

1937

38110

CO 533/481

38110

PART 1

KENYA

PART 1

CRIMINAL CASES

Previous

1136

R. 241 14/4  
R. 304 15/4  
Mr Flood 15/4

Subsequent

PART 2

Sir G. Burke 13/11  
Registry  
R. 297 19/5  
R. 309 19/5

R. 297 14/1/37

Mr Paskin 20

R. 309 14/1

Mr Duncan 10/6/37

Mr Paskin 14/1

Mr G. Burke  
Mr Flood 24/6

Mr Duncan 25/1/37

Sir C. Bottomley 23/10

Mr Paskin 14/1

R. 241 17/11

12/1

R. 309 1/7

R. 304 31/1

Mr Paskin 3/7

Mr Paskin 28/1

Mr Duncan 20/7/37

Mr Duncan 23/3/37

Mr Flood 22/7

Mr G. Burke 17/3

Mr Flood 26/6

12/1

R. 309 27/3

12/1

Mr Paskin 23

309

Mr Duncan 14/1

Mr Flood 14/1

Mr G. Burke 14/1

C.I.

CRIMINAL.

1. GOV. KENYA.....667.....18.12.36.  
 Trs. copy of Judge's Report, copy of Judgment in Supreme Court Criminal Case No. 96 of 1936, Rex v. Musa Haji S/O Masanja and copy of Judgment of Court of Appeal and states that the sentence of death was subsequently committed to one of hard labour for life.

2

? Put by  
 A. Brown  
 13.1.37

M. Duncan  
 10/11

J. Paine  
 26/11

12/11

25/1/37 A. Duncan

J. Paine  
 26/11

at ...

2. ACTING GOV. KENYA.....666.....20.12.36.  
 Trs. copy of the transcript of shorthand notes taken at trial of Agutu s/o Andata in Supreme Court Criminal Case No. 158 of 1936, when the accused was sentenced to 20 lashes and 8 years imprisonment with hard labour.

This case has been mentioned  
 in the EA Press.  
 Note Mr Lane's comments  
 on the <sup>neglect</sup> barbarism of the  
 parents.

Very true  
 J

M. Duncan  
 to see

? Put by  
 A. Brown  
 28/1/37

The assessors all thought it ~~was~~ would rape & their remarks are indicative. In this country I wonder whether a girl of 9 1/2 could be presumed to consent: but of course Indian girls, adult young.

\* probably true

1.1.1937  
 28.1.

fls  
 D13

As regards the law in this country,

"When the female is under sixteen ...

"and in fact consents, the man is

not guilty of rape but is punishable

"under the enactments set out

"post, p. 622 et seq."

(Russell on Crime, 9th ed. vol. 1. p. 617).

23/2/37

A. Duncan.

(S. J. Bushy to see)

1. ... of 6th of March, 1937.

2. ... 8.2.37. ... two copies of transcript of shorthand notes taken at trial of Raymond Letcher who was found guilty of causing grievous harm to Odongo son of Solo and was sentenced to imprisonment with hard labour for twelve months.

Note This is the case mentioned in the Press cutting in No 3.

Raymond Letcher was tried by the Justice of Peace (sitting with a European jury) for causing grievous harm to Odongo & Solo.

He was found guilty and sentenced to 12 months hard labour.

The wretched native is paralysed

for life as a result of being run over by the accused's car while the accused was pursuing him in it.

? Pithy

A. J. ...

27/12/37

J. J. ...

11 23/1/37

Sir G. Bushe

What will happen if the man dies before next September? Won't it be a murder charge then & one very hard to get out of? The accused has been found guilty of a grievous act and if the victim dies as a result within a year or a day it would appear to be murder. I don't suppose the fact of his being already guilty on the charge of causing grievous harm would bar another trial for murder though the jury would no doubt regret

J. J. ...

64

I don't know what to do about this

...

Sir C. Bottomley

You may like to see No 4. It was the Press and there has been little fuss over it.

I don't like to see it. It's most unpleasant

Pithy well.

13.4.37

...

5. A/GOV.KENYA.....160.....12.3.37.  
Trs.details of Criminal Case No.11 of 1937 where  
Mohinder Singh S/O Karam Singh was sentenced to  
2 years and six months with hard labour.

Put by  
J.S. Rowson with  
1874/5)

See G. B. P. to see  
19/5

6. ACTING GOV. KENYA.....1828.....14.3.37.  
Trs.details of Criminal Case No.10 of 1937 where  
J.P. Englebrecht and Kimutai arap Kiboro were  
sentenced as indicate for assault on Kibrop arap Nagole.

But for his age (72 years) the  
accused Englebrecht would  
have gone to prison. The  
Medical evidence pages 2-10  
indicate that the 15-year  
old Kibrop arap Nagole was  
thrashed unmercifully with a  
kiboko.

Put by  
J.S. Rowson with  
19/5/37

Mr. Duncan  
to see

and yet the jury went out of their  
way to say that they did not  
consider his flogging to be brutal!

Yes. It is really  
extraordinary  
1/5.

another unpleasant  
case for  
10/6/37

Seen.

H. Duncan.

(S.P. B. to see).

The jury did find him guilty. See pp 31, 7, 53 for some  
odd phrases which I hope won't get published. They are not  
typical at all but would be made much of by Mr. Macbray Ross

I doubt if there will be publicity on this  
case a conviction, and the possible  
value of an old man's property which  
will have little publicity value.

Of course, so far as the supposed  
injustice of summary of summary  
punishment goes, their views are  
now widely held, but I think  
it is recognized that a man who  
takes the law into his own hands does  
so at his own risk and also that  
some moderation must be observed.  
I do not think many respectable  
people would uphold a man guilty of  
violent offenses.

If there is any other value of  
the case we have the report. In our  
reluctance we can

Put by  
19/5/37  
above



KENYA

No. 353

RE

6 JUL-1937



7  
GOVERNMENT HOUSE  
NAIROBI,  
KENYA.

28 June, 1937.

Sir,

In accordance with the instructions contained in Mr. Thomas' despatch No.762 of the 18th July, 1924, I have the honour to transmit two copies of the transcript of the shorthand notes taken at the trial of Robert Peter Chapman Purchas, who was charged before the Supreme Court of Kenya in Criminal Case No.78 of 1937, with the offence of manslaughter of Mara, wife of Mauti, contrary to Section 185 of the Penal Code.

2. The accused was found not guilty and was discharged.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*R Brooke-Pollock*

AIR COUNCIL MARSHAL,  
GOVERNOR

THE RIGHT HONOURABLE,

W. CRMSBY GORE, P.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON. S.W.1.

I N D E X

	Page
P L E A	1
CHARGE TO THE JURY	2
OPENING ADDRESS FOR PROSECUTION	2 - 6
<u>EVIDENCE FOR THE PROSECUTION:</u>	
ROGER TUKE LAMBERT	Examined 6 Cross-Examined 18
MURUNGI S/O MUSENDA	Examined 22 Cross-Examined 27
CHARLES ODEP S/O OSERO	Examined 31 Cross-Examined 34 Re-Examined 35
MAKORE S/O ANUNDA	Examined 36 Cross-Examined 37
NYAIKA S/O KITANGWA	Examined 38 Cross-Examined 40
NYABORE S/O NDUBI	Examined 40 Cross-Examined 40
DEPOSITION OF DR. WRIGHT	40 - 42
FREDERICK IVOR GRANT	Cross-Examined 42
<u>EVIDENCE FOR THE DEFENCE:</u>	
ROBERT PETER CHAPMAN PURCHAS	Examined 44 Cross-Examined 48
KIPKOSKE ARAP MISAI	Examined 51 Cross-Examined 51
PERCY ROSS	Examined 54
OPICHA S/O ONDINGA	Examined 55 Cross-Examined 56
MR ARCHER ADDRESSES ON BEHALF OF ACCUSED	62 - 74
MR PHILLIPS ADDRESSES ON BEHALF OF THE CROWN	75 - 81
SUMMING UP	82 - 90
VERDICT OF JURY	91

EXHIBIT NO. 1 - SKETCH PLAN.

IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HOLDEN AT KISUMU

2nd June, 1957.

**B E F O R E**

**HIS HONOUR MR. JUSTICE WEBB K.C.**

**(AND A JURY)**

**CRIMINAL CASE NO. 78 OF 1957**

**R E X**

**versus**

**ROBERT PETER CHAPMAN PURCHAS**

Transcript of Shorthand Notes taken by J.S. Templeton,  
Official Shorthand Writer to H.M. Supreme Court of Kenya.

---

MR. A. PHILLIPS, CROWN COUNSEL, appeared for the Prosecution  
MR. C.K. ARCHER appeared for the Defence.

---

**P L E A**

THE DISTRICT REGISTRAR: Robert Peter Chapman Purchas, you  
are charged with the offence of Manslaughter contrary to  
Section 185 of the Penal Code in that you, on or about the  
19th day of March, 1957, in the Nyansa Province, unlawfully  
killed Mara wife of Mauti. Do you plead Guilty or Not Guilty?

ACCUSED: Not Guilty.

The following Jurors were drawn:

M.E. Gannon

William Adams

J.J. Kelle

A.D. Usher Jones

A. MacGregor.

Accused was warned to challenge but made no objection.

The Jury were sworn and appointed A. MACGREGOR to be  
their Foreman.



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2nd June, 1957.

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Accused was warned to challenge but made no objection.

The Jury were sworn and appointed A. MACGREGOR to be their Foreman.

---

THE DISTRICT REGISTRAR: Gentlemen of the Jury, the Accused Robert Peter Chapman Purchas is charged with Manslaughter. To that he has pleaded Not Guilty and it is your duty to say, having heard the evidence, whether he be Guilty or Not Guilty.

MR. PHILLIPS ADDRESSES ON BEHALF OF THE CROWN:

May it please Your Lordship, Gentlemen of the Jury, this case arises out of an accident which took place on the 19th of March last when a Kisii woman named Mara wife of Meuti was knocked down by a lorry driven by the accused Mr. Purchas and received injuries from which she died. The accident took place on the Sondu-Ngoina Road at a point where it passes through a camp named Magwagwa. On the day in question a large number of natives, apparently several hundred, had collected at that camp and they were being arranged and drawn up in lines prior to appearing before Mr. Lambert the District Officer in connection with taxation. Mr. Lambert himself was sitting in a hut or banda about thirty or forty yards from the scene of the accident. He did not actually witness the accident himself but he heard the sound and walked out immediately to investigate. You will hear the evidence of several persons who saw the accident happen, in particular one Murungi who was Mr. Lambert's interpreter, and another man attached to Mr. Lambert's staff, a hut-counter named Charles. Both of these men were standing in a position where they could see the accident happen. There was also an old man named Makore who will tell you that he was close beside the deceased when she was struck by the lorry and apparently he himself only narrowly escaped being struck. Mr. Lambert will give evidence as to observations and measurements he made immediately after the accident.

The facts which I shall endeavour to prove are briefly as follows: The lorry came along the road from the Sonda direction going at what struck the observers as a fast speed. There were a good many natives actually on the roadway and there were very many more close beside the road. Most of the natives on the road hastily jumped to the side as the lorry approached, and incidentally the accused seems to have sounded his horn loudly and continuously as he approached the camp but not immediately before reaching the place where the deceased was standing. This woman was apparently standing in the road in a group with several others with whom she had been lined up and she seems not to have noticed the approach of the lorry until it was almost on top of her. You are probably familiar with the type of pedestrian very common among natives in this country who for some reason or other, not necessarily deafness, seem to be quite oblivious to the sound of a motor horn until it is blown almost in their ears. That seems to be what happened in this case. This woman's companions seem to have jumped clear and got out of the way but she was too late and was struck by the lorry and knocked down. She was then dragged along under the lorry for a distance of about 30 paces when she fell clear. The lorry went on for about 70 yards and then reversed a short distance before finally coming to rest.

The offence with which the accused is charged is manslaughter and in order to establish that offence the Prosecution will have to convince you that the accused was guilty of Criminal negligence. When His Lordship comes to sum up he will direct you as to what exactly constitutes criminal negligence but I would like to address a few remarks on that point to you at this stage subject, of course, to what His Lordship will tell you later. Criminal negligence means something more than mere inadvertence. Mere inadvertence might be sufficient to make a man liable in a civil action for damages but it is not sufficient to convict him of the

criminal offence of Manslaughter. In order to create criminal responsibility it is necessary to prove a very high degree of negligence. In this case in my submission the evidence shows that the accused drove his lorry in a grossly negligent manner, indeed in a reckless manner, and in considering that question I would ask you to take into account the circumstances of the case, particularly the number of people who were on the road or near the road at the time of the accident, and in that connection I would quote the words of Archbold who is the standard authority on Criminal Law at page 899 of the 1954 Edition. He says:-

"The degree of care to be used in driving depends on "the number of persons or vehicles in the street." and as authority for that proposition he refers to the case of Rex v Murray 5 Cox 509. Now in this case the evidence is to the effect that there was a considerable number of people actually on the road and a crowd of some hundreds in the immediate neighbourhood of the road and it is alleged that what the accused did was to drive his lorry along that road relying on people getting out of his way and in the expectation of their doing so going at such a speed that if anyone did not get out of his way he could not avoid hitting that person. In other words he took the risk of hitting anyone who failed to get out of his way sufficiently quickly. Of course I do not say that he consciously and deliberately considered the question as we are considering it now and decided to take that risk but what I do say is that his conduct amounts to that.

It will occur to you, Gentlemen, no doubt to ask what evidence is there of the speed at which this lorry was travelling and I would say to you at once quite frankly that I am not able to prove exactly what was the speed of the lorry. It is very difficult for an unskilled observer to give an accurate estimate of the speed at which a vehicle

is travelling but I think nevertheless that the evidence will show that the accused was driving at a speed which was dangerous in the circumstances on such a crowded road even though in ordinary circumstances it would not have been considered an excessive speed. In the special circumstances in this case it was the duty of the accused to drive slowly, very slowly, through that camp and to give the people who were on the road ample opportunity of getting out of his way. By failing to do so and by continuing at an ordinary speed he committed what I submit was an act of criminal negligence. The fact that after hitting the woman he also went on for over 100 paces for about 50 yards of which the woman was dragged underneath the lorry is some indication of the speed at which the lorry was travelling even though the brakes had not been applied all that time. If the accused had been going reasonably slowly it is difficult to believe that he would not have pulled up before that.

It may perhaps be suggested to you by the defence that this woman ran in front of the lorry at the last moment so that the accused had no chance of avoiding her and that her own negligence was a contributory cause of the accident. If that defence is put forward it will be for you to decide after hearing the evidence which story you believe. The Crown case is that the deceased had been standing on the roadway for some time before the lorry approached and that the lorry ran her down before she had a chance of getting out of the way, and it is possible that she might have, to use a colloquial term, dithered in the middle of the road when she found the lorry just on the point of running her down, and in fact in her fear she might have started to run in one direction or the other and possibly she ran in the wrong direction. Panic-stricken people quite often do that sort of thing, but that would not exonerate the accused if he was to blame for first putting this woman in the position of peril and making it necessary for her to run for her life.

That, Gentlemen, is a brief outline of the case and I will now proceed to call the first witness before you.

THE CASE FOR THE PROSECUTION

ROGER TUKE LAMBERT sworn:

EXAMINED BY MR. PHILLIPS:

- Q. 1. What is your full name, Mr. Lambert? -- A. Roger Tuke Lambert.
- Q. 2. And are you a District Officer stationed at Kisii in the South Kavirondo District? -- A. Yes.
- Q. 3. Where were you on the 19th March last? -- A. I was at Magwaga Camp in the North Mugirango Location, South Kavirondo District.
- Q. 4. What time did you arrive there that day? -- A. About midday.
- Q. 5. Were there many people at the camp? -- A. Yes, the camp was full of natives, candidates for taxation exemption, I should say about four or five hundred.
- Q. 6. Would you give a brief description of this camp? --  
A. The camp is right on the main Ngoina-Sondu Road.
- Q. 7. Is this a sort of small District Road? -- A. It is the main Sotik-Kisumu Road when passible and for a time it has been used as the main road from Kisii to Kisumu.
- Q. 8. Can you give any idea of the volume of traffic which passes along that road? -- A. It is rather difficult to say but that particular day I saw four or five lorries and two cars between midday and the evening.
- Q. 9. Is this camp on an open piece of ground? -- A. Yes it quite open. There is a bend in the road which obstructed the view of the camp to a certain extent from the Sendu side, the side from which the lorry driven by Mr. Purchas came. There are trees in the camp but they don't obstruct the view. There is a certain amount of long grass fringing the road.

- Q.10. Would it be correct to describe it as a fairly open clearing through the middle of which the road runs?—  
A. Yes I think it would. The road is a little bit sunk actually in the camp itself. The camp is in a hollow. Facing Ngoina from Sondu there is a drop from the bank on the right hand side of the road and I think the grass comes flush with the road on the left hand side. Just a slight out out of about 18 inches.
- Q.11. What were these natives doing? What was their position?  
A. I was not an actual witness of what they were doing at the time.
- Q.12. You said there were some hundreds of natives in the camp at the time? — A. Yes when I arrived at the camp I instructed the Chief to arrange the candidates "mlango by mlango" in lines radiating from one of the trees to the left of the road facing Ngoina.
- Q.13. About how far from the road is that tree? — A. Twenty or thirty yards.
- Q.14. What did you do while they were being arranged? —  
A. I had crossed the road, gone up a short path 50 yards from the road and I was sitting in my banda waiting for the candidates to be ready.
- Q.15. Was there any noise going on in the camp while this was being done or was it quiet? — A. There was considerable noise; chattering and conversation; natives talking and shouting.
- Q.16. While you were in your banda did you hear anything unusual? — A. I heard a lorry driving through the camp and as it passed roughly opposite my banda I heard a loud bang.
- Q.17. What sort of impression did it make on you? Did you form any opinion at the time as to what might have caused the bang? — A. It seemed to me as if a box

might have fallen from the lorry; that sort of noise.

Q.18. Was there any other noise? -- A. Yes there was a lot of shouting which seemed to be directed at the lorry. I realised that the crowd were trying to stop the lorry and I heard a Police whistle blown.

Q.19. What did you do then? -- A. I got up and left the banda and was met outside by a native and an askari. I asked them what had happened.

Q.20. And did you get certain information? -- A. Yes.

Q.21. And then what did you do? -- A. I ran down to the road.

Q.22. And what did you see? -- A. I saw a native woman lying huddled up near the end of the path from the banda slightly to the right as I came down. She was lying pretty well in the centre of the road covered with dust and blood; there was blood on the road; she was unconscious.

Q.23. Did you examine her? -- A. I examined her roughly. I did not carry out a detailed examination.

Q.24. And then what happened to her? -- A. We picked her up and carried her across the road to one of the huts and poured water over her and loosened the clothing round her neck.

Q.25. What did you do then? -- A. I then returned to the road. I had previously seen the accused. He came up to me almost at the same time as I reached the body and his lorry was drawn up quite close to the body. He had accompanied me with the body to the hut and we walked back together to the road. The lorry was drawn up on the Ngoina side; it came from the Sondu direction. Accused pointed out that the position of the lorry was not where it had been after the accident. Between the time he brought the lorry to a standstill and my arrival on the road he had backed the lorry to the vicinity of the body.



Q.26. You say he told you that? — A. Yes.

Q.27. Did he point out any positions on the road? — A. I cannot say he pointed it out. I went to investigate the accident as far as I could from what I could see of the signs on the road. He pointed out where the lorry tracks finished. I walked with him and he showed me where he had stopped. I could see from the tracks on the road where the lorry had actually stopped and I paced the distance from where the lorry was drawn up to where I had found the body, or rather from where I had seen the body to where the lorry had stopped. The distance was 70 yards.

Q.28. Did the accused tell you anything about how the accident happened? — A. He said the woman had crossed the road in front of the lorry from the right hand side and that he had no time to do anything.

Q.29. From his right hand side as he came down the road? —  
A. Yes.

Q.30. Did the accused say anything else to you? — A. He mentioned that he had sounded his horn on approaching the camp and he said that he had seen the Chief clearing a party of natives off the road at the top end of the camp, the Sondu end, and from the fact that they had been cleared off the road he had supposed that all the natives in the camp were aware of his approach. I think he said that he did not notice any natives on the road in the centre of the camp.

Q.31. Before we go any further, Mr. Lambert, did you later prepare a sketch plan to illustrate the scene of the accident? — A. Yes, but not on the day. I took some notes on the day of the distances. The sketch plan I prepared on the day of the Coroner's Inquest.

- Q.52. Is this the plan which you prepared and handed in at the Preliminary Enquiry? -- A. Yes.  
(Sketch Plan put in as Exhibit 1)
- Q.53. Is this plan true to scale? -- A. No it is not. The width of the road is out of proportion to the width of the lorry tracks as shown on the plan.
- Q.54. Can you say what was the approximate width of the road? -- A. I think about 5 paces.
- Q.55. Is the position where the body was found marked on this plan? -- A. Yes.
- Q.56. Is that the spot marked "body"? -- A. Yes.
- Q.57. And is the place where you first saw the lorry marked? A. Yes it is marked with a square.
- Q.58. Did you see any marks on the road anywhere near the body? -- A. Yes I saw a distinct smear in the dust.
- Q.59. What kind of a smear was it? -- A. It finished at the body and it was clearly caused by the body being dragged. It was clearly a drag mark in the dust.
- Q.40. Could you see the lorry tracks at that point? -- A. Yes it was within the lorry tracks.
- Q.41. And was it parallel with them? -- A. Yes.
- Q.42. And did you measure the length of that mark? -- A. I paced back to a point shown to me by one of the onlookers and I measured that distance. I cannot exactly say I measured the smear mark. The distance from the body to the alleged point of impact, the place pointed out by the interpreter Marungi and alleged by him to be the point of impact. The distance from that point to where I found the body was 55 paces and the smear mark was a little less, about 29 paces. It commenced about 6 paces from the alleged point of impact.
- Q.45. And did you measure the distance from the place where you found the body to the furthest point the lorry

that was 70 paces.

- Q.44. Did you see anything else on the road anywhere near the scene of the accident? -- A. Near the alleged point of impact I saw small pieces of broken glass. Accused was standing with me at the time and he looked about on the road and picked up a few pieces of broken glass.
- Q.45. Can you say exactly where these pieces of glass were in relation to the point you call the alleged point of impact? -- A. Within a yard or two, scattered about the road. I cannot say exactly in which direction.
- Q.46. Nearer to Ngoina or nearer to Sondu? -- A. Nearer to Ngoina. I think we found one or two slightly to the right of the lorry tracks and others dotted about the road.
- Q.47. Were they near the middle of the road or at the side of the road? -- A. Nearer to the left hand side of the road coming from Sondu.
- Q.48. Can you describe the position of the lorry tracks in relation to the road on either side of the alleged point of impact? Were they on the crown of the road or nearer to one side or the other? -- A. Nearer to the left hand side of the road coming from Sondu. Quite close to the fringe at the left hand side of the road, and the lorry seemed to have gone across the road more into the centre from the alleged point of impact to where I found the body and inclined to the right.
- Q.49. Was the body in the middle of the road or more to one side than the other? -- A. The body was roughly in the middle of the road; possibly a little bit more to the right than the left. My recollection is that it was very nearly in the middle of the road.
- Q.50. Does the road run straight through the camp or is there any bend? -- A. Through the camp itself the road is

that was 70 paces.

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- Q.50. Does the road run straight through the camp or is there any bend? -- A. Through the camp itself the road is

straight.

- Q.51. On approaching the camp from the Sondu direction is there any bend? -- A. Yes there is a distinct bend.
- Q.52. A right hand or left hand bend? -- A. It is a double bent, first right and then left.
- Q.53. Can you say for what distance the road is straight for anyone passing through the camp from the Sondu direction up to the scene of the accident? --A. About 250 yards.
- Q.54. Did you make any measurements? -- A. I measured from Marungi's alleged point of impact to where I have shown. That was 90 paces.
- Q.55. Did you make any further measurements? -- A. I didn't measure the distance on the plan of approximately 70 yards. That was an estimate of the distance from the road drag shown on the plan to the point on the bend where I should say the centre of the camp would come into view.
- Q.56. You have referred to a point shown to you by Marungi as the alleged point of impact. When did Marungi point that out to you? -- . Very shortly after the accident; directly I began calling for eye-witnesses and just after I had taken the body into the hut.
- Q.57. Was the accused present when he pointed it out? -A. Yes.
- Q.58. Did Marungi say anything to you about that point? -- A. He told me that he had been standing on the footpath leading up to my banda and that he had seen the accident.
- Q.59. Did Marungi at that time give you any description of the accident? -- A. Yes, he said that the woman was standing near the side of the road. He pointed out the place and said that there were one or two other natives there at the time of the accident who had managed to get out of the way in time. The woman had

been "caught on the road" was the description he gave. The other exception candidates had managed to get off the road.

HIS HONOUR MR. JUSTICE WEBB: You say he showed you a point near the side of the road where the woman was standing. Can you give us any idea about how far from the side of the road? -- A. About 1 1/2 paces.

HIS HONOUR: That is from your left side going towards Ngoina? --

A. Yes. This information was given rather by way of contradiction to what the accused told me. The accused said he thought the woman crossed the road from his right to the left at the end of the path leading up to my banda.

HIS HONOUR: I take it the accused said that in English? --

A. Yes, but I think I interpreted it to the boy because I remember him saying "No" and taking me to the other point further on. He was quite emphatic that she was not going across the road. The accused said he thought she had crossed the road at the foot of the path but when contradicted he didn't seem very certain about the exact point where he had struck the woman but seemed prepared to accept the point of impact pointed out by Marungi as being quite correct, but he stuck to his story that she was crossing the road.

Q.60. Is the position of the path to the banda approximately as shown on this plan? -- A. Yes, approximately.

Q.61. Where was the glass with reference to the point where the path emerged on to the road? -- A. There seemed to be more glass in the vicinity of Marungi's alleged point of impact than anywhere else although I think there were a few pieces further along the road.

HIS HONOUR: While we are on the subject of the glass, did you find anything on the lorry to indicate that the

glass might have come from it? -- A. Yes, the right lamp was smashed and there was blood on it. There were still splinters in the lamp but a lot of glass had fallen out.

Q.62. Where was the beginning of what you describe as the smear mark with reference to the point where the path emerged on to the road? -- A. Do you mean facing Ngoina?

Q.63. Suppose you are standing at the beginning of the smear mark facing in the direction of Ngoina, is the path in front of you or behind or immediately level? -- A. In front and to the right.

HIS HONOUR: In other words the smear mark began on the Sondu side of the path? -- A. Yes.

Q.64. Did anyone else on that occasion make any statement to you claiming to have witnessed the accident? -- A. A hut counter named Charles and a Tribal Policeman named Nyaika came forward as witnesses and there was an old man who claimed to have been standing next to the deceased.

Q.65. What was the old man's name? -- A. I forget his name.

Q.66. Do you know if he is a witness in this case? -- A. Yes.

Q.67. Would you recognise him? -- A. I think so, I am not quite sure.

(Witness Makore s/o Anunda produced)

Q.68. Is this the man? -- A. Yes.

Q.69. Anyone else? -- A. There were also the passengers on the lorry, Accused's servant who I understand was sitting beside him in the front seat and a Police Askari who I understand was standing in the back of the lorry.

Q.70. Can you remember anything of what these witnesses told you at the time? -- A. I remember that the story told by Charles corroborated that of Marungi and that he said he was standing close beside Marungi.

Nyaika the Askari told me he was standing on the other side of the road, that is, on the left hand side facing Ngoina, and that he had blown his whistle.

- Q.71. Did any of these witnesses say anything about what the woman was doing, in particular whether she was standing or moving and whereabouts on the road she was? -- A. I do not remember Charles or Nyaika saying anything about that but I think the old man told me the woman was standing just behind him on the road. He said he was standing close to the edge of the road and he said "I being a man got off the road". I got the impression that they were at the end of the line of exemption candidates facing towards the clump of trees. Somewhere in that clump was the central point from which the lines were radiating and the tail of the line went on to the road.
- Q.72. And the old man Makore said he had been standing close to the side of the road? -- A. Yes.
- Q.73. Did he mean on the road near the side or off the road near the side? -- A. On the road.
- Q.74. And he said that the woman was behind him? -- A. Yes.
- Q.75. Did he point out the position where the woman was? -- A. Yes.
- Q.76. Then would behind him be further on to the road? -- A. Yes.
- Q.77. About how far on the road? Can you give an estimate? -- A. I think I have already mentioned about 1½ paces.
- Q.78. Did Marungi point out the place where he said the woman had been? -- A. Yes, and it coincided with what the old man said; exactly the same point.
- HIS HONOUR: Did Marungi ever attempt to indicate to you the exact point where the woman was standing as distinct from the place where the lorry hit her? -- A. I



cannot swear to that.

HIS HONOUR: At the place where the old man said the woman was standing were the tracks of the car visible? -A. Yes.

HIS HONOUR: And if the old man was correct in where he said she was standing she would have been standing in between the tracks of the car? - A. I think she would; yes certainly she would.

Q.79. Did you do anything to mark the point of impact alleged by Marungi? - A. Yes I had a stake driven into the bank.

MR. PHILLIPS: There is just one point My Lord about which I would like to be quite clear. Has Your Lordship got it that the distance from the place where the body was found to the end of the tracks was 70 paces?

HIS HONOUR: What I have understood him to say is what is shown on his plan; that from the place where the body was found to the place where the tracks of the lorry ended and it started to go backwards again was 70 paces, and that from the point of impact to where the body was found was 55 paces.

Q.80. From an examination of the tracks of the lorry wheels did it appear to you or were you able to say whether there had been any braking? -- A. I did look for brake marks. I went back with the accused and we looked together for brake marks. I cannot remember seeing anything definite in the dust; any definite brake skid mark. There was a slight swerve in the tracks just before the alleged point of impact; a swerve to the left on the Sondu side of the point of impact.

HIS HONOUR: That is to say that the lorry had apparently swerved towards where the woman was standing? --

A. It was coming along fairly well to the left of the road and it seemed to have swerved very slightly possibly a few inches.

HIS HONOUR: But that is a swerve to the right which you are showing? -- A. Well shall I say "kink" in the tracks a slight kink to the left; it just deviated a few inches and came back again.

Q.81. About how far was that kink from the point described as the alleged point of impact? -- A. I think it was about two or three paces. I do not remember taking a measurement of that. I was rather looking more for brake marks.

Q.82. How far back did you follow the lorry tracks in the direction of Sondu? -- A. At the time no very great distance. Possibly 10 or 15 yards. I was more concerned with the woman and what the best thing would be to do for her.

Q.83. Did the lorry tracks appear to you as far as you observed them to be uniformly distinct over the whole distance or were they more distinct in some places than in others? -- A. Pretty uniformly distinct.

Q.84. Did you test the lorry in any way? -- A. Yes when I had finished my investigations of distances and so on I took the accused or went with him in the lorry and asked him to test the brakes. The accused was driving and I was sitting beside him; when we reached a straight and fairly level piece of ground I asked him to go at about 25 miles per hour and I think he was actually travelling about 27 miles per hour when I asked him to apply the brakes hard and he did so and the lorry pulled up at once. I got out of the lorry and paced the distance. I could see the brake skid marks quite distinctly and I paced the distance and made a note. The skid marks were 25 paces long.

HIS HONOUR: Do you mean that when he was going at 27 miles per hour 25 paces was the shortest distance in which he could pull up? -- A. Yes he put his foot down hard

on the brake. If he had applied the hand brake as well he might have pulled up sooner.

- Q.86. After you had concluded these investigations in company with the accused what did the accused do? -- A. I wrote him a letter to the Medical Officer at Kisii and another letter to the Police and I asked him to take these letters direct to Kisii.
- Q.86. Did he leave in his lorry with those letters? -- A. Yes he left at once.
- Q.87. Did you remain there in the camp? -- A. Yes I was working there.
- Q.88. Did the Doctor come later? -- A. Yes, Dr. Wright and Assistant Inspector Grant arrived later about 5.30. In the meantime the woman had died.
- Q.89. Can you say about how long after the accident she died? A. I made a note of the actual time, 8.25 p.m.
- Q.90. Did the Doctor make a post-mortem examination when he arrived? -- A. Yes he went into the hut and examined the body. He didn't cut open the body or anything like that.
- Q.91. That was Dr. Wright? -- A. Yes.
- Q.92. Do you know if Dr. Wright is here to-day? -- A. No, he is sick.

CROSS-EXAMINED BY MR. ARCHER:

- Q.93. Most of the broken glass I think was found a yard or two from the alleged point of impact? -- A. Yes.
- Q.94. And that glass had fairly obviously come from the right hand lamp of the lorry? -- A. Yes.
- Q.95. It therefore looked from that as though the woman was on the right hand side of the lorry at the point of impact? -- A. Yes, I think so.
- Q.96. The point of impact was according to your plan slightly to the left of the crown of the road? -- A. Yes.
- Q.97. I think you said that this old man Makore who claimed to be standing in the vicinity of the deceased

woman said she was standing about  $1\frac{1}{2}$  paces from the left hand side of the road when the lorry struck her? -- A. Yes that is about the distance he indicated to me as far as I can remember. I did not measure it.

Q.98. And on the assumption that the breadth of the lorry is 5 feet and that she was  $1\frac{1}{2}$  paces from the side of the road the left hand side of the lorry would have been right on the edge of the road? -- A. Yes.

Q.99. And there were no signs or marks in the dust of the road showing that the lorry had ever been right in to the left hand side of the road at any point? -- A. The lorry tracks were quite distinct.

Q.100. Yes it was practically in the middle of the road? --

A. I should say a little to the left.

HIS HONOUR: On your plan you show them as being quite near the left side of the road? -- A. These tracks are not meant to be in proportion to the width of the road.

HIS HONOUR: The question is whether the near side tracks of the lorry at the point of impact were in the middle of the road or half way between the middle and the left hand side as you go towards Ngoina, or right over. We are not concerned with the width of the road at the present moment. -- A. I cannot be very definite about that because I have no measurements that I took from the edge of the road to the lorry tracks. All that I can say is that I think it was more to the left than to the right. Exactly how many inches it was from the edge of the road I cannot remember.

HIS HONOUR: You say they were to the left hand side of the crown of the road? -- A. Yes but how near I cannot say.

