuma had told me that if I did not give this evidence I should be put in prison. I made the same statement I have made today to my employers, Mr. Bentley before going to the Judge's Court. I did not tell the Judge the truth because I was afraid of the askari Wakuma. I would make the statement I have made here today to the Judge himself. It is the truth. When Mr. Bentley asked me first about the matter I denied that I saw the murder because he said to me "if you really saw the murder say so but if you did not it is a very bad thing to tell lies." He is my employer and I am not afraid of him.

Read over and found correct.

sd. D.R. CRAMPTON,  
R.C.

28.12.28.

Kitale

Supreme Court Crim. Case No. 61/28

Certified true copy of the original.

sgd. D.R. CRAMPTON.

Resident Commissioner,  
Kitale 28/12/28.

WAGISHU

my remarks regarding the system which prevails as shown in the Wagishu Murder Case, are as follows:-

The system has allowed the prosecution in the initial stages of the case, i.e. at the Police Investigation, to fall into the hands of an unscrupulous and brutal native, Askari; it has allowed such Askari to obtain perjured evidence from native witnesses, in sufficient quantity to satisfy the Police Officer in charge of the case, that four innocent natives were guilty of murder.

It has allowed the Police Officer in charge to present such evidence in such a way as to convince the Magistrate that the case should go for trial.

It has allowed a Supreme Court Judge to find accused guilty and sentence them to death, and in all probability it would have allowed the appeal against the sentence to be quashed, leading to the execution of the four accused, but for the intervention of one, who because he has lived most of his life among the natives, understands to some extent, their mentality.

In other words, the machinations of an unscrupulous Askari very nearly led to a grievous miscarriage of justice, and the system which has been evolved to protect and defend accused natives, failed to show that anything was wrong.

Such a consummation, it is evident, may result, in an environment, in which practically all the officials concerned are ignorant of native mentality.

I imagine that in a Crown Colony such as Kenya, where the influence of white settlement has played an important part in shaping the lines of law administration, there has been too much stress laid on the idea of copying British practice, as distinct from laying down a foundation in which native mentality is taken into account.

It is evident that the systems prevailing in Black Protectorates such as Uganda and the Sudan, take more account of native mentality and conditions than the system introduced into Kenya, where white settlement and white ideas have been important factors.

Most of the safeguards for accused natives, with the notable exception of the jury system, are the same in Kenya as in England, and they seem to have been instituted in Kenya with but little regard to an entirely different set of conditions, and to an entirely different population.

The time to my mind is more than ripe to overhaul the legal system which prevails and to thoroughly examine the question whether the system needs revision or not.

The Wagishu case helps in my opinion very forcibly to show that alterations are required; and it is for this reason, and because of my experience as an ex Magistrate and Administrative Officer under a different system, that I imagine you have kindly allowed me to discuss the system in Kenya.

What I wish to say I have put under four different headings which are as follows :-

1. the system of Police Investigation.
2. the system of inquiry by the Magistrate.
3. the trial system, and
4. the system of Appeal.



... of the Police Investigation:-

... at least to some extent, I think, that the Police in Kenya ... in any other country, are intent on obtaining a conviction, ... the commencement of investigation.

... certain information is to him which helps to incriminate a native, and the Police case is built up on such information.

The accused who is arrested is naturally in a hostile environment, and as distinct from an accused person in England, he understands little of what is going on, and what for instance is the importance of answers to questions put to him. Neither does he understand clearly how he can help himself in calling evidence to counter the evidence which is brought against him. He knows that the Police Officer in charge of the case thinks that he is guilty and from this he imagines that any Police Officer who may be asked to help him is proceeding, with the evidence and the words of the Police Officer, that in fact the officers and men are concerned in an united effort to obtain a conviction.

... is how the investigation ... is ... the very good reason ... an ... has been ...

... will help ... the ... leaves the ... result ... approach ...

... the Police Officer in charge ... the ... different ...

... the Police Officer ... the ... the ... as well as for the ...

It is customary for these ... organisations to deny this idea that the ... are seeking to gain conviction.

From the nature of things they ... investigate ... human nature. The more zealous an officer, the more he will try and prevent a case of ... through his hands.

This being so all over the world, the danger of such an attitude is to my mind increased where a Police Officer is a European dealing with a native who ipso facto does not understand the meaning of much which is going on in front of him.

The idea that at the time of the investigation, it is the business of the accused native himself to call his own witnesses, seems to me to be a direct admission that those holding such an idea ... mentality. The native is probably much more intelligent ... in this way, and he will rather ... to do so.

know for his, it is for a Police Officer, thinking an accused native in front of him is concealing something, and that he himself is unable to get anything out of him, and that such native to an intelligent police askari, and nothing has been done, of course, anything may happen.

In many cases an unscrupulous askari can do what he likes with a native who is accused of crime. The askari's one idea is that his officer thinks the native is guilty and is concealing something and his one aim and object is to do something which will please his "Swana". This explains the attitude of the askari Wokuna in the Wagishu case.

Some other influence other than that of the Police seems to me imperative at the time of investigation, so that the influence of the Police Officer who is working for a conviction, is counteracted.

Some other official, who, as far as can be, understands a native and is in a position to gain a native's sympathy, so that he will understand he is trying to help him, and open his mind to him, should work in conjunction with the Police.

In the settled area in Kenya, there would be some safeguard if the Police Officer in charge made a point of consulting the European employer of accused. I am quite certain that no Wagishu of mine would ever have been even accused in the Wagishu case, had I been in residence on my farm at the time of investigation.

It will be answered that the safeguard against an unfair prosecution by the Police, is to be found in the Magisterial inquiry, where the Magistrate will sift all the evidence for an accused and accused.

I am certain this is not sufficient safeguard. He (3). It is system inquiry by the Magistrate:-

As distinct from the High Court Judge, who takes the trial Magistrate at his inquiry is supposed to be conversant with native customs and language, and to be conversant with a native's language. His knowledge in these respects will therefore be a safeguard.

In the Wagishu case inquiry, it will be found that the inquiry follows on the same lines as the Police investigation, and that such inquiry is dominated by the influence of the Police.

The Police bring accused before the Magistrate, and in his Court endeavour to prove the fact that there is sufficient evidence to justify accused being sent for trial.

In other words, prominence is given to the points which incriminate accused, and as at the Police investigation, points in favour of accused are omitted. This is why I have written elsewhere that the dice are unfairly loaded against accused.

The Magistrate, as things are, is very much in the hands of the Police. There is a presumption in the Magistrate's mind that the accused would not have been brought before him, unless there was a prima facie case against them.

The Magistrate has really no one to refer to except the Police Officer in charge of the case and this helps to explain why, in the Wagishu case, no facts of any importance were elicited in favour of accused. One gains the impression that

the Magistrate, in the same way as the Police, considered the accused guilty from the start and never realised that there was any evidence which could have helped them.

This explains why Mohamed Malik and others were never called at all for the defence before Mr. Gillespie, and why the two Waghishu who were wrongly called for the prosecution, were likewise never called for the other side.

Take the evidence of Yusef, of Mr. J. C. Kruger's farm. His evidence had it been called, would have shown that deceased intended visiting his cousin on the day of the crime. Mr. Dale knew of this fact, as he admitted at the re-trial. He never mentions it to the Magistrate as its mention would have helped to spoil his case.

The Magistrate is therefore left in ignorance of this point.

The Police Officer, who really controls the proceedings before the Magistrate, calls in the witnesses who will help his case, and omits those who may upset his case, and further the Police Officer asks his witnesses the questions, re which the witnesses, as in the Waghishu case, know the answers expected of them.

Again I would stress the fact that witnesses should make statements as distinct from answering questions. Native witnesses do not from the nature of things pay much regard to the sanctity of an oath and can therefore more easily perjure themselves.

It is clear that the Magistrate in the Waghishu inquiry was in a position to explain to accused how they could help themselves by calling evidence. The utmost pains should always be taken to explain what the question, "have you witnesses to call in your defence", really means. It is notorious that natives do not understand what is meant and it is further clear to me that accused natives seeing the Police Officer conduct their case before the Magistrate, and influencing the Magistrate, by the time such question is asked them, feel that the Magistrate is also against them.

I naturally consider too, that for a better appreciation of all that a case means, the Magistrate in a murder inquiry, should visit the scene of the crime.

One can always get a better idea of what transpired if this is done. Facts, e.g. distances between certain points etc. Will be better appreciated on the spot than in a Court house.

Mr. Gillespie before your Commission stated he would have called evidence for the defence if he had known there was such evidence. Exactly: but from whom was he to find out if there was such evidence? From the Police: and it is clear that the Police omitted mention of such evidence because it would spoil their case. If this is what can occur, there is all the more reason for the Magistrate visiting the scene of the crime. Had he done so in the Waghishu case, he would, for one thing, have come across Mohamed Malik, and this being so, would I imagine, have called him to his court.

There is a great danger that the Magistrate from the outset is prejudiced against accused, from the very fact that the Police consider they have a good case.

In this connection, I ask you to realize what actually transpired re the evidence about the hoos of accused. In the Waghishu case. The merest mention is made of them before the Magistrate. The question is asked by the Police Officer of witnesses, "to whom do the hoos belong"? and then at the trial a damning

a damning point is made against these two accused, in that, "the mud found on these hoes is similar to the mud found down at the stream where the corpse was found". Is this fair? Why if a point about the mud is to be made at the trial, is it not first of all made at the inquiry?

At the inquiry such evidence re the mud, might be of some value as the mud would be comparatively fresh.

This helps to show what I have already mentioned that the inquiry before the Magistrate is to a great extent controlled by the Police.

Had the point about the mud been given the same prominence before the Magistrate as before the Judge, the Magistrate might have found out that these hoes were used to disinter the corpse.

The same argument applies to the bloodstained shirt of accused No. 4 had the same point been made of this before the Magistrate as was made before the Judge, the Magistrate would naturally have ruled out such evidence as irrelevant, as the blood had never been analysed, and there would then have been no mention of this irrelevant matter before the Judge.

Surely too, a copy of the Police Investigation being before the Magistrate, some hint from a perusal of it might have been given him that witnesses had been detained longer than was necessary, and if witnesses had been interrogated re what happened to them at the investigation, surely the Magistrate would have found out that there had been ill treatment.

The fact remains that no hint of unfair treatment ever transpired or that witnesses had been unlawfully detained, and this helps to show what a commanding position the Police are able to take up during the magisterial proceedings.

These abuses could be remedied were the magistrate working in conjunction with the Police at the time for their investigation or better still, were the Police Officer in charge, a Magistrate.

Realizing this situation, it seems imperative that someone, conversant with native mentality should be assisting the accused in the early stages of a case and in any case, it should be the duty of the Magistrate to make a fair and exhaustive inquiry as distinct from finding out merely whether there is enough evidence to send accused for trial.

In the Sudan, the Police Investigation and Magisterial inquiry are really all one proceeding and are conducted by a Police officer who is a Magistrate and these proceedings showing the statements of both witnesses for prosecution and defence and the statements of accused, are before the Judge.

In the same country, the evidence of Masaba and Okiriang, called for the prosecution in the Wagishu inquiry would have been called for the defence. All the other defence witnesses in the Wagishu case would have been called for the defence. The so called motive would never have been allowed to stand, on account of its absurdity apparent to a Magistrate conversant with conditions; and further the minute account of the crime as given by Busiku and Wenge, in description of what occurred on a dark night, would have aroused the gravest suspicion. Not so in the Wagishu case. The minute account given was accepted and I am bound to say that the Magistrate was prejudiced, being too much in the hands of the Police Officer; so that the accused

were ...

were in the position of being guilty till they proved their innocence, instead of the reverse.

no (3), The Trial System :-

MUCH of what has been said re the system of the magisterial inquiry applies here also though the Judge is not supposed to be conversant with local custom and native mentality as is the case with the Magistrate.

In Kenya, the Judge is merely in Court to weigh up the evidence brought before him and I imagine in Kenya it would never be his business to go behind the scenes and find out how evidence was obtained. He assumes that all in this respect is square and above board.

He does not worry himself re points for the prosecution and defence, relying on the fact that these are in the capable hands of the respective advocates. Here to my mind, is a real danger. The Judge being unacquainted with local conditions and native mentality assumes that the defence is in capable hands. It may not be so. The lawyer briefed for the defence may be as unacquainted with native mentality as is the Judge. This danger would be avoided were the Court composed of three members of the Administrative service, fully conversant with native mentality etc. and acting both for the prosecution and for the defence.

I am certain no competent court composed of Administrative officers would have found the four wagishu accused, guilty of murder.

They would have found out all that I did after the first trial, simply because of their knowledge of Swahili, of native mentality and local conditions.

They would never have accepted the minute description of the crime given by Susiku and Wenge. They would have realized that the small child Mandatu was probably frightened when first interrogated. They would never have accepted the farcical motive given for the crime.

They would have wanted to know and to have had proved to their satisfaction what took a man of the exclusive Wandu tribe down to my Wagishu lines at night. They would have wanted to visit the scene of the crime. They would have wanted the fullest information as to why the Wandu first of all denied knowledge of his deceased cousin and his cousin's tribe.

They would have wanted to know how it was that Mr. Dale constituted himself an expert on Wandu custom.

They would have taken the utmost trouble to explain to the accused how they could help themselves in calling evidence for their defence.

They would have insisted on calling the headman of the farm and finding him a man of intelligence, (in no way connected tribally with those who figured in the case), they would have been at pains to get all the evidence they could from him. They would themselves, have interrogated all the witnesses they wished to and they would have sent for any witnesses they wanted and who were found to be absent.

They would have made searching inquiry re the two local boys and would have found out from Mohamed Malik that the boys were used to disinter the corpse and were taken away from the farm a week after the investigation commenced and not long after as Mr. Dale stated.

In the ...

In the same way, they would have severely criticised and admonished the Counsel for the Prosecution, who drew attention to a bloodstained shirt of one of the accused, after finding out that the blood stains had never been analysed.

They would have severely cross-examined Busiku on his statement. They would particularly have done so re his attitude of in no way trying to stop the murder. They would have been in any case reluctant to admit his evidence, as being in their opinion altogether too minute considering that the night of the crime was dark and considering that such a minute description could hardly have come from the lips of a backward African native.

They would have questioned the admissibility of his evidence as being in the nature of an accomplice's evidence. They would have regarded the evidence of the half imbecile woman Wenge as of very little value in corroboration of Busiku's statement.

They would never have questioned a woman of this kind as to Wagishu custom after murder. They would have referred such a matter to the Assessors, had there been any sitting with them, but with a Court composed of Administrative Officers, there would probably have been no Assessors in Court, as being unnecessary.

They would have examined all witnesses from the point of view of the defence as well as from the point of view of the prosecution.

There would presumably have been no advocate in Court. The Court itself would have been fulfilling such functions. The whole idea would have been, after a solemn inquiry, to try and arrive at the truth.

Administrative officers sitting as a Court would have been attempting to find out exactly how the Police obtained their initial evidence against the Wagishu after first having suspected and arrested the deceased's cousin, and having found out that the initial evidence obtained, was obtained from a frightened child of five years of age. They would have searchingly examined the two Police officers as to how they obtained such evidence.

They would further have directed their enquiries as to the movements of the deceased on the day of the crime and as to his terms of friendship or otherwise with his cousin.

They would have examined Mohamed Malik re his tracking evidence and would have done so probably on the scene of the crime. On the same point they would have called Mr. Thurburn as a witness and in this connection would have assured themselves that there was no circumstantial evidence, such as the finding of any blood-stained weapon, signs of a struggle, etc., connecting the Wagishu with the crime.

They would further have thought it queer that a man, afterwards accused, gave the first information to my Headman about the crime and later helped the Police, tracing the trail, etc., and queer also that two of the four accused (had all four been guilty) should have waited on the farm two days after Okong and Maraby had been arrested, imagining that they would naturally have absconded.

They would have wondered why four Wagishu should have trailed a corpse through grass when they could have carried it, thus leaving incriminating evidence behind them.

They ...

They would have ascertained that Okobe and Mafaby were sick men at the time of the crime; that Mandutu the child slept with her grandmother on the night of the crime and never visited Busiku's hut, and they would have realized the truth re the so called party: that there was in fact, no party at all.

They would have found out from Mohamed, details re the bloodstained spear found in deceased's cousin's hut, (for such details would have been part of Mohamed's statement, as distinct from his answers to questions), and they would probably have stopped the case after hearing the statements of the four accused, insisting in their opinion that the wrong men were on their trial.

All these different things I imagine a competent court composed of Administrative Officers, could have done, in direct contradistinction to what a High Court Judge in Kenya would have done, and this because he would not have had the knowledge necessary to prompt him to find out the different details mentioned. He would not take on himself to call extra witnesses. He would imagine that all necessary witnesses had been called by the lawyer concerned, but it is my point that a Judge investigating crime at a trial of native Africa, should be armed with the knowledge which would prompt him to unravel all the points mentioned above. Things as they are in Kenya, it is not so much the duty of a Judge to try and get at the truth as to merely sift the evidence which is put before him.

This is where the system of the trial in my mind, fails.

In the ordinary way, an Administrative Officer can address any question at a point to a witness or to accused. The Judge cannot do so because of his ignorance of native language. He merely hears the answer of a native to a question put to him by an interpreter and the remark which he hears from a witness or an accused native, in this way may often give an entirely false meaning or impression.

Interpreters as far as possible should be done away with. They are a source of danger.

I repeat my now well known case of faulty interpretation in the second Wagishu trial. The witness Busiku was asked by Prosecuting Counsel through the interpreter, "who was at your tembo party?" If this question had been put literally in Swahili or Wagishu, the witness would probably have answered, (unless he had been otherwise prompted by the Police), "I never had a tembo party" Actually the interpreter turned to the witness and said in Swahili, "Who drank tembo with you?" The witness replied giving the names of several friends. The interpreter then announced the witness's answer in English, and on the record of the Court goes down the remark that several people were at the "tembo party". The witness never said anything of the kind, and a false impression is immediately created, as was created from the time of the Police investigation into the Wagishu case, and as remained right up till the end, i.e. at the time of the second trial.

At the time of this second trial, at which I was present there was no Court official present, who even listened to what the interpreter was saying for none of them understood Swahili. The danger of this ignorance of native language, which results in the employment of an interpreter is obvious.

Interpreters would very rarely be employed, were a Court composed of Administrative Officers and will always have to be used if a Court is composed of a High Court Judge.

In the same way, assessors should be done away with. The tribes in Kenya are not sufficiently sophisticated, and could with difficulty furnish assessors with the requisite intelligence.

One of the Assessors in the Wagishu trial was a Government squatter.

They are not only of but little use (in the wagishu trial they were never referred to at all, and were never asked their opinions re the two matters of native custom mentioned at the trial), but they are a danger; for people unacquainted with the system here imagine that in some way assessors are an assistance to the Court and perhaps to the accused; that they fulfil in some measure the part of a jury in England, and give the impression that as long as they are in Court, accused are being tried by their peers who are assisting the Judge.

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In discussing the system of trial in Kenya, something should be said with regard to the "atmosphere" of the High Court, in which a native is tried. I approach this matter from the point of view of the native who is accused, and the effect of the "atmosphere" on his mind.

As I have shown he has already been made to feel in the Police investigation proceedings and at the Magistrate's inquiry that he is in a hostile environment; the Police who are seeking to gain a conviction being the predominant influence.

He then is taken under police escort into the High Court, from the cell where he has been quartered. It may be that the lawyer who has been briefed for the defence has interviewed him, and it may well be that such interview has been without result for the lawyer may not have had the requisite amount of time in which to carefully find out what is in accused's mind. He may not have possessed the instinct of sympathy which will prompt an accused native to open his mind to him and he may know but little of a native's mentality or his language. There was such an actual condition of things, I remember, when Mr. Martin who had been briefed to defend the four Wagishu accused, interviewed them in Kitale prison. He could not understand what accused were saying nor could they understand him.

With such a state of affairs, little can be gained of advantage to the defence from such an interview and the lawyer perforce has to fall back on the Magisterial proceedings to guide him.

In these, as has been pointed out, there may be little to suggest a clear line of defence. Most of what is contained in such proceedings deals with the prosecution; for in these proceedings, the aim of the Magistrate has been to see whether sufficient evidence exists against the prisoner to justify the case being sent for trial. Compare all this with the state of affairs in England, from where much of the procedure prevailing here, is copied. In England, an accused man has had legal advice before the Magistrate, and again received assistance at his trial and this from an advocate who speaks his own language and who understands his mentality.

In Kenya from the nature of things, this cannot be so and the paltry fee awarded the lawyer in Kenya will hardly be sufficient to induce him to spend much time preparing a defence. While on this point, I would ask on what lines could Mr. Daly of Nairobi have been able to prepare a defence for accused at their second trial, had I not been at hand to take him behind the scenes and acquaint him with what had happened in the Kitale police lines, etc.,

All that Mr. Daly, unassisted, could do was to make a careful perusal of the first trial proceedings and those before the Magistrate, and to mark with his pencil certain legal points which struck his mind in the proceedings, e.g. the admissibility or otherwise of the evidence of Busiku, as having been an accomplice.

All the story of police intimidation would have been as a sealed book and even had accused been interviewed by Mr. Daly and had given him an account of what had occurred at the Police Investigation Mr. Daly could hardly have used such information coming as it did from natives.

There is further, the point that African natives would not be in a position to understand what evidence could help them,

and ...

help himself in calling witnesses, because those who know will know the particularly native experiences in this respect.

Under the present system, the lawyer briefed for the defence calls his witnesses, and such duty is left to him by the judge who imagines that the interests of accused are in safe hands.

The ordinary native when asked if he has witnesses to call, generally replies that the matter is in God's hands.

Anyone conversant with this mentality will be at pains to show the bench to make him understand that at the time of such a question, the Court is trying to help him. So that as things are now, a native passing through the various stages, leaves the hostile environment which has been described, and passes, at his trial, into an atmosphere of complete strangeness and unintelligibility to him.

For these reasons, the statement of the government will through requires revision.

Natives should be allowed to call their own administrative officials, including a police officer, and other witnesses who can give evidence in their own defence. The accused would be allowed to call his own witnesses, and the law would be the same for the accused and the state.

The government is interested in the case and is interested by the fact that the accused is a native who is not understood by the court. The government is interested in the case and is interested in the fact that the accused is a native who is not understood by the court. The government is interested in the case and is interested in the fact that the accused is a native who is not understood by the court.

In the way, the witnesses make statements as distinct from answering questions put to them by counsel, the truth will be in the eye of the court to arrive at, will never be very far away, and is often before the accused will come from the accused himself.

As things are now, there is far too much danger that the truth is rarely arrived at. The law in the opinion of the judge will have been observed; but there is a very different thing from the truth being arrived at.

The proceedings of a Court of Administrative Officers should naturally be revised by the Legal Adviser to the Governor, and I maintain that such a system of trial would be much fairer than is at present the case.

no (4). The System of Appeal :-

An appeal against a sentence comes naturally at the end of the proceedings. The important thing is to change the structure on which the initial proceedings (i.e. the police and magisterial investigations and the actual trial), are based. If the structure for these is changed, so that it takes much more account of native mentality, there will never be the same grave danger of unfair verdicts and sentences. Consequently the matter of appeal becomes comparatively unimportant.

Of course the same danger exists if the appeal is to be argued by an advocate who does not understand native mentality, and who because he does not understand a native's language, is debarred from interviewing him satisfactorily.

As things are now, I believe the Senior Prison Officers take some part in framing an appeal: and because these officers are chosen ~~are chosen~~ the type of man who understands native mentality, as they live in contact with them and understand, at any rate, a little, they are, better than any other official concerned, able to get at the truth of a case from a native who is condemned and in their custody.

The more such officers are trained on to elicit truth, when an appeal is to be framed, the better: and they should be given every chance of explaining thoroughly to an advocate concerned, the salient facts as elicited from a prisoner; but as I have said it is possible as proceedings are conducted by those who understand native mentality and language, the matter of how appeals are framed is of comparative importance.

Before leaving this branch of the system, I wish to point out one fact which is to him important.

Legal Authorities in Native Africa, particularly the advocates and judges, i.e. all those brought up to follow the traditions of the English bar, are always at a loss to understand how anything can be wrong, if the English system is followed, no matter in what part of the world. They do not seem able to understand that such a system can be unfair to a native, BECAUSE THEY DO NOT UNDERSTAND A NATIVE'S MENTALITY, NEVER HAVING LIVED IN CONTACT WITH THEM.

Did they understand a native's mentality, they would have seen what I mean. Two illustrations will suffice. During, at the retrial, was describing the geography of the native huts on my farm. At this time he was becoming rapidly confused, owing to the way questions were put to him by an advocate who did not understand his mentality, and the judge, it was obvious, was rapidly concluding that the boy was lying. He was in fact doing nothing of the kind, but was trying to explain truthfully how these huts were situated.