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- Q.101. There were natives, I think, lining the left hand side of the road? — A. I cannot say because I was not an eye witness.
- Q.102. You didn't deal with that point in asking the witnesses about things generally? — A. No, I think at the time I rather took it for granted that the camp was full of natives.
- Q.103. May I just repeat this, there were signs of a slight swerve to the left a few yards before the point of impact? — A. Yes I remember that. I pointed it out to the accused.
- Q.104. Which would rather indicate that an attempt was being made to avoid something on the road on the right hand side of the car rather than the left hand side? A. Yes I think towards the right of the centre point of the car. It is very difficult to say which way a man is going to swerve when he meets an object in front of him. I think it is possible that if the swerve had been very much greater the lorry would have hit the bank. He might have hit a native standing by the side of the road if he had gone further.
- Q.105. Was the whole attitude of the accused helpful to you while you were conducting your investigations? — A. Perfectly.
- Q.106. He volunteered the statement, didn't he, that he had run some distance beyond where the body was and reversed his car back to it? — A. Yes.
- Q.107. And throughout he stuck to his story and never deviated from it that the woman had either run or walked into his lorry from the right hand, his right hand side of the road? — A. Yes.
- Q.108. You have said I think that he had two passengers in his lorry, one was an Askari and the other was his personal boy? — A. Yes.

- Q.109. Did they both at that time corroborate his statement as to where the woman had come from? -- A. I remember accused's boy doing so and I think the Askari did so. I am not quite certain about the Askari but I think they both did so.
- Q.110. Was the accused obviously very much upset, white and shaky? -- A. Yes I can say that he was very white and certainly very upset.
- Q.111. And rather had the appearance of suffering from shock? A. What do you mean by shock?
- Q.112. I suppose really anybody who has killed or knocked a person down can be presumed to be suffering from shock. What I meant was that he was white and shaky and very much upset. -- A. He was white and very upset. I don't think I can go much further than that.
- Q.113. You are quite sure that you saw no signs of braking before the point of impact? -- A. Yes.
- Q.114. And later on when you made this test of brakes there was no question at all as to when the brakes were applied? -- A. No question at all.
- Q.115. Now in the course of these investigations you made do you form any estimate of the speed at which the accused's lorry was probably travelling? -- A. All I can say is that the natives said he was going fast.
- Q.116. And that with the native is a relative term? --A. Yes.
- Q.117. So that really there was nothing in the course of your investigations which assisted you in coming to any conclusion as to the speed of the lorry? -- A. I could come to no definite conclusions at all as to the speed.
- Q.118. To go back to the deceased woman's position at the time the car struck her, or rather prior to the car

having struck her. I think you told the Court that Charles the hut counter and Nyaika the Askari said nothing before you as to the old woman's position prior to the lorry coming along? -- A. I don't remember exactly what they did say; they came forward as witnesses and so far as I can remember they corroborated Marungi generally in his statement.

- Q.119. And I think in the course of your investigations one of the witnesses said that the old woman had been dithering on the road. I don't know what term he used but I think you translated it as "dithering"? -- A. Yes.

HIS HONOUR: In your statement to the Magistrate you say "an old man said that the woman had been dithering on the road". Is that the same old man Makore? -- A. Yes. From what I remember I think he said he was standing there and saw the lorry coming and decided to step off the road and that the woman who was standing just beside him seemed unable to make up her mind what to do, and therefore I used the word "dithering".

NO RE-EXAMINATION BY MR. PHILLIPS.

MURUNGI SON OF MUSENDA affirmed:

EXAMINED BY MR. PHILLIPS:

- Q.120. What is your tribe? -- A. Mtende.  
Q.121. And what is your occupation? -- A. Interpreter.  
Q.122. Where? -- A. At Kisii.  
Q.123. For the District Commissioner? -- A. Yes.  
Q.124. Do you remember the day when an accident happened at Kagwaga Camp? -- A. Yes.  
Q.125. Do you remember the date? -- A. It was the 19th of the third.  
Q.126. And where were you at that time? -- A. I had gone to the camp.

- Q.127. What time did you reach the camp? -- A. About 11 o'clock.
- Q.128. Was anyone else at the camp? -- A. There were many poor people at the camp.
- Q.129. What were they there for? -- A. To be exempted from tax.
- Q.130. Who was going to exempt them? -- A. Mr. Lambert.
- Q.131. Were you acting as interpreter to him at that time? -- A. Yes but I had not yet started any work.
- Q.132. Did you see anything of this accident? -- A. Yes.
- Q.133. Where were you at the time the accident happened? -- A. I was walking along the footpath towards the Bwana's banda. I was on the other side of the road.
- Q.134. Do you mean the road was between you and the banda? -- A. Yes there is a big road from Sondu and another short road branching off. I was on that road which goes from the big road to the banda.
- Q.135. Were you walking towards the banda or away from it?-- A. I was walking towards the banda.
- HIS HONOUR: So you had your back to the big road? -- A. Yes.
- Q.136. At that time did anything attract your attention? -- A. I heard a horn of a motor car coming from the direction of Sondu.
- Q.137. What sort of a noise was the horn making? -- A. It was sounding continuously.
- Q.138. Did you see any vehicle? -- A. Yes I saw a motor car.
- Q.139. How far away was it when you first saw it? -- A. About 80 or 90 paces away.
- Q.140. In which direction was it going? -- A. Towards Sotik.
- Q.141. You said there were some poor people there?--A. Yes.
- Q.142. How were they standing? -- A. They were arranged in lines with their backs towards the road and they were facing towards Kericho.



- Q.143. Were any of them on the road itself or were all of them off the road? -- A. The last ones were standing on the road.
- Q.144. Can you give any idea about how many natives there were on the road altogether as the lorry was approaching? -- A. Five or six.
- Q.145. Were they all in one place or scattered about in different places? -- A. Those were on the road but there were many others off the road.
- Q.146. Were those 5 or 6 people on the road in one place or scattered about? -- A. They were all in one place.
- Q.147. And where was that place? -- A. On the road.
- Q.148. How far from where you were? -- A. About 5 paces away.
- Q.149. Was the road through the camp clear except for these 5 or 6 people? -- A. Yes.
- Q.150. Had there been anyone else on the road before the lorry came or had it been clear for some time before the lorry came? -- A. There were some people some distance away from there, nearer the place where the lorry had started to hoot and they were being lined up by Chief Martinus.
- Q.151. And what happened to them? -- A. Martinus started to clear them off the road from Kericho side.
- Q.152. Why did he do that? -- A. Because the lorry had hooted behind.
- Q.153. Did you see any other object or vehicle on the road near the camp before the lorry came? -- A. There were other people on the side of the road.
- Q.154. I am not talking about people. Was there anything at all. Did you see a road drag anywhere near the camp on that day? -- A. That was near where Martinus was.
- Q.155. To go back to this group of 5 or 6 people on the road how were they standing? -- A. They were standing in a group facing one another talking.

- Q.156. Do you know if they had yet been arranged in line or not? — A. The front of that line had been arranged but not the end.
- Q.157. Do you mean that they were not actually standing in line? -- A. Yes.
- Q.158. Did you notice anyone particularly who was in that group? — A. I could not recognise because I had not looked at them.
- Q.159. What happened as the lorry came along the road? — A. They got startled and one looked in front and one looked behind; by that time the lorry had already arrived and struck.
- Q.160. Did you see what sort of person it was who was struck? A. It was a woman; an old woman.
- Q.161. And did you see in which direction she was looking when she was struck? -- A. She looked behind to where the lorry was coming from.
- Q.162. In which direction had she been facing when she was in this crowd before the lorry arrived? -- A. She was talking to the other women there.
- Q.163. Can you remember whether she was facing or had her back to you? -- A. She was half facing Vericho and I was on her right.
- Q.164. Did you see what she did as the lorry approached? — A. She got startled and looked in front and then looked back and then she was struck and fell down.
- Q.165. At the moment when she was struck was she standing still or was she moving? -- A. She had just turned to look behind.
- Q.166. Was she still in the same place where she had been talking with the others or had she moved from that place? — A. She was there.
- Q.167. And did you see what part of the lorry struck her? -- A. Her head struck the lamp of the lorry.
- Q.168. Which lamp? -- A. The right hand lamp.

- Q.169. And what happened to her when she was struck? -- A. After she was struck by the lorry she fell some paces in front and then the lorry carried her away.
- Q.170. What part of the lorry carried her away? -- A. The front iron.
- Q.171. What happened to the other people who had been in the group? -- A. They got off the road immediately towards Kericho side.
- Q.172. And what happened to the lorry? -- A. The lorry dragged her, I could hear the noise, to the place where the body was left. The lorry continued to go for about 70 paces. Mr. Lambert came.
- Q.173. What happened to the lorry then? -- A. The tribal policeman was blowing his whistle whilst the lorry was still going.
- Q.174. And what did the lorry do? -- A. The lorry stopped.
- Q.175. Did it remain there? -- A. The lorry backed and stopped.
- Q.176. Did you see who was driving the lorry? -- A. It was the accused.
- Q.177. Did you see anyone else in the lorry? -- A. There was a Police Askari and the Bwana was sitting with one of the Kipsigis in front.
- Q.178. I think you said Mr. Lambert came out? -- A. He came and we showed him from the point where she was struck to the place where the body was and he took measurements.
- Q.179. Did anyone move the body before Mr. Lambert came or was it still in the same place? -- A. No the body was still there.
- Q.180. And I think you said you showed Mr. Lambert the place where the woman had been struck? -- A. Yes.
- Q.181. Was the point of impact in the middle of the road or was it nearer to one side of the road than the other? -- A. In the centre of the road.
- Q.182. Can you give any idea of what speed the lorry was travelling? -- A. It was going fast.

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- Q.182. Can you give any idea of what speed the lorry was travelling? -- A. It was going fast.

Q.183. Had you a clear view of this group of people or were there any people between you and them? -- A. There was no obstacle.

Q.184. And to which side of the road did the other people in the group jump in order to get out of the way? --

HIS HONOUR: He has told us the Kericho side.

MR. PHILLIPS: I am not quite sure which is the Kericho side.

Q.185. Which is the Kericho side? -- A. I was on the Kisii side.

Q.186. And is the Kericho side the other? -- A. Yes.

Q.187. Did you hear the lorry horn sounded as the lorry approached this group? -- A. No.

Q.188. Whereabouts was the lorry when it stopped sounding its horn? -- A. It stopped at the first group of the poor people.

Q.189. Is that the group you referred to as being marshalled by Chief Martinus? -- A. Yes.

Q.190. And do you say that it was not sounded again after that? A. It was not.

Q.191. Was there anyone else anywhere near you? -- A. I was with Charles.

Q.192. Is that the hut counter? -- A. Yes.

Q.193. How far away were you from him? -- A. About 5 yards.

CROSS-EXAMINED BY MR. ARCHER:

Q.194. I think they were mostly old natives who were attending this camp? -- A. They were mostly old but there were young people also.

Q.195. And as this was right out in the Reserve I take it most of them would be unaccustomed to traffic? -- A. Yes.

Q.196. You say this is a new camp? -- A. Yes.

Q.197. So there have not been big concentrations of natives at that point before? -- A. No.

Q.198. I think there were two groups on the road, one under Martinus nearer fairly close to the corner and a second group? -- A. Yes.

Q.183. Had you a clear view of this group of people or were there any people between you and them? -- A. There was no obstacle.

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Q.198. I think there were two groups on the road, one under Martinus near fairly close to the corner and a second group? -- A. Yes.

- Q.199. The second group was nearly opposite you? -- A. Yes.
- Q.200. And as the lorry came round the corner it was fairly close to the first group? -- A. Yes.
- Q.201. And it was then that it sounded its horn loudly and continuously? -- A. Yes.
- Q.202. And Martinus Minor the Chief of the District was in charge of that group? -- A. Yes.
- Q.203. And he waved them off the road? -- A. Yes.
- Q.204. And at the same time as those people got off the road the second group of natives more or less opposite you likewise parted right and left to either side of the road? -- A. They all went to the Kericho side.
- Q.205. That was the left side of the road as the lorry was travelling? -- A. Yes.
- Q.206. Are you prepared to swear there were no natives whatsoever on your side of the road -- A. Yes where I was there was no one.
- Q.207. Were the natives on your side of the road a little further up the road, that is to say, on the Sondu side? -- A. Yes.
- Q.208. When the lorry first came into sight, when you first noticed it and it sounded its horn did you notice it also reduce speed? -- A. Yes it did when it blew the horn because it was coming round the corner.
- Q.209. I understood you to say there were five old women standing together on the crown of the road? -- A. Yes.
- Q.210. Was there an old man with them? -- A. There was a line of men reaching to this group.
- Q.211. You mean some men were lined up ready to claim exemption and at the end of that line was this group of women. Is that it? -- A. Yes.

- Q.212. Are you quite sure that no members of that group which you saw in the middle of the road were on the right hand side of the road? -- A. No.
- Q.213. Did the lorry reduce speed at all? -- A. It only slackened speed at the first group, it went fast after passing the first group.
- Q.214. And these old women were standing right in the middle of the road? -- A. Yes.
- Q.215. And the horn was never sounded again after that first time? -- A. I didn't hear the horn again.
- Q.216. Then your suggestion is that the lorry deliberately ran right into this group standing in the road? -- A. Yes it came and there were groups of people on the road on Kericho side.
- Q.217. I am asking you whether you suggest that the lorry deliberately ran into this group of five people in the middle of the road? -- A. Yes it went fast.
- HIS HONOUR: You are not being asked whether it went fast. --  
A. I don't know whether it was done intentionally but it ran on.
- Q.218. Where exactly was the deceased woman, the woman who was hit by the lorry. Where exactly was she standing in that group? -- A. She was nearer to me, on my side of the group.
- Q.219. Was she the outside woman on your side, nearest to you? -- A. Yes because the others were standing away from me.
- Q.220. Do you know this old man Makore? -- A. I saw him after the accident.
- Q.221. Where was he standing in relation to the old woman who was killed? -- A. I didn't see him. There were many people there.
- Q.222. If he had been one of that group on the road you could not have failed to see him? -- A. Yes.



Q.223. Now you say that the first point of impact, that is to say, the first place of impact with the deceased woman was her head? -- A. Yes her head and her right side.

Q.224. What part of the lorry struck her head and right side? -- A. The lamp of the lorry struck her on the head and the iron struck her right arm.

Q.225. Then it is obvious that the woman was on the right hand side of the car when she was struck? --

HIS HONOUR: Is that not a matter of inference?

MR. ARCHER: Then may I put it in the form of a question?

Q.226. Was the woman on the right hand side of the car when she was struck? -- A. She was in the centre of the road and she turned her head to see back.

Q.227. And the right hand side of the lorry caught her? -- A. Yes.

Q.228. Have you talked about this case with the other witness Charles? -- A. Yes.

Q.229. I am going to put it to you that your statement that there were no natives on your side of the road between you and where the accident occurred is false. -- A. It is not false. There was no one between myself and the woman.

Q.230. I put it to you that your statement that there was a group of natives standing in the middle of the road is also false. -- A. They were there.

Q.231. Have you had any experience of cars? --A. Not much.

HIS HONOUR: What do you mean by that, Mr. Archer? Do you mean has he been in a car or has he driven a car?

MR. ARCHER: I was just going to ask him about speeds.

MR. PHILLIPS: The reply actually was "I don't know very much about car matters".

Q.232. Then you are unable to help us as to how many miles per hour this lorry was being driven at when the accident occurred? -- A. That is so.

Q.225. Now you say that the first point of impact, that is to say, the first place of impact with the deceased woman was her head? -- A. Yes her head and her right side.

Q.224. What part of the lorry struck her head and right side? -- A. The lamp of the lorry struck her on the head and the iron struck her right arm.

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Q.227. And the right hand side of the lorry caught her? -- A. Yes.

Q.228. Have you talked about this case with the other witness Charles? -- A. Yes.

Q.229. I am going to put it to you that your statement that there were no natives on your side of the road between you and where the accident occurred is false. -- A. It is not false. There was no one between myself and the woman.

Q.250. I put it to you that your statement that there was a group of natives standing in the middle of the road is also false. -- A. They were there.

Q.251. Have you had any experience of cars? --A. Not much.

HIS HONOUR: What do you mean by that, Mr. Archer? Do you mean has he been in a car or has he driven a car?

MR. ARCHER: I was just going to ask him about speeds.

MR. PHILLIPS: The reply actually was "I don't know very much about car matters".

Q.252. Then you are unable to help us as to how many miles per hour this lorry was being driven at when the accident occurred? -- A. That is so.

NO RE-EXAMINATION BY MR. PHILLIPS:

MEMBER OF THE JURY: You have told us there was one group with Chief Martinus and another group of these five women? — A. Yes.

MEMBER OF THE JURY: Could the driver of the lorry have seen the second group where the woman was when he came to the first group? — A. Yes he could have seen. (Witness does not wish to have his evidence read).

CHARLES ODEP son of OSERO Sworn:

EXAMINED BY MR. PHILLIPS:

- Q.233. Are you a hut counter employed by the District Commissioner, South Kavirondo? — A. Yes.
- Q.234. Do you remember when an accident happened at Lagwagwa Camp? — A. Yes.
- Q.235. Were you present there at the time of that accident? — A. I was.
- Q.236. Did you see what happened? — A. I did.
- Q.237. Will you describe briefly in your own words what you saw? — A. After we entered the camp I noticed the Bwana's banda was built on Sonda side. There was a path from the Sonda Road to the banda. I was on the road.
- Q.238. Which road? The big road or the small road? — A. I had just left the main road to go towards the Bwana's banda. I heard a noise. I stopped and looked in front and noticed a car coming.
- Q.239. What sort of a car? — A. It was a lorry but not a proper lorry.
- Q.240. From which direction was it coming? — A. From Sonda.
- Q.241. What was the noise you heard? — A. The noise which a motor car makes.
- Q.242. After hearing the noise what did you do? — A. We stopped and then we heard the Bwana of the car blowing the horn.

HIS HONOUR: You keep on saying "we". Who do you mean by "we"?

A. I was with Murungi the Interpreter.

Q.243. and then what happened? -- A. We were surprised.

Q.244. Why were you surprised? -- A. Because the road was full of people; the motor car was running very fast. We continued standing and the motor car kept on going and the people were still there. In the camp there was much noise; no one could hear anything. The lorry continued running; people started to see the lorry and they ran to both sides. Where we were standing there was a group of five women and one man. People were on the road; some were talking, some the Chief had already lined up, some were running when the lorry was coming but they didn't hear the noise of the lorry. When they heard the noise of the lorry they dashed off leaving the woman. The woman was surprised; she could not tell whether the lorry was coming from the front or behind. When she came to her senses she looked over her shoulders. About the same time as she looked to the back she was struck by the motor car. She was thrown and fell in front of the motor car; the motor car still went on. The motor car dragged her. After she had been made smooth the motor car left her. Before he started to drag her we made a sign to him to stop the car but he did not stop. He continued some distance and then stopped. After stopping he came back. He was stopped by an Askari who blew his whistle much and ran after him.

Q.245. Whereabouts was this woman when she was struck? Was she in the middle of the road or towards one side?  
A. They were in the middle of the road.

Q.246. And when she was struck was she in the same place where she had been standing talking or had she moved? -- A. First of all they were standing and after she was struck she was thrown in front.

- Q.247. You say they were standing before the lorry arrived. Did this woman move away from the place where she had been standing talking before she was struck or was she still in the same place where she was talking? -- A. Others when they heard the noise of the motor car jumped off the road leaving this woman puzzled.
- Q.248. What do you mean by puzzled? -- A. Because others went away and she started looking to the side.
- Q.249. Do you mean she couldn't make up her mind what to do? -- A. Yes.
- Q.250. Were there any other people on the same side of the road as you and Murungi? -- A. They were scattered about the side of the road.
- Q.251. But were there any other people on the same side of the road as you and Murungi between you and where the accident occurred? -- A. There were people in front of us in the Sondu direction on our side of the road.
- Q.252. Were there any people on your side of the road close to where the accident happened? -- A. Not just there because this was the road to the Bwana's banda, but beyond there were some people.
- Q.253. When did the lorry driver stop sounding his horn? -- A. When he turned round the corner he began to see people; then he started to blow the horn.
- Q.254. When did he stop sounding the horn? -- A. After he had given one long blast he stopped.
- Q.255. And where was the lorry when the horn stopped sounding? -- A. When he got round the corner and saw people and after hooting continuously he stopped.
- Q.256. How far away were you when he stopped sounding the horn? -- A. As far as from here to that house. (Witness indicates distance of about 100 yards)

Q.257. And after he had stopped sounding the horn did he sound it again? -- A. No.

CROSS-EXAMINED BY MR. ARCHER:

Q.258. By the time the Bwana ceased to sound his horn the natives had cleared off the road in front of him?--  
A. They had not cleared off the road.

Q.259. You say the Bwana drove his car with this group of natives in front of him and he deliberately drove into them? -- A. After he saw the people and blew the horn the people started scattering.

Q.260. And there was a considerable state of confusion I suppose as the lines of applicants for exemption had not been completed? -- A. They had started to line them up.

Q.261. But there was a great deal of confusion? -- A. Yes they were making noise.

Q.262. Where in this group of five women and one man was the deceased woman? -- A. She was one of them.

Q.263. But whereabouts? -- A. One was standing this way and one that way. She was closest to me in the middle of the road.

Q.264. Did you see what happened to the old man who was with her? -- A. He ran away.

Q.265. Which side of the road did he run to? -- A. He was amongst the women and they ran to the opposite side from me.

Q.266. I have two points to put to you, first that it is not true that there was this group of people of whom the deceased was one standing in the middle of the road. -- A. How do you mean that they were not there.

Q.267. I am suggesting that it is not true. -- A. AS I CA I saw them standing.

Q.268. What do you mean by "as I came"? -- A. We were

coming along this road and they were the last of the people in the camp.

Q.269. The second point is are you quite sure there were no natives near you? -- A. There was nothing. A little further on there were people.

Q.270. How far away from you were the people you say were on the same side of the road? -- A. About 14 yards away

Q.271. Since you saw this accident have you talked the case over with Murungi? -- A. I live with Murungi at the same place and we have been talking about it.

Q.272. And did you come to the conclusion that you had to get this European who had killed this woman into trouble? -- A. You cannot say that because we are saying exactly what we saw.

RE-EXAMINED BY MR. PHILLIPS:

Q.273. Did you make any statement to Mr. Lambert immediately after the accident when he came down to look at the body on the road? -- A. When the Bwana came he did not ask me.

Q.274. Did you never tell him? -- A. I did not tell him at that time.

HIS HONOUR: Well when he did ask you did you tell him? --

MR. ARCHER: My Lord I made a careful note at the time that Charles and Nyaika said nothing about the woman's position when the lorry struck her.

Q.275. Have you any particular grudge against Mr. Purchas? -- A. I have no grudge.

Q.276. Did you know him before this accident? -- A. I saw him there and I began to know him.

Q.277. Did you know this woman before, the woman who was killed? -- A. She was a Kisii woman. I began to see her after she had been run over by the lorry.

Q.278. What tribe are you? -- A. Jaluo.

Q.279. And what tribe is Murungi? -- A. Mtende.

(Evidence read over to witness).

MAKORE son of ANUNDA affirmed:

EXAMINED BY MR. PHILLIPS:

- Q.280. What tribe are you? -- A. Kisii.
- Q.281. Do you remember an accident happening at Magwagwa camp?  
A. Yes.
- Q.282. Were you present at Magwagwa Camp on that occasion? --  
. Yes I was there.
- Q.283. Did you see with your own eyes how the accident happened? -- A. Yes, the woman was in front and I was a little behind. When she was a little behind then the lorry appeared and struck her and she fell down.
- Q.284. You say the woman was in front of you? -- A. We were in a line, then we saw the lorry coming; I stepped back, then the lorry came and caught the woman.
- Q.285. Before the lorry came where were you? -- A. I was on the road.
- Q.286. In the middle of the road or at the side? --A. Facing in a direction diagonal to the line of the road.
- Q.287. And where was this woman? -- A. The woman was in front of me.
- Q.288. Was she on the road or off the road? -- A. She was on the road.
- Q.289. And was anyone else on the road near that place? --  
A. There were many people there paying taxes, not one person.
- Q.290. And were any of these taxpayers actually on the road? --  
A. There were two lines.
- Q.291. Were there any other people on the road near to you and the woman at the time the lorry came? -- A. Yes there were other people.
- Q.292. How many? -- A. Many people.
- Q.293. All together in one place? -- A. There were only two lines.
- Q.294. How far away was the lorry when you first saw it? --  
A. I heard the lorry when it was near me.



- Q.295. What did you do when you heard it? -- A. I jumped aside.
- Q.296. And what happened to the woman? -- A. The lorry ran over her and took her for some distance.
- Q.297. What was she doing at the moment when the lorry struck her? -- A. We were standing in two lines to pay taxes and the lines had come right back to the road.
- Q.298. Was she in one of the lines? -- A. Yes.
- Q.299. Was that the same line as you were in or another? --  
A. The same line; she was in front of me.
- Q.300. And when the lorry struck her was she standing still or was she walking or running or what was she doing? -- A. She was standing and she was turning round to see what it was.
- Q.301. Did you hear the horn of the lorry? -- A. I did not hear. If I had not fallen to the side I did the lorry would have also killed me.
- Q.302. Did it pass close to you? -- A. Yes and I fell back.
- Q.303. What was the name of that woman? -- A. Maraa.

CROSS-EXAMINED BY MR. ARCHER:

- Q.304. Looking towards Ngoina you were on the left hand side of the road? -- A. Yes.
- HIS HONOUR: Were you looking towards Ngoina? -- A. We were looking towards Kericho.
- Q.305. So looking towards Kericho you were on the left hand side of the road -- A. Yes.
- Q.306. And there were only three of you, you and two women one of whom was the deceased, on the road? --  
A. Yes we were three.
- Q.307. And you were not with three or four other women? --  
A. No they were behind.
- Q.308. Were you or the deceased woman the nearer to the middle of the road? -- A. Yes we were standing on the road.

Q.509. My question was who was the nearer to the middle of the road? -- A. I and the woman, we two.

HIS HONOUR: If we take you to a road here could you show us how you were standing? -- A. Yes.

(Witness demonstrates on a road outside the Court that the woman was about three feet from the side of the road and he behind her, i.e. nearer to centre of road, and that there were only himself and two women on the road).

Q.510. Can you tell me if there were natives on the other side of the road, the side opposite to you? -- A. The people who were there were the poor people who had been placed there.

Q.511. Were there any people on the other side of the road, the same side as the Bwana's banda? -- A. There were some sitting in the grass waiting to be exempted by the Bwana.

Q.512. Were they not standing? -- A. No, they were sitting on the grass.

Q.513. You are quite sure there were none standing? -- A. They were not standing.

Q.514. I suppose for some little time you had been talking to these two old women about your exemption from tax and so on? -- A. No we were in a line to pay taxes.

Q.515. But were you not talking to one another? -- A. No.

Q.516. The whole place was quite quiet, was it? -- A. Yes, there was no noise.

NO RE-EXAMINATION BY MR. PHILLIPS.

(Evidence read over to witness).

NYAIKA son of KITANGWA affirmed:

EXAMINED BY MR. PHILLIPS:

Q.517. Are you a Tribal policeman in the South Kavirondo District? -- A. Yes.

Q.518. Were you at Magwaga Camp on the day an accident took

- place and an old woman was killed? -- A. Yes.
- Q.519. Did you actually see her knocked down with your own eyes? -- A. I saw. I was standing outside the corner of the house guarding prisoners.
- Q.520. And what did you see? -- A. I heard the sound of a motor horn. I looked up and saw the motor car coming in front of me from the direction of Sondu.
- Q.521. What happened then? -- A. When it passed in that way there were people in the camp. After that I heard people crying out "The motor car has run over some one". I looked and saw that it was true the car had knocked someone down. I took out my whistle and blew it. He didn't hear my first whistle, I blew a second time and then a third time and then he stopped. I ran up to him and told him "Bwana you have killed someone". I came back to the place where the body was and saw Mr. Lambert there.
- Q.522. Had you seen this woman in camp that day before she was injured? -- A. Yes.
- Q.523. About what time did you see her? -- A. Before the motor car had arrived.
- Q.524. Where had you seen her? -- A. In the camp; I had collected them together.
- Q.525. Was the woman who was killed among the people you collected? -- A. There were three people, one an old man, the woman who was killed and another woman who was standing at the edge of the road.
- Q.526. Did you see them standing there? -- A. Yes.
- Q.527. Was that before the lorry came? -- A. Yes I placed them in line.
- Q.528. Did you put the deceased in that line? -- A. Yes, I placed two lines.
- Q.529. And when you put her in line was she on the road or off the road? -- A. One was at the edge of the road and two were on the road.

Q.330. Was the deceased among those two who were on the road?

A. Yes she was the second person on the road.

Q.331. Did you see any other people further along the road? --

A. Yes but they had heard the horn and had cleared off the road.

CROSS-EXAMINED BY MR. ARCHER:

Q.332. You didn't see the accident actually happen, did you?--

A. No.

NO RE-EXAMINATION BY MR. PHILLIPS.

(Evidence read over to witness)

NYABORE son of NDUBI affirmed:

EXAMINED BY MR. PHILLIPS:

Q.333. Did you know Maraa wife of Mauti? -- A. Yes.

Q.334. Was she related to you? -- A. Yes.

Q.335. How was she related to you? -- A. My father and her father were brothers.

Q.336. Did you see her body after she died? -- A. Yes I arrived and found her dead.

Q.337. Was that at Magwagwa Camp? -- A. Yes.

Q.338. Were you present when the Doctor came and examined her?

A. Yes I was there when he arrived.

Q.339. Did you identify the body to him? -- A. Yes, I said "This is Maraa".

CROSS-EXAMINED BY MR. ARCHER:

Q.340. Was she at all deaf? -- A. No she was not deaf.

NO RE-EXAMINATION BY MR. PHILLIPS:

MR. PHILLIPS: Dr. Wright, My Lord, is ill and unable to attend and I understand that my learned friend consents to his Depositions being read under Section 287(a).

MR. ARCHER: I consent My Lord.

DEPOSITION OF FREDERICK JAMES WRIGHT M.D., M.R.C.P.

"I am a Medical Officer stationed at Kisii. At about 3.30 p.m. on the 19th March, 1957, I received a written communication from Mr. Lambert, District Officer, on the receipt of which I proceeded by car to

Magwaga Camp in North Mugirango Location where I arrived shortly after 5.30 p.m., and was taken to a hut where the body of Moraa wife of Mauti was identified to me by Nyabori s/o Ndali. The body was that of a woman of about 45 years of age who had been dead for from two to three hours. There was a simple fracture of the shaft of the left femur about two inches above the knee and of the upper end of the right femur through the neck of the bone. There was a bruise on the right shoulder, a bruise with broken skin on the outer side of the right eye, a bruise with broken skin on the right side of the head over the parietal bone which was not broken. There was also a cut one inch in length through the skin on the inner side of the left elbow. In my opinion death resulted from shock from multiple injuries. The injuries were sufficient to have caused the death of a person of any age in whatever state of health. The injuries were consistent with the striking of deceased by a motor vehicle.

Id. by accused.

- Q. From the fact of deceased having injuries on the left side could you say if she was struck on the left hand side? — A. I am unable to state whether these injuries were caused by impact of the vehicle against the body of deceased or by the deceased in striking the ground as the result of having been struck elsewhere by the vehicle.
- Q. Had deceased any injuries to indicate that she was struck in the back or behind the knees? — A. I did not detect a bruise over the back and I cannot tell whether the fracture above the left knee was caused by a blow in front or from behind. From the combination of injuries I am unable to state the direction in which the deceased was facing at the time of the impact or whether she was stationary or moving.

Q. Was there any indication that she was first struck on the right-hand side as opposed to the left or vice-versa? -- A. There was no indication either way.

By Court Q. Is there any possibility that deceased's life could have been saved had a Doctor been present at the time of the accident? -- A. No.

No re-examination."

MR. PHILLIPS: Your Lordship will see at page 12 of the Depositions that at the Preliminary Enquiry Assistant Inspector Grant asked to be allowed to give evidence himself on certain matters but his evidence was excluded by the Magistrate on the grounds that he was prosecuting. A notice was served in respect of his evidence but I do not wish to lead evidence on these matters. Inspector Grant is here if my friend wishes to cross-examine him.

MR. ARCHER: My Lord I am in this difficulty, I am perfectly prepared to allow this evidence to go entirely if I have an undertaking from my learned friend that he is going to make no reference to certain evidence in his cross-examination of accused. If, on the other hand he is going to refer to the matter then I shall feel compelled to put certain questions to Assistant Inspector Grant by way of cross-examination. I have no wish to do so. It is for my learned friend to say.

MR. PHILLIPS: I think it unlikely, My Lord, that I shall cross-examine on this point but I cannot give any definite undertaking that I will not do so.

MR. ARCHER: In that event, my Lord, I shall cross-examine the Inspector.

FREDERICK IVOR GRANT Sworn:

CROSS-EXAMINED BY MR. ARCHER:

Q. 541. Mr. Grant, as an officer of the Police Force you are probably aware of the procedure when a certificate of competency to drive a motor car is applied for?

Q.542. That is, of course, a certificate of competency to drive a motor vehicle I am referring to. Is it the invariable rule to put an applicant through a test?—  
A. Yes.

Q.543. The invariable practice? — A. Yes.

Q.544. Even where the applicant has driven a car for years and comes out to this country? — A. Not in a case like that.

HIS HONOUR: Then it is not the invariable practice? — A. No sir, I misunderstood the question. I thought Mr. Archer was referring to new drivers.

Q.545. In the case of somebody who has been driving a car for years stating to a Police Officer that he has driven a car is it the practice to put him through a test?—

A. Not invariably, in a case where a man has been driving for years a test would not be necessary.

Q.546. In other words the Police are prepared to accept from the applicant a statement as to previous experience in driving in lieu of a test? — A. Yes they would be prepared to accept a statement in conjunction with previous driving licence or certificate.

Q.547. So that the test as to the applicant's competency as a driver is very often his previous experience? —  
A. Yes.

NO RE-EXAMINATION BY MR. PHILLIPS:

MR. PHILLIPS: That completes the Crown Case My Lord. There was no statement made by the accused at the Preliminary Enquiry.

THE CASE FOR THE DEFENCE.

MR. ARCHER: My Lord I do not propose to waste the time of the Court by submitting at this stage that the Defence is not called upon to answer any case. I propose, therefore to call my client and to put him into the box to tell his story. I shall also call other witnesses.

ROBERT PETER CHAPMAN PURCHAS Sworn:

EXAMINED BY MR. ARCHER:

- Q.348. Your name is? -- A. Robert Peter Chapman Purchas.
- Q.349. You are living in Sotik? -- A. Yes.
- Q.350. How long have you been in the country Mr. Purchas? --  
A. Since May 1955.
- Q.351. What is your age? -- A. Twenty five.
- Q.352. On the 19th March last I think you were driving in  
your lorry from Kisumu to Sotik? -- A. Yes.
- Q.353. What model is the lorry? -- A. Chevrolet 1954.
- Q.354. How long had you driven that particular car? -- A. Since  
the beginning of June last year.
- Q.355. Were the brakes and steering in order on that day? --  
A. Yes perfectly.
- Q.356. Were you travelling with a load or light? -- A. Light.
- Q.357. Were you alone in the lorry or had you anyone with you?  
A. I had my own boy and I picked up an Askari half  
way between Kisumu and Sotik near Sondu.
- Q.358. Where was your boy? -- A. He was sitting in front  
with me.
- Q.359. And where was the Askari? -- A. He was in the back.
- Q.360. About midday what happened? -- A. I was travelling  
towards Sotik and I came round a bend in the road.  
I was doing about 30 miles per hour and having  
rounded this bend I saw a collection of natives  
where I have never seen a collection of natives  
before. These natives were in two main groups.  
Immediately on seeing them I applied the footbrake.
- Q.361. Perhaps you would just say something about where the  
two main groups of natives were in relation to  
yourself as you came round the bend. -- A. The  
first lot was about 70 paces from the corner.
- Q.362. And how far was the next group beyond them? -- A. About  
40 paces beyond.
- Q.363. When you approached this first group you have just



- told us you applied your brake. To what speed did you slow down? -- A. To about 20 miles per hour.
- Q.364. Did you do anything else? -- A. Yes I sounded my horn very vigorously.
- Q.365. When you say you sounded your horn what do you mean?--  
A. I kept my hand on it and took it off again several times.
- Q.366. And what happened when you sounded your horn? --  
A. The first group got out of the way. I noticed they were being pushed off the road by a native in uniform.
- Q.367. Who was the native in uniform do you know? -- A. I afterwards discovered that he was Chief Martinus.
- Q.368. And what happened when you passed the first group of natives? -- A. I saw that the way was quite clear as the other group had also got out of the way.
- Q.369. Will you explain a little more exactly what you mean by getting out of the way? -- A. They scattered to the side of the road and left a path for the lorry to go through.
- Q.370. To one side of the road or to both sides? -- A. To both sides.
- Q.371. Did you appear to have a clear road? -- A. Yes.
- Q.372. What did you do then? -- A. Having seen there was a clear road I took my foot off the brake.
- Q.373. Did your lorry slightly gain speed? -- A. Yes.
- Q.374. And when you got to the second group at what speed do you think you were travelling? -- A. About 25 miles per hour.
- Q.375. What happened then? -- A. I had nearly got past this group of natives when the deceased ran out from the right hand side of the road. She was only about 4 yards away when she started to run out.
- Q.376. Could you have avoided her? -- A. No.

- told us you applied your brake. To what speed did you slow down? -- A. To about 20 miles per hour.
- Q.364. Did you do anything else? -- A. Yes I sounded my horn very vigorously.
- Q.365. When you say you sounded your horn what do you mean?--  
A. I kept my hand on it and took it off again several times.
- Q.366. And what happened when you sounded your horn? --  
A. The first group got out of the way. I noticed they were being pushed off the road by a native in uniform.
- Q.367. Who was the native in uniform do you know? -- A. I afterwards discovered that he was Chief Martinus.
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- Q.375. What happened then? -- A. I had nearly got past this group of natives when the deceased ran out from the right hand side of the road. She was only about 4 yards away when she started to run out.
- Q.376. Could you have avoided her? -- A. No.

- Q.377. Were there any other natives on that side of the road? -- A. Yes there were.
- Q.378. Did you see any group of natives in the middle of the road? -- A. No I did not.
- Q.379. What measures did you take when the deceased woman ran into you? -- A. I instinctively swerved to the left.
- Q.380. What sort of a swerve was that?--A.A slight swerve, but had I swerved any more I should have hit a lot more natives on the left hand side of the road.
- Q.381. Do you know what was the point of impact between your lorry and the deceased woman? -- A. I had the impression that I struck the woman on the left hand side with the right hand mudguard and lamp.
- Q.382. What happened after that? -- A. Having hit this woman I apparently lost my head.
- Q.383. Do you remember having dragged her? -- A. No. I have no recollection at all.
- Q.384. Do you recollect having heard shouts and a Police whistle and so on? -- A. No.
- Q.385. What is your explanation of that in the light of the evidence which you have heard given in this Court? A. The only noise I heard was, having drawn up, I then heard some boys who came along the side of the lorry and told me I had knocked someone down.
- Q.386. And what did you do when you were told that you had knocked someone down? -- A. I then reversed the lorry and I drew up a few paces from where Mr. Lambert was bending over the deceased.
- Q.387. Are you conscious of any event from the moment that you struck the deceased woman until you pulled

- up to a standstill? -- A. No not at all.
- Q.388. You have heard Mr. Lambert giving his evidence in this Court as to subsequent events after you came together over the deceased's body. Do you agree that substantially it is correct? -- A. Yes I entirely agree.
- Q.389. In particular did you in company with him look for signs of your having braked the car just before at the moment of impact? -- A. Yes we did.
- Q.390. And what was the result? -- A. There were no signs of the back wheels having locked causing a skid mark.
- Q.391. Are you quite satisfied that the road was clear just before this woman walked out? -- A. Yes.
- Q.392. Do you consider that your speed was safe and reasonable under the circumstances? -- A. Yes.
- Q.393. What do you think was the cause of the accident? -- A. The woman having darted from the right hand side of the road at such a short range, 4 yards.
- Q.394. Mr. Lambert has told us that your personal boy and Askari both supported you in the statement that the woman came into the car from the right hand side. Had you had any previous conversation with them prior to your talking it over in his presence? -- A. No.
- Q.395. How many miles have you driven this particular lorry? -- A. Twelve thousand.
- Q.396. Do you mean that you have now driven it 12,000 miles? -- A. I have driven it 12,000 now. I should say I had driven it about 11,000 then.
- Q.397. For how many years have you been driving a car? -- A. Since 1932.
- Q.398. Have you ever had an accident? -- A. No, the only thing that happened was that when I was driving Mother's Austin Seven the door flew open one day

and got smashed; otherwise I have had no accident.

CROSS-EXAMINED BY MR. PHILLIPS:

- Q.399. Why did you stop your lorry? -- A. I recovered my senses and drew up straight away.
- Q.400. You recovered your senses and then you decided to stop? -- A. It was almost simultaneous; I recovered my senses and drew up at once.
- Q.401. But you will agree that you must have travelled some distance after hitting the woman before you made any attempt to pull up? -- A. I have no recollection of that.
- Q.402. But is it not a fact that you travelled at least 100 yards after hitting the woman? -- A. After hitting the woman I had no recollection of anything that happened until I drew up.
- Q.403. But you realised you had hit her? -- A. Yes.
- Q.404. Did you realise that at once? -- A. She came out from the right hand side of the road and could not be avoided.
- Q.405. Why didn't you at once take steps to pull up the lorry? -- A. There was not a chance. She was hit and then I apparently lost my head and I recollect nothing more until I drew up.
- Q.406. Do you agree that there was a very large crowd of natives at the moment? -- A. Yes.
- Q.407. Some hundreds? -- A. Yes.
- Q.408. Some of them as you have said were actually on the road as you approached? -- A. Yes.
- Q.409. And many more were lining the side of the road? -- A. I have the impression that the ones who got off the road were the ones who were lining the road afterwards. There were a lot more in the grass and among the trees.
- Q.410. So that there was a considerable crowd of natives close to the edges of the road? -- A. Yes.

- Q.411. And at the point or near the point where this accident occurred there was only quite a narrow place for you to pass between them? -- A. Well the natives had cleared off the road or were lining the edges.
- Q.412. Lining the edges, but it is not a broad road is it?--  
A. Five paces I believe.
- Q.413. Is it not a fact that you saw these natives clearing out of your way and you thought they were all going to clear out of your way and therefore you did not take any step for their safety? --A. When I saw the first lot clearing off the way was quite clear; plenty of room to get through.
- Q.414. How close did you get to them before they left the road clear for you? -- A. The road was clear after I passed the first group.
- Q.415. Yes but before you passed the first group? --A. They started to scatter as soon as I blew my horn.
- Q.416. And then when you had passed the first group you saw the way clear where the second group was? --  
A. Yes.
- Q.417. But not till then? -- A. No.
- Q.418. How near did you approach to that second group before they scattered to the side of the road? --  
A. I was about 35 yards away.
- Q.419. And going at about 25 miles per hour? -- A. I was going at about 20 miles per hour and then when I saw the way was clear I took my foot off the brake; there is a slight slope down and I increased speed.
- Q.420. There is a slight slope down? -- A. Yes.
- Q.421. If one of those people had remained in the middle of the road and had not got out of your way you would have had to brake pretty hard in order to avoid hitting him or her? -- A. I had 35 yards in which to draw up.

- Q.411. And at the point or near the point where this accident occurred there was only quite a narrow place for you to pass between them? -- A. Well the natives had cleared off the road or were lining the edges.
- Q.412. Lining the edges, but it is not a broad road is it?--  
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- Q.417. But not till then? -- A. No.
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- Q.419. And going at about 25 miles per hour? -- A. I was going at about 20 miles per hour and then when I saw the way was clear I took my foot off the brake; there is a slight slope down and I increased speed.
- Q.420. There is a slight slope down? -- A. Yes.
- Q.421. If one of those people had remained in the middle of the road and had not got out of your way you would have had to brake pretty hard in order to avoid hitting him or her? -- A. I had 35 yards in which to draw up.

- Q.422. but you would have had to brake pretty hard? -- A. Yes.
- Q.423. I put it to you that you saw this group on the road in front of you and they all apparently made a movement to go to the side of the road and it appeared to you that they were all going to get out of your way but one was left on the road and she was the one you struck? -- A. No, the way was clear; I had a clear road when I was 35 yards away so I took my foot off the brake.
- Q.424. Did you hear the witness Murungi telling Mr. Lambert what he saw occur? -- A. Yes.
- Q.425. Did you hear him say that the woman had been standing on the road? -- A. I don't remember now.
- Q.426. Did you hear him deny that she had run out from the right hand side of the road as you stated? --  
A. Yes he did. I definitely stated that she had run out from the right hand side of the road and he said no. I think he did state that she was standing in the road because we were arguing about the alleged point of impact.
- Q.427. Did you see anything to suggest why this woman suddenly darted across the road? -- A. No reason at all.
- Q.428. When did you last sound your horn before you reached the second group? -- A. Having passed the first group and seen the way was clear I didn't sound my horn any more.
- HIS HONOUR: You say that after hitting the woman you lost your head and then you drove on and remember nothing more until you stopped. Why did you stop?  
A. I recovered my senses and drew up straight away.

HIS HONOUR: Do you mean that during that period you had forgotten you hit the woman? -- A. I cannot remember anything that happened. I might have put my foot on the accelerator for all I know.



HIS HONOUR: Do you know did you put on the brake or try to put it on immediately before hitting the woman? -- A. I had no time.

HIS HONOUR: As regards this first group, you must have taken them rather by surprise since you say the Chief was pushing them off the road -- A. It is a blind corner. When I came round the corner I suddenly came on these natives where I have never seen a crowd of natives before.

NO RE-EXAMINATION.

KIPROSKE ARAP MISAI affirmed:

EXAMINED BY MR. ARCHER:

Q.429. Are you the personal boy of Mr. Purcass? -- A. Yes, I work for him.

Q.430. Do you remember an accident at Magwagwa Camp when a woman was killed -- A. We went on until we saw those Kisii. We saw many Kisii. The Bwana blew his horn; some of the Kisii went one side and some to the other side. We continued on until a woman who was standing on the side went across from the right.

Q.431. How far away from the lorry was this woman when she walked out from the side of the road -- (witness indicates a distance of 3 or 4 paces)

Q.432. Was the lorry going fast. -- A. Not very fast. It was going slowly on account of seeing people.

Q.433. Could you see what part of the lorry struck the woman? -- A. She was struck on the right side of her head.

Q.434. Was anyone else on the lorry with you? -- A. Yes the Askari was with me.

Q.435. Where was the Askari? Was he in front? -- A. He was riding behind.

CROSS-EXAMINED BY MR. PHILLIPS:

Q.436. As the lorry came along the people were getting out of the way on either side? -- A. Yes.

- Q.437. and some of them jumped out of the way very quickly?  
A. As soon as they heard the hooting they cleared off the road until we saw that the road was clear.
- Q.438. Before you came up to the spot where the woman was hit did you see any people on the road there? --  
A. No we didn't see any others. This woman left the other people and cut across.
- Q.439. But before you came there did you see a little group of people standing there? -- A. Some were standing on the side of the road.
- Q.440. Is it not a fact that you came round this corner into the camp and you suddenly saw a group of people on the road? -- A. No we had left the other people.
- Q.441. Did you see any other people on the road? -- A. Yes
- Q.442. How many people? -- A. Many people.
- Q.443. Were they on the road where the motor car goes? --  
A. When we saw people there were many people there.
- Q.444. Were they all across the road, blocking the road? --  
A. Before they heard us they were blocking the road. After hearing the horn they scattered.
- Q.445. And were there a lot of people on the road at the place where this woman was knocked down? --  
A. Yes and they got off the road. The woman left the other people and she was caught.
- Q.446. But she was with a group of people on the road? --  
A. Yes and they went aside to each side.
- Q.447. Which way did they go? -- A. Some to one side and some to the other.
- Q.448. And did this woman first go to one side? -- A. Yes when she heard us coming at first she went to the side.
- Q.449. And then she hesitated and ran back again? --A. Yes when we were near.

Q.450. And she did that because she was frightened? --

A. She did that.

Q.451. Did you see that old man Makore? -- A. No.

Q.452. You didn't see him at all? -- A. I did not see him.

Q.453. And as you were going along do you say that the woman came out from the right hand side? --A. Yes.

Q.454. And at the moment when she was struck was she standing still? -- A. She was moving.

Q.455. In which direction? -- A. She was going like that and then stopped.

Q.456. Was she running from left to right or how? --A. There was no other road; there was only one road.

Q.457. You said she came out from the right hand side of the road. Did she cut straight across the front of the lorry? -- A. Yes.

Q.458. And how was it that the lorry struck her on the right side of the head? ..

MR. ARCHER: My Lord have we that in evidence?

HIS HONOUR: Yes he pointed to the right side of the head and said it struck her there.

A. The lorry was going along this way and she came that way and the lamp struck her.

Q.459. Was she struck on the right side -- A. Yes. I don't know how but I am certain she was struck on the right.

Q.460. The fact is that you were not really paying any particular attention until the very moment of impact? -- A. I was looking at the people and I saw her come out.

Q.461. It was not until the very moment of the collision that you took any notice of what was happening and then you looked up and saw the woman being hit on the right side of the head --A. Yes I saw she was struck there.

Q.462. What happened after she was struck? -- A. We went on a little and then stopped.

HIS HONOUR: Did you go on fast? -- A. Not fast. We were driving slowly because there were many people.

HIS HONOUR: And when you hit the woman did you not go more slowly still? -- A. We went slowly.

HIS HONOUR: Did you say to the Bwana "We have hit a woman"?-- A. Yes he had also seen and I told him he had hit someone and he said "Yes" and stopped.

HIS HONOUR: Did all the people shout? -- A. Yes and one blew a whistle. As he blew the whistle we stopped and were going back.

HIS HONOUR: But the man says he blew the whistle three times. How many did you hear? -- A. I think I heard two whistles.

HIS HONOUR: If the Bwana was going slowly why could he not stop at once? He knew he had hit the woman and he heard the whistle. Why did he not stop at once? -- A. I don't know.

NO RE-EXAMINATION. (Evidence read over to witness).

COURT ADJOURNED AT 5 p.m. AND RESUMED AT 9.30 a.m.  
ON 3RD JUNE, 1957.

PERCY ROSS Sworn:

EXAMINED BY MR. ARCHER:

Q.463. You are a Bachelor of Medicine and a Bachelor of Surgery? -- A. Yes.

Q.464. You are practising in Kisumu? -- A. Yes.

Q.465. In your opinion, Dr. Ross, is it possible for a person who has been subjected to a sudden mental shock to lose for a short period possession of his faculties so as to be rendered unconscious of events which are happening around him? -- A. Yes I think that is quite possible.

Q.466. I want to put a hypothetical question to you. Supposing that an individual driving a car were to

run into a pedestrian with a force of impact which would be sufficient to cause death or serious injury to that pedestrian could that circumstance cause such a shock to the driver of the car as to have the consequence referred to in my previous question? -- A. Yes I think that is quite possible.

- Q.467. And could the mere imminence of such an impact, that is to say, the driver being faced with, in his opinion, an unavoidable accident, be sufficient to cause that state of mind? -- A. Yes I think so.

NO CROSS-EXAMINATION BY MR. PHILLIPS.

OPICHA son of ONDINGA affirmed:

EXAMINED BY MR. ARCHER:

- Q.468. You are P.C. No. 969? -- A. Yes.
- Q.469. Do you remember an accident happening at Magwagwa Camp? -- A. Yes.
- Q.470. On that day where were you? -- A. I was at the back of the lorry.
- Q.471. Of the lorry driven by this Bwana, the accused? -- A. Yes.
- Q.472. What part of the lorry were you riding in -- A. On the right side at the back near the cab where the Bwana was sitting driving.
- Q.473. Were you sitting or standing? -- A. I was standing.
- Q.474. I think as you were nearing the camp you came on a large crowd of natives? -- A. Yes.
- Q.475. Did the Bwana sound his horn? -- A. Yes very much.
- Q.476. What happened to the natives? -- A. The people cleared off by going to each side.
- Q.477. At what sort of speed was the lorry travelling, fast or slow? -- A. It was not going fast.

Q.478. Will you tell the Court what happened then? --

A. When we were about to finish the crowd there was only this woman left on the right. She moved from the right to go to the left; the Bwana also swerved to the left and they met.

Q.479. Did you see where the woman was struck by the motor car? -- A. She was struck on the left because she was going away from the right.

Q.480. Did you see what part of the lorry struck her? --

A. The lamp and the mudguard.

Q.481. Which lamp and mudguard? -- A. The right hand ones.

Q.482. Had you a clear view of the accident from where you were standing? -- A. I saw.

Q.483. Were you able to see clearly what happened? -- A. I saw.

Q.484. Did you see well? -- A. I saw.

Q.485. Were there any other natives on the right hand side of the road? -- A. Yes there were other people.

Q.486. How far from the lorry was the old woman when she started to come across the road? -- A. From here to the door (witness indicates distance of about 5 yards).

CROSS-EXAMINED BY MR. PHILLIPS:

Q.487. And did the Bwana then immediately put on his brakes?

A. Yes he put on the brake at once.

Q.488. Did he put them on hard? -- A. Yes.

Q.489. How can you tell that he put on the brake? -- A. I saw because I was looking forward and I could see in front.

Q.490. Could you see into where the Bwana was sitting? --

A. Yes from behind I could see because the top covering was bad.

HIS HONOUR: Do you mean you saw him put on the brake? --A.Yes.

HIS HONOUR: How did he put it on? -- A. He pushed with his foot.

- Q.491. But there were several pedals which he could have pushed. Do you know whether it was the brake pedal he pushed? -- A. Yes it was the brake pedal.
- Q.492. At any rate you say you saw him put on the brake? -- A. Yes.
- Q.493. Was that before the woman was hit? -- A. When the woman came near that was the time he pressed.
- Q.494. Was there a hole in the top of the cab or how were you able to see what he was doing? -- A. There was a hole. The plank was bad.
- Q.495. Was it a big hole or a little hole? -- A. Sufficient.
- Q.496. If you were looking through this hole to see what the Bwana was doing how could you see exactly what happened to the woman? -- A. It was after the woman was run over.
- Q.497. Didn't you just now say it was when she was coming near the lorry? -- A. I don't understand.
- Q.498. Did he put on the brake when the woman came near or after she was run over? -- A. After she was run over.
- Q.499. Why did you say it was before she was run over? -- A. I didn't understand properly.
- Q.500. Did he put on the brakes immediately after she was run over? -- A. He put on the brakes and I got down.
- Q.501. How far had you gone before he put on the brakes? -- A. We went on for a bit, then he put on the brakes and I jumped off the lorry.
- Q.502. Did you hear the sound of a Police whistle being blown? -- A. I heard the tribal policeman blow a whistle.
- Q.503. How many times did you hear it? -- A. Many times it was blown.
- Q.504. If the Bwana put on his brakes immediately after knocking the woman down why didn't the lorry stop

good or bad.

- Q.505. Do you know whether he put on the hand brake or not?  
A. He did put on both brakes, the hand brake and the foot brake.
- Q.506. Did you see him put on the hand brake? -- A. Yes with his left hand.
- Q.507. Did he do that at the same time as he put on the footbrake? -- A. Yes both at the same time.
- Q.508. Where did you get on to this lorry? -- A. Near the market.
- Q.509. And where were you going to? -- A. I was going to my post.
- Q.510. Was there anything inside the lorry? -- A. There were the Bwana's boxes.
- Q.511. Had you been standing up the whole time since you got on the lorry? -- A. Yes and I was holding on to the body.
- Q.512. You say that when the woman started to run the Bwana turned to the left? -- A. Yes because the woman came from the right.
- Q.513. Did he think there would be room to get past her? -- A. Yes.
- Q.514. Is it not a fact that the woman hesitated in the middle of the road? -- A. No because she was running and she was an old woman.
- Q.515. When you first caught sight of her what was she doing? Was she standing? -- A. She was not standing.
- Q.516. The first you saw of her was when she was actually running? -- A. Yes because she was coming from a small road.
- Q.517. Is that the path from the Bwana's banda? -- A. Yes.
- Q.518. Did you see anyone else on that path at the time of the accident? -- A. No I only saw that woman.
- Q.519. Did she not come out of a group of people? -- A. No.



- Q.520. So she was by herself on the right hand side of the road? -- A. She was alone there.
- Q.521. Had you seen her go across the road from left to right as you approached? -- A. She was coming from the right to the left.
- Q.522. Yes but before she did that had she previously gone across from left to right? -- A. Yes.
- Q.523. Did you see her go across and then come back again and run into the motor car? -- A. No she came from right to left.
- Q.524. You said you saw the woman run twice across the road. A. I did not say that.
- Q.525. Did you see a group of people on the road at that place? -- A. There were many people there.
- Q.526. Were there many people actually in the middle of the road? -- A. Those who were on the road cleared off when the Bwana blew his horn.
- Q.527. At that place where the accident happened had there been a lot of people? -- A. They had cleared off.
- Q.528. Did you see them clear off? -- A. I saw all clearing off and the road was quite clear.
- Q.529. Can you say about how many people there were on the road at that place? -- A. There was nobody there before. People came afterwards shouting.
- HIS HONOUR: You have just said you saw people running off the road? -- A. I saw everybody clear off and the road was quite clear.
- Q.530. Before they cleared off how many were on the road at this place where the woman was hit? -- A. I did not see again.
- Q.531. Did you see that old man Makore? -- A. I saw Makore after we had taken the woman to the hut.
- Q.532. Did Makore tell you that he and the woman were standing on the road when the lorry came? -- A. Only afterwards.

- Q.533. Did you see a road drag on the road? -- A. No.
- Q.534. But there was one there. -- A. I didn't see it.
- Q.535. But you say you were keeping a good look out? --  
A. There was no drag there because the Bwana put a peg there.
- Q.536. But a little further on along the road, about 100 yards away? -- A. I did not see it.
- Q.537. Then you could not have been looking out as carefully as the Bwana was. -- A. I was looking the same as the Bwana but I didn't see the drag.
- Q.538. As you entered the camp were you looking at the road in front? -- A. Yes.
- Q.539. Did you see the Chief on the road? -- A. I saw the Chief after we had got off the lorry.
- Q.540. But not before? -- A. No.
- Q.541. You didn't see him clearing people off the road? --  
. I did not see him.
- Q.542. Do you still say that all the time you were going through the camp you were standing up looking ahead? -- A. Yes I was standing. I could not sit down.
- Q.543. What part of the woman's body was struck by the lorry? -- A. The left side of her head and the left hip.
- Q.544. Did you see what happened to her when she was struck? A. Yes I went and carried her.
- Q.545. Yes but at the moment when she was struck was she thrown into the air or did she fall on one side or the other? -- A. She was thrown in front then he went ahead.
- Q.546. But if she was thrown in front he must have hit her again? -- A. He dragged her a little.
- Q.547. Is the lorry outside the Court now? -- A. Yes.
- Q.548. Can you demonstrate exactly how you were standing when the accident occurred? -- A. Yes.

Q.549. And how you saw the Bwana put on the brake? --A. Yes I can show.

(The Court and Jury inspect the lorry and witness shows where he was standing. There is a small opening at the junction of the roof and back of the cab through which one could see into the cab by stooping and peering through, but not otherwise. Witness says that he did stoop down and peer through because he wanted to see if accused was putting on the brake so that he could alight).

HIS HONOUR: Mr. Lambert asked you all about this at the time did he not? -- . No.

HIS HONOUR: Did you not speak to him about it -- A. No.

HIS HONOUR: He told us that you told him about the woman running across the road from the right. --

A. After the Bwana had gone and we had remained there for many hours then he asked me if I had seen the accident and I said I had.

HIS HONOUR: Do you know that Murungi the interpreter and Charles the hut counter and Makore all say that this woman was standing on the left hand side of the road? -- A. They have said so but they don't know.

NO RE-EXAMINATION.

(Evidence read over to witness).

MR. ARCHER: That, My Lord, closes the case for the Defence.

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MR. ARCHER ADDRESSES THE COURT ON BEHALF OF

THE DEFENCE.

May it please Your Lordship, Gentlemen of the Jury, you have now listened to the evidence presented by the Crown and the Defence in connection with this unfortunate accident and after you have been addressed by myself, my learned friend, and finally by His Lordship you will be called upon to deliver your verdict as to whether in your opinion the accused has been guilty of such negligence and want of care, such gross negligence, as to amount to Criminal negligence in Law.

His Lordship will no doubt in his address to you point out the Law on the subject and instruct you as to the degree of negligence which is necessary in order to make a man responsible criminally for the consequences of his acts.

I should like at the outset to express on behalf of my client his most sincere regret for this most unfortunate accident. In his view he was the entirely innocent cause of this woman's death but a vehicle driven by him has been the cause of her death and I can assure you that there is no one here who, under similar circumstances, could regret more than he does that this woman met her death in a sense at his hands. It is moreover (I think I am justified in saying this) his intention whatever may be the result of these proceedings to see as a matter of grace that the expression of sympathy is translated into something more substantial so far as the dependents of the deceased woman are concerned. Acting under advice he has taken no steps in this direction while these proceedings are pending for a reason which I think, Gentlemen, you will be able to appreciate.

This case is happily free from many aggravating factors which are not uncommon in the ordinary course with running-down cases. Not infrequently there is a suggestion that the accused has been under the influence of drink or so affected

by drink that he has not complete control of his faculties and is subjecting innocent pedestrians to the risk of not driving properly. That factor is entirely absent from this case. In many another case of this nature there is the charge of reckless speeding at these ridiculous speeds of which modern cars are capable, where a youngster might take out a car and drive at sixty or seventy miles an hour quite regardless of other people. That feature is absent from this case. There is at times a charge that a man has taken a vehicle out on to the public roads when it is not in a fit state to be driven, that is to say, when the brakes are not brakes at all or when the tyres are liable to burst at moderate speeds. Here again in this case there is no such charge which my client has to answer. The point really is whether under the circumstances he was driving in such a way as to endanger the life of this woman without justification to himself.

Now you have listened to a great deal of evidence, practically all of it native evidence, and I think you will agree with me, Gentlemen, that it has been extraordinarily conflicting. It is difficult out of this welter of evidence to arrive at the true facts of the case. I shall make an attempt at a later stage to analyse the statements of the various witnesses with a view to assisting you to arrive at the truth but I ask you, as opposed to the almost incredible variations which there are in the native evidence, to accept the evidence of the only person who, I suggest, can be relied on and that is the accused himself. I do submit to you that he went into the box and told a simple, straightforward story. I am going to be as brief as possible but I consider that I must go over that story shortly with you in the interests of my client.

Now on the day in question, the 19th March, he had been here in Kisumu and was travelling back to Sotik. He

was travelling in his lorry which you have seen outside, a 1934 Chevrolet. It is a car which he had driven at that time something like 11,000 miles and was well used to. The brakes and so on were in order. The lorry was light but he has his personal boy as a passenger and had picked up an Askari on the road. At a point on the road which we have come to know as Magwagwa Camp coming round a bend he came on a large concourse of natives where he had no reason to anticipate them. You have heard one of the natives tell you that this camp was a new one and it had not been used before. My client was accustomed to the road which he had used from time to time and had no reason to anticipate a large crowd of natives. I make no point of that except this, that such a crowd does have a somewhat unsettling effect on a driver. He is apparently driving in the blue where he has no anticipation of meeting anyone and he suddenly comes on a crowd of natives. I submit that this has undoubtedly an unsettling effect upon the mind of the driver under the circumstances. He sees a crowd of natives more or less in two groups; one is fairly close to him under the authority at the moment of the Chief and the other one is some 35 to 40 yards further down the road. He sounds his horn loudly and continuously, which has been admitted by every witness, and the natives scattered right and left and got off the road, not only those in the first group but those in the second group also. I am taking his own story at the moment which is, I suggest, corroborated by the two passengers he had with him. Having seen that he had a clear road and that the natives, not only of the first group but also of the second group, had parted right and left he takes his foot off the brake which he had put on when he first caught sight of the natives - as he told you, he had slowed down to something like 20 miles per hour having been travelling at something like 30 when he came to the corner - and, there being a slight declivity at that point, his car gathered

- 55 -

momentum until he was travelling about 25 miles per hour. He was not asked the question in cross-examination or in examination but that is his impression of his speed, and he did not go the length, as he might have done, of saying that he looked at his speedometer for some reason and saw that he was travelling at 25 miles per hour. He did nothing of the sort. He said he calculated his speed at 25 miles per hour. He had no reason to think that any contretemps was about to arise. What happened then is the matter in dispute. I am still taking his own story which, as I say, in its essentials is corroborated by the natives who were with him in the car. Within a few paces of the car an old woman suddenly moved out from the crowd of natives or a few natives standing on the right hand side of the road; it was quite impossible for him to avoid her and he saw that a collision was imminent. He did what he believed to be the best thing under the circumstances, he slightly swerved to the left in what was a hopeless attempt to avoid her. Had he swerved very violently to the left he would, on his own story and I think inevitably you must believe this, have run grave risk of charging into a crowd of natives on his left. There is no dispute about the numbers of natives who were lining that side of the road and had he in attempting to avoid the woman swerved very violently there is no doubt that he would have been endangering the lives of very many and one instinctively on these occasions does the right thing without thinking at all. He unfortunately hit the woman; he says he hit her as she came across the road from the right and the damage to the lorry shows that the right hand lamp was broken, that there is a dent in the front of the radiator and that there is a large dent in the right hand mudguard. It is not possible to say exactly what did happen when the woman was hit. The injuries were such, you will appreciate from the Medical declaration, that the Doctor was unable to say how she was standing at the time

she was hit but the possibilities are, the probabilities I should say, that the left side of her head was hit by the radiator and that she was then thrown back on the bumper bar which probably caught her about the knees so that she fell against the right hand mudguard. At any rate my client himself is not quite clear as to exactly where she was hit; he only knows it was on the right hand side of the lorry. Now as I told you he completely lost possession of his faculties, which really means that the shock of the whole thing was such that he did not for a short time, and only for a short time, know what was happening around him. His mind on that subject is a complete blank. It appears that the car dragged the woman's body underneath it for some 50 paces, that she then dropped clear and the car proceeded on for another 70 paces until he pulled up. Some time before that limit of 100 yards was reached presumably my client came to his senses, recollected or appreciated that it was up to him to stop the car as there had been an accident, and drew the car up. He was then told by an Askari who had pursued him and had been blowing a whistle and by some other natives that he had knocked down or killed a woman and he immediately reversed his car and went back to the scene of the accident. He got out all white and very much upset as Mr. Lambert has said and proceeded to help Mr. Lambert in every way possible with his investigations into the cause of the accident. Not from start to finish did he attempt to hide anything or to prevaricate. Mr. Lambert said that he rendered him every possible assistance. Amongst other things he volunteered the statement, no doubt it was apparent, but he said he went on for some distance and then reversed his car back.

Now I say that in its essentials, as to where this woman was and as to where she came from, this story of the accused is corroborated by the two witnesses who were with



him in the lorry. One was sitting in the front seat with him and the other was standing in the back of the lorry at the right hand side, which might account for the fact that he did not see the road drag. At any rate I think you will agree having seen the lorry that the Askari was in a good position to see pretty well what happened at the time of the collision and the period immediately preceding it.

The Defence, of course, in these cases always suffers if it calls evidence from the disadvantage that the representative of the Crown, my learned friend, has the right to sum up for the Crown, in other words, has the last word with the Jury. Consequently the Advocate for the Defence has to try and anticipate every point which the Crown is likely to present to the Jury in summing up their side of the case. I imagine that the two main points I should have to deal with are first, the speed at which the car was travelling, and secondly as to the position of this woman prior to the happening of the accident.

Now the only evidence we have before us in this case of speed translated into miles per hour is the evidence of the accused himself. Had Mr. Lambert seen this accident it would probably have been fairly easy for him to say at what speed this lorry was travelling because practically everyone now drives a car and is qualified to judge speed within certain limits; but the evidence of the Crown is native evidence and that can get no nearer than to say that the lorry was travelling fast. Now "fast" is of course a relative term and it is very difficult indeed for a native unaccustomed to cars to disassociate himself from the speed of an ox-waggon etc. A motor car which in his view is travelling fast might, in the eyes of a European, be going at a moderate speed, and I would ask you to bear that in mind in conning over the evidence of these witnesses.

There is also, of course, the well-known tendency of

- 66 -

the native to exaggerate in a case of this kind. May I say that they have here merely the evidence of one European against them, and as far as two of these witnesses are concerned I have already suggested to them and I am going to suggest to you that they are trying to make it as bad as possible. It is very tempting for them to exaggerate in a case such as this where there is only one European against them. She was a local woman who was killed and I have no doubt that in that Camp there was a great deal of excitement and a great deal of feeling and, amongst these unsophisticated natives, a great deal of justifiable feeling, and that influence was, I suggest to you, at work when they said the car was driving fast. That does not destroy my clients evidence that in his opinion he was travelling at 25 miles per hour and I would submit to you that, the road being clear as he swears it was and in which he is corroborated by his native witnesses, the speed at which he was travelling was safe under the circumstances, and that had this woman given him a little more chance no accident would have happened. She, I am afraid, was the author of her own death. You know what these women are; it is only natural and one cannot blame them for it, but they do dither as one witness described it. They make up their minds quite definitely to do one thing and then they suddenly change their minds and do the other. We have probably all had that experience in driving.