The situation was saved by my passing ten matches to the advocate concerned, and asking him to place them in a line in front of the witness, to represent the huts. The matter was then cleared up.

Again at another time, I was discussing the case with an advocate who practises in this country. His point was that the evidence of Susiku and the woman hence must be true, as the two statements corresponded in such a remarkable way. The very fact that the woman's vivid statement did correspond in all minute details with Susiku's statement, made me suspicious. She could never have been clever enough to make such a statement on her own account. That she did - to the legal mind -

helped to prove to him that she was speaking the truth. To my mind, understanding her mentality, the reverse was the case.

The lawyer further<sup>er</sup> seemed to forget that her so called "statement" was not a "statement" at all, in the real meaning of the word, for her statement had been, all the time, in the form of answers to questions, put to her by those, who wanted certain answers, which she was aware she was expected to give.

As settlers we most of us in Kenya, live in daily contact with the natives, and, if we have any intelligence, are far better able to understand, as a result, native mentality than those, e.g. the judges and others who do not live in such contact.

To me, understanding something of this queer mentality, it is as plain as can be that the present system under which a native is tried is unfair. To the legal mind, this is not so. It is felt because our system has been evolved through centuries and is as fair as can be in a civilized country, that it is naturally fair in Africa. Those who think in this way, forget first of all that the native is an entirely different being to anything found in England and speaks and thinks in a language not understood by the Court which tries him.

Therefore if any change is to come about in the present system, there will naturally be much reluctance to countenance any change, on the part of the Legal Authorities, unless they have been Administrative Officers and have lived in contact with natives.

If any Commission ever sits in this country, with the idea of testing whether the prevailing system is fair or otherwise, one member should be an experienced Administrative Officer who among his other duties, has been a Judge, and he should preferably be chosen from a country where a different and fairer system prevails, e.g. from the Sudan.

One more word. In civilized England, advocates practice and receive remuneration for proving if they can that a guilty man is innocent in the eyes of the law. Have we reached such a stage as this in native Africa?

Surely in the present stage of native development in Africa the aim of all concerned in a Court should be to arrive at the truth without the assistance of barristers.

In all I have written about this Wagishu case, I have tried to put myself behind the native's mind and to show as clearly as I can, how the procedure followed to-day must strike him.

One intelligent native, with whom I have discussed this case, has given his version as follows:-  
 "It is clear, quite clear that the four Wagishu were innocent and that the cousin or the deceased Nandi was his murderer; but what chance had the ignorant Wagishu got. The Police convinced of their guilt, intimidated them and the witnesses to make the statements which would later secure convictions, and were able to persuade the Magistrate accordingly, and when at the trial it became a fight between the respective advocates concerned, before a judge who did not understand the natives or their language, and the advocate fighting for the Crown, and following the Police presentation of the case (which was never upset as it should have been,) was able to win".

If this is how the case strikes an intelligent native

at fault ...

an part with all the details of the case and as natives of this country are those primarily concerned, as their lives depend on the Judge's decisions, how can such a system be considered fair.

I maintain that it is the reverse of fair, and that under it, miscarriages of justice must frequently occur.

SD: OSTALD BENTLEY.  
E I P A L E 1st Oct:1930.

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The following are the changes in the system which I advocate :-

1. As To The Police Investigation :-

- (a) In all capital cases, the Magistrate should conduct this investigation with the help of the Senior Police Officer in the Station, and with him should visit the scene of the crime, and as far as possible conduct the investigation on the spot. The cooperation of the Magistrate is imperative so that the ordinary type of Police Officer in Kenya, whose career to some extent depends on his success in obtaining convictions, is not left to work single handed.
- (b) Police officers should not be allowed too much latitude in dealing with natives connected with a case.
- (c) At this Magisterial Police Inquiry, witnesses should give their evidence by means of statements, and not in the form of answers to questions, which latter method leads to many questions being asked.
- (d) The Magistrate and Police Officer should be the European employees in these cases and every chance to help them.

2. The Trial Court :-

- (a) The court should consist of a District Commissioner as president, and two other Administrative Officers.
- (b) The business of the court will therefore be conducted in Swahili (with an interpreter).
- (c) Interpreters will only be employed when absolutely necessary.
- (d) Assessors in such a court will be unnecessary. Any point of native custom or law will be referred to the competent tribal court concerned.
- (e) As it is not possible to have a defence counsel in practice in such a court, their functions will be the duties of the District Police Officer in a court as prosecutors.
- (f) The accused should be explained the charges against him, and that they can help themselves by calling evidence for their defence. (This applies also to Magisterial-Police Inquiry).
- (g) In making a statement when the time arrives for such statement. (This also applies to the Magisterial-Police Inquiry).
- (h) In making a statement in mitigation of punishment before sentence is passed.
- (i) Procedure in a court should be arranged and simplified so that accused natives understand exactly what is going on.

- (b) As mentioned re the magisterial-Police-Inquiry, witnesses should give their evidence in the form of statements to be examined on them by the Court at their conclusion.
- (1) In capital cases, the Court should if necessary, visit the scene of the crime.
- (2) The Proceedings taken at the magisterial-Police Inquiry should be in the hands of the Court.
- (3) Proceedings of the Court to be confirmed or otherwise by H. E. The Governor through his Legal Adviser.

SUB. DONALD BENTLEY.

APPENDIX B.

COPIES OF RECORDS OF JUDICIAL PROCEEDINGS.

1. Proceedings in the Court of the 2nd Class Magistrate at Kitale - Criminal Case No. 348 of 1928 (April, 1928).
2. Proceedings in the Supreme Court at Kitale - Criminal Case No. 61 of 1928 (July, 1928)
3. Order of the Court of Appeal for Eastern Africa at Nairobi (December, 1928)
4. Order of the Court of Appeal for Eastern Africa at Kampala (March, 1929)
5. Judgment of the Supreme Court at Nairobi, (September, 1929)
6. Judgment of Court of 2nd Class Magistrate at Kitale convicting Constable George Hamisi of assault on the woman Wenge. (April, 1929)
7. Sworn Statement of Musiku.
8. Letter from Magistrate at Kitale forwarding Musiku's statement, dated. 28.12.28.



Copy.

Criminal No. 91.

OFFICE AND PROCTORATE OF KENYA.

In the Criminal Appeals Nos 27, 28, 29 & 30/28 to  
H.M. Court of Appeal.  
In the 2nd class Magistrate Court  
at Kitale.

Criminal Case No. 348 of 1928.

Prosecutor ... Crown Att. Police Kitale.

Accused ...

1. ... s/o Uborai
2. ... 245/907. ... s/o
3. ... 3200 ... s/o
4. ... Maratse.

Date of issue 24/4/28.

Date of hearing 7/4/28.

Charge Murder and abetment of Murder Section 109, 114  
302 I.P.C.

Judgments Committed for trial before the Supreme Court of  
Kenya.

Chargesheet.

Criminal No. 119.

COLONY AND PROTECTORATE OF KENYA.

In the 2nd Class Magistrate's Court

At Kitale.

The Crown ..... } Prosecutor

versus

Okobe  
Muruabi  
Matanda  
Kutosi } Accused,

I. I.R. Gillespie, 2nd Class Magistrate .....  
..... do hereby charge you Okobe, Muruabi, Matanda  
and Kutosi.....

that you on or about the 13/14 of April 1928 in T.M. did  
together beat Kihengich deceased with stick so that he  
died thereby committing the offence of murder under  
302

Amended 11/J.E.  
N.S. 20.7.28.

.....  
and thereby committed the offence of murder and abet-  
ment of murder

11/J.E.R.S.

.....  
punishable under section 302 of Ordinance No..... of  
I.P.C. and within my cognizance, and I hereby direct  
that you be tried on the said charge.

Dated 30.4.1928.

SD: I.R. GILLESPIE.

2nd CLASS MAGISTRATE, KITALE.

Crown through Police.

versus

1. Okube s/o Uboore.
2. Maiuabi s/o Wasilwa.
3. Matanda s/o Wanduku.
4. Kutosi s/o Maratsi.

Accused present.

Dale A.I. prosecuting.

These persons are believed to be the murderers of a person who has as yet been fully identified, but is believed to be NDI. 375634 Alvington a herdsman found in pool of sand on Mr. C. Bentley's farm near Kitale on 14th April. The body had marks of violence upon it. 1st witness. H.W.L.A. NBI. 2459123. Musiko s/o Wandotea alias Sungura.

I work on a tractor for Mr. Bentley. I know all the accused. They all work on Mr. Bentley's farm.

My house on the farm is near the school. The accused's house is about 40 yards away (Demonstrated).

On Friday about 14 days ago I made a full indebbi or "tembo". A man called Nakaimo a driver who has gone to Bugishu was with me.

Namanda, Wachobi and a Eukidi man called Manura came to drink tembo. Baridi also came.

Namukori also came.

Matanda also came, also Kutosi the 3rd and fourth accused.

Okobe (1st accused) was in his own house.

There was an old woman called Werge was in my house also. She came about 4 p.m. I know Okobe's

daughter ...

24. 4. 28.

Crown through Police.

versus

- 1. Okube s/o Uberg.
- 2. Matuabi s/o Wasilwa.
- 3. Matanda s/o Wanduku.
- 4. Kutesi s/o Maratsi.

Accused present.

Dale A.I. prosecuting.

These persons are believed to be the murderers of a person who has not as yet been fully identified, but is believed to be NDI. 375634 Kimingien a h... an found in pool of sand on Mr. G. Bentley's farm near Kitale on 14th April. The body had marks of violence upon it. 1st witness. R.W.L.A. NBI. 2459123. Musiko s/o Wandotea alias Sungura.

I work on a tractor for Mr. Bentley. I know all the accused. They all work on Mr. Bentley's farm.

My house on the farm is near the school. The accused's house is about 40 yards away (Demonstrated).

On Friday about 14 days ago I made a full indeebi of "tembo". A man called Nakimo a driver who was gone to Bugishu was with me.

Namanda, Wachobi and a Eukidi man called Manura came to drink tembo. Baridi also came.

Namukeri also came.

Mutanda also came, also Kutosi the 3rd and fourth accused.

Okobe (1st accused) was in his own house.

There was an old woman called Waga was in my house also. She came about 4 p.m. I know Okobe's

daughter ...

daughter, her name is Mandudu. She also was in my house that night.

There were no others in my house. All these people drank tembo, the child did not drink much.

This is Rubawa's musical instrument.

I played it that night

My friends danced.

At 8 p.m. the tembo was finished at nearly the half hour.

After that the Nandi came. I do not know his name.

He was a little old, not very old. He came from Mr.

J.C. Krugir's farm. He came to see Mr. Robert's

Nandi herdsman. When Nandi came the tembo was finished.

When the Nandi came, he said "Modi" 4th accused said,

"Karibu".

My house is not divided into rooms.

I told that Nandi there was no Tembo.

4th accused annoyed the Nandi. When 4th accused

annoyed the Nandi the following were present, 4th accused,

3rd accused, the child, Mandudi the old women Werege and

I, all the rest had left.

All accused said to the Nandi "Why do you come here."

Are these any of your tribe here?"

The Nandi and 3rd and 4th accused said went out

together. When the Nandi heard from me that there was

no tembo he went out.

When they got outside 4th accused annoyed the Nandi with

strong words saying "Go, Go."

The Nandi was about to return a reply to 4th

accused saying "What property of yours have I eaten".

When 4th accused struck him.

4th accused struck the Nandi with a fungu and near his

head here (note witness points to point of his chin).

When ..

When the Mbandi wished to cry out 3rd and 4th accused shouted and they pulled him along. One caught one hand and the other.

They went to the house of Mbandi. I heard the noise and I followed. I followed with Mambangu.

When they got to that house Mbandi 3rd accused struck him. The Mbandi had stood up.

3rd accused hit the Mbandi with a rungu near the eye and he fell down.

1st and 2nd accused and a man called Makiriant who lives with 1st accused came out.

Okobe's wife had a gun and a shoulder.

Okobe could see Mbandi could see.

Okobe struck the Mbandi with a coffee stick. He struck the Mbandi on the stomach.

Mambusi 2nd accused shouted some words saying

"There used to be a Mbandi here whose name was Arap. Sisee and he stole the Swana's cattle. It will be good thing to beat this man and kill him completely."

I said not see anyone put a stick up his anus.