It is quite possible my learned friend may claim that the fact that the lorry ran on for something like 100 yards is evidence of speed. Gentlemen, if there had been evidence on that dusty road that the car had been braked and had failed to pull up in anything like that distance I think there would have been no answer to it, unless of course the brakes were defective, but the brakes were satisfactory. A test was made by Mr. Lambert shortly after the accident and he found the car pulled up within a

So much for the question of speed. I will now deal with the second point on which I presume the Crown will argue, that is, as to the position of this woman and as to the accused having had plenty of time at his disposal to keep clear of her and that he negligently or, on the statement of some of their witnesses, deliberately ran into her. On that question there is a most amazing conflict of evidence. First of all you have got in one room two sophisticated natives holding positions under the Government Charles and Murungi, one a hut counter and the other an interpreter, and they say that for some time before this lorry came down the road there was a group of, one says five women and the other says five women and one man, in the road conversing and apparently quite apart and distinct from the general crowd of natives surrounding them. They stick to that story and say that the accused came along and deliberately ran into that group of people without slackening speed and without again sounding his horn, because as he says there was no necessity for him to sound it again as the road was clear, they say that without sounding his horn he crashed straight into this group of natives. Gentlemen, on these facts he should have been charged not with manslaughter but with murder. I suggest to you that you cannot possibly believe that. First of all you have other witnesses for the Crown who contradicted it. There is this old man Makore who struck me as being one of those honest pagans you come across and sometimes get into the witness box; I do believe he was honest but I think he was mistaken. He says, and he was corroborated to a large extent by the Askari who was responsible for arranging these lines mlango by mlango, he says two women and two only were standing in the road and that they were well in to the left hand side of the road. He was slightly behind the deceased woman and there was a second woman close to the edge of the road, that is, if I have got the picture right and I think I

have. There was the woman unknown and unnamed, the deceased woman and Makore, and he says the car came along, he jumped clear and it struck the woman and he was quite emphatic that he was only about 1½ paces from the left hand side of the road. While I think that evidence is sufficient to destroy the evidence of Charles and Murungi who, I suggest to you very strongly, have concocted a case which they think it will be very difficult for the white man to answer, Makore's story cannot, I think, possibly be true in another particular because of the side of the car which was damaged. If this unfortunate woman had been hit 1½ paces from the left hand side of the road where would the left hand side of the car have been? It would either have been into the bank at the side of the road or into the crowd of natives so Makore's story in this respect cannot be true and with regret, because I think he was honest but mistaken, you have therefore to jettison his evidence where it conflicts with the evidence of the accused and of his witnesses that the woman walked out into the road. I am going to make a suggestion and possible solution and that is that they were all standing as the Askari says he placed them and that old Makore and the old woman had at some little time previously gone across to the other side of the road; the lorry came along and she says "where are my people" and comes across the road. That is the only explanation I can offer you of the accident and I believe it to be the correct one. That old man was honest. The dishonest people are those who concocted the story of the accused running straight into the group and knocking one of them down. Those are the dishonest ones. The old lady is not here to tell us what happened. Probably she got over to the right side of the road and suddenly realised her own people were on the other side and came across and got hit by the lorry. I do submit to you that this is the proper explanation. The position of the glass splinters

on the road shows that the early damage to the lorry, probably the first damage, was the breaking of the lamp glass and that does support the accused's story that the deceased came across the road from the right.

These two sophisticated natives stated in their evidence that there were no natives opposite the point of impact on the right hand side of the road as the lorry was travelling. Now the accused himself is quite emphatic that there were natives there but cannot say how many. He knows there were some there, and he is supported in that by the two witnesses travelling with him on the lorry. This is a discrepancy which I would ask you to bear in mind as reflecting on the veracity of these two natives who, I have suggested, have concocted this story.

There is one point in connection with the case which I fear I must trouble you with although it is, I think, entirely immaterial and I think it quite probable that my learned friend will agree that it is immaterial, but the factor having been introduced into the case I feel I must refer to it. I was given notice as Advocate for the accused a short time ago that the Crown intended to call Assistant Inspector Grant to prove that the accused did not hold in this country a certificate of competency as a driver. I believe and I shall argue that it is quite immaterial. Yesterday I was told by my learned friend acting for the Crown that he did not propose to examine Inspector Grant. You may have heard what I said to His Lordship, that if my learned friend would give me an undertaking that he was not going to cross-examine the accused on the point then I should not worry Inspector Grant. I felt obliged to cross-examine Mr. Grant to show you what was the object of his presence here as a witness. It must have become apparent to you that my client had not got a certificate of competency permitting him to drive a motor vehicle in Kenya but I do submit and I

hope my learned friend will agree with me, that it is entirely immaterial to the issues in this case, particularly when we are told by Inspector Grant that the Police are willing to accept a statement from the applicant that he has driven a car before and if they are satisfied that that is the case they will issue a certificate of competency without more ado. I felt obliged to mention that factor of the case because I was in a difficulty yesterday and a wrong construction might possibly have been put by you, Gentlemen, as to the accused's record and character had I not cross-examined Mr. Grant. The real test of course is a test which my client has stood up to, whether you have driven a car for years without an accident. He is a young man and has only driven for four or five years and as he told you he has never had an accident except that the door of his Mother's car flew open and got smashed.

Now, Gentlemen, I have, I hope, done something to break down the evidence of the Crown in this case. I have suggested to you what is a possible explanation of that old woman's movements and I hope that you will agree that it is more than a possible, that it is the probable explanation, and that you will find my client has not been guilty of negligence but that he was taken by surprise and that the old woman's death was unavoidable having regard to her own actions. It is, of course, for the Crown to prove its case. The onus is not upon me as Advocate for the Defence but it is for the Crown to prove the guilt of the accused and unless they do satisfy you on the evidence that without any question, without any question, the accused was guilty of such a degree of negligence as amounted to Criminal negligence, then my client is entitled to an acquittal at your hands.

The Crown will have to base its case entirely on native evidence some of which, I suggest, is distinctly tainted and I ask you to bear that consideration most

carefully in mind when you come to consider your verdict.

Again I would ask that this should weigh with you, that here you have in the accused a young man who is on the threshold of his life. This is a serious offence which can be punished by imprisonment and I do ask that you should take that most seriously into consideration and that apart from any benefit of doubt you will give him indulgence in view of the circumstances.

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MR. PHILLIPS ADDRESSES THE COURT ON BEHALF OF  
THE CROWN

May it please Your Lordship, Gentlemen of the Jury, my address to you will be quite brief and it will be concerned mainly with one simple issue which you have to determine which is a question of fact.

You have heard two different accounts of how this accident happened. Firstly there is the story told by the Crown witnesses that the deceased was standing in the road and that on the approach of the lorry her companions hastily jumped to the side and that she was too late and was knocked down before she could get out of the way. On the other hand there is the story told by the Defence which is to the effect that the road was clear until the very last moment and that the deceased then ran across the road from right to left giving the driver of the lorry no chance to avoid her. I submit to you that of these two stories the Crown story is the one to be believed. You have two witnesses who, I submit, are independent witnesses, Murungi the interpreter and Charles the hut counter. They belong to different tribes from the deceased; they hold positions of responsibility in the Government employ and in the course of their work they are constantly in close touch with Europeans and I submit to you most emphatically that they have no reason at all in wanting to concoct a false charge against Mr. Purchas. It is very difficult for the Defence to get over the evidence given by these people because, if it is true, they have a very strong case to meet, and the only suggestion they can make about the evidence of these witnesses is that it was deliberately concocted; that a false charge was deliberately framed with the object of getting the accused into trouble. As I pointed out there does not seem to be any reason at all why they should want to do that. As I have said they belong to different tribes and I think you will agree that they gave



their evidence in a straightforward sort of way. They did not try to exaggerate it and one usually finds that if a native comes to Court to give false evidence he will exaggerate and it is usually easy to discover whether or not he is trying to tell exactly what he saw. Then there is this old man Makore, and in the case of this man my learned friend does not suggest that he is trying to concoct a story. In fact he has given striking testimony of the honesty of this man and perhaps for that very reason you will think his evidence was true. I think you must have been impressed by the way he demonstrated his evidence and he was clearly describing something he actually saw; he was not describing something imaginary or something he thought about afterwards and which he had reconstructed as being what he thought must have happened. He was clearly demonstrating exactly what he saw and what happened at the time, and I ask you to accept that his evidence is true and not only true but that he is not mistaken.

There are some points in the evidence of these three witnesses in which they do not correspond exactly but I think you will agree that they are comparatively minor points such as, for instance, the number of people comprising that group on the road. Before the accident happened they probably had no particular reason to notice the number of people. The accident happened quickly and it is not surprising if there are variations in the details but I submit that one cardinal point does emerge and I can summarize that by saying this, that it was the lorry which ran into the woman and not the woman who ran into the lorry and that is the whole issue on which I ask you to concentrate your attention.

The Defence story is, in my submission, unworthy of credit. With regard to the accused himself, if he was driving negligently and carelessly he probably doesn't remember exactly what happened. Quite possibly the first

thing he knew was that the woman was in front of his lorry and it seems to me that it is probably the most likely explanation that he lost his head and went on a hundred yards without stopping. I do not want to contest that point at all.

I think you will be satisfied that neither of the two native witnesses called for the Defence is to be believed. First there is the boy sitting beside the accused. There is one thing of which he was more certain than another and that was that the woman was hit on the right side of her head. If he saw the accident as he says he did the picture of it would be impressed on his mind, and he automatically and instinctively raised his hand and demonstrated the right hand side of the face when asked where she was struck. He did not take time to think it out; the answer came straight away and he stuck to it. He said that at any rate he was certain she was struck on the right hand side. Either you accept that or you reject his evidence altogether in which case of course he cannot be taken as corroborating in any way the testimony of the accused. That statement that the deceased was struck on the right hand side of the head is consistent with the Medical evidence. The Doctor I quite agree was not able to commit himself to anything definite or conclusive. It is a serious matter in a case of this kind for a Doctor to say anything definite and he quite fairly said he could not commit himself. You have seen the lorry and those dents in the mudguard and the marks on the radiator and it seems very likely that if the woman had been struck so forcibly as to make those dents there must have been some injuries on the parts of her body which were struck. The actual injuries the Doctor saw are as follows: A fracture of the left thigh bone and a fracture of the right thigh bone. They were both broken. There was a bruise on the right shoulder, a bruise with

broken skin on the outer side of the right eye, a bruise with broken skin on the right side of the head, and apart from the general condition of the body which, I imagine, must have been knocked about very considerably, the only distinct injury on the left hand side was a cut one inch in length through the skin on the inner side of the left elbow, and the fracture of the left femur and incidentally the right femur was also fractured. On the right side, however, you get a bruise on the shoulder, a bruise on the eye and a bruise on the side of the head, which is entirely consistent with the Crown evidence that the woman was struck on her right side.

Then there was the evidence of the Askari, the last witness. Now, Gentlemen, I think you have probably formed the impression that the Askari was not telling the truth. It is very hard to believe he looked down through that little hole and saw Mr. Purchas applying the brakes. It seems hardly conceivable that in the excitement of the moment he remained bending down and looking through, and then from his own statement it is clear that he could not have been keeping a look out. He didn't see the road drag; he didn't see the Chief getting the people off the road, and therefore I think you must have very grave doubts as to whether he was looking at all. I therefore ask you to attach no importance whatever to his evidence.

The evidence of these Defence witnesses is, I submit, in very striking contrast to the evidence given by the Crown witnesses. The Crown witnesses have not attempted to exaggerate and they have given the impression of people who are trying to describe what they saw. There is nothing at all unreasonable or impossible about the story. My learned friend has suggested that you cannot believe the accused saw this group and deliberately ran into them and he suggests that if that is so the proper charge would be murder. I am not suggesting that he deliberately ran into the group, but

when he came to the first group and the people got out of the way he probably expected that they would all get out of the way and carried on at a speed of about 25 miles per hour; he saw this small group of five or six people and they appeared to see him and he probably thought they would also get out of the way but this unfortunate woman stopped and dithered and the accused, having run the risk of carrying on at a speed of 25 miles per hour in the hope that they would get out of the way, was unable to avoid her and knocked her down and ran over her.

With regard to the purely legal aspect of the matter I am quite content to rest entirely on what His Lordship will tell you as to the meaning of criminal negligence. I would only mention that in a very recent case, the case of Andrews, the House of Lords reaffirmed the decision in the leading case Bateman that in cases of this kind it is necessary for the Crown to prove a very high degree of negligence. My submission is that if the facts are as alleged by the Crown then that high degree of negligence has been proved.

Picture to yourselves, Gentlemen, that scene. The camp crowded with natives, many of them by the side of the road and a good many actually on the road itself. Then picture the lorry driving along at a speed of 25 miles an hour with no thought on the part of the driver about what will happen if one of these chattering natives, most of them elderly people, fails to get out of the way or is taken unawares and runs panic-stricken in front of the lorry. I think you will be satisfied that if that is what happened then the accused is guilty of criminal negligence and I would say that that negligence must be considered in relation to duty. Negligence really means neglecting to perform a duty and in the special circumstances of this case it was the duty of the accused to drive very slowly and carefully

through that Camp and I submit that he failed to do that and that it was not a case of ordinary want of care or inadvertence, it was a case of gross negligence.

There are just two further points I should like to emphasise while on this question of criminal negligence. The first is this, that there is no suggestion that the accused had any criminal intention or that he was indifferent to whether this woman was killed or not. There is no such suggestion for a moment. What is suggested is that he did not think about it before the accident and did not take sufficient care. What the Crown alleges is negligence. It is true that a high degree of negligence has to be proved but it is still negligence and not deliberate intention to kill, and that is why in cases of this kind we all naturally cannot help feeling a certain amount of sympathy for a person who finds himself charged with this grave offence of manslaughter by negligence because we know he did not mean to do it and is very sorry it happened; but I am confident, Gentlemen, that in considering your verdict in this case you will not be swayed by feelings of sentiment however natural they may be. The second point I want to emphasise is this, that although the degree of negligence which has to be proved is high it is not so high that it is purely academic or purely imaginary. I suggest that if the facts are as the Crown alleges the accused is guilty of criminal negligence and if those facts do not amount to criminal negligence it is very difficult to say what would.

I therefore submit that the story told by the Crown witnesses is substantially true. It is impossible to explain away that evidence and unless you are satisfied that they have deliberately concocted this story I ask you to accept their evidence and to find the accused is guilty of criminal negligence and therefore of manslaughter.

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The Information contains only one count, that is, the count of Manslaughter but I would ask Your Lordship to consider whether it would be proper to direct the Jury that they may convict on a lesser offence although not properly charged. I would cite the parallel that if a man is charged with ~~murder~~ it is very common for him to be convicted of manslaughter even though not charged, and if a man is charged with driving to the common danger and the offence is not found to be true he may be convicted of the lesser offence of careless driving. I would put that before Your Lordship for consideration but I leave the matter entirely to Your Lordship.

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SUMMING-UP BY HIS HONOUR MR JUSTICE WEBB.

Gentlemen, I will mention one or two points first of all in order that you may, as I think you should, dismiss them entirely from your minds. The first is the fact that after the accused's lorry hit, as it undoubtedly did hit, this woman it continued for a distance of 100 yards. That might be a very material fact indeed if it was suggested that this accident had happened owing to the motor car being driven at an excessive speed, but it is agreed by both sides here and I think the evidence justifies you in holding that this lorry was not being driven very fast; 20 or 25 miles per hour, and therefore it is quite obvious that it could have been pulled up much more quickly. Sometimes the fact that a motor car has continued for a long distance beyond the actual place where an accident occurred is of great importance because it proves that the car must have been going faster than the Defendant says it was. The argument in such a case is "You say you were only driving at 20 miles per hour. We all know a car going at 20 miles per hour can be pulled up in 10 or 15 yards, or possibly less, and if you went along for 100, 150 or 200 yards it is quite obvious you must have been going very much faster". That aspect does not come into this case at all.

The second matter is the fact that has been alluded to by Mr. Archer, namely, that the accused had not got a certificate of competency. That fact again might be a very material fact if it was suggested or if there was any evidence that the accident had happened because the man who was driving the car was inexperienced or incompetent but it is not suggested here that this accident arose from any lack of skill or power to manage the car. Therefore the fact that the accused had no certificate of competency does not affect the matter.



Now Gentlemen, in this case as in many others one is always faced when one comes to decide on questions of fact with a great difficulty which is common, to a certain extent, in all cases. It is particularly common in cases relating to motor car accidents and, as if that were not enough, it is more common still when we come to deal with uneducated or native witnesses. That difficulty is that in any event which happens very quickly, and in the case of a motor car accident as you know it is a matter of seconds and fractions of seconds, it is extremely difficult even for an intelligent and observant person to distinguish between the things which he has actually seen and the things which he thinks must have happened but which he did not really see at all. In other words, people confuse inferences with actual facts observed by the senses. Now in this case it is a significant fact and a fact which is not present in every case that it is quite clear that the two accounts of this accident which we have heard were both given at the time or very shortly after the accident. It is not a case where it can be suggested that the account given either by the Prosecution or by the Defence has been manufactured afterwards or patched up, and I would put before you as well as I can or remind you rather of the two accounts between which you have got to choose.

On the side of the Prosecution you have three witnesses, Murungi, Charles and the old man Makore. Mr. Lambert, as you will remember, told you that the account given by Murungi was given a very few minutes after the accident, after they had carried the woman to the hut, and that it was given by way of contradiction of what the accused said. The accused said the woman had crossed the road from the right and it was in contradiction to that that Murungi said the woman was standing on the road. This is Mr. Lambert's account of what he said: That the woman

was standing in the road about 1½ paces from the left hand side. He was quite emphatic that she was not crossing the road. He described how these people were standing in a line with the tail of the line actually on the road and he said: "They got startled and one looked in front and one looked back; by that time the lorry had already arrived and struck", and then again he said "She got startled and looked in front and then looked back and then she was struck and fell down. She had just turned to look behind when she was struck". He said the lorry hit her on the right side.

The hut counter Charles put it very much in the same way: "She was surprised and could not tell whether the lorry was coming from in front or behind. When she came to her senses she looked over her shoulder but at the same time as she looked she was struck".

Then the old man Makore had a rather vivid remark in his evidence: "I being a man got off and she being a woman didn't. We were in a line; then we saw the lorry coming. I stepped back, then the lorry came and caught the woman. If I had not fallen to the side I did the lorry would have killed me also".

Now taking these stories for the moment they give us a picture. The lorry comes round the corner and here are these people. There is one group fairly near the corner; the horn is blown and as we have heard the Chief hurries the people off the road and the road is clear, and the picture suggested to my mind by the evidence of the Prosecution if it is correct is that the collection of people nearer to the lorry scattered. There were other people on the road further on and the suggestion is that the lorry came on hoping or expecting that these people would in turn get out of the way, the old man jumps out of the way, the woman looks the wrong way first and then the right way and then she is too late. Now that is the picture if you believe the

story of the Crown and it is for you to say whether you believe it or not.

On the other hand the accused from the very first said that the woman had crossed from the right at so short a distance from him that it was quite impossible for him to do anything to avoid the accident. He says perfectly frankly that he did not attempt to put on the brake because there was no time to do so. His story is borne out by the native who was sitting beside him in the lorry and by the evidence of the Askari who was at the back of the lorry. The Askari is far from satisfactory as a witness but that does not mean that he is not possibly telling the truth. It is undoubtedly the fact that just as Murungi, Charles and Makore gave their account of the accident soon after it happened so these people gave their account to Mr. Lambert while he was still on the scene and at a time when apparently there would have been no opportunity of the accused instructing them in such a story or of them concocting it. When one is confronted, as you are, with two contradictory stories of an occurrence one naturally tries to look and see whether one party or the other are either telling lies or making a mistake and one looks to see if there is any undisputed fact that will help, and I am bound to say, Gentlemen, that in this case I can find extremely little assistance from facts of that kind. The injuries to the woman undoubtedly suggest that she was hit on the right hand side of her body but I can only say that they suggest it because the Doctor himself says "I am unable to state whether these injuries were caused by impact of the vehicle against the body of deceased or by the deceased in striking the ground as the result of having been struck elsewhere by the vehicle.... From the combination of injuries I am unable to state the direction in which the deceased was facing at the time of the impact or whether she was stationary or moving", and on being asked "Was there

any indication that she was first struck on the right-hand side as opposed to the left or vice-versa?" his reply was that there was no indication either way. Therefore the highest one can put it is that from the fact that most of the injuries were on the right hand side and from the fact that, as we have seen, there are considerable injuries to the lorry it does seem probable that she was struck on her right hand side; but unless I have completely confused myself I cannot get from that any assistance in choosing between one story and the other. If, as the Defence say, she was crossing the road in front of the lorry from the right hand side to the left, then surely her left side would be what the lorry would meet. If, as the Prosecution witnesses say, she was standing on the left hand side of the road and the lorry came along and just as it was meeting her she looked over her left shoulder, again it would be her left side that would be hit. Therefore as far as this is concerned I cannot find very much to help you.

Now Mr. Archer has pointed out and, if I may say so, very properly pointed out that possibly a hint may be drawn from the undoubted fact that just immediately before the lorry met the woman it swerved or attempted to swerve to the left. Mr. Archer says that is consistent with the story that a man is driving along a road that he believes he has seen to be clear in front of him and suddenly without any warning someone springs out from the right hand side so close to him that it is impossible for him to avoid that person; he instinctively swerves away and then he must swerve back again because if he continues in that direction he finds he may run into the side of the road and another lot of people there; and he says that if in fact the case put up by the Prosecution is correct and there was this little group of people standing on the left hand side of the road would he have driven straight into them? Well of

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course he would not, but he might have driven at them saying to himself "You see me coming or if you don't you ought to. Get out of the way." But according to Mr. Lambert's observations on the spot the tracks of the lorry were to the left hand side of the road. If so, and if he was driving at them, I don't mean driving at them deliberately but expecting that they would get out of the way before he came to them, then I cannot see why he should swerve to the left. If he swerved at all I think he should swerve to the right.

Those, Gentlemen, are the two accounts of the actual facts that happened and you will have to choose between them.

Now you may accept in its entirety the story told by the Prosecution witnesses; you may say to yourselves that the witnesses for the Defence are either telling untruths or making a mistake; but you must not accept the story told by the Prosecution witnesses unless you are quite convinced that it is true. In other words it is the duty of the Prosecution to convince you that the account given by their witnesses is the correct account, but that is not the case as regards the account put forward by the Defence. It is not for a man who is accused to prove that he is innocent. He has done enough if he tells you a story which you honestly think might possibly be true even though you may not be convinced that it is true. That is what we mean when we say that a prisoner is entitled to the benefit of the doubt. In human affairs facts cannot be proved with mathematical certainty but what we mean when we talk about a Jury being satisfied beyond all reasonable doubt is this, that no member of that Jury should feel after he has given his verdict that he wants to say to himself "I wonder if I was right". He ought to have no serious doubt.

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by the accused person it is not necessary for him to prove to you that his version is correct. It is enough if you honestly think that perhaps it may be true.

Well Gentlemen, so much for the facts of the case. If you do not accept the account of the facts given by the Prosecution, that is to say, if you are quite satisfied that they are wrong, that is the end of the case. If you think that they may be correct, or that the account given by the accused may be correct but are not very sure which, then again I tell you that you must give the accused the benefit of the doubt and he is bound to be acquitted. But if you think that the account of this accident given by the Prosecution is the true account and you are quite satisfied that the account given by the Defence is not true, then you have to consider the Law on the case and once more I regret that it happens to be the type of case in which a Judge cannot give you very much assistance.

The section of the Penal Code under which the accused is charged says that any person who by an unlawful act or omission causes the death of another person is guilty of Manslaughter, and an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm. Well of course in practically all cases of Manslaughter by negligence it is perfectly obvious from the start that the last thing the accused intended to do was to cause injury, and in practically all of such cases there is probably nobody who regrets what he has done more than the accused himself.

As to what amounts to negligence in any particular case one cannot give any fast rule because the standard of care naturally enough varies with the circumstances of every case. If you are driving a motor car and you see a



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As to what amounts to negligence in any particular case one cannot give any fast rule because the standard of care naturally enough varies with the circumstances of every case. If you are driving a motor car and you see a

grown man obviously in possession of all his faculties someone perhaps whom you know, coming along in front of you no one would suggest that you should drive very slowly or stop. On the other hand, if you see a little child clearly it would be quite insufficient for anyone who had run over a little child to say when charged with it "Oh I blew my horn. What more was I to do?". Therefore in every case the question arises "Has the man done all that he should have done in those circumstances?" or perhaps it should rather be put "Has he grossly and completely failed to do what he should have done in those circumstances?"

You will probably agree that a man driving a lorry and seeing a crowd of natives on the road would be expected to take more care than if they were people of higher civilization and more familiar with motor cars and crowded traffic. We are all familiar with the way in which, even when you hoot, a native will sometimes take no notice of it and on another occasion will leap frantically out of the way. Here is what the Law books say on the subject:

"Mere inadvertence, while it may create civil liability, will not suffice to create criminal liability".

In other words, before you can punish a man for causing death or injury by negligence you must be satisfied that, having regard to all the circumstances of the case, the place where the accident occurred and the sort of person to whom it happened, the accused had acted with very great and reckless indifference to the lives or the safety of the people who were there or the person whom he ran into or whom he injured. As was said in one case:-

"Whatever epithet is used and whether an epithet be used or not in order to establish criminal liability the facts must be such that, in the opinion of the Jury, the negligence of the accused went beyond a mere matter of compensation between

"subject and subject and showed such disregard for  
"the life and safety of others as to amount to a  
"crime against the State and conduct deserving  
"punishment."

It is impossible, as I have said, in cases of negligence for a Judge to draw a line and say "Gentlemen, if you find that the facts are so and so then the case will be upon one side of the line and if you find the facts are so and so it will be on the other side". Every case has to be judged according to its own circumstances.

If you find yourselves unable honestly to say which is the true version of the facts then the accused should be acquitted. If, on the other hand, you believe that he drove along this road seeing these people in front of him and perhaps expecting that they would get out of the way but from the time he turned the corner taking no steps to warn them of his approach, then it would be for you to consider whether in these circumstances he was acting with such indifference to their lives and safety as to deserve punishment.

The last thing I would say to you, Gentlemen, is this, the Law as you know makes no question of race or colour and I am quite sure that you will allow no such consideration to affect your minds when you come to consider the liability of the accused.

Now Gentlemen will you please consider your verdict.

THE JURY RETIRED AT 12.15 AND  
RETURNED AT 12.50.

THE DISTRICT REGISTRAR: Members of the Jury, are you  
agreed upon your verdict?

THE FOREMAN OF THE JURY: Yes we are agreed.

THE DISTRICT REGISTRAR: Do you find the accused Robert  
Peter Chapman Purchas guilty or not guilty of

the manslaughter of Mara wife of Mauti?

THE FOREMAN OF THE JURY: We find him Not Guilty.

THE DISTRICT REGISTRAR: You say he is Not Guilty and that  
is the verdict of you all?

THE FOREMAN OF THE JURY: Yes.

(The prisoner is discharged).

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IN HIS MAJESTY'S SUPREME COURT OF KENYA  
SESSIONS HOLDEN AT KISUMU

CRIMINAL CASE NO.78 OF 1957

R E X

v e r s u s

ROBERT PETER CHAPMAN PURCHAS

DECLARATION VERIFYING TRANSCRIPT OF SHORTHAND NOTES  
OF TRIAL

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the trial of the above case, to which transcript this Declaration is annexed, I, the said James Stanley Templeton, certify that this is a correct record of the proceedings at the said trial.

DECLARED at Nairobi this

19th day of June, 1957,

Before me:

*106-121114*

*James Stanley Templeton*

Registrar,  
Supreme Court of Kenya.

KENYA.

No. 182



GOVERNMENT HOUSE

NAIROBI

KENYA.

24 March, 1937.

RECEIVED  
26 APR 1937  
C. O. RECY

Sir,

Gov. 21323/24

In accordance with the instructions contained in Mr. Thomas' despatch No. 762 of the 16th July, 1924, I have the honour to transmit two copies of the transcript of the shorthand notes taken at the trial of Jacobus Paulus Englebrecht and Kimutai arap Kibore, who were charged before the Supreme Court of Kenya in Criminal Case No. 10 of 1937, with the offence of assault causing actual bodily harm to Kibrop arap Ragole, contrary to Section 229 of the Penal Code.

2. The accused were found guilty, the first accused being sentenced to pay a fine of £1,000/- and in default to four months' imprisonment without hard labour; and the second accused to a fine of £75/-, or in default to one month's imprisonment with hard labour.

I have the honour to be,  
Sir,  
Your most obedient, humble  
servant,

*A. W. Wade*

ACTING GOVERNOR.

HONOURABLE  
W. GIMSBY GORE, I.C.S., F.R.S.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.

I N D E X

	Page
P L E A	1
CHARGE TO THE JURY	2
OPENING ADDRESS FOR PROSECUTION	3
<u>EVIDENCE FOR THE PROSECUTION:</u>	
JOHN FORBES	Examined 7
	Cross-Examined 11
GEORGE MILNE TAYLOR	Examined 13
KIBROP ARAP RAGOLE	Examined 15
	Cross-Examined 23
KIMETO ARAP CHELULE	Examined 25
	Cross-Examined 30
JOHN FORBES (Recalled)	Examined 32
	Cross-Examined 34
AKBARALI RAJABALI	Examined 34
	Cross-Examined 35
MALAKWEN ARAP KOECH	Examined 36
	Cross-Examined 39
KATWA S/O SERITE	Examined 41
	Cross-Examined 44
<u>EVIDENCE FOR THE DEFENCE:</u>	
UNSWORN STATEMENT OF FIRST ACCUSED	48
UNSWORN STATEMENT OF SECOND ACCUSED	50
ADDRESS BY FIRST ACCUSED	50
SUMMING UP	54
VERDICT OF JURY	61
SENTENCE	62

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LIST OF EXHIBITS

- Exhibit No. 1** - Photographs  
**Exhibit No. 2** - Kiboko  
**Exhibit No. 3** - Negatives
-

IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HOLDEN AT ELDORET

1st March, 1957.

B E F O R E

HIS HONOUR MR. ACTING JUSTICE LANE

(AND A JURY)

CRIMINAL CASE NO. 10 OF 1957

R E X

versus

(1) JACOBUS PAULUS ENGLEBRECHT

and

(2) KIMUTAI ARAP KIBORE

Transcript of Shorthand Notes taken by J. S. Templeton,  
Official Shorthand Writer to H.M. Supreme Court of Kenya.

MR. A. PHILLIPS, CROWN COUNSEL, appeared for the Prosecution.  
The Accused were not defended by Counsel.

P L E A

THE DISTRICT REGISTRAR: Jacobus Paulus Englebrecht and  
Kimutai arap Kibore, you are both charged for that you on  
the 3rd day of November, 1956, in the Rift Valley Province  
assaulted one Kibrop arap Ragole thereby occasioning him  
actual bodily harm which offence is assault causing actual  
bodily harm contrary to Section 229 of the Penal Code.

Do you plead Guilty or Not Guilty?

ACCUSED NO.1. Not Guilty.

ACCUSED NO.2. I hit him with three strokes of a kiboko.  
(taken as plea of Not Guilty).



THE JURY WERE DRAWN:

The first Juror to be drawn was J.L.G. Murphy who was challenged by Mr. Phillips on the ground of deafness. The challenge was allowed.

The following Jurors were then drawn:

- D.A.J. Coetzee
- M.J. Ullman
- J.E. Etheridge
- G.R. Pembridge
- P.H. Wontner

Both accused were warned to challenge but made no objection D.A.J. Coetzee was affirmed and the other four Jurors were sworn. The Jury appointed G.R. PEMBRIDGE to be their foreman.

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THE DISTRICT REGISTRAR: Gentlemen of the Jury, the prisoners Jacobus Paulus Englebrecht and Kimutai arap Kibore are charged on this Information with assault occasioning actual bodily harm contrary to Section 229 of the Penal Code in that on or about the 3rd day of November, 1936, in the Rift Valley Province they assaulted one Kibrop arap Ragole thereby occasioning him actual bodily harm. To this Information both the accused have pleaded Not Guilty and it is your charge to say, having heard the evidence, whether they be guilty or not guilty.

---

MR. PHILLIPS OPENED THE CASE ON BEHALF OF THE PROSECUTION.

---

MR. PHILLIPS ADDRESSES ON BEHALF OF THE CROWN:

May it please Your Lordship, Gentlemen of the Jury, the issue which you have to try in this case is very simple. There will be no legal intricacies to worry you. What you are concerned with is a simple, straightforward question of fact, namely, whether the two accused assaulted the Complainant and whether that assault caused him bodily harm.

The first witness whom I shall call before you for the Prosecution is the District Surgeon Dr. Forbes. He will tell you that on the 9th November last he examined the complainant Kibrop arap Ragole and he will tell you that he found him to be suffering from certain injuries which included the following:

A mass of linear bruises on the left hip of which not less than ten were distinct, and in the case of one of these bruises the epidermis was totally removed. On the right hip there were at least seven abrasions and in four of them the epidermis was totally removed.

There were a number of other injuries including injuries on the left cheek, on the right cheek, on the side of the head, on the chest, on the back, on the knees, on the right thigh and on the abdomen. Most of these last named injuries were comparatively minor ones.

It will therefore be quite clear to you from the Doctor's evidence that the complainant did actually suffer bodily harm. The case for the Crown is that that bodily harm was the result of a flogging, or, to be more accurate, a series of floggings administered by the two accused with a kiboko.

It appears that Mr. Englebrecht the First accused suspected the complainant, who is aged apparently about 15 years and who at that time was employed by Mr.

Englebrecht as a houseboy, of stealing some money which he found to be missing - I think the exact sum was Sh.100 - and Mr. Englebrecht charged this boy with the theft of that money. The complainant denied the charge but appears to have been frightened and to have run away. He was brought back to Mr. Englebrecht and again denied the charge. Mr. Englebrecht then produced a kiboko and threatened to beat the boy with it. As a result of this threat or as a result of the actual beating (which it was will no doubt appear in the evidence) the complainant admitted the theft under pressure and said he would show where the money had been hidden. He then proceeded to point out a hole in the ground but no money was found there; he was beaten again, and again apparently in order to escape further beating he said he would show where the money was and again he pointed out a place and no money was found there. This happened several times and each time the beating was repeated. During the course of the beating the complainant apparently mentioned the second accused Kimutai as having stolen the money and while the beating was going on Kimutai himself arrived and took a hand in the beating himself. This was with the consent and approval of Mr. Englebrecht who was still present. After the complainant had been repeatedly beaten Mr. Englebrecht went to Eldoret leaving the complainant tied up. Next morning the complainant ran away and some days later, I think it was about six days later, he was seen and examined by Dr. Borbes.