I said to them "You have killed this man and if the Govt. come asking about it, I shall tell. They said "It is our affair."

I left them talking about throwing him away.

They took two hoes to bury him. These are the two hoes.

Ext. 3 was in Okobe's house, 1st accused Ext 4 was in Mambusi's house 2nd accused. I did not go with the accused.

All four accused went.

The Mbandi had a blanket on him. He wore nothing else.

These belong to the Mbandi Ext. 5

I know they are his because he wore that kind of carriage.

Ext. 2 Red bush handle and hoes.  
Ext. 3 Red bush handle and hoes.  
Ext. 4. plum handled hoes.

Ext. 5 and 6.

I do not know what the accused did with the blanket. I went home. No one else came to my house. I went back to my house. I found the mother of 1st accused's wife's mother. Werge. No one else came. N. adudu was in my house. She arrived there before I did.

On Saturday I saw 2nd accused in the store. He said to me "A hyana has killed a bush buck, let us go and get the meat" I said, "Two people are enough for that. I am not going to get into trouble with the ~~authorities~~ leaving my work."

He was alluding to the dead Khandi. I was grinding poison 1st accused came to me saying in our language "We found the body of a murdered man in our river." Mrs. Nampara was standing there. He asked and I told him what 1st accused was saying.

No one told me to refuse to give information about this. No one spoke about not giving information.

1st accused states:

R.O.C.

"He is speaking the truth I have nothing to ask him"  
2nd accused states: He speaks the truth.

3rd accused did not live in my house leaving others drinking tembo in our hut.

It was all four who killed the man but 3rd and 4th accused first struck him and pulled him along. (Kutosi). 4th accused commenced the trouble.

R.O.C.

ED: I. H. GILLESPIE

Remanded to 25.4.24.

ED: I. H. GILLESPIE

25.4.28. Re-opened, accused all present.

AD. by Court  
Police Reserve

AD.

witness under  
3rd accused.

witness under  
4th accd: AD.

I do not know what the accused did with the blanket. I went home. No one else came to my house. I went back to my house. I found the mother of 1st accused's wife's mother. Werge. No one else came. Mandudu was in my house. She arrived there before I did.

On Saturday I saw 2nd accused in the store. He said to me "A hyena has killed a bush buck, let us go and get the meat" I said, "Two people are enough for that. I am not going to get into trouble with the ~~Magistrate~~ by leaving my ~~work~~"

AD. by Court  
Police Reserve

He was alluding to the dead Mandi. I was grinding posho 1st accused came to me saying in our language "We found the body of a murdered man in our river." The newspaper was standing there. He asked and I told him what 1st accused was saying. No one told me to refuse to give information about this. No one spoke about not giving information.

abt

1st accused states:

R.O.C.

ALL.

"He is speaking the truth I have nothing to ask him"

2nd accused states: he speaks the truth.

witness under  
3rd accused.

3rd accused did not live in my house leaving others drinking tembo in our hut.

witness under  
4th accused: XXX.

It was all four who killed the man but 3rd and 4th accused first struck him and pulled him along. (Mitosi) 4th accused commenced the trouble.

R.O.C.

SD: I. W. GILLESPIE.

Remanded to 25.4.24.

SD: I. W. GILLESPIE.

25.4.24. Re-opened, accused all present.



1st witness is the wife of the 1st accused.  
2nd witness.

was avenge d/o Askare A/S English woman.

I am wife of 1st accused.

I live on Mr. Bentley's farm.

I remember the day the Mhandi died on our farm.

it was on a Saturday.

I was in my house at the time.

I was by myself.

My husband was there, he was sick.

I saw the Mhandi while he was being murdered.

he was brought by 4th accused and accused.

They beat him.

They killed the Mhandi. They struck him. They struck him  
on the back and on the side. My husband struck him on  
the stomach.

Muraali and accused was present.

They all beat the deceased.

2nd accused struck the Mhandi on the shoulders with  
a stick.

I saw 1st witness, the Mhandi was taken from his  
hut. 1st witness was present when the Mhandi was  
beaten. Muraali was present with me.

I saw the Mhandi had died completely. They went to  
bury him.

I know these fees.

Fee 1 belongs to me.

Fee 2 belongs to 2nd accused.

That Mhandi I have not known. That was the first  
occasion I saw the Mhandi.

They beat the Mhandi for nothing because he came at  
night. One cock was killed. It was killed by 4th  
accused. The cock belonged to my husband. All four

(6)

accused ate it. I did not eat any of it. It is not the custom for women to eat fowl.

R.O .C.

My husband was sick, he was in his house. I went to drink tembo leaving him at home sick. I returned early because my husband was ill.

I did not see the Mhandi bringing any of the ingredients of tembo to 1st witness before the tembo drinking. 1st accused was not present when the Mhandi was beaten at first witness's house. There was shouting and the Mhandi was brought to the 1st accused's house. Muhori, Baridi and 1st witness did not come. Muhori and 1st witness stayed outside.

3rd and 4th accused entered 1st accused's house. The Mhandi was killed outside the house, he was not brought inside.

It was the 3rd and 4th accused who took the body to bury and all the others. There were three who went to bury the body. 3rd and 4th accused and Wasiranya.

When they had buried the body, they ate the cock. They ate it about 1 a.m. that night.

No questions.

I left the 3rd accused in 1st witness's house. I saw 3rd accused kill the Mhandi. He brought him from 1st witness's house to his house.

It was not Muhori, Baridi and 1st witness who killed the Mhandi.

Muhori was with the European. I did not see the others. I did not see a stranger who I had not seen before, he came that day to the farm. I saw him with the accused when they buried the Mhandi.

The stranger's name was Wachovi.

No it is not Mr. Bentley's farm now.

The 1st witness told me to go to my house in case my sister

was ill in the first

2nd witness (Kwaku)

Contd. I saw the 4th accused eating the cock. My words

are not the outcome of envy, because you belong to another clan.

I have not told any lies whatever.

Sd/- I.R. Gillespie.

I understand O. Koto... for oath...  
of age. I know...  
Ngoma on our farm...  
present.

I know first

He was at his own house, he was drinking...  
Ngoma was in the house of Kwaku and is...  
came and then accused to 1st witness...  
witness's house with an old...  
witness's hut. He was killed.

These accused killed him.

They struck him with sticks and clubs. It was 3rd accused  
who struck him first, then fourth accused hit him. The 1st  
and 2nd accused did not touch him. My father was present.  
The man was beaten at night at 1st witness's hut. He was  
beaten outside 1st witness's hut. Then the accused took the  
Kwaku to the corrugated iron belonging to the European and  
beaten him there. I did not follow. I stayed in the house.  
That time 3rd and 4th accused struck the man outside  
witness's house. They carried him away. I saw 2nd accused.  
I saw him at his house. 2nd accused went to 1st accused's house

while my mother was lighting a fire there.

2nd accused found me in 1st accused's house. I did not see the Wandi near 1st accused's hut. I saw him near 1st witness's house.

1st accused was lying down asleep in his own hut when 2nd accused came. I did not see 2nd accused do anything that night.

I slept in 1st witness's house that night.

That night when the people were drinking tembo.

After that night I went to 1st accused's hut.

I found my father and 1st accused were drinking tembo. I found my father and 1st accused were drinking tembo.

The Wandi was killed at that time.

A accused ... R.O.C.

SA/ L.A. Gillispie.

I remember.

... to ...

... accused ...

... names.

... W. ...

I work for Mr. ...

I know ... accused.

I do not know that Wandi was killed at our farm.

I do not know anyone of the name of Busins or Sangura.

I remember Sangura now. I lived in the 2nd accused's hut.

At other time I live on Captain Orr's farm.

I never lived with 1st accused.

I remember that day people drank tembo. I was at 2nd accused's hut.

I did not drink tembo ...

le. This witness appears hostile. May I examine him as such?

I am of the same opinion, the other witnesses have been reluctant. He may be examined as such.

I went to bed at 8 p.m. On the night of the tembo I did not help to bury that Mrendi in the mud.

I did not come out of the hut with 1st or 2nd accused. I did not see people hit the Mrendi.

I did not see 2nd accused go out of the house.

I did not see 3rd accused kill anyone.

5th witness.

UCU. 0586249 Mr. /O WaSpour. A/S.

I work as a ploughman for Mr. Bentley.

I know all the accused.

I sleep in the same hut as 4th accused.

After night of the tembo, I was sick in 4th accused's hut.

4th accused went to 1st witness' house to drink tembo.

4th accused returned at 9 p.m. that night. I heard no noise before

4th accused came in.

Next morning 4th accused told me they had found a Mrendi

in the river.

He told me nothing else.

le. May I have the privilege of examining this man as a hostile

witness?

Yes.

4th accused told me nothing about the Mrendi. I did not

see 4th accused's vest that night.

I did see 4th accused's vest that night.

I did not see blood on 4th accused's vest that night.

This witness appears hostile. May I examine him as such.

I am of the same opinion, the witness appears to have been most reluctant. He may be examined as such.

I went to bed at 8 p.m. On the night of the tembo I did not help to bury that mbandi in the mud.

I did not come out of the hut with 1st & 2nd accused. I did not see people hit the mbandi.

I did not see 2nd accused go out of the house.

I did not see 3rd accused kill anyone.

5th witness.

UGU. 0586249 Msaba s/O Waspor S.

I work as a ploughman for Mr. Bentley.

I know all the accused.

I sleep in the same hut as 4th accused.

After night of the tembo, I was sick in 4th accused's hut. 4th accused went to 1st witness's house to drink tembo. 4th accused returned at 9 p.m. that night. I heard no noise before 4th accused came in.

Next morning 4th accused told me they had found a body in the river.

He told me nothing else.

May I have the privilege of examining this man as a hostile witness?

Yes.

4th accused told me nothing about the mbandi. I did not see 4th accused's vest that night.

I did see 4th accused's vest that night.

I did not see blood on 4th accused's vest that night.

The people left 1st within 2 hours from the scene. I saw no mark on any record of having killed anyone. I did not see the accused pull the body along with him in his hands.

I did not see 1st witness Richard or Baisdi kill the man.

A.O.S.

By I.N. & J.L. 1919.

Dr. J. H. Charles E. Cohen, S/S.

San-Diego District Surgeon T.M.

I examined a body on 14th of April on Mr. Bentley's farm. The body was that of a well-nourished male native adult, 54 years of age. I found a recent lacerated wound above the left ear, on removing the scab, there was extensive bruising of the tissues. On opening the skull there was a fracture extending from the left ear to the top of the head.

There was a fissured fracture towards the top of head and another extending backwards. There were no other signs of injury on the body. I believe there was a small superficial wound over the eye. I noticed no wound under the jaw.

The jaw bone was broken.

I noticed the jaw chaw rather distended with wind. There was no external marks of a blow on the forehead. The fracture of the skull was the cause of death. It must have been a severe blow with a heavy instrument. I remember there was a wound over the eye. There was no injury to the skull underneath it.

When I examined the body, there was a faint mark on the

TH. H. S.

Witnessed by J. H. S.

The fracture was immediately under the external wound I described. I examined the stomach externally but not internally. To cause any injury internally the blow would be likely to leave an external mark.

R.O.C.  
I.R. Gillispie.

...bring in Mubori.

Do you wish to call this in as a witness?

A 11 reply no.

Do not wish to call him.

S. I.R. Gillispie.

I do not wish to call this.

I do not wish to call.

I wish to call this.

for evidence for a while.

I produce NK 165049 - ...

I do not wish to call this man.

Accused all state they do not wish to call this.

Witness. Joseph Dale. S/S

I am a ... Inspector Police, Kitale, ...

On 14th April at 10.50 a.m. I received a report from

Mr. E. Greed.

Mr. H.E.D. Lewis proceeded with me to the ... of

Mr. O. Bentley. This D.M. could not come on account of

pressure of work.

On arrival at the scene at 11 a.m. I was shown a mud-pool by the Hygiene Officer ... of Mwendu. I saw the

lower part of a native protruding from the mud-pool and the

body removed.

The body was entirely naked and appeared to be that of

an adult Mwendu.



On a rough examination I found a cut of about 1 1/2" long by 1/4" wide over the right eye and cheek. A slight cut under the right eye. The folds of the skin. It was difficult to measure, probably about 1" long. The anus was red and inflamed, and blood was trickling out of it.

In the body...

used...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

On evening of 16th on information received accused Nos. 1 and 2 were arrested at 6 p.m. On 18th 3rd and 4th accused were arrested on further information.