The witnesses who will be called for the Prosecution to testify to the circumstances in which the flogging was carried out will be firstly the complainant himself, secondly a young boy named Katwa aged about 15 who at the time in question and until at any rate quite recently was in the employment of Mr. Englebrecht, and in addition

two other witnesses who were in the employment of Mr. Englebrecht and as far as I know they may still be in his employment; they are two Nandi natives and they apparently assisted at the flogging by helping to hold complainant down.

Now in a case of this kind where the witnesses are natives of a somewhat primitive type and where they view the matter from different angles it is not surprising if their versions do not exactly correspond in all details. The complainant naturally might be inclined to exaggerate somewhat, and in this case he tells a story about a pistol; he says that Mr. Englebrecht pointed a pistol at him and threatened him with it. Well that story may be quite true; on the other hand it may not be true. It may be a piece of exaggeration which he has introduced into the story in the hope of making a bigger impression. No doubt, gentlemen, you are familiar with the type of person who is inclined to embroider a story in the hope of impressing his hearers, but that need not necessarily mean that the whole story is false. On the other hand the two Nandi natives would probably be disposed to minimize the case/ <sup>against</sup> the two accused because, at any rate until recently, they had been in the employment of first accused and as I say they themselves took a hand in the beating. The other witness is a small boy named Katwa and I may tell you at this point that it was subsequently proved that this boy Katwa was the actual thief and he was in fact convicted in the Magistrate's Court of having stolen the money, which shows that the complainant was entirely innocent.

It is for the Jury in a case of this kind to discriminate and after eliminating such part of the evidence as they think to be unreliable to decide what is the residuum of truth and I have no doubt after doing that you will find in this case that the charge has been proved. Certain facts in my submission will stand out clearly from the evidence. Firstly that both the accused actually

inflicted blows on the complainant but it was Mr. Englebrecht who took the initiative and who was in control of the proceedings throughout. Secondly I think you will be satisfied that no voluntary admission was made by the complainant and there was no proof of his guilt, and in fact as I have already told you he was afterwards proved to be innocent; and thirdly the flogging was not only unjustified according to any standard but it was also extremely brutal and inhuman in the manner in which it was carried out. I should like to enlarge a little on those last two points. Imagine for the sake of illustration a case in which a native boy has been found to be guilty of theft and his employer decides to take the law into his own hands and proceeds to administer corporal punishment in a reasonable manner and without any undue severity, such an action would be definitely contrary to the law and it would not necessarily be approved by public opinion but it might not be generally regarded as a very serious offence. The present case, however, is entirely different. Here it was not a question of punishing an offender. I say in all seriousness that the flogging in this case was nothing less than a form of torture applied with the object of extorting an admission from a boy who was only suspected and not proved to be guilty and who was in fact actually innocent; and when I say extorting an admission I mean an admission firstly of having committed a theft and secondly of the place where the money was hidden. The evidence shows quite clearly that there was no admission at all by the complainant until the kiboko was produced and he was at least threatened with the flogging and such admissions as he did make were only made, and quite naturally made, in the hope of escaping further beating.

I do not think I need say very much to convince you of the extreme brutality with which this flogging was

carried out. The Medical evidence will speak for itself with far greater eloquence than I can command, and you will hear that it was not until almost three weeks after he was admitted to Hospital that the complainant was fit to be discharged.

I have put before you, gentlemen, what is in my submission the correct view of this matter and I feel confident that that is the view which will be taken of such a matter by the public opinion of this country which you are here to represent, but I would remind you that whether or not after hearing the evidence for yourselves you accept that view you will still be legally bound to find the accused guilty of this charge if you believe that they actually did inflict this flogging on the complainant and that it caused bodily harm. The law does not allow an employer to administer corporal punishment to his employee even for good cause, so that even if the accused were able to convince you, as no doubt they will try to do, that there was some good cause for flogging the complainant and that the flogging was administered in a reasonable manner; even though they were to convince you of that, it would still be your duty to convict them of this offence. I would ask you throughout the trial not to lose sight of that one simple issue on which you will be asked for your opinion.

THE CASE FOR THE PROSECUTION

JOHN FORBES sworn:

EXAMINED BY MR PHILLIPS:

- Q. 1. Your name is John Forbes? -- A. Yes.
- Q. 2. Are you the District Surgeon at Eldoret? -- A. I am.
- Q. 3. What are your Medical qualifications? -- A. M.B., B.Sc.
- Q. 4. Do you remember examining a boy named Kibrop arap Ragole? -- A. I do.
- Q. 5. Is that the boy?(indicating complainant) -- A. Yes.

- Q. 6. Do you remember the date on which you examined him? -  
A. 9th November 1956.
- Q. 7. What in your opinion is the age of that boy? --  
A. Somewhere about 15 or 16.
- Q. 8. Was he admitted to Hospital on that day? -- A. He was.
- Q. 9. And how long did he remain in Hospital? -- A. Until the 26th.
- Q.10. And while he was in Hospital under your treatment did you take any photographs? -- A. I did.
- Q.11. On what date did you take the photographs? -- A. The day after he came in.
- Q.12. That is the 10th? -- A. Yes.
- Q.13. Are these prints of the photographs? (Four photographs produced) -- A. Yes sir  
(Four photographs put in as Exhibit 1 and shown to both accused and the Jury).
- Q.14. Will you please describe to His Lordship and the Jury the condition of the complainant when you examined him on 9th November?

WITNESS: May I look at my Report to refresh my memory, sir?

HIS HONOUR: Yes you may.

A. There were the following injuries:

1. An abrasion on the left cheek one inch long and one sixth of an inch wide.
2. A semicircular abrasion on the right cheek 2½ inches long and a quarter of an inch wide at the widest part.
3. An abrasion on the left side of the head above and to the front of the left ear 2½ inches long and a quarter of an inch broad.
4. An abrasion on the front of the chest 2 inches long and an eighth of an inch wide.

All these come under the category of "Harm"

5. The left hip was covered with a mass of linear

bruises of which not less than 10 were distinct. One bruise 4 inches long and half an inch wide at the widest part, the epidermis was totally removed. Three other bruises at right angles to the above varying in length from 1 to 2 inches and in width from a quarter of an inch to half an inch.

6. On the right hip at least 7 abrasions and in 4 of them the epidermis was entirely removed. They varied in length from 5 inches to  $5\frac{1}{2}$  inches and in width from half an inch to a quarter of an inch.

Nos. 5 and 6 come under the category of "Main".

7. On the left side of the back in the middle a linear bruise  $1\frac{1}{2}$  inches long and half an inch wide. Apart from this there were three small circular bruises.

8. On the right side of the back three bruises varying in length from  $1\frac{1}{2}$  to 1 inch and all of them half an inch wide.

9. Inside the right knee the marks of 7 weals and 4 abrasions, three of them from 2 to 3 inches in length and a quarter of an inch broad.

10. There was an abrasion 1 inch long on the back of the right knee.

11. In front of the right thigh there was one small abrasion and another linear abrasion  $1\frac{1}{2}$  inches long and five eighths of an inch wide.

12. On the left side of the abdomen in front there was an abrasion  $2\frac{1}{2}$  inches long and one eighth of an inch wide.

Nos. 7 to 12 come under the category of "Harm".

Q.15. Can you give an opinion, Doctor, as to how those injuries might have been caused? -- A. They were probably caused by a kiboko.



- Q.16. Could they have been caused by that kiboko?(kiboko produced Exhibit 1 in lower Court) -- A. Yes, that is very likely.
- Q.17. Can you say about how long before you examined him the injuries had been caused? -- A. Several days.
- Q.18. Is it possible they had been caused 6 days earlier? -- A. I should put it at from 5 to 8 days. It is rather difficult to be sure because one does not know if he got any treatment.
- Q.19. Would you consider them to be serious injuries? -- A. No, I should consider them severe injuries in the absence of infection.
- Q.20. If infection had occurred they might have been serious? -- A. Oh, anything could have happened.
- Q.21. Was any bleeding caused by those injuries? -- A. There had been some but he was not bleeding when I saw him. Scabs were formed.
- Q.22. Would they cause a considerable amount of pain? -- A. A dreadful amount of pain.
- Q.23. Would the person who received them be disabled in any way temporarily or permanently? -- A. He was quite incapable of work.
- Q.24. Could he walk properly? -- A. No, he could only walk very stiffly and with considerable pain.
- Q.25. Did you consider it necessary for him to remain in Hospital until the day when he was discharged, the 26th November? -- A. Definitely.

ACCUSED NO.1. I did not follow that answer.

MR. PHILLIPS: The question was "Did you consider it necessary for him to remain in Hospital until 26th November the day he was discharged?" and the Doctor replied "Definitely so".

Q.26. Is it likely that any permanent marks would be left

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MR. PHILLIPS: The question was "Did you consider it necessary for him to remain in Hospital until 26th November the day he was discharged?" and the Doctor replied "Definitely so".

- Q.26. Is it likely that any permanent marks would be left

by these injuries? -- A. There would probably be permanent marks in two places but there will be no permanent disablement.

Q.27. Are the injuries visible in those photographs? --

A. Yes very much so.

Q.28. Do the white marks on the photographs represent the injuries? -- A. They represent where the skin has been destroyed and where the pigment of the black skin has been destroyed.

Q.29. Do you mean that mere bruises alone do not appear in the photographs? -- A. They do. They appear pure white as the pink comes out white. On some of them the black may appear but in two places where the skin was very badly injured the pigment will not return - in the two places where the wounds were very deep.

Q.30. In your opinion could the infliction of such injuries be regarded as reasonable castigation? --

A. Certainly not.

CROSS-EXAMINED BY FIRST ACCUSED:

Q.31. Dr. Forbes are you sure that the wound on the right cheek is the same as shown on the photographs? --

A. Yes.

Q.32. The photograph shows a mark on the right cheek but you said there was one on the left cheek. --

A. There is one on the left cheek here. That is the one; an abrasion 1 inch long, and No.2 a semicircular abrasion on the right cheek.

Q.33. You say about six days after he had that beating you examined him. -- A. I did not say so. I said I examined him on the 9th.

Q.34. Well that is six days. Are you sure that nothing else could have happened in the meantime to have made the bruises worse by native medicine? --

A. I am not at all sure. I don't know anything

about it. I only described the wounds as I saw them.

Q.55. Is it possible that by bad treatment the wounds could get worse in six days? -- A. Yes, and it is also possible they would have been better if they had got good treatment.

Q.56. What do you mean by bodily harm? Were there any bones broken? -- A. "Harm" and "Main" are given by me as laid down by Government definition.

Q.57. You said also that he suffered pain. How did you know he suffered pain? You could not feel the boy's pain? -- A. No, I could not feel another man's pain.

Q.58. You guessed that he was feeling pain? -- A. I took his statement which was corroborated by his injuries.

Q.59. Do you swear that it was necessary to keep the boy in Hospital 14 days? -- A. I have already sworn that it was necessary to keep him 17 days.

NO CROSS-EXAMINATION BY SECOND ACCUSED.

NO RE-EXAMINATION.

THE FOREMAN OF THE JURY: Dr. Forbes you said the patient was suffering a dreadful amount of pain. The Jury would like to know if he had been properly treated from the time the wounds were made whether he would have suffered less pain? -- A. He would have suffered very much less pain.

THE FOREMAN OF THE JURY: Did the boy actually report to you for treatment or was he brought to you by the Police? -- A. I cannot remember at the moment. I know he was in the Hospital when I paid my morning visit.

THE FOREMAN OF THE JURY: Were these photographs taken before the boy received any treatment whatsoever? -- A. No they were taken the day after. He got one day's treatment before the photographs were taken.

THE FOREMAN OF THE JURY: Would any treatment that the wounds received have the effect of exaggerating their appearance in the photographs? -- A. No, on the contrary. It would have made very little difference from the small amount of treatment he received but had there been any difference it would have had the opposite effect.

THE FOREMAN OF THE JURY: The photographs are quite untouched? -- A. That I cannot say. I gave them to a local Photographer to be done.

HIS HONOUR: I take it the Jury mean that you yourself did not alter the negatives in any way.

WITNESS: No sir.

THE FOREMAN OF THE JURY: Your Honour the Jury would like to see the negatives.

WITNESS: I think that Captain Angus is in possession of them. He was defending Mr. Engelbrecht in the lower Court. I would like to say that when I gave the negatives to the Photographer he did not know what they were. He got no instructions except just to develop and print them. I will produce the negatives if I can get them.

GEORGE MILNE TAYLOR sworn: (Extra witness called by Prosecution after notice duly served on both the Accused).

EXAMINED BY MR. PHILLIPS:

Q.40. What is your full name? -- A. George Milne Taylor.

Q.41. Are you an Inspector of Police stationed at Eldoret?

A. I am.

Q.42. Do you know the First Accused Mr. Englebrecht? --

A. I do.

Q.43. Did you receive a Report from him? -- A. Yes.

Q.44. On what date? -- A. On the 6th November 1936.

Q.45. To what did that report relate? -- A. To the theft of Sh.100/-.

Q.46. Did you see him again on the 16th November? --

A. I did.

Q.47. Where? -- A. On his farm.

Q.48. Did he produce anything to you on that occasion? --

A. He produced a kiboko.

Q.49. Is that the kiboko? (kiboko produced) -- A. That is the kiboko.

Kiboko put in as Exhibit 2.

Q.50. Did you take possession of that kiboko? -- A. Yes.

Q.51. Did you later produce it in the Resident Magistrate's Court at the Preliminary Enquiry? -- A. I did.

Q.52. Did you carry out any investigations in consequence of the report made on the 6th November? -- A. I did.

Q.53. And what was the ultimate result of these investigations? -- A. I arrested a toto.

Q.54. What was his name? -- A. Katwa.

Q.55. What was his father's name? -- A. Serite.

Q.56. And was he charged in the Resident Magistrate's Court? -- A. Yes he was charged with theft.

Q.57. Theft of what? -- A. Theft of Sh.100/-.

Q.58. And was he convicted? -- A. Yes.

Q.59. On what date? -- A. On the 2nd January 1957.

Q.60. Do you remember the number of that case? -- A. May I refer to my file? The number was 2871 of 1956.

FIRST ACCUSED: Your Honour may I remark that this evidence has not been heard before.

HIS HONOUR: You had notice of this witness did you not?

FIRST ACCUSED: This morning for the first time. I knew I put in a complaint to Mr. Taylor and he came out and investigated but I know nothing about when the case was tried.

HIS HONOUR: But you have had notice of Mr. Taylor's evidence?

FIRST ACCUSED: But the whole evidence should be heard by

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the Jury, not this new article.

HIS HONOUR: I don't quite see what your objection is.

FIRST ACCUSED: I was not present when the case was heard.

I know nothing about the hearing of the case.

HIS HONOUR: I do not think you have any reason to take objection on that ground.

MR. PHILLIPS: I do not know whether Mr. Englebrecht is suggesting that there was some reason to think that the complainant was also guilty. Perhaps he might be informed that he can put it to Mr. Taylor in cross-examination.

Q. 61. Is this the boy Katwa? -- A. Yes that is the boy.

NO CROSS-EXAMINATION BY FIRST OR SECOND ACCUSED.

THE FOREMAN OF THE JURY: During the investigations into the case against Katwa was any evidence produced or anything to lead the Crown to think the complainant in this case might have been connected with Katwa in the theft of the Sh.100/-?

A. The accused Katwa pleaded guilty to the theft.

THE FOREMAN OF THE JURY: Did anything occur that lead the Crown to believe it possible that the complainant in this case was connected with Katwa? -- A. No, nothing occurred which might have suggested that the complainant was involved.

KIBROP ARAP RAGOLE affirmed:

EXAMINED BY MR. PHILLIPS:

Q.62. Is your name Kibrop arap Ragole? -- A. Yes.

Q.63. Do you understand Swahili? -- A. Yes I know Swahili well.

Q.64. Are you a Kamasia? -- A. Yes.

Q.65. Do you know Mr. Englebrecht? -- A. Yes.

Q.66. Did you formerly work for him? -- A. Yes.

Q.67. How long ago was that? -- A. I worked one week for him.



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Q.67. How long ago was that? -- A. I worked one week for him.

- Q.68. About how many months ago was that? -- A. I do not know if it was 2 months ago.
- Q.69. What kind of work did you do for Mr. Englebrecht? --  
A. Kitchen boy.
- Q.70. Do you remember when Mr. Englebrecht lost some money? -- A. Yes.
- Q.71. Who first told you about that money being lost? --  
A. The Bwana himself told me.
- Q.72. What time of the day was that? -- A. I don't know whether it was 10 o'clock in the morning.
- Q.73. And what did he say to you on that occasion? --A. He asked me to produce his money and I told him I had not stolen it.
- Q.74. Did he mention how much money it was? -- A. He did not say how much but he said "Produce my money; you have stolen it".
- Q.75. What did you say to that? -- A. I told him I had not stolen it.
- Q.76. Was anything else said on that occasion? --A. He said "If you don't produce it I will ~~shot~~ you with a gun".
- Q.77. Then what happened? -- A. He went off to get a gun. I ran away. When I ran off he went to the shamba and called his men.
- Q.78. Where did you run to? -- A. High up.
- Q.79. Did you see Mr. Englebrecht again after that? --  
A. Yes his men came out and caught me and they took me to him.
- Q.80. Was that on the same day or another day? -- A. On the same day.
- Q.81. Who were the men who came and fetched you? --  
A. arap Chelule who is outside and arap Koech and Katwa.
- Q.82. Where did they take you? -- A. They took me to the Bwana's house.

- Q.83. Then what happened when you were brought before the Bwana again? -- A. The Bwana beat me.
- Q.84. With what did he beat you? -- A. With a kiboko.
- Q.85. Like that kiboko?(Exhibit 2 produced) -- A. This is the kiboko.
- Q.86. Did he beat you himself with it? -- A. Yes he beat me himself.
- Q.87. Was anyone else present when he beat you? -- A. The men who caught me were there with him.

COURT ADJOURNED AT 11.15 a.m. AND RESUMED AT 11.25 a.m.  
EXAMINATION RESUMED:

- Q.88. I think you said that when you were beaten there were present the people who had caught you and brought you back? -- A. Yes.
- Q.89. They were arap Chelule arap Koech and Katwa; were they all present when you were beaten? -- A. They held me.
- Q.90. All three of them? -- A. arap Koech and arap Chelule.
- Q.91. And was Katwa present also? -- A. He did not come to the place where I was beaten. He was at the house.
- Q.92. Was anyone else present when you were beaten? --  
A. Myself, arap Chelule, arap Koech and the Bwana.
- Q.93. Nobody else? -- A. No.
- Q.94. Can you remember how many times you were beaten? --  
A. I could not count because he beat me very many times.
- Q.95. Did you receive all the blows at once? -- A. No, he beat me and I was tied up after that. They tied my hands and my neck and they put me outside the store.
- Q.96. Was that after you had been beaten? -- A. Yes they beat me first and then tied me up.
- Q.97. Were you beaten again after that? -- A. The Bwana told me he was going to shave and when he came back if I had not shown where the money was he

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- Q.97. Were you beaten again after that? -- A. The Bwana told me he was going to shave and when he came back if I had not shown where the money was he

would put me in the motor car and take to the main road and shoot me there with a pistol.

- Q.98. Was it before or after you were tied up outside the store that you were beaten with the kiboko? --  
A. They tied my hands with the rope first and then they beat me.
- Q.99. You have said you were tied up outside the store and then the Bwana went away to shave -- A. Yes.
- Q.100. And up to that point you had not been beaten? --A. I had been beaten.
- Q.101. What with? -- A. With this kiboko.
- Q.102. And who had beaten you the first time before you went to be tied up outside the store? -- A. The Bwana.
- Q.103. And after he went away to shave did you see him again? -- A. He went off to shave and he came back.
- Q.104. Did he say anything when he came back? -- A. He showed me a pistol and said "I will shoot you with it on the road".
- Q.105. Did you say anything? -- A. I said "Are you going to shoot me for no reason when I have not stolen the Shillings".
- Q.106. Then what happened? -- A. He untied me. He beat me again.
- Q.107. What with? -- A. With the kiboko.
- Q.108. How many times? Can you remember? -- A. I did not count because I was put down. One man held me by my neck and the other one by my legs.
- Q.109. After you had been beaten again what happened then? -- A. I felt pain and I said "I have stolen. Let me go and show you where I put it".
- Q.110. Why did you say that? -- A. I felt much pain; that was the reason.
- Q.111. And where were you when you said that? Were you

- lying down or standing up? -- A. I was on the ground being held.
- Q.112. And then what happened? -- A. I went with arap Chelule and arap Koech. The Bwana gave them the kiboko and said "If he does not show you beat him".
- Q.113. What happened when you went with them? -- A. As I went along I told them I had not stolen the shillings and they beat me again.
- Q.114. Did you see Mr. Englebrecht again? -- A. Yes he came at that time.
- Q.115. Where did you go to? -- A. I went to a plantation of trees near the shamba.
- Q.116. And what happened then? -- A. This time the Bwana said "Catch him and put him down" and I was beaten.
- Q.117. Who beat you then? -- A. The Bwana.
- Q.118. What happened then? -- A. I felt pain and then I said "I have given it to arap Kibore".
- Q.119. Who is arap Kibore? -- A. The second accused.
- Q.120. Was he present at that time? -- A. He was in the shamba and he was sent for.
- Q.121. Did he come? -- A. Yes.
- Q.122. What happened when he came? -- A. I told him I had stolen the shillings and given them to him.
- Q.123. What did arap Kibore say? -- A. He asked me what time I gave him the shillings. I kept quiet. Later I said I had not given them to him.
- Q.124. Were you beaten again after this? -- A. Yes the Bwana gave arap Kibore the kiboko and told him to beat me.
- Q.125. Did arap Kibore beat you? -- A. Yes.
- Q.126. Where did he beat you? -- A. All over the body and on the back.
- Q.127. Were you standing up or lying down when arap Kibore beat you? -- A. They threw me down and I was being held on the ground when he beat me.

- Q.128. Were you beaten again after that or was that the last time? -- A. I was beaten again.
- Q.129. By whom? -- A. arap Kibore gave the kiboko back to the Bwana and the Bwana beat me.
- Q.130. On what part or parts of your body were you beaten?  
A. All over the body.
- Q.131. The first time you were beaten where were you beaten?  
A. On the buttocks.
- Q.132. Did the Bwana beat you on the buttocks? -- A. Yes.
- Q.133. Did he beat you anywhere else? -- A. Also on the back.
- Q.134. Did arap Kibore beat you on the buttocks? -- A. On the buttocks and all over the body.
- Q.135. Did you receive any injuries as the result of these beatings? -- A. Yes there were cuts and the blood was coming.
- Q.136. You said that you admitted stealing the money and later said you had given it to arap Kibore? --  
A. Yes, because I felt very much pain.
- Q.137. Were those statements true? -- A. I did not steal.
- Q.138. And you did not give the money to arap Kibore? --  
A. No.
- Q.139. And why did you make those false statements? --  
A. Because I felt very much pain.
- Q.140. Did you admit the theft before you were beaten? --  
A. No.
- Q.141. After you had been beaten what happened? -- A. They went on beating me and then I admitted I had stolen the shillings and I offered to go and show where they were.
- Q.142. You have already described that but when did they stop beating you, that same day? -- A. Yes.
- Q.143. What time was that? -- A. It was about 12 noon.
- Q.144. And then what happened to you after they had stopped beating you? -- A. They beat me up to 4 o'clock.

Then they went to tie me up at the store.

- Q.145. Did they tie you up there? -- A. Yes.
- Q.146. And what happened to the Bwana? -- A. He came to Eldoret.
- Q.147. And how long did you remain tied up at the store? --  
A. It was getting nearly dark.
- Q.148. And then what happened? -- A. Kimutai arap Kibore came and untied me and tied me again in the kitchen.
- Q.149. How long did you remain there? -- A. He kept watch over me until the morning.
- Q.150. What happened to you in the morning? -- A. The Bwana came in the morning. He tied me up with a chain. He went to the shamba. He told Katwa to look after me. Katwa went to draw water then I ran away.
- Q.151. Where did you go to? -- A. I went to Lesuru.
- Q.152. Were your injuries still hurting you? -- A. Yes very much.
- Q.153. Could you walk easily? -- A. No.
- Q.154. Did you receive any treatment for your injuries? --  
A. At 4 o'clock when the Bwana came to Eldoret before he left he put some medicine which is something like blood on my wounds.
- Q.155. After you had run away next morning did you receive any treatment? -- A. No.
- Q.156. Were you later examined by the Doctor? -- A. Yes.
- Q.157. Do you remember how many days later that was? --  
A. I don't know how many days it was.
- Q.158. Was it as much as 2 days or more than 2 days? --  
A. Not 2 days. More than 2 days.
- Q.159. Was it as much as 5 days? -- A. I don't know whether it was 5 or 6 days.
- Q.160. And you were examined by the Doctor? -- A. Yes.
- Q.161. How did you come to Eldoret? -- A. The Bwana of the Police brought me here.



- Q.162. And did you remain here in Hospital? -- A. Yes, I stayed here in Hospital.
- Q.163. Was Mr. Englebrecht present during the whole of the time you were beaten or was he absent part of the time? -- A. Part of the time he had gone off to the house.
- Q.164. And were you beaten while he was away at the house?  
A. Yes.
- Q.165. Who beat you then? -- A. arap Chelule.
- Q.166. Anyone else? -- A. and arap Koech.
- Q.167. Who was the last person to beat you? -- A. The Bwana beat me last. He hit me here on the cheek and on the left side of the face and on the head. There is still a mark.
- Q.168. Who was the last person to beat you on the buttocks?  
A. Second accused.
- Q.169. Was Mr. Englebrecht present when the second accused beat you on the buttocks the last time? -- A. No the Bwana had not arrived.
- Q.170. Between the time when you ran away next morning and the time when you were brought to Eldoret by the Police did you receive any sort of treatment for your injuries? -- A. No only the medicine which the Doctor put on me when I arrived at Eldoret but not before.
- Q.171. Were you beaten again by anyone during that time? --  
A. No.
- Q.172. Can you say on how many different occasions Mr. Englebrecht beat you? Not how many strokes but how many different occasions? -- A. I think about 5 times. I am not certain.
- Q.173. On how many occasions did arap Kibore beat you? --  
A. I don't know whether he beat me 4 times.
- Q.174. Did you steal that money? -- A. I did not steal.

CROSS-EXAMINED BY FIRST ACCUSED:

- Q.175. Where were you when you were first beaten? You talk about a hundred beatings but where was the spot you had the first beating? -- A. At your house.
- Q.176. According to the evidence you were beaten at the shamba. All these lies will have to be proved by the witnesses. You said you were tied up with a chain? -- A. After you returned from Eldoret you tied me with a chain.
- Q.177. And you said I went to the shamba. How did you break the chain to get loose at that moment? -- A. I untied the chain myself.
- Q.178. How could you break the chain with your hands? -- A. I cut it.
- Q.179. What did you cut it with? -- A. With an axe.
- Q.180. With your leg in it? Did you walk away or did you run away? -- A. I was not strong enough to run. I went away slowly.
- Q.181. Did you not meet a motor car which picked<sup>you</sup>/up? -- A. No I walked on my feet.
- Q.182. Did you look round to see whether there were any boys after you? -- A. No.
- Q.183. If you walked is it possible that the boys I sent after you could not catch you? -- A. I did not see them.
- Q.184. You said in your statement that I pointed a rifle at you and then you ran away. Didn't I shoot after you when you ran away? -- A. No.
- Q.185. Why didn't I shoot you? -- A. You said you would shoot me with a gun and then you went to get it and I ran away.
- Q.186. You didn't actually see the gun in my hands? -- A. Yes I saw the gun in your hand.

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- Q.185. Why didn't I shoot you? -- A. You said you would shoot me with a gun and then you went to get it and I ran away.
- Q.186. You didn't actually see the gun in my hands? -- A. Yes I saw the gun in your hand.

- Q.187. You said in your statement that I pointed the gun at you. Is that true? -- A. You went to get it from the house.
- Q.188. And when I got it did I point it at you? -- A. I was on the verandah when you came out with the gun and you said you would shoot me with it while you were still in the house and I ran away.
- Q.189. So I was not out of the house with the gun when you were there. By the time I came out with the gun you had gone? -- A. Yes.
- Q.190. So I did not see the direction you went? -- A. I went round to the back of the house and you did not see me.
- Q.191. You said also in your statement that the pistol had two barrels? -- A. Yes you had a pistol with two barrels.
- Q.192. Did you hear it going off? -- A. No.
- Q.193. Why did I show you the gun? Did I show it to you for fun? -- A. I don't know.
- Q.194. Didn't you receive any shots? -- A. No you did not shoot at me.
- Q.195. All the sores you had on your back, what were they from? Were they from the rifle, the pistol or a cane or what? -- A. They were caused by the kiboko.
- Q.196. You are quite sure it was only the kiboko? -- A. Yes.
- Q.197. What did your people put on your sores when you ran away? -- A. You put medicine like blood.
- Q.198. I asked you when you ran away to Lesuru. You were there 6 days before the Police caught you. In those 6 days what did the boys put on your back? A. They did not put any medicine.

- Q.199. You were not sick at all then? -- A. I was very ill.
- Q.200. Then why did your brothers not put any medicine your sores? -- A. They did not know what kind of medicine to put on the sores.
- Q.201. Had you any intention of going to the Police? -- A. If I had been able I would have gone to the Police.
- Q.202. You were able to run away. Were you not able to run to Eldoret, the same distance? -- A. I had not enough strength to come.
- Q.203. But you ran away to another place and not to the Police? -- A. I went very slowly. I was not strong enough to go.

CROSS-EXAMINED BY SECOND ACCUSED:

- Q.204. Did you say I only hit you with 5 strokes of the kiboko? -- A. No it is not true that you only gave me 5 strokes.

THE FOREMAN OF THE JURY: The witness has said arap Chelule and arap Koech also beat him. Did they beat him very badly? -- A. Yes they beat me as hard as first accused did.

THE FOREMAN OF THE JURY: Were you already bleeding when they beat you or did you bleed as a result of their beating? -- A. I was already bleeding when they beat me.

THE FOREMAN OF THE JURY: Who did you go to at Lesuru? -- A. To arap Rono.

THE FOREMAN OF THE JURY: Did you arrive there the same day? -- A. Yes.

NO RE-EXAMINATION:

(At the request of first accused this witness (Complainant) strips and shows his back and buttocks to the Jury).

KIMETO ARAP CHELULE affirmed:

EXAMINED BY MR. PHILLIPS:

- Q.205. What is your name? -- A. Kimeto arap Chelule.

- Q.206. What tribe are you? -- A. Nandi.
- Q.207. Where do you work? -- A. For Bwana Mote (First accused).
- Q.208. Do you know this boy Kibrop arap Ragole who has just gone out? -- A. Yes.
- Q.209. Did he work for this Bwana too? -- A. Yes.
- Q.210. Do you remember some time ago when the Bwana had some money stolen from him? -- A. Yes.
- Q.211. Was anyone accused of stealing that money? -- A. Yes.
- Q.212. Who was accused? -- A. The mtoto.
- Q.213. Which mtoto? .. A. Kibrop.
- Q.214. Who accused him of stealing? -- A. The European.
- Q.215. Which European? -- A. First accused.
- Q.216. Were you present on that occasion? -- A. I was in the shamba.
- Q.217. What was the first you heard about it? -- A. The European came to the shamba and said "The mtoto has run away".
- Q.218. And then? -- A. He said the mtoto had run away and had taken away his property. He told me to look for him.
- Q.219. Did you go? -- A. Yes.
- Q.220. Did anyone else go with you? -- A. Katwa and arap Koech went with me.
- Q.221. Did you find the mtoto? -- A. Yes.
- Q.222. And what did you do with him? -- A. We took the mtoto to the Bwana, First accused, near the shamba where we met the Bwana. The Bwana said "Take him to the house". We took him to the house. The Bwana went first to look at the Machine. He returned to the house and he found us there with the mtoto. As the Bwana came out he tied the mtoto and said "Go and tie him in the store". We took him to the store.

Q.203. What is your name? -- A. ...

Q.204. Did you say I only hit you with a stick of the kibo? -- A. ...

Q.205. But you ran away to another place and not to the Police? -- A. I went very slowly. I was not strong enough to come.

Q.206. Had you any intention of going to the Police? -- A. If I had been able I would have gone to the Police.

Q.207. You were able to run away. Were you not able to run to Kibrop, the same distance? -- A. I had not enough strength to come.

Q.208. But you ran away to another place and not to the Police? -- A. I went very slowly. I was not strong enough to come.

Q.209. Did you say I only hit you with a stick of the kibo? -- A. ...

Q.210. The witness has said that ...

Q.211. ...

Q.212. ...

Q.213. ...

Q.214. ...

Q.215. ...

Q.216. ...

Q.217. ...

Q.218. ...

Q.219. ...

Q.220. ...

Q.221. ...

Q.222. ...

Q.203. What is your name? -- A. ...

Q.204. ...

Q.205. ...

Q.206. ...

Q.207. ...

Q.208. ...

Q.209. ...

Q.210. ...

Q.211. ...

Q.212. ...

Q.213. ...

Q.214. ...

Q.215. ...

Q.216. ...

Q.217. ...

Q.218. ...

Q.219. ...

Q.220. ...

Q.221. ...

Q.222. ...

- Q.223. What happened then? -- A. We tied him in a standing position. The Bwana went inside the house and he came out with a kiboko.
- Q.224. Like this one? (Exhibit 2 produced) -- A. Yes this is it.
- Q.225. What happened then? -- A. He said to the mtoto "I am going to beat you. Where have you put my property?"
- Q.226. What did the mtoto say? -- A. He said "I have not stolen".
- Q.227. What happened after that? -- A. The Bwana wanted to hit him and he said "I will go and show you where I put it".
- Q.228. Do you know why he said that? -- A. He saw the kiboko and that the European was going to beat him.
- Q.229. Did he show you where he put it? -- A. He took us and showed us a hole. We looked but we did not find anything.
- Q.230. Did Mr. Englebrecht go with you to the hole? -- A. Yes he came in a motor car.
- Q.231. Who had the kiboko then? -- A. arap Koech.
- Q.232. What happened when he showed you the empty hole? -- A. We dug but did not find anything and by this time the European came.
- Q.233. What happened when the Bwana arrived? -- A. The Bwana got out of his motor car and came and looked at the hole.
- Q.234. What did he do then? -- A. The Bwana did not find his property there and he said "Catch him and put him down. He has deceived me".
- Q.235. Was he beaten then? -- A. Yes.
- Q.236. By whom? -- A. The European.
- Q.237. With what? -- A. With this kiboko.
- Q.238. On what part of his body? -- A. On the buttocks.