On 14th when I returned with the doctor 1st and 4th accused informed they had lost the spoor owing to the rain just beyond where I lost it.

There was very heavy rain that afternoon.

(Note by Court.) 1.50" fell.

On 15th in the morning about 11 a.m., 1st and 4th accused shewed us alleged track, very faint of something having been drawn through the short grass leading in the direction indicated in the sketch and finally alleged to be lost at a wagon on Mr. A.G. Roberts' farm, some 200 yards from the hut of a Nandi herd called Kipketi, an isolated hut.

We have reason to believe that the report of the Finger Print Department will show that deceased was Kipketi's brother.

Kipketi filed passed the body but gave no information.

On 14th before leaving the scene to go for the doctor I tried over the ground looking for tracks and could not see them, I also had police over the same ground. The tracks were pointed out by the accused/after heavy rain on Sunday

It is possible but improbable that tracks were there on Saturday.

R.O .C.

Sd/ I.R. Gillespie.

May be removed as it does not appear to have any bearing on the case.

Photo of deceased put in by Mr. Dale.

Case adjourned to 2.5.28 no time to complete.

Sd/ I.R. Gillespie.

All accused present. Case re-opened.

By Court. Busiko.

I am a Mgishu.

When a Mgishu native has killed a person on returning to his home it is the custom for him to kill a sheep. If he has no sheep he kills a fowl.

No questions.

R.O.C.

Sd/ I.R. Gillespie.

I produce a certificate certified by the Finger Print Department of the deceased. I can swear that the Finger Prints on the reverse were taken by myself and E.P.C. Landell. On 14/4/28 from the fingers of the deceased and pasted them on this sheet Police Form 20. The deceased appears to be NDI 575684 and from this Ext. 9 it would appear that his name was Kimengich arap Yimalil, employed by J.C. Kruger, Kitale.

The method by which I have taken this was by cutting out the paper and then taking the finger impression by rolling the paper round the fingers.

No questions.

R.O.C.

Sd/ I.R. Gillespie.

The accused are told of the charge to be laid against them and asked if they have anything to say.

Okobo states:-

I was in my bed with my wife and at 9 p.m. when I heard people shouting outside.

When I heard the noise I went out and I was ill at the time.

I saw the Mnandi. He had been beaten and he was dead some time.

When I saw the body, my head ached and I returned into the house and left these people Mtanda and Kutosh dragging the body. It was very dark.

The first witness Busiko was present at the whole affair from striking to burial.

I saw first witness at my house and afterwards he went to his house.

I was a sick man and I had not the strength to hit or kill a man. I was asleep. That is all I have to say.

On R.O. states:- "When they buried the body 1st witness had returned to his house."

R.O.C.

Sd/ I.K. Gales, jr.

Wishes to call no witnesses.

Mufabi, states:-

I was asleep and I was awakened by shouts. I thought the noise was as of people coming from tembo. I heard the noise, I did not go out at night. I did not open the door. I heard the shouts and thought it was one of the boys of tembo.

R.O.C.

Sd/ I.K. Gales, jr.

Have no witnesses.

I have no witnesses to call.

Mutande states:-

This is malice brought about by the fact that we came from the tembo we did not see the Mbandi. They had made the Mbandi killed the Mbandi and had nothing to do with the Mbandi.

They pulled him down by the hands for the purpose of making people think we killed him. This is a maliciousness against us.

Have you witnesses?

I have no witnesses to call.

R.O.C.

Sd/ I.K. Gales, jr.

Kutosi, states:-

3rd accused and I left the tembo at 7 p.m. and went out and did not see the Mr. ad there. They have taken an oath for nothing. This is malice which has brought us against us and they themselves murdered him. 3rd accused and I are of one clan and have friends and they put this malice upon us saying that we killed the man.

R.D.C.

He is a witness?  
I have no witnesses  
Charged, found and...

FINDING:-

I find that there is sufficient evidence against the four persons now charged before committed to trial with whom they are charged and I commit them for trial before the Supreme Court of Kenya.

R. R. Gillespie.

HC Class Magistrate.

0.4.50.

Substance of Information In Charge

That the body of a native was found buried in a mud-pool on Mr. O. Bentley's farm on 14.4.28 at about 7.30 a.m. A Post Mortem held at 5 p.m. on the same day revealed the fact that his skull was fractured.

No one as yet has been able to identify the body. No natives are missing from the surrounding farms.

Forwarded to  
Magistrate

Time: 9.0 a.m.

Date: 16.4.50

Sd/ J. Dale.

Officer in Charge Kitale Police Units



CGFY.

EAST AFRICA PROTECTORATE

In His Majesty's Supreme Court of Kenya,

at ..... Nairobi,

Criminal Case No. 61 of 1928.

OF CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928 to  
H. M. Court of Appeal for E. A.

at the Sittings holden at Kitale on the 21st day of July, 1928.

PROSECUTOR .....

Rex.

Accused. ....

1. UGU. 0382522 Okube s/o Uboro.

.. NBI. 2458907 Mafuabi s/o Waselwa.

3. TN. 4959208 Matanda s/o Wanduku.

4. Kutogi s/o Maratse.

Date of hearing \_\_\_\_\_

Charge Murder Sec. 302 I. P. C. \_\_\_\_\_

Committing Magistrate I. R. GILLESPIE ESQ., \_\_\_\_\_

Court of Committing Magistrate II CLASS MAGISTRATE. \_\_\_\_\_

Date of Commitment 30. 4. 28. \_\_\_\_\_

Original Criminal Case No. 348 of 1928 of Kitale. \_\_\_\_\_

Judgment.

... ..

C O P Y

EAST AFRICA PROTECTORATE

In His Majesty's Supreme Court of Kenya,

at ..... Nairobi.

Criminal Case No. 61 of 1928.

cr/ CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928 to  
H. M. Court of Appeal for E. A.

at the Sittings holden at Kitale on the 21st day of July, 1928.

PROSECUTOR .....

hex.

Accused. ....

- 1. UG6.0382520 Okube s/o Uboro.
- 2. NBI.2458907 Murubi s/o Waselwa.
- 3. TN. 4989208 Matanda s/o Wanduku.
- 4. Kutosi s/o Maratse.

Date of hearing \_\_\_\_\_

Charge Murder Sec. 302 I.P.C. \_\_\_\_\_

Committing Magistrate I. R. GILLESPIE ESQ., \_\_\_\_\_

Court of Committing Magistrate II CLASS MAGISTRATE. \_\_\_\_\_

Date of Commitment 30. 4. 28. \_\_\_\_\_

Original Criminal Case No. 348 of 1928 of Kitale. \_\_\_\_\_

Judgment. \_\_\_\_\_

... ..



C O P Y.

E A S T K E N Y A P R O T E C T O R A T E.

In His Majesty's Supreme Court of Kenya.

at ..... Kisumu.

Criminal Case No. 61 of 1928.

of/ CRIMINAL APPEALS NOS. 27, 28, 29 and 30 of 1928 to  
H. M. Court of Appeal for E. A.  
at the Sittings holden at Kitale on the 21st day of July, 1928.

PROSECUTOR .....

Rex.

Accused. ....

- 1. UGU.0382522 Okube s/o Uboro.
- 2. R.B.I.2458907 Maruabi s/o Waselwa.
- 3. T.N. 4969208 Matanda s/o Wanduku.
- 4. Kutosi s/o Maratse.

Date of hearing \_\_\_\_\_

Charge Murder Sec. 302 I. P. C. \_\_\_\_\_

Committing Magistrate I. R. GILLESPIE ESQ., \_\_\_\_\_

Court of Committing Magistrate II CLASS MAGISTRATE. \_\_\_\_\_

Date of Commitment 30. 4. 28. \_\_\_\_\_

Original Criminal Case No. 348 of 1928 of Kitale. \_\_\_\_\_

Judgment.

Charge Sheet.

COLONY and PROTECTORATE of  
KENYA.

IN THE 2nd Class Magistrate's COURT

AT ..... Kitale

The Crown

\_\_\_\_\_  
\_\_\_\_\_

} Prosecutor.

versus

Gyobe  
Kutusi  
and  
Kutusi

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

} Accused.

I, I. R. Gillespie, 2nd Class Magistrate

do hereby charge you Gyobe, Kutusi, and

and Kutusi ..... that you on or about the 13/14 of April 1928 in T.N. did

together beat Kimengion deceased with stick so that he

died thereby committing the offence of murder

.....

and thereby committed the offence of murder and abetment of

murder ..... punishable

under Section 302, of Ordinance No. ..... of I.P.C.

and within my cognizance and I hereby direct that you be

tried on the said charge.

.....

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.....

Sd/- I. R. Gillespie,  
2nd Class Magistrate,  
Kitale.

20. 7. 28.

Davis, Crown Counsel for Prosecution.

Martin, for the defence.

The charge having been read over to accused they pleaded as follows:-

Accused No. 1. I did not kill him, I saw him after he had been killed.

Accused No. 2. I did not kill, I found him dead.

Accused No. 3. I did not kill, I saw the body and called Namedi to see it.

Accused No. 4. I did not kill, I saw the track where the body had been dragged, and I thought it was an animal, and I followed and saw the body.

Assessors:-

No. 1. Abdulla s/o Luture.

No. 2. Ochumdu anka.

No. 3. Murlero s/o Kisambo.

CHARLES EDMOND GOWEN, sworn:-

I am District Surgeon in charge of Trans Nzola District. I remember on 14th April 1928 examining body of a male native on Mr. Bentley's farm. Police Inspector Dale was present. There was a lacerated wound on the left side of his head above the left ear. The wound must have been caused by a heavy instrument such as a rungu. On removing the scalp, there was extensive bruising of the tissues, and on opening the skull there was a fracture extending from above the left ear to the top of the head. The injury might have been caused by a heavy blow with a rungu. There was a small superficial wound on his right eyebrow. The fracture of the skull was immediately below the external wound. There was no other sign of injury. I made the ordinary Post Mortem

examination...

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Assessors:-

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examination. I paid more attention to the head than to the rest of the body. In my opinion death was caused by fracture of the skull, the result of a heavy blow caused by a heavy instrument. I should think that the body had been lying there dead three or four days. I think there must have been more than one blow struck.

No question.

Head over correct.

ED: J.E.R.STEPHENS.

JOSEPH DALE, sworn:-

I am Inspector in charge of police at Kitale.

I remember receiving on 14th April information from Mr. Creed at 10. 33. a.m. I proceeded to the farm of Mr. Bentley. I was taken to a mud pool on that farm, and there I noticed the knee cap of a native protruding from the mud. I had the body removed. The body was entirely naked. In my opinion the native was of the Mandi tribe. I made a cursory examination of the body. There was a cut over the right eyebrow about 1 1/2 inches long and about a quarter of an inch in width. There was a ragged cut underneath the chin, the length of which I could not state as the skin was wrinkled, but probably an inch long. There was blood oozing out of the left ear, when we took the body out of the mud. The stomach was swollen as if bruised. The anus was red as if bruised, and in my opinion not through illness. In my experience in other cases of a similar nature with this tribe, it often happens they put a stick up the anus, with a vicious intent to hurt. I was also present at the examination by the doctor. I identify the body examined by the doctor, as the one found in the mud pool. I found tracks of the body having been taken from a place to the pool. On information received I followed up tracks from mud pool in the direction of Waglan Lines, past the top

and ..

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end ..

and of their huts up to a distance of about 100 yards from the mud pool. I lost the track near the Wagishu Lines, somewhere about 40 to 50 yards from the centre of their lines, and a pile of wood ash was there, as they were burning waste stumps there. It was a broad track as if some heavy body had been dragged along. I took the finger prints of the deceased. I forwarded the finger prints to the officer in charge of the Finger Print Bureau on 16th April. I tried to identify the deceased by other means. I obtained all the labourers on the surrounding farms, and I had them all filing past the body to see if they could identify the deceased. All stated they did not know deceased or his tribe. Some volunteered the information that he might be a Kitchu, and others a Nandi, but no one would definitely state his tribe. No death of a native was reported from the neighbouring farms. Before I received the classification from the Finger Print Bureau I received information that a herdsman had been missing since April 15th, from a Mr. Kruger's farm about three or four miles from Mr. Bentley's farm. The name given was Kimingich Arap Yemlit. The result of the classification received from the Finger Print Bureau stated that the finger print impressions were those of Kimingich Arap Yemlit. I produce the certificate exhibit 1, I left two of the accused with an askari to follow up the track. They volunteered to show the track and I left them to follow up. They were accused Nos. 1 and 4. Very heavy rain was approaching and I left them to attend the post-mortem examination. Nos. 1 and 4 were the first to give the information about the track. Accused Nos. 1 and 2 were arrested on 16th April on information received. Accused Nos. 3 and 4 were arrested on April 18th.

On ...

On the day I arrested Accused No. 4 and on the day he appeared in the Lower Court, he had on a white flannel vest similar to accused No. 3. On the white flannel vest of accused No. 4 there were spots of dry blood. But when he appeared in court with a red vest on. On Sunday 15th April I searched Nos. 3 and 4 and showed me tracks continued on the wood ash, but they were narrow tracks but they were not similar to the track from the wood ash to the mud pool. A further track ended on an old waggow road between Mr. Scotty's farm and Mr. Robert's farm. The end of this track was an 80 yards on Mr. Robert's farm from the hut was discovered to be the same as that the track would be made of the accused. I marked them

Accused No. 3 and No. 4 were arrested and identify the earrings Exhibit the deceased. They are of No. 4 were found in the were taken on April 15th them and similar to what was earth which one would expect seen working on coffee land as they found

One of the same kind of mud from any other part of the swamp, except that the swamp had not been cut up where the deceased was found. The brother of the deceased filed part the body, but he stated he did not know deceased. I arrested him on suspicion on account of his manner. I released him on getting further evidence. From the ash heap where I lost my track and the waggow huts were not more than 60 yards. I examined road the waggow



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Lines, and I found no trace of a struggle. I found no trace of a person being dragged from the accused's huts to the place where I lost the track from the mud pool. I know Mr. Bentley's farm.

Read over correct.

ED: J.E.R.STEPHENS.

SUSPENSE S/O WANDOTI affirms:-

I work on a tractor on Mr. Bentley's farm. I know all the accused. They work on the same farm as I do. Their huts are very near mine. I remember a Nandi being found in a mud pool on the farm where I work. I remember the day when a police officer got the body from the pool. I remember two or three days before the body was found, I had a tembo party in my hut. The tembo was ready on the Friday evening, and the police officer found the body the next morning. I did not invite anybody, but the people from the farm came. Accused Nos. 3 and 4 were there and there was a girl named Mandutu there. Accused Nos. 1 and 2 were in their own huts that evening. Accused No. 2 came to my hut and asked me to give him some tembo, and I did. He drank it and went away. I remember a Nandi coming to my hut at 7.30 p.m. The tembo was finished. The Nandi was a very old man. I did not know from what farm he came. I had never seen him before in my hut. I did not know his name. When he came, Accused Nos. 3 and 4 were in my hut. The Nandi said nothing when he came. He said "Hodi", and the accused Nos. 3 and 4 said "Come in". We spoke to him in Kiswahili, but he did not reply, but spoke in Nandi. We gave him no drink, because all was finished. Mandutu was present when the Nandi came. He did not remain for long. I told the Nandi the tembo is finished and he started to go out. He stood outside. Accused Nos. 3 and 4 followed ...

6

followed him. They did not say anything when they followed. I heard them talking to the Nandi outside. Accused No. 4 asked the Nandi why he had come. He said "Is there any of your tribe herer". Both accused held the Nandi by the wrists. They took him towards the hut of Accused No. 2 about 25 yards away. When he came close to accused No. 2's hut, accused No. 4 struck the deceased on the chin with a stick. No. 3 accused had no stick. Accused No. 4 had a stick similar to a rungu with a knob. The Nandi cried out when he was struck. He threw his head aside and blood came out and then he fell down. Accused No. 1 came with a stick and struck the deceased on the stomach. He could not get up as his teeth were loosened. Accused No. 2 struck the deceased on the back of the head with a knobbed stick. He only hit one blow. He was on the ground when he received the blow on the head, and afterwards he remained motionless. He was sitting on the ground, supporting himself on his hand, and after the blow he fell flat and remained motionless. I saw accused No. 2 there, he said beat him very much, as there used to be a Nandi here named Saisi who stole Mr. Bentley's cattle. Accused No. 2 had a stick in his hand. He said this before Accused 3 struck the deceased on the back of the head. I did not see accused No. 2 strike deceased. It was after accused No. 2 said "strike him very much" that Accused No. 3 struck deceased on the back of the head, and he fell. Mandutu also saw this and Wabenenge the wife of accused No. 1 saw it. I said "now you are killing this Nandi, what has he eaten" They said "We were playing, but he is dead now, what can we do?" I said "you have killed this man, if the Government find out, and they come and arrest me, I shall tell". Deceased was

dead.

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6

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dead

dead. Accused No. 4. gave him the final blow on the eye-brow when he was lying on the ground. I left them discussing where they should take the body, I heard them saying "I think we should take the body to the river". - I then went to my hut. I did not see them take the body away. The shoes exhibit 4 belong to accused Nos. 1 and 2. I never said before the District Commissioner "They took two shoes to bury deceased".

ex. 4.

The bandi had a blanket on him when lying on the ground. The ear-rings Exhibit 3 belonged to deceased. he was wearing them on that day. No one in our village wears such ear-rings. Nandutu and the wife of accused No. 1. could also see what I saw. I next saw the four accused in the morning at 3.30. a.m. Accused No. 4. called accused No. 1.

ex. 3.

and said "let us follow the track", when I took the track to the store I met accused No. 2. I asked the other accused what they had done they told me they had followed the track. In my own mind I thought they were talking of dragging the deceased. I saw them again at the store at about 6.30 a.m. Accused No. 2 wanted to go to the river where accused nos. 1 and 4 were, and I said "let us put a sack in the mill and grind flour and wait here, and when they get there they will bring it". Later the neapara came, and we ground a sack of flour. Then Accused No. 1. came and said "we have found a body, somebody has killed a person, and brought him to our river. When Accused No. 1. was talking to me in the Gishu language, the neapara asked me what we were talking about, and I told him. The neapara is an Arab, and I spoke to him in Kiswahili. Nobody else said anything to me about the dead man. It is the custom in our tribe, if a man is killed, to kill something. It is our custom, if a woman is killed to kill a hen, and if a man is killed to kill and eat a cockerel.

It ...



not about your help. I did absolutely nothing. I never attempted to do anything.

re-ex.

if I had shouted there was no one who could have come and helped me.

Read over correct.

SD: J.E.R. STEPHENS.

of Court.

Accused No. 1. was sick and his wife came and got a cup of tembo for him.

Read over correct.

Sd; J.E.R. STEPHENS.

Adjourn till 2 - 15 p.m.

Resumed at 2. - 15 p.m.

WENCE D/O KAKABA, arr 11msr-  
I am the wife of accused

three months ago I was living with him on Mr. Bentley's farm. I had been there two weeks. My husband had been there only two weeks, we had come from another farm. I remember a Nandi being killed about three months ago. I was inside the hut and I heard a noise. I opened the door and noticed people outside. I saw a Nandi outside. I saw someone beating the Nandi. I saw someone beating the man but could not see who it was as it was dark. I remember telling the District Commissioner that I saw the persons who struck the Nandi. I saw Accused Nos. 3 and 4 strike the Nandi. I saw them strike the Nandi with sticks, my husband Accused No. 1. did not go to the place where the Nandi was beaten, but he went to the door. I told the District Commissioner that I saw my husband accused no. 1. strike the Nandi, but the Nandi was dead then. Accused no. 3 only looked on, he did not strike the Nandi. I did not hear him. I saw the body taken away. I saw all the accused standing there. One of the hoes (Exhibit 4) (the smaller one) is mine ...

mine and the larger one belongs to accused No. 2. The hoes were taken to bury the dead man. Accused No. 3 took the small one, and accused No. 4 the large one. All went. They went at night time towards the river. That was where the body was found. I saw them take the body away. they dragged it. The body was 10 yards from our hut. I saw busiku and Nandutu there. My husband accused No. 1. has four chickens. Some time after the Nandi died my husband killed a cockerel. After burying the Nandi the four accused returned and ate the cockerel. Nobody else ate any of it. They themselves cooked it.

I stood just outside the door. There was no moon. There was no rain that night. It was dark, but I could see. Even before they came to eat the cock. I saw the men were the accused. I could recognise them because I stood near them. My husband accused no. 1. handed the hoes to Accused no. 4. My husband was too sick to go to a tembo party, so I went to fetch some and brought it in a basin. He drank it in the morning. My husband did not drag the body, but he followed it. I saw the body being dragged towards the river. There is a path to the river. They dragged him along the grass, but not along the path. I know because many people in the morning followed the track. I went in the morning when other people were going. I saw busiku there when the nandi was being beaten. I did not see accused arrive when I went outside. I saw them there. Nandutu was in my hut when the man was brought. I am her mother. She went to sleep in busiku's hut with her grandmother after the nandi was buried. There was a noise of talking and shouting out. There was no rain, but it was dark.

Nandutu was in my hut until after the Nandi was buried. If Nandutu said that she was in busiku's hut

before ...

before the Nandi was struck, she would be telling a lie.

Read over correct.

SD: J. E. R. STEPHENS.

NANDUTI D/O OKABO, Accused No. 1, a child of about five years of age.

I know accused No. 1. His name is Okabo. He is my father. I sleep in the hut of Okabo. I was in the hut when some men were drinking tembo. I know Accused Nos. 2 and 4. Their names are Matanda and Autosi. I remember giving evidence before the District Commissioner and what I said.

The witness who is a very small child now refuses to repeat anything of what she said to the District Commissioner.

Adjourn till 9 - 10 ...

J. E. R. STEPHENS

Returned to ...

MABAKA S/O ...

I am a ...  
four accused ...  
Nos. ...  
said ...  
no. 4. ...  
"where if ...  
whether ...  
aim much ...  
had diarrhoea ...  
medicine. ...  
that a Nandi had been killed ... on ... Monday.  
Monday. The Nandi was killed ...  
on Monday. Accused No. 2. ...  
blood on Accused No. 2's chest, as I was covering my head  
with a blanket. I got up on the Friday after the  
government had discovered the body. I was taken sick





present when the police dug the body out of the mud on Saturday and I saw accused No. 3, at the time the body was dug up. Accused No. 1, had been instructed to follow the track, and accused No. 2, had gone away, and I, together with men to dig up the body, followed the track with Police Officer, and lost it near the accused's hut. When I was in the Sudan I was an expert tracker, and I lost the track that day. I did not ask any of the accused about the matter, the track followed towards Swana Roberts' farm, and Accused No. 4, was sick. I asked accused No. 1, who had killed the handi, and he said the track comes from Swana Roberts' farm. I heard about a chicken being killed and eaten, but it was afterwards. I heard it from the toto after accused nos. 1. and 2. had been arrested. After Accused Nos. 1. and 2. had been arrested I was told they had eaten the chicken, and then busiku and Accused nos. 3 and 4. were arrested. I was told by the Police that Accused Nos. 3 and 4. had been arrested on suspicion.

read over correct.

SD: J.E.R. STEPHENS.

HAZOBI S/C MBANAS affirms:-

I was coming from Cherengani on Sunday, and I met the neapara, and he asked me what are you looking for, and I said "I am looking for work". I heard that the handi had been already killed. I was working in Cherengani and my master was going to England, and he signed me off, and said "go and look for work". I left Mr. Knowles' farm at 11 A.M. on Sunday and arrived at Mr. Bentley's farm at 2 P.M. I was signed off on Friday 13th April at 2 P.M. and I went to see a friend at Mr. Godley's farm and spent the night

busiku ...

Busiku brought into Court and asked whether the witness is the Wachobi he mentioned as being at his tembo party, and he replies it is not the man.

Witness Wazobi states he never made a statement to the Police.

Case for the defence closed.

Martin for defence addressed the Court and assessors.

Opinions of Assessors.

Assessor No. 1.

I find all the accused guilty of murder.

Assessor No. 2.

They are all guilty of murder. They killed and ate the cockerel, and Accused No. 1. is old, and gray-haired and if he did not wish to take part he could have stopped.

Assessor No. 3.

They are all guilty.

-----

J U D G M E N T S :-

The four accused Okobe, Mafuabi, Matanda and Kutosi were charged before me under Section 302 I. P. C. of the murder of a Nandi. A Nandi on the morning of April 14th was found buried in a mud pool with the knees protruding on Mr. Bentley's farm and there was a track leading from the mud pool to an ash heap near the hats of accused.