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- Q.230. Did Mr. Englebrecht go with you to the hole? -- A. Yes he came in a motor car.
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- Q.235. Was he beaten then? -- A. Yes.
- Q.236. By whom? -- A. The European.
- Q.237. With what? -- A. With this kiboko.
- Q.238. On what part of his body? -- A. On the buttocks.



- Q.239. Was the complainant standing up or lying down when he was beaten? -- A. He was lying on the ground.
- Q.240. Did anyone hold him down? -- A. He was held.
- Q.241. By whom? -- A. We held him.
- Q.242. Whom do you refer to as "we"? -- A. Myself and arap Koech.
- Q.243. Can you say how many times he was beaten on that occasion? -- A. I did not count.
- Q.244. Was he beaten many times or only a few times? --  
A. A few times.
- Q.245. Was he beaten hard? -- A. Not with much force.
- Q.246. Did any blood flow as a result of the beating? --  
A. No, only marks were there.
- Q.247. And what happened after that? -- A. The mtoto said "Do not beat me. I have given the property to Kimutai"(i.e. Second Accused).
- Q.248. Who is Kimutai? Is he the same as arap Kibore? --  
A. Yes he is accused No. 2.
- Q.249. What happened then? -- A. The European sent arap Koech to call Kimutai. Kimutai came. He was asked "What have you to say? The mtoto says he has given you the money". Kimutai said "No he has not given the money to me". Then the European said "Beat him, he has made a false statement against you".
- Q.250. And was he beaten? -- A. Yes.
- Q.251. By whom? -- A. By accused No.2.
- Q.252. Can you remember how many times he beat him? --  
A. Three times.
- Q.253. On what part of his body? -- A. The European told him not to hit him on the head. He hit him once on the cheek and the other twice on the buttocks.
- Q.254. What happened after that? -- A. Then when the second accused beat him the mtoto said "I have not given him the money. Wait I will go and show you where I put it".

- Q.255. And did he show you? -- A. He went and showed us a hole again, another hole. We dug the hole but we could not find it.
- Q.256. What happened after that? -- A. When we could not find anything in this hole he said he had not put the money there and he showed another direction down below. We went down below and looked in the grass amongst the leaves and we could not find anything.
- Q.257. And then? -- A. When we got there the European said "Why have you annoyed me. Why don't you show me my property". Then he beat the mtoto.
- Q.258. On what part of his body? -- A. On the buttocks.
- Q.259. How many times? -- A. I did not count.
- Q.260. Did he hit him hard? -- A. Not very hard.
- Q.261. Did you see any blood? -- A. No.
- Q.262. Did you see any blood at all afterwards? -- A. No.
- Q.263. Was the complainant beaten again after that? --  
A. Then the mtoto said he had put the money near the cattle boma. We were going towards the cattle boma and we were called by the shamba boys who told us the ropes were finished. Then I and second accused went to the shamba. We left the European there with the mtoto.
- Q.264. Did you beat the complainant at all? -- A. No.
- Q.265. Did arap Koesch beat him? -- A. No.
- Q.266. On how many occasions did Mr. Englebrecht beat him? --  
A. On two occasions. The first one I saw and the second was when the mtoto said he put the money near the vegetable garden.
- Q.267. On how many occasions did Kimutai beat him? -- A. He gave him only three strokes.
- Q.268. And was Mr. Englebrecht present on each occasion when he was beaten? -- A. Yes.

Q.269. He was present each time? -- A. Yes.

MR. PHILLIPS: My Lord I ask leave to cross-examine this witness on certain statements he made in the lower Court. Your Lordship will see that on page 9 there were certain statements made then which he has now contradicted, in particular the fifth and sixth lines from the top and the sixth line and 7th line from the bottom and the eighth line from the bottom.

HIS HONOUR: I do not feel inclined to give leave.

MR. PHILLIPS: As your Lordship pleases. I am quite content to leave it to Your Lordship.

CROSS-EXAMINED BY FIRST ACCUSED:

Q.270. Were you one of the boys I sent to catch the mtoto? --  
A. Yes.

Q.271. Did I tell you what direction you were to go? --  
A. No you said the mtoto had run away and that one of us should take one direction and the other the other direction and try to find him.

Q.272. When you brought the mtoto back where did you find me? -- A. In the shamba near the wattle trees, at the edge of the wheat field.

Q.273. What did I tell you about the mtoto? -- A. You told us to take the mtoto to the house.

Q.274. Did I go with you? -- A. No you went to the shamba first. We went to the house alone.

Q.275. And then I arrived at the house? -- A. When we had got to the house you also arrived.

Q.276. And what did I do when I arrived at the house? --  
A. You tied the mtoto.

Q.277. And what did I ask the mtoto? Why did I tie him? --  
A. You asked him about the property.

Q.278. What did the mtoto then say? -- A. He said he had not stolen.

Q.279. Were you there when the mtoto said "I stole the money. Don't beat me"?

- A. Yes I was present.
- Q.280. Did you hear him admit that he had stolen the money?
- A. Yes and we asked where he got it from.
- Q.281. And where did he say he got it? -- A. He said he got it from the hip pocket of your trousers.
- Q.282. And when I questioned the mtoto what did he say?
- A. He deceived you and said "Wait I will go and show you the place where I put it".
- Q.283. All the witnesses say the mtoto said "Don't beat me. I gave it to Kimutai". Is that a lie or the truth? -- A. It is the truth.
- Q.284. Then the mtoto was not beaten at all before he admitted he stole the money? -- A. He admitted after he was beaten.
- Q.285. Not before he was beaten? Was he beaten before he admitted? -- A. When you came out from the house with the kiboko and before you had hit him he said he would go and show where the money was.
- Q.286. Did you see Kimutai hit the mtoto with the kiboko on the left cheek? -- A. Yes, then you told him not to hit him on the head.
- Q.287. Where did I tell him to hit the mtoto? -- A. On the buttocks.
- Q.288. And then when he hit him on the backside did I stop him again or not? -- A. You said "Don't hurt him".
- Q.289. So this occasion was the first: when did the beating start again? -- A. The first one and the one near the vegetables.
- Q.290. You said in your evidence you left me with the mtoto. Where did you go to? -- A. We went to the shamba and left you with the mtoto.
- Q.291. Only the two of us? -- A. Yourself, the mtoto and arap. Kioch.
- Q.292. When did you come back again? -- A. We returned at 4 o'clock. We found you measuring the posho.

Q.293. After I measured the posho what did I do? -- A. You went away.

Q.294. What were my instructions before I went away? --  
A. You told Kimutai to look after the mtoto.

Q.295. Kimutai and who else? -- A. and Katwa.

NO CROSS-EXAMINATION BY SECOND ACCUSED

NO RE-EXAMINATION

THE FOREMAN OF THE JURY: Where have you been working since the mtoto was beaten? -- A. I am still working for first accused.

THE FOREMAN OF THE JURY: Are you quite certain that you saw no blood on any occasion? -- A. I am certain I did not see any blood.

HIS HONOUR: How many beatings did you see altogether? Not how many strokes but on how many occasions? --  
A. The first one I saw was near the wattle trees in the shamba and second one was at the vegetable garden. When we went to be shown the place near the boma we just came to the place and another man came to call us and we left and went to the shamba.

COURT ADJOURNED AT 12.55 p.m. AND RESUMED AT 2.15 p.m.

MR. PHILLIPS: My Lord I would ask leave to recall Dr. Forbes in order to produce the negatives referred to this morning.

HIS HONOUR: Very well.

JOHN FORBES Recalled: on same oath:

EXAMINED BY MR. PHILLIPS:

Q. 296. Have you brought the negatives you referred to this morning? -- A. I have.

Q.297. Are those the negatives? -- A. Yes.

(Negatives put in as Exhibit 3 and handed to the Jury for inspection).

Q.298. Were they originally all on one film? -- A. Yes.

Q.299. Where did you take that film to be developed? --  
A. To a photographer, I don't know his name, something like Rajabali.

- Q.300. And did you later receive the negatives of that film back? -- A. I got them back some time ago.
- Q.301. --Including these four negatives? -- A. Yes.
- Q.302. While we are waiting for the photographer, Doctor, can you say whether the injuries from which this boy was suffering amounted to bodily harm in the terms of this definition "Harm' means any bodily hurt, disease or disorder whether permanent or temporary"? -- A. I have already said some were harm and two were mains according to the definition. They would all come under "harm" but two would come under "Main".
- Q.303. What in your opinion is the minimum that has to be proved in order to establish harm under the definition? -- A. The definitions state any bodily hurt. By that I take it that it is any bodily hurt visible to the eye; something that another man can see and not have to rely simply on the statement of the injured man.
- Q.304. Would it be possible to strike a blow with a kiboko like this without causing harm? -- A. If I saw anything I would certify it was harm but if I could not see anything I could not certify it was harm.
- Q.305. But a weal for instance would be bodily harm? --  
A. Yes.
- Q.306. Whether or not there were any abrasion or any blood? --  
A. A weal is definitely a pathological condition.
- Q.307. But would it make any difference whether blood was drawn or not? -- A. Not the slightest. The definition says "any hurt".
- Q.308. Would a bruise amount to that? -- A. Yes certainly.
- Q.309. Can you say then whether a blow struck with a kiboko like this would normally cause bodily harm in that sense? -- A. If it made a weal such as I

could see I should say it was. I can only go by the definition laid down by law.

Q.310. In other words if there were any visible marks as a result of the blow it would be bodily harm in your opinion? -- A. It would. I want to make this clear. I can only go by the definition which says "Harm means any bodily hurt". I can only certify to hurt if I can see it. That is the position I take up.

Q.311. Can you recognise this Indian? -- A. I think he is the photographer.

Q.312. Is he the man to whom this film was taken to be developed and from whom you later received it back?  
A. To be perfectly candid I cannot swear to him. I only saw him once.

CROSS-EXAMINED BY FIRST ACCUSED:

Q.313. Doctor Forbes I see in the law book "with the intention of bodily harm". Can you say it was with the intention of bodily harm or was it accidental? -- A. I cannot say. I know nothing about it.

NO CROSS-EXAMINATION BY SECOND ACCUSED:

MR. PHILLIPS: I wish to call an additional witness My Lord in respect of whose evidence notice has been served as required by the Criminal Procedure Code.

AKBARALI RAJABALI sworn:

EXAMINED BY MR. PHILLIPS:

Q.314. What is your business? ; -- A. I am a photographer.

Q.315. Do you carry on business at Eldoret? -- A. It is not my own business. I am working for my employer

Q.316. What is the name of the firm? -- A. P.Govinji.

Q.317. Was a film brought to your Studio to be developed by Dr. Forbes some time ago? -- A. Yes.

Q.318. Can you remember the date? -- A. No, I don't remember

Q.319. Have you any idea about how long ago it was? -- A. It was about 3 or 4 months ago.

- Q. 320. Who developed that film? -- A. I did.
- Q. 321. Can you identify those negatives? -- A. Yes, it is given number 116 and I developed them.
- Q. 322. You refer to No. 116. What number is that? -- A. In the film line they are called 116; 1A size.
- Q. 323. Were those negatives part of that film which was brought by Dr. Forbes and developed by you? -- A. Yes these are the films and there were some more also. These are part of that lot.
- Q. 324. Did you make prints of those negatives? -- A. Yes.
- Q. 325. Are those the prints? (Exhibit 1 produced) -- A. Yes, these are the prints of those films.
- Q. 326. Are they true prints of those negatives? -- A. Yes.
- Q. 327. Were those negatives or those prints interfered with in any way or touched up in any way before you handed them to Dr. Forbes? -- A. No interference was done to them.

- Q. 328. Did you later hand those negatives and prints to Dr. Forbes himself? -- A. Yes.

CROSS-EXAMINED BY FIRST ACCUSED:

- Q. 329. Are you a real photographer? -- A. Yes.
- Q. 330. Have you got a lens? -- A. I don't understand.
- Q. 331. If you are a photographer you must have a lens? --

HIS HONOUR: Do you mean a camera?

FIRST ACCUSED: The thing you take photographs with, Has he got a camera? -- A. Yes it belongs to my master.

- Q. 332. Did you take the photographs yourself or did Dr. Forbes take them? -- A. I did not take the photographs. I merely developed them.
- Q. 333. You only developed them. Did you take them? -- A. No.
- Q. 334. Can you develop any photographs any man brings to you. If I bring a film can you develop it? -- A. Yes.

NO CROSS-EXAMINATION BY SECOND ACCUSED:

No Re-Examination.



MALAKWEN ARAP KOECH affirmed:

EXAMINED BY MR. PHILLIPS:

- Q. 335. What is your name? -- A. Malakwen arap Koech.
- Q. 336. Are you a Nandi? -- A. Yes.
- Q. 337. Where do you work? -- A. For Bwana Moto.
- Q. 338. Is this the Bwana? (First accused) -- A. Yes.
- Q. 339. Do you know the boy Kibrop arap Ragole? -- A. I know him.
- Q. 340. Did he work there too? -- A. Yes.
- Q. 341. Do you remember when he was accused of stealing some money? -- A. Yes.
- Q. 342. Who accused him? -- A. The Bwana.
- Q. 343. Were you present on that occasion? -- A. I was in the shamba.
- Q. 344. How did you hear of this first? -- A. The Bwana came and called me and told me the mtoto had run away.
- Q. 345. Did he say anything else? -- A. He told me to go and look for him.
- Q. 346. Did you go? -- A. Yes.
- Q. 347. Did you find him? -- A. Yes.
- Q. 348. And what did you do with him? -- A. I brought him back.
- Q. 349. Did you take him to Mr. Englebrecht? -- A. Yes.
- Q. 350. Did Mr. Englebrecht say anything to him? -- A. Yes the Bwana told him he had stolen the shillings.
- Q. 351. What did he say? -- A. He said he did not steal.
- Q. 352. What happened then? -- A. The Bwana told us to take him to the house.
- Q. 353. Did you take him? -- A. Yes.
- Q. 354. Was anyone else with you? -- A. Katwa and arap Chelule.
- Q. 355. What happened when you took him to the house? --  
A. The Bwana followed us and brought a rope. He tied Kibrop by the neck. He went to his house to have his meal.

- Q. 356. Did the Bwana come out again? -- A. Yes he came out of his house with a kiboko.
- Q. 357. Was the kiboko anything like this one? -- A. Yes this is the kiboko.
- Q. 358. Did the Bwana say anything? -- A. When he came he said "Show me my shillings".
- Q. 359. Did Kibrop say anything to that? -- A. Kibrop said "Let us go and I will show it".
- Q. 360. Do you know why he said that? -- A. Because he saw the kiboko.
- Q. 361. Did Mr. Englebrecht say anything about this kiboko? -- A. He asked him about the shillings.
- Q. 362. Did he say what he was going to do with the kiboko? -- A. He said "If you don't show me the shillings I will beat you".
- Q. 363. Did Kibrop go and point out a place? -- A. He went and pointed to a hole.
- Q. 364. Did you find anything there? -- A. We did not get anything.
- Q. 365. Did Mr. Englebrecht go to that place? -- A. Yes.
- Q. 366. What happened when you found nothing in the hole? -- A. The Bwana said "Catch him and beat him with the kiboko".
- Q. 367. And was he beaten? -- A. Yes.
- Q. 368. By whom? -- A. The Bwana himself.
- Q. 369. With the kiboko? -- A. Yes.
- Q. 370. Was the complainant lying down or standing up, or in what position was he when he was beaten? -- A. He was lying down on the ground and being held.
- Q. 371. Who held him? -- A. Myself and arap Chelule.
- Q. 372. And on what part of his body did the Bwana beat him? -- A. On the buttocks.
- Q. 373. Do you remember how many blows he struck? -- A. I did not count.

- Q.374. Did he hit him hard? -- A. No gently.
- Q.375. Did the blows cause any mark? -- A. There were marks only.
- Q.376. What sort of marks? -- A. The marks of the kiboko.
- Q.377. And then what happened? -- A. After he was beaten he said that he had given the shillings to Kimutai.
- Q.378. What happened then? -- A. The Bwana said to me to go and call Kimutai.
- Q.379. Did Kimutai come? -- A. Yes.
- Q.380. And what happened when he arrived? -- A. Kimutai questioned the mtoto "When did you give me the shillings?".
- Q.381. And what did the mtoto say? -- A. The mtoto said "I gave you the shillings in the morning".
- Q.382. What happened then? -- A. The Bwana told Kimutai "Beat this mtoto. He is making a false statement against you".
- Q.383. Did Kimutai beat him? -- A. He hit him on the cheek.
- Q.384. And what happened then? -- A. The Bwana said "Do not beat him on the face; beat him on the buttocks"
- Q.385. And then did Kimutai beat him on the buttocks? -- A. He hit him on the buttocks twice.
- Q.386. Did they cause any marks? -- A. No, only the marks of the kiboko.
- Q.387. Were they hard blows? -- A. No.
- Q.388. Was Kibrop beaten again after that? -- A. He offered to go and show where the shillings were. He was not beaten any more.
- Q.389. What happened to him after they had stopped beating him? -- A. He was brought to the house.
- Q.390. And what happened there? -- A. The Bwana tied him up. After tying him up he told Kimutai to look after him.

- Q.391. And then what did the Bwana do? -- A. The Bwana got into a motor car and I don't know where he went to.
- Q.392. How long did Kibrop remain there? -- A. He was there until next morning.
- Q.393. And then what happened to him? -- A. In the morning when I went off to work I left him there.
- Q.394. In the store? -- A. No in the kitchen.
- Q.395. Was he still tied up? -- A. Yes.
- Q.396. What was he tied with? -- A. With a chain.
- Q.397. Did you see him again after that? -- A. I did not see him.

HIS HONOUR: Who is Kimutai you have been referring to?---

A. Accused No.2.

- Q.398. You cannot say how many strokes he received? --  
A. I did not count how many there were.
- Q.399. Were there many? -- A. Not very many.
- Q.400. And were his buttocks injured after the beating was finished? -- A. There was swelling on the buttocks.
- Q.401. Did you see the swelling? -- A. Yes I saw it.
- Q.402. Did anyone else beat him except Mr. Englebrecht and Kimutai? -- A. No.

CROSS-EXAMINED BY FIRST ACCUSED:

- Q.403. I want to know exactly whether the mtoto admitted he stole the money before he was beaten or was he first beaten and then admitted that he stole the money? -- A. He admitted after he was beaten.
- Q.404. Was he beaten before he said he stole the money? --  
A. He was beaten first and then he admitted.
- Q.405. Was he beaten before you called Kimutai? -- A. He was beaten before I went to call Kimutai.
- Q.406. Did you see any blood on the mtoto? -- A. No.
- Q.407. Did you also beat him in the trees? When the mtoto

tried to take money out of the hole did you beat him?

A. I did not beat him.

Q.408. Would you undergo a beating like what the mtoto got for Sh.100/-? If I offered you Sh.100/- and said I would give you as much as I gave the mtoto would you lie down and let me give it to you? —

A. No, I would not like to be beaten.

Q.409. Not for Sh.100/-? -- A. No.

Q.410. Were you there next morning when the boy ran away? —

A. No, I was at work.

Q.411. Just now you said next morning the boy was there and then you went to work? — A. When I went off to work the mtoto was there.

Q.412. How do you know he was there? Did you come straight from your hut to work or did you come to my house?

A. I know because I left him there the previous day at 4 o'clock.

Q.413. You only heard the mtoto had run away that morning?

A. Yes I heard.

Q.414. And just now you said he was tied with a chain. How did you know the mtoto was tied with a chain? —

A. When I went away he was tied up.

Q.415. The day before? — A. At 4 o'clock the previous day.

Q.416. I am talking about next morning. You said next morning he was tied with a chain? -- A. I don't know what happened in the morning. I know what happened at 4 o'clock the previous day.

Q.417. I know you were not there. You are talking a lot of nonsense. -- A. I saw him at 4 o'clock the previous day.

Q.418. Did you get your posho at 4 o'clock? -- A. Yes.

Q.419. Did you hear my instructions to Kimutai to look after the complainant? -- A. I heard.

Q.420. Did you hear me tell him to look after him and give him food and water if he wanted it? —

A. Yes I heard you say give him food and water.

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A. Yes I heard you say give him food and water.

NO CROSS-EXAMINATION BY SECOND ACCUSED:

THE FOREMAN OF THE JURY: Did the other boy who went down to the pighole with the mtoto, arap Chelule, beat the mtoto? -- A. No.

NO RE-EXAMINATION:

KATWA S/O SERITE affirmed: (aged about 12):

EXAMINED BY MR. PHILLIPS:

- Q.421. What is your name? -- A. Katwa son of Serite.
- Q.422. What tribe are you? -- A. Kakamega.
- Q.423. Where do you work? -- A. I work for Bwana Moto.
- Q.424. Do you still work for him? -- A. I am still working for him.
- Q.425. What kind of work do you do? -- A. Kitchen mtoto.
- Q.426. Did Kibrop also work there some time ago? -- A. Yes.
- Q.427. Do you remember whether he was beaten at all during the time he was working for Mr. Englebrecht? -- A. I do not know whether he was beaten or not.
- Q.428. Do you deny that you ever saw him beaten? -- A. Yes I deny that I saw him being beaten.
- Q.429. You deny that you saw him beaten? -- A. Yes.

MR. PHILLIPS: Would Your Lordship allow me to cross-examine this witness. His evidence starts at page 5 of the depositions My Lord.

HIS HONOUR: Yes you may cross-examine him.

- Q.430. Do you remember giving evidence in this Court before the Magistrate? -- A. Yes.
- Q.431. Did you tell the Magistrate that you saw Mr. Englebrecht beat Kibrop with the kiboko? -- A. Yes.
- Q.432. Why do you now deny it? Was that statement true? -- A. Yes it was true.
- Q.433. Then why do you now deny it? -- A. When he was beaten I was not there but I saw him when he was brought to the house.
- Q.434. But did you tell the Magistrate that you saw Mr. Englebrecht beat Kibrop? -- A. Yes.

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- Q.434. But did you tell the Magistrate that you saw Mr. Englebrecht beat Kibrop? -- A. Yes.

- Q.435. Well, I ask you again was it true when you said that?  
A. Yes:
- Q.436. You did see him beat Kibrop? -- A. Yes.
- Q.437. Why did you just now say that you didn't see him beat Kibrop? -- A. I saw him when he said he would go and show where he put the money. I did not see what happened when they went off. Then I saw him when he was brought back to the house.
- Q.438. Is that all you saw? -- A. When they brought him to the house they tied him in the store and they did not beat him.
- Q.439. Did you see anyone at all beat Kibrop on that day? -  
A. Yes I saw one.
- Q.440. Who beat him? -- A. This man Accused No.2.
- Q.441. But you know someone else beat him on that day? --  
A. I do not know whether he was beaten by another man but I saw second accused beating him.
- Q.442. Did you make the following statement to the Magistrate: "Then first accused beat complainant. Complainant was lying on the ground. Arap Chelule and second accused and arap Koech were holding him down. The first accused beat the complainant on the buttocks five times. He beat like everybody beats. Complainant bled, his buttocks were swollen. Complainant then admitted he had stolen the money. He was crying hard". Did you say that to the Magistrate? -- A. Yes, except about the bleeding.
- Q.443. Do you deny that you told that to the Magistrate? --  
A. I deny about the bleeding.
- Q.444. You admit the whole statement except the bleeding? --  
A. Yes.
- Q.445. And was it all true except about the bleeding? --  
A. Yes, everything except the bleeding part.

Q. 435. Well, I ask you again was it true when you said that?

A. Yes:

Q. 436. You did see him beat Kibrop? -- A. Yes.

Q. 437. Why did you just now say that you didn't see him beat Kibrop? -- A. I saw him when he said he would go and show where he put the money. I did not see what happened when they went off. Then I saw him when he was brought back to the house.

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A. Yes.

Q.456. You did see him beat Kibrop? -- A. Yes.

Q.457. Why did you just now say that you didn't see him  
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A. Yes.
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A. Yes, everything except the bleeding part.

- Q.446. And it is all true? -- A. Yes.
- Q.447. Why did you tell the Magistrate that the complainant bled if it was not true? -- . I did not tell him that. I told him that he did not bleed.
- Q.448. Do you suggest that the Magistrate did not record your evidence properly? -- A. Yes, he did not write correctly.
- Q.449. Did you say again after that "I think the first accused beat him ten times. He beat him on the buttocks. They were ordinary blows. Complainant bled"? -- A. I did not say that he bled. I did not see any blood.
- Q.450. So a second time the Magistrate has recorded it incorrectly? -- A. Yes.
- Q.451. And then did you go on to say this "The second accused then beat the complainant about three times with this kiboko. They were hard blows and made the complainant bleed"? -- A. Yes.
- Q.452. You did say that? -- A. Yes.
- Q.453. And was it true? -- A. Yes, it was true.
- Q.454. And then after that did you say this "Later the complainant was beaten again by the first accused outside near the house with this kiboko. He was beaten about six times. Complainant was standing up at the time. They were hard blows. I saw the complainant's flesh was swollen by the blows and there was blood"? -- A. I said there was no blood.
- Q.455. So the Magistrate has made another mistake? --A. I told him that I did not see any blood.
- Q.456. And did you also say complainant was beaten on five occasions in all? -- A. Yes.
- Q.457. And he had moved in the interval between the beatings? -- A. Yes.
- Q.458. And was that correct? -- A. Yes it was correct.

- Q.459. Is it not a fact that it was you who stole the money? -- A. No I got this money from another man. The man who makes bricks deceived me and he asked me to let him have the money and said we would divide it.
- Q.460. Who was this man you are referring to? -- A. Kere, the man who makes bricks.
- Q.461. At any rate you were charged in this Court before the Magistrate for stealing that money? -- A. Yes.
- Q.462. And you pleaded guilty? -- A. Yes.
- Q.463. And you were punished? -- A. Yes.
- Q.464. And you know that Kibrop had nothing to do with the theft of that money? -- A. Yes.
- CROSS-EXAMINED BY FIRST ACCUSED:
- Q.465. What did you say to the Police when they came out to investigate the theft case? -- A. I told him that the bricks man told me to admit to the Police officer that I had stolen the money.
- Q.466. You said you went in and stole the money? -- A. Yes.
- Q.467. And you showed the Police where you got it? -- A. Yes.
- Q.468. You said you took it out of the hip pocket? -- A. Yes.
- Q.469. You have had your punishment for that? -- A. Yes.
- Q.470. Were you and Kimutai looking after Kibrop in the kitchen during the night? -- A. Yes.
- Q.471. Was he tied? -- A. He was not tied up.
- Q.472. And what happened next morning? -- A. Nothing was done.
- Q.473. When I arrived I got him all right; he was still there. Is that true? -- A. Yes he was still there in the kitchen next morning when you woke up.
- Q.474. But when I arrived next morning was he there? -- A. Yes.
- Q.475. What did I do then to Kibrop? -- A. You tied his legs.

- Q.476. What with? -- A. With a chain.
- Q.477. What sort of a chain? -- A. Dog chain.
- Q.478. Why did I tie him? -- . So that he would not run away.
- Q.479. What was my intention? -- A. You wanted to bring him on the following day to the Court.
- Q.480. Not the following day, that morning? -- A. Yes.
- Q.481. But I went first to the shamba? -- A. Yes.
- Q.482. And when I got back from the shamba what happened? --  
A. You found him gone.
- Q.483. You were there to look after him. Who untied him? --  
A. You asked me to bring water in the morning. I went down to the river and when I returned I found him gone.
- Q.484. What did you state to me in the presence of witnesses about untying Kibrop? You must tell the truth. --  
A. I told you that on my return from the river I found the mtoto gone and the chain was there on the ground.
- Q.485. And if I bring witnesses to say that you said you untied him with a file? -- A. No I did not tell you that. I told you that I found the file on the table.
- Q.486. So you did not tell me that you untied him? -- A. No.
- Q.487. What did you tell me about a panga? Do you remember telling me about a panga? -- A. No.
- Q.488. Why did you not admit when you came in here the first time that you stole the money? -- A. The brickman told me not to admit it at first. He told me to say that he had stolen it and I put it away for him.
- Q.489. Is it usual for a man who steals money to say to another man "You put it away for me"? -- A. He deceived me by telling me we would divide the money; he would take one half and I would take the other.



- Q.490. Why did you not get any half? Why didn't you keep your half? -- A. He deceived me. He said "Let us keep the money together".
- Q.491. How much money have you left? You got Sh.50/- and the other boy got Sh.50/-. How much of your Sh.50/- have you left? -- A. He came during the night and took the whole lot, mine and his.
- Q.492. Can you remember what day or night it was? -- A. no, I cannot remember.
- Q.493. How many days after Kibrop ran away? -- A. I don't know the day.
- Q.494. I want to know exactly, who told you to come and say you stole the money? -- A. The brickman told me.
- Q.495. The brickman is not here. What does the brickman know about the matter? -- A. We knew each other long before and when I left your employment I was engaged at the place where he is working. I was working for you. I left your service and I was engaged at the place this man was.
- Q.496. If you were working for me before why did I dismiss you? -- A. Someone was eating your fowls and you accused me and thought I was eating them. Another mtoto was accused with me.
- Q.497. Where is that mtoto? -- A. He is at Plateau with a fundi who left your service.
- Q.498. Did you get punished for stealing the money? -- A. Yes.
- Q.499. What kind of punishment? -- A. Ten strokes with a cane.
- Q.500. At the prison here? -- A. Yes.
- Q.501. Are they allowed there to issue the cane? -- A. Yes.
- Q.502. And your partner who stole the money from you, where is he? What happened to him? -- A. I left him in jail. I don't know what happened to him.

NO CROSS-EXAMINATION BY SECOND ACCUSED:

THE FOREMAN OF THE JURY: When did you leave the employment of Mr. Englebrecht? -- A. I am still working for him.

THE FOREMAN OF THE JURY: How long have you been working for him this time? -- A. About 18 days.

HIS HONOUR: Do you mean you were dismissed after the stealing of the money and then you were taken on again? Is that right? -- A. About the fowls I was dismissed.

HIS HONOUR: I did not ask why you were dismissed. Were you dismissed after the stealing of the money? -- A. Yes.

HIS HONOUR: And taken on again? -- A. Yes I went back after I was whipped and the Bwana gave me a job and I worked.

NO RE-EXAMINATION:

MR. PHILLIPS: That completes the Crown case My Lord. Neither of the accused made any statement at the Preliminary Enquiry.

HIS HONOUR: Mr. Englebrecht, you can enter on your Defence now. You can give evidence on your own behalf if you wish to or you can make an unsworn statement or if you do not wish to say anything of course you are not obliged to say anything. If you wish to give evidence on oath you are liable to be cross-examined but if you make an unsworn statement you will not be cross-examined. You can choose what you want to do.

FIRST ACCUSED: I will make an unsworn statement to save time.

SECOND ACCUSED also informed that he may make a statement on oath or an unsworn statement but that if he makes a statement on oath he may be cross-examined and that he need not make any statement unless he wishes.

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UNSWORN STATEMENT OF FIRST ACCUSED

JACOBUS PAULUS ENGLERRECHT

Your Honour and Gentlemen of the Jury I am going to give you something to make the matter more clear. On the 3rd November, it was a Monday morning, I cashed a cheque at Barclay's Bank for Sh.120/- with the intention of paying Sh.100/- to the Standard Bank, but as there was not time I had to leave Eldoret without paying this money to the Standard Bank. I had a reaper and binder going on the farm so I worked that whole Monday with the intention to come back on Tuesday morning to pay the money to the Standard Bank so I was sure that I had the money. It was cash and I took it on Monday night out of one pocket and put it into another pocket and I kept my door always locked even if I went out into the garden. On Tuesday morning I separated the Sh.100/- from the other Sh.20/- which I intended to use to pay my labour. I hung the trousers with the money in the pocket in my bedroom on a nail. There were three mtotos working in the garden and the kitchen and I gave them each a bundle to take to the reaper and binder. The house was locked and nobody was left. On reaching the reaper and binder I found that there was something broken. I gave Fibrop the complainant my key to go back and enter by the kitchen door because all the other inside doors were open; it was only the kitchen door and the front door that were locked, there is no inside door, only curtains. I told him to go and take the grease from the pantry and put it on the verandah. He himself was to bring me a little plane; I told him where it was. He did it and came back and brought the plane and the key in his one hand but I was very suspicious and sorry that I had sent this boy thinking that I had money in the bedroom. He was only a new boy about 10 days there; but it was too late when it came into my mind as he was gone. I got the binder

going and I walked straight back to the house and passed the complainant on the back verandah and I went straight in to see if the money was still in my trousers and found it gone. Then I asked him if he had stolen my money and he was frightened. He said something about a gun which is all lies. I went back into the house a second time after I said to him "You are responsible for all losses". I made sure that the money was gone. When I came back after I found it was so he was gone. He ran away when he got a fright. I did not know what direction he went because I did not see him. That was about 1½ hours time since we left with the mtotos and I came back and found the money gone. I am sure there was nobody else could enter the house because it was locked and nobody else could unlock the doors. It was locked when I came back and I undid it again. It was only during the time when he went to fetch the grease out of the pantry that the money was gone. I am quite sure he took it.

I don't think any further evidence will be in the interest of this matter. I will address the Jury later.

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HIS HONOUR: Do you wish to call any other evidence?

FIRST ACCUSED: I should like to call the second accused.

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The Statement of First accused is read over in English and translated to Second Accused

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COURT ADJOURNED AT 4.10 p.m. UNTIL 10 a.m.

ON TUESDAY 2ND MARCH 1957

Both Accused released on the same bail.

2ND MARCH 1957, 10 a.m.

COURT RESUMED - COURT AS BEFORE

HIS HONOUR: Mr. Englebrecht, if you want to add anything to your statement you can do so.

FIRST ACCUSED: No sir.

HIS HONOUR: I understand you want to call Accused No. 2 as a witness.

FIRST ACCUSED: Yes sir.

HIS HONOUR: As he is an accused person he is not obliged to give evidence unless he wants to. I will ask him if he agrees to give evidence.