The Chief witness for the prosecution was one Busiku who worked with accused on Mr. Bentley's Farm. On Friday April 15th he gave a tembo party, and according to his story when the tembo had all been drunk, and his friends had gone there, only remained in the hut himself, accused Nos. 2 and 3 (Matanda and Kutosi) a child of about 3 years of age Manduru (daughter of Accused No. 1.) and an old woman

Busiku brought into Court and asked whether the witness is the Wachobi he mentioned as being at his tembo party, and he replies it is not the man.

Witness Wazobi states he never made a statement to the Police.

Case for the defence closed.

Martin for defence addressed the Court and assessors.

Opinions of Assessors.

Assessor No. 1.

I find all the accused guilty of murder.

Assessor No. 2.

They are all guilty of murder. They killed and ate the cockerel, and Accused No. 1. is old and gray-haired and if he did not wish to take part he could have stopped.

Assessor No. 3.

They are all guilty.

-----

J U D G M E N T:-

The four accused Okobe, Mafuabi, Matanda and Kutosi were charged before me under Section 302 I. P. C. of the murder of a wandi. A Wandi on the morning of April 14th was found buried in a mud pool with the knees protruding on Mr. Bentley's farm and there was a track leading from the mud pool to an ash heap near the huts of accused.

The Chief witness for the prosecution was one Busiku who worked with accused on Mr. Bentley's farm. On Friday April 13th he gave a tembo party, and according to his story when the tembo had all been drunk, and his friends had gone there only remained in the hut himself, Accused Nos. 3 and 4 (Matanda and Kutosi) a child of about 3 years of age Mandutu (daughter of Accused No. 1.) and an old woman

the grandmother of the child. A Mandi came to the hut, they told him that the tembo was finished, and he went out. Accused Nos. 3 and 4, followed him, and after some talk, Accused Nos. 3 and 4, each took a wrist of the Mandi and pulled him along to within about 15 yards of the hut of Accused No. 2. When he saw accused No. 4, struck the Mandi on the chin with a stick like a rangu with a knob on it. Accused No. 1, who had not been to the tembo party because he was sick, although his wife had fetched him a basin of tembo, came out of his hut and struck the Mandi on the stomach. Accused No. 2, said "beat him very much, as they used to be a Mandi here named Saisi who stole Mr. Bentley's cattle". Accused No. 3, struck the Mandi on the back of the head. Accused No. 3, struck him after Accused No. 2, and said "Strike him very much". The Mandi fell on the ground when he was struck on the head by Accused No. 3. Accused No. 1, then struck the Mandi on the eyebrow with a rangu which finished him off.

swear the wife of Accused No. 1, is a reluctant witness and would not give the evidence that she gave in the Court before, and would naturally be inclined to give evidence in favour of her husband but she admitted that Accused No. 1 went to the door of the hut, although he did not go to the place where the Mandi was being beaten, but that it was only a few yards away. She admitted that she told the District Commissioner that she saw her husband strike the Mandi, that he was dead then. She admits she saw the dead body taken away and that all the accused were standing by. She admits the smaller hoe belonged to her, and the larger one to Accused No. 2. (Exhibit 4.) She says Accused No. 3 took

Dr. 4.

the grandmother of the child. A Mandi came to the hut, they told him that the tembo was finished, and he went out. Accused Nos. 3 and 4, followed him, and after some talk, Accused Nos. 3 and 4, each took a wrist of the Mandi and pulled him along to within about 10 yards of the hut of Accused No. 2. When he says accused No. 4 struck the Mandi on the chin with a stick like a ranga with a knob on it. Accused no. 1, who had not been to the Mandi party because he was sick, although his wife had fetched him a basin of tando, came out of his hut and struck the Mandi on the stomach. Accused No. 2, said "I hit him very much, and there used to be a Mandi here named Saigi who stole Mr. Bentley's cattle". Accused No. 3, also struck the Mandi on the back of the head. Accused No. 3, struck the Mandi on the back of the head. Accused No. 2, said "Strike him very much". The Mandi said he was struck on the head by accused No. 3. Accused no. 1, then struck the Mandi on the forehead with a ranga which finished him off.

...the wife of Accused No. 1, is a reluctant witness and would not give the evidence that she gave in the ... and would naturally be inclined to ... give evidence in favour of her husband but she admitted that Accused No. 2 went to the door of the hut, although he did not go to the place where the Mandi was being beaten, but that it was only a few yards away. She admitted that she told the District Commissioner that she saw her husband strike the Mandi, that he was dead then. She admits she saw the dead body taken away and that all the accused were standing by. She admits the smaller hoe belonged to her, and the larger one to Accused No. 2. (Exhibit 4.) She says Accused No. 3 took

4.

the ...

the small one and Accused No. 4, the large one. The noes were handed to Accused No. 4, by Accused No. 1. They went at night towards the river where the body was found.

They alleged in the depositions that her husband had four chickens and that after the husband had been buried, one of the cockerels was killed and eaten by the poor accused. There is a custom amongst the Nandi, that when a person is killed a cockerel is killed and eaten, and in the case of a man being killed and a woman being killed...

It was stated that the accused No. 1, a child of five years of age, and Accused No. 2, gave a statement in the court...

Inspector said in chief and cross-examination that he said he followed up a track which was about 400 yards long and led to a pile of wood ash where he lost the track.

It was a heavy track as if some heavy body had been dragged along. This was on Saturday April 14th.

On Monday 15th April Accused No. 1, and 2, showed him new tracks continued from the wood ash but it was a narrow track, and not similar to the track from the wood ash to the mud pool, where he lost the broader track would be about 30 yards of the hats of accused.

According to the medical evidence given by Dr. Cowen the District Surgeon, the deceased had a lacerated wound on the left side of the face above the left ear. The wound must have been caused by a heavy instrument such as a runga. On removing the scalp there was an extensive bruising of the tissues and on opening the skull there was a fracture extending from above the left ear to the top of the head.

The injury might have been caused by a heavy blow with a  
 rungu. There was a small superficial wound on the right  
 eyebrow. The fracture of the skull was immediate, below  
 the external wound. In his opinion death was caused by  
 the fracture of the skull, the result of a heavy blow  
 caused by a heavy instrument.

I agree with the assessors that all the four Accused  
 took part in the killing of this Nandi, and I find them  
 all guilty of murder and under Section 302 I. P. C.  
 sentence each of them to be hanged by the neck until he  
 shall be dead.

SD: F. E. R. STEPHENS,

Judge.

July 21st 1928.

The accused are informed that they have a month  
 within which to appeal from this sentence.

SD: F. E. R. STEPHENS.

Judge.



IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.Sittings held at Kitale.Criminal Case No. 61 of 1928.(Original Criminal Case No. 348 of 1928 of II Class  
Subordinate Court at Kitale)

Res.....Prosecutor

versus

- |                                      |                |
|--------------------------------------|----------------|
| 1. U.G. 0082522 Okube s/o Oloro      | }.....Accused. |
| 2. N.B. 2458907 Mafuabi s/o Waselwa  |                |
| 3. T.N. 495920 8 Matanda s/o Wanduku |                |
| 4. Kutosi s/o Maratse                |                |

J U D G M E N T:

The four accused Okobe, Mafuabi, Matanda and Kutosi were charged before me under Section 302 I.P.C. of the murder of a Nandi. A Nandi on the morning of April 14th was found buried in a mud pool with the knees protruding on Mr. Bentley's farm and there was a track leading from the mud pool to an ash keep near the huts of accused.

The chief witness for the prosecution was one Busiku who worked with accused on Mr. Bentley's farm. On Friday April 14th he gave a tenbo party, and according to his story when the tenbo had all been drunk, and his friends had gone there only remained in the hut himself, Accused Nos. 3 and 4 (Matanda and Kutosi) a child of about 1 year of age - Takutu (daughter of Accused No. 1) and an old woman, the grandmother of the child. A Nandi came to the hut, they told him that the tenbo was finished, and he went out. Accused Nos. 3 and 4 each took a wrist of the Nandi and pulled him along to within about 15 yards of the hut of accused No. 2. Then he says accused No. 4 struck the Nandi on the chin with a stick like a gun with a knob on it. Accused No. 1 who had not been to the tenbo party because he was sick, although his wife had fetched him a basin of tenbo, came out of the hut and struck the Nandi on the

HIS MAJESTY'S SUPREME COURT OF KENYA AT DAIKOTI.

Sittings held at Kitale.

Criminal Case No. 61 of 1928.

(Original Criminal Case No. 348 of 1928 of II Class Subordinate Court at Kitale)

-----  
vs.....Prosecutor

vs.....

- |                                      |                |
|--------------------------------------|----------------|
| 1. UGU. 082522 Okube s/o Oloro       | }.....Accused. |
| 2. NBI. 2458907 Mafuabi s/o Waselwa  |                |
| 3. T.S. 495920 8 Matanda s/o Wanduku |                |
| 4. Kutosi s/o Maratse                |                |

J U D G M E N T:

The four accused Okobe, Mafuabi, Matanda and Kutosi were charged before me under Section 30 P.C. of the murder of Wardi. A Wardi on the morning of April 14th was found buried in a mud pool with the knees protruding on Mr. Bentley's farm and there was a track leading from the mud pool to an ash heap near the huts of accused.

The chief witness for the prosecution was one Busiku who worked with accused on Mr. Bentley's farm. On Friday April 13th he gave a tembo party, and according to his story when the tembo had all been drunk, and his friends had gone there only remained in the hut himself, Accused Nos. 3 and 4 (Matanda and Kutosi) a child of about 8 years of age - Akutu (daughter of Accused No. 1) and an old woman, the grandmother of the child. A fire came to the hut, they told him that the tembo was finished, and he went out. Accused Nos. 3 and 4 each took a wrist of the child and pulled him along to within about 15 yards of the hut accused No. 2. Then he held accused No. 4 struck him with on the head with a stick like a gun with a knob on it. Accused No. 1 who had not been to the tembo party because he was sick, although his wife had fetched him a bowl of tembo, came out of the hut and struck the head of the

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stomach. Accused No. 2 said "beat him very much, as there used to be a Nandi here named Saisi who stole Mr. Bentley's "cattle". Accused No. 3 then struck the Nandi on the back of the head. Accused No. 5 struck him after accused No. 2 had said "strike him very much". The Nandi was on the ground when he was struck on the head by Accused No. 3. Accused No. 4 then struck the Nandi on the eyebrow with a runge which finished him off.

Mweng, the wife of accused No. 1 was a reluctant witness and would not give the evidence that she gave in the Court below, but; and would naturally be inclined to give evidence in favour of her husband but she admitted that accused No. 1 went to the door of the hut, although he did not go to the place where the Nandi was being beaten, but still it was only a few yards away. She admitted that she told the District Commissioner that she saw her husband strike the Nandi, but he was dead then. She admits she saw the dead body taken away and that all the accused were standing by. She admits the smaller hoe belonged to her, and the larger one to accused No. 3 (Ex.). She says Accused No. 3 took the small one and accused No. 4 the large one. The hoes were handed to accused No. 4 by Accused No. 1. They went at night towards the river where the body was found. They dragged it. She admitted that her husband had four chickens and that after the Nandi had been buried, one of the cockerels was killed and eaten by the four accused. There is a custom amongst the Nandi, that when a person is killed a chicken is killed and eaten, a cockerel in the case of a man being killed and a hen in case of a woman being killed.

It was impossible to get Namputu a child of five years of age and daughter of accused No. 4 to give any evidence, or to repeat what she had said in the Court below.

Inspector Dale in charge of the police at Kitale said he followed upon track from the mud pool for about 400 yards until he came to a pile of wood ash where he lost the track.

It was a broad track as if some heavy body had been dragged along. This was on Saturday April 14th.

On Sunday 15th April accused Nos. 1 and 4 showed him new track continued at the wood ash but it was a narrow track and not similar to the track from the wood ash to the mud pool where he lost the broader track about 50 yards of the hole of the hole.

According to the forensic evidence given by Dr. Gowen Lockhart Surgeon, the deceased had a lacerated wound on the forehead of the head which was caused by a heavy instrument such as a runger. On removing the scalp there was an extensive laceration of the skull and on opening the skull there was a fracture extending from above the left eye to the top of the head. The fracture might have been caused by a heavy blow on the forehead. There was a small fracture of the skull below the external wound. In his opinion death was caused by the fracture of the skull, the result of a heavy blow caused by a heavy instrument.

I agree with the assessors that all the four accused took part in the killing of the deceased and I find them all guilty of murder under Section 301 I.P.C. and I order each of them to be hanged by the neck until he shall be dead.

sd. J. P. R. Stephens  
Judge.

The accused are informed that they have a month within which

which to appeal from this sentence.

sd. J. E. H. Stephens  
Judge.

I certify this is a true copy of the original.

sd. E. J. O'Farrell,  
Registrar,  
Supreme Court,  
Nairobi.

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IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN  
AFRICA AT NAIROBI.

Criminal Appeals Nos. 27, 28, 29 & 30 of  
1928.

(From Criminal Case No. 61 of 1928 of H.M. Supreme Court  
of Kenya sittings held at Kitale)

1. Okube s/o Oboro
2. Mafurabi s/o Waselwa
3. Matanda s/o Wanduku
4. Kutosi s/o Maratse

Appellants  
(Original accused)

versus

Rex

Respondent  
(Original Prosecutor)

ORDER:

Mr. Bentley undertakes to take Busiku to Kitale  
within 15 days to lodge a complaint, or withdraw his  
statement.

Case adjourned to next sessions (Uganda)

id. C.J.G.

20.12.28

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

Sessions held at Kampala

Criminal Appeals Nos. 27, 28, 29 and 30 of 1928.

(From original Criminal Case No. 61 of 1928 of H.M. Supreme Court of Kenya - sittings held at Kitale)

1. Okubi s/o O Goro }  
2. Mafuchi s/o Waseiwe } ..... Appellants  
3. Matanda s/o Wanduku } (Original Accused)  
4. Kutoyi s/o Maratse }

versus

Res. .... The Resident  
(Original Prosecution)

JUDGMENT:-

In these 4 cases we have come to the conclusion that a new trial must be ordered. That being so it is obviously not desirable to comment on the facts to any extent and we shall confine our remarks to one point only. The 4 accused were tried before the High Court for the murder of a bandi on evidence which clearly supported a conviction, consisting as it did of direct evidence by eye witnesses. The application of the accused Mr. Bentley from enquiries made by him of the witness Busigo was convinced that the evidence given at the trial by Busigo was false and was induced by threats and torture on behalf of the Police. He therefore lodged an appeal and appeared before the Court sitting at Nairobi. At that sitting there was no legal evidence before the Court and an undertaking was given by Mr. Bentley that he would either withdraw his statement or take Busigo to Kitale to lodge a complaint. Busigo was taken to the Magistrate at Kitale and made a full statement accusing the Police as having threatened him to make him give false evidence at the trial. That sworn statement is now before the Court and is of such a nature as to induce us to quash the

conviction and sentence and to order a new trial at which the whole case will be re-investigated. Whether the complaint before the Magistrate will be proceeded with and whether it results in a conviction of any person or not has nothing to do with the case before us. It will be for the judge at the new trial to determine what of the contradictory statements of Busby is to be rejected from the evidence which will be adduced before him.

It has been suggested that Mr. Bentley did not fulfil his undertaking. This Court is that he did not secure the Henry Jones of the Police as and for extracting the evidence by the case. This Court is not at present concerned with the merits of the prosecution. All that was desired was a sworn statement which he had made so far as having failed to fulfil his undertaking. Bentley already what the Court is in the matter. It is wished to add that he has done so on account of a trouble of the case actuated by a public spirited desire to prevent a possible miscarriage of justice.

Ed. O.J. Griffin,  
Joseph Sheridan,  
W. La Frie Smith.

St. North, 1888.

Ed. O'Farrell  
Magister of Court  
For E.A. Marold



IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Criminal Case No. 61 A of 1928.

From  
(Original Criminal Case No. 348/28 of the 2nd Glass Court at Kitale).

Rex..... ,...Prosecutor

versus

- 1. UGU. 0382522 Okube s/o Uboro
  - 2. NEI. 2458907 Mafuabi s/o Waselwa
  - 3. TN. 4959208 Matanda s/o Waselwa
  - 4. Kutosi s/o Maratse
- } Accused.

Case for Crown.

I decide that there is no evidence against the accused and I therefore do not call upon the accused for a defence. I do not sum up to Assessors but I stop the case.

The accused are discharged.

sd. S.J. THOMAS.

10.9.28

12.9.30

Mr. Solicitor for the Crown.

Mr. Daly for accused.

At the close of the case for the Crown I decided that there was no evidence to place before the Assessors and I entered the above finding as my note. There was some discussion as to the interpretation to be placed on that finding. I have since consulted the Chief Justice and Mr. Justice Sheridan and I am satisfied that the correct interpretation is that the four accused have been acquitted. I have thought fit to mention this matter in Court so as to remove any misapprehensions which may have arisen in consequence of the discussion that I have previously referred to.

Mr. Solicitor indicates that he concurs.

HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.  
Criminal Case No. 61 A of 1928.

From  
(Original Criminal Case No. 348/28 of the 2nd Class  
Court at Kitale).

Hex..... ,...Prosecutor

versus

- 1. UGU. 0382522 Okube s/o Uboro
  - 2. WEI. 2458907 Mafuabi s/o Waselwa
  - 3. TN. 4959208 Matenda s/o Waselwa
  - 4. Kutosi s/o Maratse
- } Accused.

Case for Crown.

I decide that there is no evidence against the  
accused and I therefore do not call upon the accused for a  
defence. I do not sum up to Assessors but I stop the case

The accused are discharged.

sd. S. THOMAS.

10.9.29

10.9.29

Mr. Solicitor for the Crown.

Mr. Daly for accused.

At the close of the case for the Crown I decided  
that there was no evidence to place before the Assessors  
and I entered the above finding as my note. There was  
some discussion as to the interpretation to be placed on  
that finding. I have since consulted the Chief Justice  
and Mr. Justice Sheridan and I am satisfied that the  
correct interpretation is that the four accused have been  
acquitted. I have thought fit to mention this matter in  
Court so as to remove any apprehensions which may have  
arisen in consequence of the discussion that I have  
previously referred to.

Mr. Solicitor intimates that he concurs.

sd. S. THOMAS.

J. B. S.

I certify this is a true copy of the original.  
(sgd) WALTER M. JACK, Registrar, Supreme Court,  
Nairobi

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17th April, 1929.

In the II Class Magistrate's Court at Kitale

Criminal Case No. 342 of 1929

CROWN, through, POLICE, KITALE

versus

GEORGE NZIMIKWAO S/O HAMISI

17th April, 1929.

In the II Class Magistrate's Court at Kitale

Criminal Case No. 542 of 1929

CROWN, through, POLICE, KITALE

versus

GEORGE NZIMIKWAO S/O HAMISI

This case has been instituted by the Police at Kaji  
on instructions to prosecute from the Commissioner of Police,  
Nairobi. The accused an Ex-police askari is now serving  
a sentence of 6 months R.I. under Section 325 I.P.C. for  
assaulting a person in his custody. The offence under  
Section 325 I.P.C. now complained of took place a year ago.  
The complainant a Kikuyu woman is of so low a standard of  
mentality as to appear almost mentally deficient. Despite  
the cause and deliberation with which questions were put to  
her she frequently contradicted herself. She is of the type  
that incessantly bewildered. She was unable to identify the  
accused at a parade of askaris. First she says the askari  
who beat her was in plain clothes, the uniform and  
finally after stating that it was the accused who struck her  
and that he was in uniform states that the askari who beat  
her is not in uniform at all. It is true that under stress  
of her husband being arrested and her serious a charge as  
murder she may have paid little attention to detail. Further  
more a year has elapsed. However, I am entirely satisfied  
from the evidence of her, her husband's witness and from the  
evidence of the witnesses called by accused in his defence  
that the complainant was in fact severely cuffed by accused  
and struck by him with a stick. As regards a motive for the  
beating complainant herself alleges that she was asked  
like her say that her husband committed the murder. The  
other witnesses say she was beaten for making a scene when  
her husband was arrested and bound by the police. In either  
case I am satisfied that there was no excuse whatever for such  
brutal treatment or abuse of authority on the part of the  
accused. I find accused guilty of the offence with which he  
has been charged under Section 325 I.P.C. - The Police ask for  
an exemplary sentence to be given. I sentence the accused  
to 6 months R.I. this sentence to commence on completion of the  
sentence accused is now undergoing. Sd/- H. LEAD  
II Class Magistrate

CONF.

Musiku s/o Wandoti duly affirmed.

The above native was asked by me if he desired to make a Voluntary Statement about a murder which occurred on Mr. Bentley's Farm in April last and stated that he did desire to do so.

On that day the labourers on the farm found the body of a Nandi buried in the mud of the stream. This was about 8 months ago. The headman Mahomed reported to Mr. Starbuck who lives near. Two European Police and one Native Policeman came to investigate. The body was taken out and cleaned and then all the people on the farm were called to identify the corpse. We were told by the Police to keep the body in a hut until Sunday. On Monday the body was buried and the Police arrested two English labourers Wafabi and Okube. At the same time one Askari, whose name I do not know but whom I could recognize, took a child of Okube, a girl of a hut 6 years of age, to an empty hut and I heard this Askari frightening the child who eventually said that her father Okube had killed the Nandi. Two days later I was called in to Kitale to give evidence. I was kept six days in Kitale and slept in the Police lines. One day an Askari called Wakuma Masawa said to me "You and others killed the man" I denied it and then he said "Why do you deny it when the others have already admitted killing the man?" After two days as he kept on talking to me like this I got frightened and told him something. He then took me to the Police Swana. He said "if you don't speak the truth I will imprison you for a year". I was frightened and told the Police that I had seen the Nandi murdered by certain people. This was untrue and I said it because I was frightened. I gave the same evidence in Court for the same reason. When I made the statement to the Police Swana the Askari Wakuma was present. I told the Swana the same things I had told Wakuma. The latter had frightened me. The evidence I gave in the Court and in the Judge's Court that I saw the murder committed ...

committed by the four Busishu Mafabi, Okube, Kutosi and Matanda was untrue. I did not see any murder committed. I gave this evidence because I was afraid as the Askari Wakuma had told me that if I did not give this evidence I should be put in prison. I made the same statement I have made today to my employer, Mr. Bentley, before going to the Judge's Court. I did not tell the Judge the truth because I was afraid of the Askari Wakuma. I would make the statement I have made here today to the Judge himself. It is the truth.

When Mr. Bentley asked me first about the matter I denied that I saw the murder because he said to me "if you really saw the murder say so but if you did not it is a very bad thing to tell lies." He is my employer and I am not afraid of him.

Read over and found correct.

SD: D. R. GRAMPTON.

R.C.

28.12.28.

Kitale.

Supreme Court,

Crim. Case No. 61/28.

Certified true copy of the original.

SD: D. R. GRAMPTON.  
Resident Commissioner.  
Kitale. 28/12/28.

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committed by the four Busishu Mafabi, Okube, Kutosi and Matanda was untrue. I did not see any murder committed. I gave false evidence because I was afraid as the Askari Wakuma had told me that if I did not give this evidence I should be put in prison. I made the same statement I have made today to my employer, Mr. Bentley, before going to the Judge's Court. I did not tell the Judge the truth because I was afraid of the Askari Wakuma. I would make the statement I have made here today to the Judge himself. It is the truth.

When Mr. Bentley asked me first about the matter I denied that I saw the murder because he said to me "if you really saw the murder say so but if you did not it is a very bad thing to tell lies." he is my employer and I am not afraid of him.

Read over and found correct.

SD: D. R. CRAMPTON.

R.C.

28.12.28.

Kitale.

Supreme Court.

Crim. Case NO. 61/28.

Certified true copy of the original.

SD: D. R. CRAMPTON.  
Resident Commissioner.  
Kitale. 28/12/28.



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Copy.

Resident Commissioner's Office

Kitale.

Ref. No. Cr.C/348/28.

28th December, 1928.

The Ag. Registrar,  
Supreme Court of Kenya,  
Nairobi.

The Asst. Superintendent of Police here informed me verbally that a sworn statement from Busiku was urgently required.

Statement is enclosed herewith. I presume some instructions from the Supreme Court are in the Post.

D. R. CRAMPTON.

Resident Commissioner.

Copy to:-

A.S.P. Kitale, together with 2 copies of sworn statement.

Copy

Resident Commissioner's Office,  
Kitale.

Ref. No. Gr.C/348/28.

28th December, 1928.

The Ag. Registrar,  
Supreme Court of Kenya,  
Nairobi.

The Asst. Superintendent of Police here informed me verbally that a sworn statement from Busiku was urgently required.

Statement is enclosed herewith. I presume some instructions from the Supreme Court are in the Post.

SD: D. R. CRA

Resident Commissioner.

Copy to:-

A.S.P. Kitale, together with 2 copies of sworn statement.

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