Second Accused informed that First Accused wishes him to give evidence but that as he is an accused person he need not do so unless he wishes and that he may make an unsworn statement. He elects to make an unsworn statement and states:-

"If the Bwana told me to beat the boy I had no strength to refuse. When I was called from the shamba the mtoto told a lie and said that I had stolen the money and the Bwana told me to beat him and I had no power to refuse. That is all I have to say."

Statement of Second Accused read over and translated.

Accused No. 2 states he does not wish to call any witnesses.

HIS HONOUR: That concludes your case, Mr. Englebrecht. If Mr. Phillips wishes to address the Court he can do so and after that you can do so if you wish.

MR. PHILLIPS: As the Accused are not defended My Lord I do not propose to address the Court any further.

FIRST ACCUSED ADDRESSES THE COURT:

Gentlemen of the Jury this is a very complicated case and very hard for new people to understand unless you know as I do how the matter was going on but I will try and explain as well as I can.

You have heard that all the witnesses have admitted

that I stopped the natives when I saw them beat too hard or do anything wrong. That will make the matter clear that I had no intention of bodily harm or tried to see it being done. They all said that when I lashed him it was not hard although I don't admit that I lashed him but they said I did not lash him hard. There is no sign of cruelty.

As far as my experience can go this does not include an assault although the word "assault" includes a lot and it leaves out a lot. Remember if I point my finger at a man he can charge me for an assault. There is common assault and there is assault with intention. If I have a quarrel with a man and it turns to a fight it cannot be taken as an assault. Why not? If the native gives reason and steals my money and I try to educate him could that be taken as an assault?

My strongest objection is against the Section under which I am charged. It does not fit in this matter at all. It gives the Jury an opportunity to say not guilty. It stands in the same way as if a schoolmaster takes a cane and beats his schoolboys for any mischief like stealing or telling lies. It is his duty to educate them. It is my duty to civilize these uncivilized natives, practically called vermin. If I find them doing wrong whilst in my employment I should think I am in the same right as a schoolmaster or a father to learn them civilization.

Now I am coming to the bruises, the marks you saw on the photographs. What is the boy's evidence in that matter? He was stood in front of you and his body will show you no bodily harm. If it was really as the photograph shows there would have been marks left of six inches, twelve inches and I don't know how many as described by the Doctor but there is not a single mark left. I can show you marks on my body which I had when I was a child. They still remain there. That can be thrown out as nonsense. There

is no proof and it should not be allowed that photographs should be taken and brought into a Court. I strictly object to that. It is not evidence, especially in this case where the man was in front of you. You did not see him when the photographs were taken and nobody saw him. But you have seen him now and you all know that in a severe beating the marks will remain there for ever. I beg you not to take any notice of those photographs and the evidence of Dr. Forbes. Dr. Forbes has got no confidence. Dr. Forbes will put anything in the way to satisfy him. According to the evidence I accused Kibrop of stealing the money and according to my evidence that I gave yesterday you will see that when I with the mtotos left the house it only took me 2 hours to be back again. As sure as we are all alive when we left the house was locked and the money was in my trousers in the side pocket. Not ten minutes before I changed my clothes to go and start work so I was sure it was there. In an hour and a half when I came back the money was gone. Kibrop admitted that he stole the money and the best part of the whole lot was that when the boys asked him where he got it he described the truth. He said in the trousers in the back pocket and the boys asked him "Which trousers?" he said the velvet trousers, so that if he did not steal the money how did he know to tell where he got it. Two months after that the other mtoto Katwa turned up and admitted. Could you believe for one moment, gentlemen, you all know what the savages are, that he would turn up and report himself and say he stole the money unless there is something. I dare not say what I want to but I can say what I think. There is great suspicion in me about that matter. The second thing for you to consider, gentlemen, is if the other mtoto stole the money what did he do with it? He says that other boy stole it from him. Where is that boy? I



handed him over to the Police. I gave both boys to the Police. Where is that other boy? The Policeman brought me Sh.24/- and said that was all he could get of my money. I asked him what he did with the boy and he said "I cannot punish him; he didn't admit". I accused one boy; the second boy says "I stole the money" and the third boy stole it from him. One boy said yesterday he was accused and got ten lashes; the other one is a free man.

I am an old man; I am 72 and have been 31 years in Kenya. There has never been a Criminal case against me. I challenge the whole of Kenya Colony to bring a Record and show that there was a Criminal case against me. I know nothing about Courts. I have never bothered with them except little petty cases but not Criminal cases.

Taking all these things into consideration, gentlemen, you all know what the natives are and what their habits are. I have tried to explain to you how things can be coloured. Educated people can put in words and make things sound different than what they are. Now just consider the circumstances. If a matter like this is encouraged where will it end. How many settlers will be brought up for an assault.

I come back again to the matter of that article of assault with intention of bodily harm. It sounds very bad but there are no bones broken as far as I know and the Doctor could not say that there were any bones broken. His skin is smooth and cannot show anything. Could you after seeing these things judge a man to be guilty.

It is up to you, gentlemen, to use your discretion and to do what is right, what is justice and give your judgment according to that.

I am sorry for this boy the second accused. He is ignorant and cannot answer for himself. He has nobody to defend him and I appeal to you on his behalf.

SECOND ACCUSED does not wish to address the Court but states.

"I only gave him three strokes with a kiboko".

COURT ADJOURNED AT 10.30 a.m. AND RESUMED AT 10.45

SUMMING UP

Gentlemen of the Jury, it is your duty to bring in a finding on the facts before you. The only issue before the court is whether the first and/or the second accused committed an assault occasioning actual bodily harm to [illegible]. A simple assault is a mere attempt to commit a forcible act against another person in an unlawful way, that is to say, a mere gesture can be a simple assault; but an assault definitely includes any beating or wounding. If actual bodily harm is caused the offence in question - the one with which these people are charged - is committed.

Those are the two issues, whether an assault was committed occasioning actual bodily harm. Actual bodily harm includes any hurt or injury whether permanent or temporary calculated to interfere with the health or comfort of the person assaulted. It need not be an injury of a permanent character and it need not amount to what is known as grievous harm and it is not necessary to prove that blood was actually drawn from any wound. I make this point clear because some emphasis has been laid on whether certain witnesses saw blood or not.

If the Crown case is proved there can be no justification in law for the assault. There is no question here of any lawful correction of a person in the position of a pupil or scholar by a schoolmaster or anything like that and there is no question of mere correction for an offence which has been proved. This itself would not be lawful but it would not be so culpable as the offence which is before you now.

The Crown case as you have heard is that a certain

number of beatings were inflicted upon Kibrop and that he was twice tied up, once with a rope and once with a chain, possibly three times but certainly twice, with the object of making him show money which was suspected of being stolen. There are two witnesses arap Chelule and arap Koect who should be regarded as accomplices because according to the Crown case they assisted in holding the complainant down whilst he was being beaten and in fact are said to have actually beaten him themselves. Probably Katwa the mtote also should be regarded as an accomplice because he had something to do with the tying up. Regarding these three people as accomplices it is necessary as a matter of practice that their evidence should be corroborated and it is part of the Crown case that there is plenty of corroboration in the Medical evidence. Dr. Forbes' evidence was shortly that there were twelve injuries in all. The main injuries were first, at least ten distinct weals on the left buttock of the complainant and secondly at least seven distinct weals on the right buttock of the complainant, and that the skin or epidermis was entirely removed from both sides of his buttocks; and he also testified to wounds on each side of the face, on his back, inside his knees and on his stomach, and he thought the injuries were caused by a kiboke. Six days had elapsed, he estimated it between two and eight days I think, before he saw the boy. The boy had to remain in Hospital for fourteen days for treatment. You saw his buttocks and back and actually there were some marks still to be seen although they are healed up now.

I will shortly remind you of the different versions of the beatings because they do differ and it is fair and necessary to the accused to take into consideration the divergencies in the evidence as regards the beatings. The complainant's evidence, Kibrop that is, is shortly that he

saw the first accused who told him to produce money which was suspected of being stolen: he was threatened with a gun and then he ran away: was brought back to the house by arap Koech and then he said there was a beating near the house or at the house by the first accused when he was held by arap Chelule and arap Koech: then that he was taken to the store and tied outside the store, then the first accused went in to shave, came back and threatened him again with shooting. Then according to him there was a second beating by the first accused when he was still held by these two men: then that he admitted stealing because of the beating, not because he had stolen. He took them to a place near a plantation: on the way he said he was beaten by arap Chelule and arap Koech but that of course is not part of this charge. Then he said because the money was not found there he was again put down and beaten near the plantation by the first accused and he then said that he had given the money to arap Kibore the second accused. Arap Kibore was sent for and came and when he arrived Kibrop denied having given the money to him. Then he said that the first accused told arap Kibore to beat him because of the lie, and this brings us to the fourth beating by arap Kibore with the kiboko which had been handed to arap Kibore by the first accused. Then according to Kibrop there was a fifth beating by the first accused. After that he was tied in the store: first accused went away and complainant was put under guard of arap Kibore and Katwa in the kitchen and in the morning the first accused came and untied him but tied him up again with a chain and went away to the shamba and when Katwa went to get water Kibrop said he got away and went to Lesuru and stayed there until the Police brought him to Eldoret. So that his version is that he had five beatings or if you include the beating by arap Chelule and arap Koech he had six, though of course that sixth one is not included in this charge. His version is that he had four

beatings from first accused and one beating from second accused and that he was tied up twice or, if you include his being tied up with a chain it makes three tyings up.

Then we have the evidence of arap Chelule who, I would remind you, is still working for the first accused. He did not see the first part when the first accused first suspected Kibrop; he was working in the shamba and he was called to catch complainant who had run away and he and arap Koech went to look for Kibrop and Kibrop was caught and taken to the house, thence to the store according to him and then the first accused produced the kiboko and threatened Kibrop "If you do not produce my money I am going to beat you" whereupon Kibrop said he would produce it and took them to a hole where nothing was found whereupon the first accused followed and told them to put him down and hold him and then there was the first beating by the first accused. Complainant then said, having been beaten, that he had given the money to arap Kibore: arap Kibore was sent for and came and according to this witness the second beating was by arap Kibore on first accused's instructions. He said "This mtoto has lied about you, you had better beat him". There were three strokes, one on the face then the first accused intervened and said "Don't beat him on the face, beat him on the buttocks" and there were two other strokes on the buttocks. Kibrop said "I will show you the place" took them to another hole where nothing was found and then according to Chelule there was a third beating by first accused. Then Kibrop was taken to near a cattle boma where he again said he would find the money for them and this witness went away to the shamba. So according to him there were two beatings by first accused and one beating by second accused on the first accused's instructions.

Then we come to arap Koech who had been sent from the

shamba to look for the boy after he had run away. He found him and brought him back: first accused said "Take him to the house": first accused tied him up with a rope - put a rope round his neck, that is to say - went into the house, came out with a kiboko and said "I am going to beat you if you don't produce the money". Kibrop then said he would take them to the place and he took them to a hole where nothing was found: then this witness said the first beating took place by the first accused, Kibrop being held by arap Chelule and arap Koech. He said that this was not a severe beating: it was a gentle beating, and arap Chelule said the same. Whereupon Kibrop said he had given the money to arap Kibore. Arap Kibore came and was told by the first accused to beat him because he had lied and then there was the second beating by arap Kibore, first on his cheek and then, on being stopped by first accused he had two more strokes on the buttocks. Then the complainant said he would show the money somewhere else; according to this witness he was not beaten any more but was taken to the house and tied up there. Then the first accused drove away and next morning complainant was still tied up and this witness went to work. It transpired that this witness did not actually see the boy again after 4 o'clock in the afternoon so does not know what happened on the following morning. He said that there were not very many strokes administered in all and that the boy's buttocks were swollen but not bleeding. Arap Koech is still working for the first accused.

Then we have the evidence of Katwa who is the mtoto who had admitted stealing the money afterwards and was convicted in the Magistrate's Court. He prevaricated in the box; first he said he had not seen first accused beat Kibrop at all: afterwards he said he had seen him being beaten by the first accused and by the second accused and he finally agreed that he saw five beatings in all in

different places. In the lower Court he had said that he saw blood and in this Court he said he had not seen any blood. He was not a satisfactory witness but it would seem that he saw a certain number of beatings. He admitted stealing the money and was convicted and he said Kibrop had nothing to do with the theft but that his accomplice was a brick-maker.

That is the evidence for the Crown.

You have heard the first accused's unsworn statement which of course has not the same weight as a sworn statement. It was chiefly about the loss of the money and he said nothing about the beating. The beating was not denied by him. You may remember that he stressed very much his suspicion that Kibrop had stolen the money although Katwa had admitted stealing it, and his argument was that because he suspected Kibrop of stealing the money he was justified in doing a number of things to Kibrop. His argument was that he was entitled to correct a native because he was a native for an offence which was merely suspected. Now in law of course there is no justification whatsoever for that argument. A person is definitely not allowed to take the law into his own hands in this way. An assault by a European on a native is exactly the same in law as an assault on another European. In any event Kibrop was not the thief and at the time of the beating if it was inflicted Kibrop had not been proved or shown in any way to be the thief; he was merely under suspicion. The punishment which was inflicted according to the Crown was not for a proved offence but merely to extort a confession which when it was extorted was definitely untrue.

This case is a glaring instance of the extremely dangerous argument which the first accused has put forward that a person is justified in beating someone whom he suspects has stolen his money or done something wrong merely to extort a confession, and as I say in this case the

confession was definitely proved to be untrue. The first accused's argument was further that this cannot be an assault occasioning bodily harm because no permanent injury was inflicted. I have already explained to you that it is not necessary that the injury should be permanent. It is quite unnecessary to prove that bones have been broken or anything of that kind for this offence to be established.

The first accused appealed to you to take into consideration his age and he has also appealed to you on racial grounds. I must point out to you, Gentlemen, that you have a very heavy responsibility as a Jury and you must not be swayed by any racial prejudice of any kind. You have to consider the law as it is put before you and the facts as they have been proved before you and the age of the accused has nothing to do with your verdict. It is a matter for consideration quite apart from that. First accused's address and argument is a mere appeal to you to uphold a form of lawlessness and I must point out to you that it is your duty to dismiss any consideration of that kind from your minds and to decide and to give your verdict on the law and on the evidence.

To sum up I may say that there is evidence of the beating of Kibrop by both accused with a kiboko. There is a divergence as to the number of beatings as I have explained to you. All the witnesses agree that both accused beat the complainant at least once: the weight of evidence is that the number of beatings was from three to five, and I would remind you again of the Medical evidence that there were twelve injuries in all; that the actual strokes seen on the buttocks of Kibrop by the Doctor were at least ten on one side and at least seven on the other, apart from the wounds in other places such as the face and neck.

Well, gentlemen, that is the matter that you have to decide, whether one or both of the accused are guilty of assault occasioning bodily harm and I ask you to consider your verdict impartially and give me your verdict when you have considered it.



THE FOREMAN OF THE JURY: Did Complainant say arap Kibore  
beat him on the face?

HIS HONOUR: (after referring to his notes) He said "arap  
Kibore beat me on the body, even on my back.  
Arap Kibore beat me on the buttocks and all over  
the body".

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THE JURY RETIRED AT 11.20 a.m. AND  
RETURNED AT 11.55 a.m.

THE DISTRICT REGISTRAR: Gentlemen of the Jury, are you  
agreed upon your verdict?

THE FOREMAN OF THE JURY: Yes.

THE DISTRICT REGISTRAR: Do you find the accused Jacobus  
Paulus Englebrecht guilty or not guilty of  
assaulting Kibrop arap Ragole and thereby  
occasioning him actual bodily harm?

THE FOREMAN OF THE JURY: Guilty.

THE DISTRICT REGISTRAR: You say he is guilty and that is  
the verdict of you all?

THE FOREMAN OF THE JURY: Yes but we wish to add the rider  
that we consider the assault was not brutal or  
dangerous.

THE DISTRICT REGISTRAR: Do you find the second accused  
Kimutai arap Kibore guilty or not guilty of  
assaulting Kibrop arap Ragole and thereby  
occasioning him actual bodily harm?

THE FOREMAN OF THE JURY: Guilty.

THE DISTRICT REGISTRAR: You say he is guilty and that is  
the verdict of you all?

THE FOREMAN OF THE JURY: Yes. We would like to add a  
rider that we consider that this accused was  
acting under instructions of Accused No.1 and  
under provocation.

THE DISTRICT REGISTRAR: Prisoners at the bar, you stand convicted of assault occasioning actual bodily harm contrary to Section 229 of the Penal Code. Have you anything to say why the Court should not pass sentence upon you according to law?

FIRST ACCUSED: No sir.

SECOND ACCUSED: I have nothing to say.

S E N T E N C E

As to the First Accused, if he had been a younger man I should have sentenced him to imprisonment. In view of his age (72) I sentence him to pay a fine of Rs.1,000/- and in default to four months' imprisonment without hard labour.

The Second accused acted under the instructions of First Accused and only inflicted three strokes or thereabouts upon the Complainant. In the circumstances I sentence him to a fine of Rs.75/- or in default to one month's imprisonment with hard labour.

Of the fine if paid Rs.100/- to be paid to Complainant as compensation.

I thank you, Gentlemen of the Jury, for your attendance and careful hearing of this case and you are excused attendance as Jurors for 2 years.

---

Second Accused allowed 15 days in which to pay: to be released on executing a Bond of Rs.75/- to appear in 15 days. First Accused also allowed 15 days in which to pay the fine: to be released on executing a Bond of Rs.1,000/- with one Surety of a like amount to appear in 15 days.

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IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HELDEN AT ELDORET

CRIMINAL CASE NO.10 OF 1937

R E X

versus

- (1) JACOBUS PAULUS ENGLEBRECHT
- (2) KIMUTAI ARAP KIBORE

11TH MARCH, 1937

DECLARATION VERIFYING TRANSCRIPT OF SHORTHAND  
NOTES OF TRIAL

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the trial of the above case, to which transcript this Declaration is annexed, I, the said James Stanley Templeton, certify that this is a correct record of the proceedings at the said trial.

DECLARED at Nairobi this  
11th day of March, 1937,  
Before me:

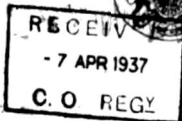
*Stanley Templeton*

*Edward K. Daniel*

REGISTRAR,  
SUPREME COURT OF KENYA.

KENYA

No. 160



5.  
14/12  
GOVERNMENT HOUSE  
NAIROBI,  
KENYA

12 March, 1937.

Sir,

Gov/21323/24

In accordance with the instructions contained in Mr. Thomas' despatch No. 762 of the 18th July, 1924, I have the honour to transmit two copies of the transcript of the shorthand notes taken at the trial of one, Mohindar Singh s/o Karam Singh, who was charged before the Supreme Court of Kenya in Criminal Case No. 11 of 1937 with committing an unnatural offence against one, Ndonga wa Mbuthia, contrary to Section 145(1) of the Penal Code. There were two alternative counts, indecent assault upon a boy aged less than 14 years, contrary to Section 146A of the Penal Code, and indecent practices between males, contrary to Section 146B of the Penal Code.

2. The accused was found guilty under Sections 145(1) and 146A of the Penal Code and sentenced to imprisonment with hard labour for two years under the first count and to...

THE RIGHT HONOURABLE

W. ORMSBY GORE, P.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.

to imprisonment with hard labour for six months on the second count, the sentences to run concurrently.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*Arthur*  
ACTING GOVERNOR.

68

I N D E X

	Page
TRANSCRIPT OF JUDGE'S NOTES	1 - 64
TRANSCRIPT OF SHORTHAND NOTES OF SUMMING UP	65 - 75
<hr/>	
<u>EVIDENCE FOR THE PROSECUTION</u>	
THEODORE FARNWORTH ANDERSON	Examined 1 Cross-Examined 2 Re-Examined 3
MAURICE HENRY FOX	Examined 3 Cross-Examined 4
DONALD MARTIN STEPHENS	Examined 4 Cross-Examined 5 Re-Examined 8 Recalled 45
UJAU WA GAHENDU	Examined 3 Cross-Examined 9 Re-Examined 10
UDONGA WA MBUTHIA	Examined 10 Cross-Examined 16 Re-Examined 21
KAIRU WA MURIA	Examined 22 Cross-Examined 23
UJEROGI WA MUTHARA	Examined 25 Cross-Examined 27
KINYANJUI WA KURIA	Examined 30 Cross-Examined 31
MUTHEMBEI WA WANGERE	Examined 31 Cross-Examined 33 Re-Examined 34
UGARI WA RUEYA	Examined 34 Cross-Examined 35
<hr/>	
<u>EVIDENCE FOR THE DEFENCE</u>	
MOHINDAR SINGH (ACCUSED)	Examined 36 Cross-Examined 38
ADDRESS ON BEHALF OF CROWN	45 - 48
ADDRESS ON BEHALF OF DEFENCE	48 - 50
JUDGE'S NOTES OF SUMMING UP	50 - 53
ASSESSORS' OPINIONS	53 - 54
JUDGMENT	55 - 64
SUMMING UP (Transcript of Shorthand Notes)	65 - 75

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IN HIS MAJESTY'S SUPREME COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 11 OF 1937

REX . . . . . PROSECUTOR

versus

MOHINDAR SINGH S/O KARAM SINGH . . . . . ACCUSED

1.2.37 Accused present on bail

Burke for Defence

Phillips for Crown

ORDER The case is fixed on 3rd February. Accused's bail extended till 3rd February.

C.A.G. Lane.

3.2.37 Accused, on bail, present.

Burke for Defence

Phillips for Crown.

Accused arraigned:

1st Count: Sec.145(1) P.C.

Plea: Not Guilty.

2nd Count: Sec.146 A. P.C.

Plea: Not Guilty.

3rd Count: Sec.146 B. P.C.

Plea: Not Guilty.

Three Assessors chosen:

1. Ibrahim Premji

2. Desraj Bahul

3. Anwar Ali.

Burke and accused have no objection to the three Assessors.

Phillips opens:

1st P.W. THEODORE FARNWORTH ANDERSON Sworn.

M.D. Medical Officer at Kiambu. I examined young Kikuyu boy Ndonga on 14th December 1936. I identify him in Court. I examined him at Kiambu hospital, just after 7 p.m. He was accompanied by Mr. Stephens, A.S.P. Kiambu: I was

asked to examine to find out if indecent assault had been committed. I found a small tear in skin just inside the anus; it had been caused quite recently, within less than six hours, certainly, probably more than 2 hours. It might have been caused by an indecent assault as alleged i.e. by introduction of man's erect penis into his anal orifice. It might have been caused by forcible

introduction of any object of approximate size of an erect penis. Certainly not caused naturally e.g. by defecation. I examined region for traces of semen: I could find none whatever. There are a number of different positions in which such an offence can be committed. I would not like to say which is the most common. Treating this as a hypothetical question; as to allegation that person committing offence was kneeling on ground, and boy said to be lying on ground with his legs inside the man's arms and his arms held behind his back by the man's hands; is quite a possible position for the offence to have been done in. I should say a grown up man would not have difficulty in committing offence on the boy but force would have to be used. I have no reason to think that had previously been subjected to this kind of thing. I don't think so from state of anal orifice. Nothing that I remember about boy's general appearance or demeanour. If an offence had been committed it is possible that I might have found traces of semen. But I was told by the boy that his bowels had been moved since the offence, and would certainly remove all traces from interior.

XXd. It would have to have been habitual for me to find signs of previous offences by boy as passive agent. If force had been used and there was resistance I would not necessarily have expected to find signs of the force; I take it that force would be by holding the subject down. Slight bruises would result: they are notoriously difficult



to find on black skin. I examined the whole body for bruises as far as I remember. The absence of such bruises conveyed nothing to me. Negative. Story was that boy was wearing trousers which were drawn below his knees; I take it that boy's knees were flexed right up; in so flexed anal orifice would not be covered with anything: I can visualise it happening with trousers round knees: Absence of semen would not necessarily indicate anything to me because of information that boy had defecated since offence; thus would not expect to find semen in or near orifice: If he had told me that semen was seen on clothing if the offender did not complete orgasm before he withdrew, one would expect to find semen on other parts of boy's body besides in or near anus; act of defecation would probably not affect such signs of semen.

XXXd. I searched the abdomen and thighs and so forth for signs of semen. I found none.

C.A.U. Lane.

Adjourn till 2.15. Accused on same bail.

C.A.U.L.

Resumed. Accused present.

Assessors as before

Counsel - do -

2nd P.W. MAURICE HENRY FOX Sworn. Government Analyst, F. 1904.

A.S.P. Stephens of Kiambu came to me on 1st December last and handed to me a shirt and a pair of shorts. I examined them by fluorescence examination for presence of seminal stains and found none. I later handed them back to him on 22nd December. I took some cuttings from them which I retained. If the garments had had seminal stains and had been washed in water probably there would be no sign. These are they identified marked 2 and 3.

XXd. Fluorescence examination means examination under

ultra violet light. Not an infinitesimal sign would show up. It is difficult to say how much would show up. The examination was to see if there were any obvious sign of seminal fluid. I could find no obvious sign by that examination. I examined definitely for presence of spermatozoa and found it negative. The examination for spermatozoa would be more searching and more specific. In that examination it would be possible to find traces of spermatozoa (if they were there) which might not have been traced by fluorescence examination. I made:

1. Fluorescence examination
2. Examination for spermatozoa

both negative. In first seminal stain might have been there but obscured by other marks, e.g. on dirty clothes

XXXn. Nil.

C.A.G. Lane.

3rd P.W. DONALD MARTIN STEPHEN'S Sworn Christian.

Assistant Superintendent of Police, Kianbu. I receive report on 14.12.36 and in consequence went to Kianbu Police Station. I arrived there about 6.40 p.m. There I found a Kikuyu juvenile who said his name was Ndonga and a Kikuyu adult, who said he was Kairu. Ndonga I thought about 9 years old. I identify both. Ndonga made a report to me: I took him to Kianbu Hospital. We arrived about 7 p.m. I handed him to Dr. Anderson at about 7.15 p.m. At Police Station I received from Ndonga

- Ex.1. 2 pieces of blue mottled soap. I see them Exhibit 1. I kept these in my possession until I handed in to Magistrate's Court. On my return to Police Station from Hospital I received from Ndonga a shirt Exhibit 2 and Ex.2. shorts Exhibit 3 which I identify. On 15th I went to Nairobi and handed Exhibits 2 and 3 to last witness at about 5 p.m. On 22nd December I received them back from last witness after he had taken some cuttings from them

my presence. I had them in my possession till I handed into Court at preliminary inquiry. On 16th I went to shop on Kiambu Road owned I believe by Nathu Rai: I arrived there about 9.40 a.m. it is on Major Pedler's farm. I saw accused there: he was pointed out to me by Ndonga, Jerome and Chui, in the front of the shop. He was carrying out duties as Manager of shop. I informed him of complaint against him through interpreter A.S.I. Paka Singh and afterwards arrested him. I noticed what appeared to be gravel rash on his left knee which had scab on it; it appeared not very fresh: it was an abrasion not a cut, about an inch; it had a scab on it: I cannot say more than that. When I arrived he was wearing linen shorts. I went over the scene with some witnesses: when I saw him again he had changed and put on pair of trousers. I examined premises and took measurements. From examination I afterwards prepared a sketch plan: this is it Exhibit 4 (entered from lower Court Record where it is also marked Exhibit 4). The front of the premises is occupied by verandah except for small store A. At back of compound there is a corrugated iron fence: with door in it. Derelict motor car at back of premises and to one side - at distance of 19 yards from door in back compound. Ruaraka River is 82 yards from the door in back of compound: path leading to river.

Ex.4.

- XIX.

From what complainant told me on morning of 15th when I recorded his complaint in writing I was not surprised to see scar on knee of accused. On 14th complainant and his brother complained at Police Station of offence. I took him at once to Hospital. Before we went I had received soap; the shirt and shorts not till we got back from Hospital: we returned at about 7.30. I did not go to shop of accused that evening. The shirt and shorts were under Ndonga's arm, rolled up: he went to Hospital with them under his arm and returned with them.

Examination of complainant was for injury and that spermatozoa was being looked for. When I saw shirt and shorts I thought they would have to be examined for spermatozoa. It did not cross my mind to go at once and examine accused's trousers. It might have either damaged or cleared accused's name to do so. I thought about it at the time. I thought I should inquire further into case before I approached accused. The shirt and shorts were still wet; rolled up in bundle. Accused if he had washed his clothes in meantime might have dried them in meantime. It is possible if I had gone at once to accused I might have obtained evidence either for or against. I envisaged possibility that they had been washed and dried: if not washed they would have had tell tale signs: if washed, they would have had signs of being washed: ditto if ironed. Accused may have had several pairs of shorts: the shorts I saw were very common kind. I did not search for other pairs of shorts. I do not think I was negligent in not searching then. I thought I should make further inquiries before I approached accused. Condition of accused's clothes on 14th within 6 or 12 hours would have been material. I spoke to Sub-Inspector about the accused's scar on knee at the shop: other than that the first mention I made of it was at lower Court.

I went to investigate scene. I had arrested scab and left him with the Sub-Inspector of Police: he had changed his clothes when I came back: we told him he was coming to Nairobi and he was allowed to change. I did not have the scab examined at all by a Medical observer. The scab was mentioned to Sub-Inspector of Police before and I told latter to tell him about the scab in his own language. He must have understood this because he asked looked down at his knee and made some remarks. I do not say he admitted it was as result of the offence. The

shop floor is wood; i.e. C, I think D floor is wood; I think I is wood; H is beaten earth and rough stone; F the same; E is <sup>rough</sup> concrete. I did not examine the accused's knees particularly.

In the circumstances described if story is true it would be probable that accused might have a scrape on both knees equally.

Shop is about 35 yards from Nairobi-Kianbu Road. Large open space in front of shop. I have seen natives gathered there. I have quite often seen them there as I passed. Door from back of shop into Courtyard. Door in corrugated iron back fence: that door may or may not be open. Door leading into F may or may not be open: also door from E to F which may or may not be open. Building is ramshackle kind of place. All ceilings unlined: a shout in any of the rooms could be heard outside. I made measurements on a.m. of 16th after arrest. That a.m. I can say that the door at back of compound X was shut: You cannot see into E or F from Q: you can only see to a point just outside door into F from the derelict car Q; if the door X is open. Sketch plan is drawn to approximate scale as accurate as I could make it. To go from B to F, you would either go through C and G, or else go round the outside of the building and compound: the labour camp is about the same elevation as the shop: possibly on a level but certainly not higher; from the labour camp you have a clear and uninterrupted view of the whole compound and the back. Except from the maize shamba (which is merely broke ground, no maize in it) the ground round the shop is open. You can see the shop from the camp: I say distance to camp is about 400 yards: not so much across the valley; you could shout across from one to the other; Path at back of shop to stream: judging by its appearance it is a well used path. I walked down to river bank.

Accused was in Police custody for one day only. I took him to Nairobi direct before Mr. Ealey D.O. Nairobi. He was on remand after that.

XIII. (After argument as to permissibility of the question to which Burke has objected) I do not say that fact that seminal stains were seen on a man's trousers would be strong evidence of sodomy: such stains could be accounted for in several ways: if I had made an investigation such as was suggested by Burke -

Burke has objected.

Order: Question allowed. C.A.G. Lane.

if I had failed to find a stain it would not have been convincing evidence on accused's behalf. As a Police Officer I am entitled under Police Ordinance to take possession of anything that is of value in investigation. I decided to arrest the accused on afternoon of 15th. When I received shorts and shirt from the boy the shorts were wet and the shirt was slightly damp. Shorts were wet all over: shirt not so wet: lighter material which would dry more quickly.

Scab on accused's knee might have been caused by scraping anywhere. It would have to be definitely scraped dragged along. Very difficult to explain why one knee and not both were affected by scraping.

No Xn. by Assessors.

C.A.G. Lane.

4th P.W. NJAU WA GAMBENDU affirmed pagan. Embu.

Working for Mathu Ram at shop on Mr. Pedler's farm, as ox driver; employed there 2 months: know accused is employed in shop: working in the shop selling goods. I know small boy called Ndonga, who is in witness room here: he was working for Mathu Ram for 3 days; he was sleeping in hut of Kairu, his half brother, in the labour camp on the farm: Monday was the last day he worked for Mathu Ram;

that a.m. I was in Nairobi with Ox cart and I returned at 11 a.m. then I took the cart to the mill on Mr. Pedler's farm: I returned to shop at 2 o'clock and found many people there belonging to the farm, some inside and some outside. I went in and found inside Mutembei, Ngari, Kairu, Njeroge, Ndonga and accused. I heard accused say he would pay Sh.20 to finish the matter. I knew what it meant because I heard that offence had been committed on the boy. I had heard it outside the shop: in the presence of the accused: I do not know who said it: I cannot say if I heard it said inside the shop as well: I was dumbfounded by surprise as it is a bad thing. When accused said this about Sh.20, Ngari said "We won't accept this". I live at the shop and sleep in the room at the back near the cattle shed: next to it; there is a corrugated iron wall in between. I live there alone. At the time of the occurrence I was sleeping there alone: there is another boy who sleeps in the shop itself. The room where I sleep is of corrugated iron with cement and stone floor. On this day I noticed that accused was suffering from fear.

XXd. There is a clock in the shop. That is why I say it was 2 o'clock. I saw the clock; time I got back from Mill. I left the shop to go to Nairobi at 2 a.m. and I got back at 11 a.m. I did not stay at shop: I handed in letter which I had brought from Nairobi and went straight to Mill. One goes through labour camp to get to the mill. From shop to Kiambu Police Station on foot, I cannot say how long it would take. I went to Mill with Ox cart and left cart at Mill and came back walking. It is quite near: less than 5 minutes walk. You cannot see shop from Mill because Mill is in a hollow at the Falls. I came back to door of shop facing main road: shop door was open. Before I went in I spoke to people outside: very many people outside: all Kikuyu: I pushed my way through crowd

into shop: I arrived at moment when accused said "I will pay Sh.20 to settle the matter" this is the first thing I heard: Ngari said No. I said nothing. Ngari said it would be better to take matter before the Europeans. That was all the conversation I heard. On Ngari saying this we all went out leaving accused alone in shop. They took road to the European's place and I went to Irobi. It is about the same distance to the Europeans as it is to the Mill: less than 5 minutes walk. Many people were there in the shop: the people outside were talking: inside they were not making a noise: they were all angry and they were not talking. I didn't hear Kairu utter a word, or Ndonga. Ngari alone I heard speak. Ndonga was sleeping at Kairu's place. I was sleeping in room at back of shop: oxen were stabled in shed next door: only a partition between me and the oxen. I heard accused say he would offer Sh.20 to finish the matter. Accused does not know Kikuyu: he understands Swahili.

XXXd. I work at the shop. I had spoken to accused and he to me, in Swahili: he used to serve natives in shop: he used to talk to them in Swahili.

Xn. by Assessors Nil. C.A.G. Lane.  
 Adjourned till 10 a.m. on 4th inst.  
 Accused released on the same bail.  
 C.A.G. Lane.

4.2.37 Accused present on bail.  
 Assessors as before.  
 Counsel as before.

5th P.W. NDONGA WA MBUTHIA affirmed pagan.  
 (N.B. This witness says he understands the nature of an oath and has been affirmed in the usual manner)  
 Aged about 9 or 10. I am called Ndonga - not sitonga.  
 I live at Ruaraka on a European's farm called "Major" with Kairu my half brother who works on the Major's farm.



I know an Indian's shop there; I recognise the accused who was working there; the owner of shop was the Indian the employer of the accused; I know him. I worked there for the Indian, herding the cattle, for one week. One day I went to Kiambu boma arriving there at 3 p.m. near sunset. That day before I went to Kiambu I had been herding the cattle; we let the cattle out to graze at 7 a.m. I herded them near shop, as far as outside the Court (say 60 yards). I went to shop that day: the cattle were resting; it was about 1 p.m. I went to shop to shelter from the sun. I sat on seat in verandah in front of shop, at entrance of shop. Nobody else was there except accused who was inside. Nobody else in shop or near. Accused called me in for bread: he said "Kuja chukua hii mkate"; he told me that the bread was not in the shop but in the room beyond, where Njau slept. He called me and said I had not cleaned the cattle shed and pointed out some dirt to me. He caught me and took me inside the shed where Njau sleeps. They had told me sleep in the shed with Njau but I had refused and gone to sleep at Kairu's.

Njau is the man who gave evidence yesterday. Accused caught me and pushed me into the room which is next to the cattle shed. He caught me by force round the body and took off my shorts. He lay on top of me (shingonera). N.B. It is doubtful if this means literally he lay on top of me, or had intercourse with me.

Witness deonstrates (with another boy (a mate of Police Boys' Brigade somewhat bigger than himself) in Court. He explains that accused knelt down on the floor, facing him (the witness) the witness being on his back on the floor, with his legs held under the accused's arms and accused's arms round witness's body: he continues -

"He put his penis inside my anus: he was stronger than I:

I was wearing a shirt and shorts: while this was happening my shorts were down below my knees: I still had my shirt on: accused me wearing shorts and a shirt; he had unbuttoned his shorts to do this: I did not know what he was doing as I had never heard of it being done before. He said nothing to me while he was doing this. I told him to leave me. I resisted: the skin of his knee was scraped in the struggle: while I was struggling his knee got scraped against the floor and lost some skin. I saw it while we were in the house when he drove the people away. I went out with him: he gave me soap to wash my clothes so that the traces of the "water" from him should not be seen: my shirt and shorts which I identify Ex. 2 and 3. There were traces of "water" from his penis on the clothes, the water had been discharged by him while we were on the ground together. He had put his penis into my anus; it went right in: I know because I felt pain: he discharged the water while his penis was inside my anus: the water got on to the shirt and shorts when he drew his penis from inside me: at that time the shorts were at my ankles, while he was getting away from me the water got on to the shorts. Some of the water got on my body.

When he had finished doing this he let me go: I took off the shirt and shorts in the shop and put on my shuka, which was in Jagan's room. I told him to give me more clothes as he had spoilt these: he told me to go away and he threw a stone at me, I dodged it and it missed me. He gave me some soap and told me to wash my clothes quickly before the cattle went away. These are the two pieces of soap Exhibit 1. It was in one piece but I broke it into two. This was in the shop when I was asking him to give me more clothes to replace these. I went down towards the river: I saw two men there, Chui and Jerome; I was crying at this time; they asked me what was the matter: I said the Indian had molested my

clothes: Chui asked me to go and call Kairu. I went to Kairu, my brother, at his hut at the place where there are 3 huts: I called Kairu: I told him that the Indian had spoiled my clothes: and that he had had intercourse with me. Kairu did not believe me and told me I was lying. I had left the clothes on a stone near the river, not in the water. I went back to Njeroge at the river: Njeroge I met coming away at a place where long grass is. I found my clothes in the water, at the edge: they had been washed. I took the clothes and I met Kairu and Ngari with him. Njeroge and Chui had gone off to get their clothes and they came back afterwards.

BURKE: As to any further question as to what witness said to Njeroge or Chui, the complaint in such a matter must be to a person in authority: they were not people in authority:

If he made a statement it was as a result of questions not a direct complaint. I shall object to any evidence of it.

s.8 I.B.A. illustration J. Notes. Woodruffe 8th Edition p.148. 2nd paragraph. 148 top.

If allegation that he had gone to his brother first or to place where his brother would be expected to be found - he goes to a place with no object of making a complaint but met two casual people; as such it is a statement not a complaint: and not admissible - elucidated from questions.

PHILLIPS: Note (4) Apurba Krishna Bose and R. v Sham Lal. These cases are with regard to point as to what is a complaint for instituting proceedings - not to be interpreted in that sense here. Note 3, p.141 R. v Lillyman 2 Q.B.1896. R. v Osborne 1 K.B.1905 157. Refer to latter case: Cockle's Cases p.83 4th Edition. (BURKE: I admit principle extends to indecent assault on males) R. v Osborne. Fact that

complaint elicited by question and answer does not make it inadmissible as long as not of leading character: not what is the matter.

If circumstances are that in absence of question no complaint would have been made then inadmissible.

Person need not be in loco parentis. Evidence of another girl aged 11 was accepted. Made in answer to questions.

s.157 I.E.A. Boy crying: it relates the statement to surrounding circumstances.

s.157 corroborates that statement was made.

BURKE: This general authority is excluded by the special authority. Cockle p.83, 84. R. v Osborne. Facts - on way back - as girl was returning she met - If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint the answer is inadmissible. Prosecutrix was running home - here boy was walking to the river not intending to make any statement.

ORDER: I cannot allow evidence as to any alleged complaint by the witness to Njeroge or Chui because I consider that as Mr. Burke has argued, the circumstances indicate that but for the questioning by Njeroge or Chui there would probably have been no voluntary complaint to them.

G.A.G. Lane.

BURKE: as to the complaint to Kairu there was nothing voluntary in complaint to Kairu - he was told to go. I shall object to that evidence.

PHILLIPS: He was not told to make a complaint - he was only told to go: the complaint he made to Kairu was voluntary: not extracted: and made very soon after the commission of offence: person in authority: boy in state of amaze: he had no time to think the matter

187

over. highly probable that he would have gone to make the complaint to Kairu. It must be a matter of speculation.

ORDER: The complaint to Kairu is admissible on the assumption that the witness would have complained voluntarily to Kairu who was his brother and at the time in loco parentis: Kairu was a person in authority for purposes of the section and the witness went there to see him and complain to him as soon as it was suggested to him.

C.A.G. Lane.

Witness proceeds:

I did not wash the shirt and shorts. I saw accused throw them in the water; as I was going off to Kairu I saw him throw them into river. On my return I met Njeroge and Chui and went back to the river to fetch the clothes: I saw accused again going up the hill towards the shop from the river. I went down to the river: I took my clothes and put them down at place where I had sat at first when I came out from the house and asked Indian to give me more clothes. I was alone. Kairu came to the shop with Ngari. They went into house where accused was and asked him why he had been playing with me: accused replied "It is your affair". Ngari, Kairu, Mutembei, Chui, Njeroge and Njau were there. Accused produced Sh.20. Ngari and Kairu refused to accept it because they wanted to go to report. He produced it from his cash box. He took out the money and said "Do you want the Sh.20/-?" I saw the money. They said "No we don't". Accused tried to persuade them to take the money for me. They said no. This talk took place inside shop. Kairu told him "Ye are going to Kiambu". Accused said "Don't go, let us discuss matter further". Kairu said "I'll have no more talk with you". I asked accused if he owed me money and why he was offering

the money: he replied "Halithuru" (very well). We went to "Major" first to get a letter to Kiambu; we got it and went to Kiambu - I and Kairu, on foot all the way: and arrived about 5 p.m. I saw Mr. Stephens Assistant Superintendent of Police (identified) and made a statement to him and gave him the soap, shirt and shorts. He took me to doctor who examined me.

At the time when I was in the room of Njau with the accused nobody else was anywhere near. I did not call out; I was too frightened to call out for help. I was in the house when I took off my shorts and the shirt and put on the shuka.

XXd. After putting on shuka in Njau's room I went outside: I went out by door of cattle shed, out of the door at back of compound and then to front of shop. I did not go through the shop. I had my shuka on then. I took the shirt and shorts with me. Accused went through the shop. I stood at the door of the shop. No one else was there. When accused offered me bread, I was outside shop on the verandah: he called me in to give me the bread: there was no bread: I went out to the verandah. I sat on verandah waiting for the bread. There was none. I first went out to look at the cattle and see if they were all right. They were then all grazing outside. The accused closed the doors of the shop and went to the cattle shed, then he called me and told me that I had not cleaned the shed properly. I was then near the fence, not far from the back door: a wire fence near the maize shamba.

The cattle shed is next to Njau's room: accused was in that shed and called me from outside and told me it had not been cleaned. I had been to look for an old brown ox which I had left down below, the old motor car. I was then going towards the labour camp. I had passed

the car when I heard him shout and I came back, to see what he wanted. I went in by the back door. He said I had not cleaned the cattle shed: he caught me: I was in the shed near Njau's room: he pushed me into Njau's room. After it happened as I said, I took off my shirt and shorts in Njau's room and put on my shuka. When I am herding cattle I wear my shirt and shorts and I keep my shuka in Njau's room. My shuka was there. I carried my shirt and shorts with me when I left the room. I went to ask accused to give me more clothes as he had spoiled mine. I went round through back door to front, the verandah: having my shirt and shorts in my hand, the door of shop was already open when I got there. I stood there leaning against counter and told him to give me new clothes. He had gone through the shop. After leaving the cattle shed I next saw accused when I came round to front of shop. I asked for other clothes: I was standing on verandah and he was inside shop. There are no stones inside shop. When I asked for the clothes he came out and chased me; I ran towards the cattle where they were resting, near an eating house which is a little to one side facing the main road (i.e. evidently L on the plan) I did not go as far as the eating house as he did not chase me far. I ran about 20 paces and he stayed on verandah. The eating house is not used now: no one was there. I ran in direction of main road. He threw a stone at me and I dodged it. I went to see after the cattle; I went back to him of my own accord and asked for other clothes; he had gone back into shop: I went back to verandah and asked: he did not chase me away again, he gave me some soap; this all took about  $\frac{1}{2}$  hour (i.e. since the Court adjourned and resumed sitting). When I ran towards the road I was still crying. I was still crying when I came back: I did not stop crying when he gave me the soap: I

went towards the river: he told me to go to river. All this time my clothes were on verandah where I had been sitting. I went to river with clothes. I don't know where sun was at this time. When I went away with soap I left accused in shop: he followed me and before I reached the river he caught me up; we got to the river together: there he again told me to wash the clothes: he had caught me up at a kind of archway which he had made: that place is about half way between the back door and the river. From there he and I walked together. I did not wash the clothes at the river: he told me to wash the clothes quickly and return soon to the cattle: then he went back. I refused to wash them: I did not follow accused when he went away: I went to call Kairu: Njeroge told me to call him. Njeroge and Chui were there when I and accused arrived at the river. Njeroge and Chui heard what accused told me. After accused left I went to call Kairu. I wanted to go and call him. Njeroge told me to call him.

Adjourned till 2.15

Accused on same bail.

C.A.G. Lane.

2.15 Resumed. Court as before.

XXn continued:

When accused and I went to River he caught me up at the archway: he told me to wash the clothes quickly: Njeroge and Chui were there: Accused went up to the store leaving us three there. I spoke to the other two: not in accused's presence: they asked me while accused was there "What happened between you and the Indian?" Accused was still there. They spoke to me in Kikuyu. When I went to call Kairu I left Njeroge and Chui there: up to time I left I had not put clothes in water. Nobody had. Nobody except accused knew I had gone to wash clothes



there. I did not stay there long before I went to Kairu: I left the clothes there on the stones: not in the water: they were not wet; Kairu was on his bed. Door open: others were there: I ran there. When Kairu told me that what I told him was lies I went back and on my way back I met Chui and Njeroge. I had not then reached the old motor car. I ran back; I met both Chui and Njeroge: there was nobody at the river: I went to river: I took up the clothes and went up the hill to the shop and found Kairu at shop, also Ngari and Kutembei; I went into shop from verandah, taking clothes with me. As I got there I heard money being offered to Kairu; he refused. Njau was there when I got there. After I saw there was no bread I went towards a wire fence to go into the house to see if there were any food remaining there. I was near motor car, in direction of labour camp. When I was given no bread I sat and leaned against one of verandah posts and then I went towards labour camp to drive off an ox. I also said in lower Court that I went to our quarters to see if there were any food left. When I was called I was going to drive off the ox. I told this Court I had taken off shirt and shorts in Njau's room: I said this in lower Court: and that I put on my shuka which was in Njau's room, in the room. It was in Njau's room that I changed my clothes not as I said in lower Court. I said in lower Court I put shirt on the old car and there I tied up my shuka: perhaps the man did not understand. I did this: I put these clothes on the old car. I said here I put on shuka in Njau's room and took clothes under my arm and that I went to the front of the house; I did not mention the old motor car. I came to front door of shop and then I saw accused: I had not seen him after I left him in Njau's room again until I saw him in the shop. I did not say that I saw accused going into the shop from where we were. Accused was rubbing his knee with a

(p.3. of deposition)

gunny bag: I saw this when I came to the shop. When I went to the river the accused locked the shop; I did not say in Court below that the Accused went down to the river with me. I said to-day that I had seen Sh. 20 produced: paper money: two papers: he went over to get it: he took a key from his belt and he was told not to get it out: I have forgotten (if he got the key out). One door of shop was open: I stood outside and saw him rubbing legs with sack. He changed his clothes and put on other long trousers in the shop: with the door open: he had his shirt on: at that time I could see something like water coming from his penis: at this time I did not see the scrape on his knee: I saw that after Kairu and others had arrived. It was a different time to when I saw the accused changing into trousers.

When the people were there he was wearing long trousers: he pulled up the trousers to scratch himself and one could see the mark on his knee. As to suggestion that when all the other people were <sup>there</sup> at the shop, it is not true that they were demanding money from accused: there was a crowd outside too: they did not want any money from him; they did not ask for it because he had beaten me: he had not beaten me because of something that happened when he told me to clean up the place that he told me to. He himself wanted to pay the money so that the complaint should not be made.

Accused actually penetrated when he had intercourse: it pained me: I cried and I struggled. I cried: I did not shout out. He penetrated as I pushed him away and he discharged on to my clothes, both shirt and shorts. He had pushed up my shirt to my chest: I was naked from chest to below knees. Some of his discharge went on to my body: my stomach. From time that this happened I have told everything that occurred till I went to the Major's house; We did not stop at camp but went straight to Major's place:

we did not stop anywhere: we waited at Major's place for some time, for a letter: we waited near some plants in a box near the entrance: we stood and waited there: we waited for Bwana Jack the son of Major, who had gone out to see the cattle-picked: Kairu spoke to him and we were given a note to Kiambu Police Station: we went there straight: we didn't stop anywhere; I went into bush to relieve myself at place where P.O. people have a camp near Kiambu. I went alone. I did not wash.

I used to have my evening meal with my brother: in daytime I had meals at duka: posho: Njau cooked it. On days when Njau was not there I went without food because I could not leave the cattle. I got posho of my own and Njau cooked it for me. I never cooked it myself. If Njau was not there I did not get any posho. I used to get it at midday: was given it in the shop. I spoke in lower Court about going to room where we cooked our posho: I went to see if there were any posho left. I went there to eat any posho there was. He called meantime: he then pointed out the cattle shed and said I had not cleaned it properly.

XXXd. I started to go and look at the Ox: he called me and I went to look at the cooked posho to see if there was any left: then he called me and told me about the cattle shed. When I put on my shuka in Njau's room, the shuka was not tied up: it was loose: I fastened it up near the old car and in doing so I put the clothes on the car. When the accused followed me and recognized me at the river he went close to Njeroge and Chui. They were in the water washing. Accused was nearer the river than I. He began washing the clothes. They told him not to do this but this was when I was not there. I had gone to call Kairu.

C.A.G. Lane.

Xd. Assessor 2. When accused pulled me down and had intercourse

my shorts were at my ankles: my legs were held under  
accused's arms: my legs were spread apart:

Xd. Assessor 3: -I did not have a w. sh after the offence before  
going to Hospital.

Witness adds: I rolled myself on the ground and I rolled myself  
on the ground.

Xd. Court: With the shorts on my ankles the accused was able  
to hold my legs one under each arm.

C.A.G. Lane.

6th P.W. KAIRU WA MURIA affirmed, pagan.

Working for Major Pedler and live on his farm:

Last witness is my brother: lives there with me: worked  
for some time for the owner of shop, Nathu Ram, I know  
accused who manages the shop: one day while last witness  
was employed there I went to Kianu with last witness.  
At about 7 p.m. we arrived there. It was light: sun had  
set: it was nearly 7 o'clock.

That day in a.m. I went to work and at midday  
about 1 p.m. I lay down in my hut; at 2 p.m. the last  
witness came to me: he said the Indian had had connection  
with him.

BURKE: I object again finally.

ORDER: Allowed as previously ruled.

C.A.G. Lane.

I thought he was saying it as a joke: I did not believe  
him: he said this Indian (the accused) he said "the  
Indian had had intercourse with him". I thought he was  
joking: he was crying as he came: last witness went away  
and Njeroge came to my house. As result of what he said  
I then went to the shop with him. I had told last  
witness to go away and I remained on the bed: I was  
asleep when the last witness came: I was awake when  
Njeroge came. Many people were at the shop: outside we  
saw accused and a lot of people with him. The other

people went away and we entered shop: the Indian had suggested that some of us should go ~~eat~~ into shop with him and others go away. I asked the accused outside the shop "Why did you have intercourse with the boy?" Ndonga was there near, in the crowd. I had not spoken to him again. When I asked the accused this question he was merely playing with the boy and suggested that the others should go away and a few of us go into shop. The clothes Ex. 2 & 3 I saw on the bench on the verandah. I entered shop with accused: seven in all: Accused, Njau, Ngari, Njeroge, Mutembei, myself and last witness. Accused said he would give us Sh.20 to finish the matter. I thought it better to go to Kiambu and get a letter from European to do so. I did so getting a letter from my employer. I saw A.S.P. Stephens there: I left clothes Ex. 2 and 3 in his charge: they were very wet: they were very wet when I had first seen them on the verandah bench. I saw the 2 pieces of soap Ex.1, on the bench with the clothes.

When I saw accused in the shop accused had a wound on his right leg, his knee, a scrape which was bleeding a little: I asked how he did it and he said he had been cut by a piece of corrugated iron: he was wearing a white shirt and black shorts. I did not tell him to give me money. I had never had any quarrel with accused and had never had anything to do with him before. Ndonga had worked there for 3 days. As far as I know Ndonga had had no quarrel with him. I never parted ~~fr~~ with Ndonga from time that we left the shop till we got to Kiambu.

Adjourned till 10 a.m. on 5th.

Accused released on the same bail.

C.A.G. Lane.

5.7.37 Accused. Court as before.

6th P.W. KAIRU affirmed. XXn.

I had worked at Major Pedler's for 3 years. Had

seen accused first some time last year. I don't know if he knew any Swahili or Kikuyu when he came. It took us from 5 p.m. till sunset to get to Kiambu. I got there nearly 7 p.m. It is now 10 a.m. We walked slowly because Ndonga could not walk fast. We waited at Major Pedler's a long time because cattle were milked: we waited about an hour there. We discussed matter with accused at the shop at 2 p.m. for about half an hour then we went to Major's. I am on monthly contract at the farm: on piece work: I had finished my piece-work before 1 p.m. with all the others. I went to hut and lay down. Ndonga came and complained to me: I did not believe him and sent him away: Njeroge came to me about that time, soon after the boy had gone away. I did not stay long. I got up at once and we went to the shop: I and Njeroge: had no sticks to beat him: we did not hit him at all: we called Mutembei as we were going to shop: not to help beat the accused: Ngari was called later after we arrived at shop by a woman: We were going to accused to find out what had happened: if you get a complaint against a person you usually go to ask him if he did the thing: I only went there to inquire: Ndonga had gone ahead: I saw him at the shop when I arrived. Hjou came from Nairobi with a cart at the same time as we arrived at the shop: we met him: we saw him get out of the cart: I did not demand Sh.20 from accused because he had beaten the boy: he himself offered Sh.20: he did not take out the money because I refused: he was sitting on a chair: he didn't get up because I said I would not take any money: Only I and Ndonga went to Kiambu Police Station. I did not go down to the river at all. On the way to Kiambu I did not stop anywhere.

XXXn. Nil.

C.A.G. Lane.

7th P.W. NJEROGI WA MUTIARA affirmed, pagan.

Work for Major Pedler and live on his farm in Kiambu district. I know Ndonga. I did not know him before December last. I do not know if in December he was living with his brother Kairu on the farm; I first saw him on 14th December. I was at river with Kinyanjui, the Ruaraka River and Ndonga came there: near Nathu Ram's shop which is on Major Pedler's land: at 2 p.m. I was at the river with Kinyanjui. Ndonga came to the river. I was washing myself: Ndonga came from the direction of the shop: we spoke to Ndonga: he was crying when he came to river: wearing a shuka: he had a piece of soap and other clothes in his hand, a shirt and shorts: these are they Ex. 2 and 3. Soap was this soap Ex. 1. After Ndonga came the Indian came and stood close by on the stones, a few yards away, a little higher up on the hill and he told Ndonga to wash the clothes quickly and to come back and look after the cattle so that they should not stray. I asked Ndonga why he was crying and why the Indian wanted him to wash the clothes quickly: the Indian went away. Ndonga made a statement to me: I told him to put down the clothes and go and call Kairu which he did. He put clothes down on the stones near the river, about 2 or 3 paces away, with the soap: he went away: the Indian came back soon afterwards and asked where is Ndonga. I told him "he had gone to see your cattle". The Indian took up clothes, threw them in the river: he dropped the soap as he did so; I picked it up and put it in my pocket: the Indian washed the clothes and asked me where the soap was: I said the boy had taken it: he washed the clothes with his hands: I asked if it was the usual thing for him to wash his boy's clothes: he said "Maithuru" (never mind). He took clothes and put them on stones near river.

Adjourned till 11.15.

Resumed. Court as before.

Witness resumes: accused went back to shop after washing the clothes. I stayed at river till Ndonga came back; he had had time to reach Kairu's place and came back; he came alone: he said that Kairu had refused to come and had said that he was lying: I went to Kairu: I found him lying down and I told him it was true: he and I went to the shop and very many people were there: Kinyanjui had stayed there with Ndonga. Many people accompanied us to the shop: we found that accused was shutting the doors of shop: he asked what was the matter: we said "Do not ask. You know". He opened the doors: he said the others had better go and 4 of us should remain to discuss because if Police came they would ask what was the matter. Accused drove the others away: he called Kairu, Ngari, Mutembei, myself and Njau and the boy Gitonga or Ndonga into the shop. We went in: accused shut the door behind us. Mutembei asked if it was true but he had heard: accused said It is not so but I am lying with the little boy. Mutembei said How was it you were playing with a little boy and not with a grown up man like yourself? I said It is true, and I pointed out a scar on accused's knee, the skin was off the knee. Accused said it was done by corrugated iron sheet while he was going out. Accused said very well he took a key and he offered us £.20 so that we should not take the matter before D.C. He stood up and felt with his hand at his waist and offered to pay £.20: Ngari said "This is not a good thing: we ought to go and tell the European owner of the farm". Kairu and all of us went out. Kairu and Ndonga went to the European. I went home with the others. - I saw accused again, late at night when I was asleep: at the house of Mutembei: I was awakened: I was sleeping at my own hut: I was awakened by a young man Murithebi who told me that the accused wanted me at



Mutembei's house: I went out to Mutembei's house and saw accused who had a lamp and a small axe. Mutembei was there. He asked me what news? I said there was no news. He said he wanted me outside to make a shauri. I said no, if there is anything to be arranged it must be here in presence of Mutembei. He said Don't be afraid. He and I went out. When he got out he handed me the small axe which he was holding. He asked me if I knew whether Kairu would be stopping anywhere on the road. I said I did not know. He asked me to go with him to the shop and that he would give me some money there as he wanted me to go with him after Kairu and follow him before he reached Kiambu. He mentioned he would give me Sh.4: I refused to go to the shop. Accused said "Never mind, you will not listen to my words": he went to the shop and I went back to sleep: only accused and myself were present - the conversation was in Swahili: he knows Swahili: he sells things at the shop: I have known accused since I have worked there about 4½ months. Accused was in charge of the shop and used to sell things to natives. I had never had any kind of quarrel with accused. I have known Kairu since I have worked on the farm. I had not known Ndonga before this day.

XXd. In labour camp Kairu shares a hut with others: I also share my hut with others: Mutembei had a hut to himself: Chui is the same as Kinyanjui; he sleeps in my house, I do not know what time accused sent for me that night. I was asleep and have no watch. I do not know what the time is when I go to sleep. If it is 6 p.m. or 9 p.m. Do not know if I have been sleeping long. There was a moon. Do not know where moon was when I went to sleep. I did not look. Nor did I look to see where moon was when I woke up and went out: I do not remember if there was a moon when I woke up. I said it was very

Mutembei's house: I went out to Mutembei's house and saw accused who had a lamp and a small axe. Mutembei was there. He asked me what news? I said there was no news. He said he wanted me outside to make a shauri. I said no, if there is anything to be arranged it must be here in presence of Mutembei. He said Don't be afraid. He and I went out. When he got out he handed me the small axe which he was holding. He asked me if I knew whether Kairu would be stopping anywhere on the road. I said I did not know. He asked me to go with him to the shop and that he would give me some money there as he wanted me to go with him after Kairu and follow him before he reached Kiambu. He mentioned he would give me Sh.4: I refused to go to the shop. Accused said "Never mind, you will not listen to my words": he went to the shop and I went back to sleep: only accused and myself were present - the conversation was in Swahili: he knows Swahili: he sells things at the shop: I have known accused since I have worked there about 4½ months. Accused was in charge of the shop and used to sell things to natives. I had never had any kind of quarrel with accused. I have known Kairu since I have worked on the farm. I had not known Ndonga before this day.

**XIId.**

In labour camp Kairu shares a hut with others: I also share my hut with others: Mutembei had a hut to himself; Chui is the same as Kinyanjui; he sleeps in my house, I do not know what time accused sent for me that night. I was asleep and have no watch. I do not know what the time is when I go to sleep. If it is 8 p.m. or 9 p.m. Do not know if I have been sleeping long. There was a moon. Do not know where moon was when I went to sleep. I did not look. Nor did I look to see where moon was when I woke up and went out: I do not remember if there was a moon when I woke up. I said it was very

late because I was asleep. It was fairly late; I cannot say what time it was when I had no watch. I do not know if it was very late or not. I do not know whether I went to sleep late. I had my food and went to sleep. I cannot say how long it takes to walk from the shop to Kiambu boma. I know the boma. If one left at sunrise I do not know what time one would arrive: as I have no watch. It was 2 p.m. when I saw Ndonga at river. I knew this by the time I left my work. I had just left work and went straight to wash. I did not leave with Kairu: was working at different place: it was very near. I was working at European's house, which was about 250 yards from the river (demonstrates). 2 p.m. was the usual time to leave work. I went straight to the river: there I saw Ndonga; first; the Indian came after him. Ndonga was in front and accused was behind him: about 30 feet (demonstrates). Accused came not right to the river. I do not know the archway. He came towards the river but stopped a few paces away: the first time: he stopped at a place about 6 paces away and from there he told Ndonga to wash the clothes quickly. In lower Court I said accused came twice. I left work at 2 o'clock and went to the river. Boy came with Indian. Indian shouted to boy to wash clothes quickly and to come back to mind the cattle, then he went back. I received a report from the boy: the Indian had gone away then. I started to ask the boy what had happened: the accused had gone: boy explained what had happened. I told boy to put clothes down and go: I had never seen boy before that day: never. I told him to go and call Kairu. I first asked him whose boy he was: he had said Kairu's. We did not have a long conversation: Camp is about ~~225~~ 250 yards away (demonstrates). The boy did not run off: I stayed till he came back, I and Chui. Boy only told me when he

came back that Kairu would not believe him: I went to see Kairu: I did not stay there: we went to duka: Mutembei had not arrived: Ngari had not either. When we got there: Chui we met on the road with Ndonga, going to the camp just below duka: I do not remember where Njan came from. Before we entered shop he arrived: he was with many others.

I often bought things from the shop: I used to buy things and go away. I did not converse with accused: Many workmen on farm: I don't know if there are 100: I cannot count. That day I don't know how many were working near Major's house: or more than 20, or more than 10, or more than 2: I do not count.

After I went to bed I don't know how long it was that I was called. When I went to call Kairu I left Chui at the river. Accused came to Mutembei's hut and sent to call me: I went to Mutembei's hut. He wanted me to go to Kiambu: conversation was outside because accused refused to talk to me in the hut. I was called by Mutembei's. Accused wanted me to go with him and follow Kairu: not to go alone: to go with him to follow Kairu. I refused to go. He got annoyed and we separated. I do not know what was going to happen if we did go and follow Kairu. If it was for purpose of giving Kairu some money, I did not hear him say this: nothing about giving money to anyone else except the Sh.4 he offered me. If I told the Magistrate that Indian had spoken of giving money to Kairu and others, there was nothing offered except that at the shop and the money he offered me to go with him Sh.4. I did not say that he said "It is better for me to give you Sh.4 to follow Kairu to see if they have gone to Kiambu and if he has not gone I will give them Sh.50". When he offered Sh.20 in the shop he was sitting down. We got up to get the money we however refused and went out: I did not see two Sh.10/- notes. I saw the skin abrasion on his knee. He was wearing white ~~trousers~~ shorts as for sleeping, and a shirt.

I do not know the colour of the shirt. He was not wearing long trousers. I did not see the long trousers. He had scar on one knee: skin was off. I could see both knees: only one knee with abrasion. His right knee.

I saw Kairu next a.m.: he came in before we went off to work: while we were still asleep: I do not know what time it was that we go to work. I saw ~~him~~ sun shining but could not say where it was.

XXXn. Mil.

C.A.G. Lane.

8th P.W. KINYANJUI WA KURIA affirmed pagan.

Work for Major Pedler and live on his farm at Kiambu. I do not remember 14th December. I do not know English dates. I know last witness. I remember one day going with him to Ruaraka River. At 2 p.m. to wash: a little boy Ndonga came (identified) wearing a shuka and had other clothes and soap in his hand: Ex. 2 and 3 are the clothes and see Ex. 1 is the soap. He made a statement to us: he was crying: after him an Indian came: after the boy made a statement to us and gone away, the Indian came: When the boy came to the river the Indian was higher up above him and he shouted to the boy to wash clothes quickly: then he went away: when Indian was standing at the place described the boy made a statement to us: Indian went away: the boy went away having put the clothes on the grass: 2 or 3 paces from the river: the soap he also placed there: then he went. The Indian came and washed the clothes before the boy came back: Njeroge asked him why he was washing the boy's clothes: he said "Never mind". The boy came back: the Indian had gone away. Boy said "Kairu has refused to come". Njeroge went to call Kairu: I stayed with Ndonga: a lot of people collected there and I went with Ndonga to the shop: I rested there for a time: then I left the people there and

went home: the boy had picked up the clothes from the river bank, from the stones, where the Indian had put them: I have worked for Major Pealer for two months: I knew Kairu only since I have been there: am not especially friendly with him: we met there at work.- No quarrel even with accused.

XXd. In a.m. we go to work very early: as sun rises: do not know how many labourers there: we were many there as we were picking coffee: cannot say how many. When Indian shouted to boy to wash clothes quickly he was about 50 feet (pointing to gallery of Court). Accused was under the archway.

Boy came back to river: Njeroge went off: next time I saw Njeroge and Kairu was when I went with them to the shop. I made the same statement in the lower Court. It was not perhaps written down. I was working in the same place that day as Kairu, in same place picking coffee: Njeroge was also there: we were all together as we left work: I left work at same time as Njeroge and we went to river together. I did not know him before that day: that was first time I saw him: did not know he was related to Kairu until he asked him why he was crying and he gave us certain information and Njeroge asked him whose boy he was: and he replied that he was Kairu's. Crowd there when we got to the shop. When I saw accused standing above the river he was wearing shorts; I do not know of what colour.

XXXn. Nil.

C.A.G. Lane.

9th P.W. MUEMBEI WA WANGERE affirmed pagan.

Work for Major Pealer as headman. I remember 14th December. I went to the shop at 3 o'clock because I saw a crowd there: outside: natives: Indian, the accused, said everyone should go and a few should remain: seven men went inside, Njeroge, Kairu, Njau, Ndonga, Ngait,

myself and accused: he shut the shop: I said to accused "I have heard that you have had connection with this boy; is it true? He said "I was playing with him". I said "are you in the habit of playing with little boys and not with grown up people?" I looked at his eyes and he appeared to be in fear as if he had done wrong. His left knee had a wound on it. He said "Let us discuss this matter here and settle it; I will pay 1.20". I told these others that it could not be settled here and they must get a letter from European and go to Kiambu as it was a big matter. After this I was feeling ill and cold and I went home. Ndonga was not wearing clothes: I saw some wet clothes outside: water was dripping from them: the garments were the exhibit 2 and exhibit 3, a shirt and shorts., and two pieces of soap were placed on the clothes but I did not examine them well: something like the soap exhibited.

Have worked for Major Pedler about 6 years. He employs not very many men: about 100. I did not know Ndonga before that day: he had come from Fort Hall direction: I first saw him that day. I used to see accused at the shop when I went to buy anything, not for long: I had nothing to do with him and never quarrelled. At night that day he came to my house carrying a small axe: he asked where Njeroge was as he wanted to speak to him: I asked why. He did not tell me but still said he wanted to speak to him. I sent for Njeroge who came. He asked Njeroge to go outside with him. Njeroge said "If you want to tell me anything tell me here in the white man's presence." Accused again asked him to go out. They went out. Indian asked him to go further away. They went further. I shut the door and went to sleep.

Adjourned till 2.15.

Accused on same bail.

C.A.G. Lane.

Resumed.

Accused.

Court as before.

XXn. resumed: "I used to buy things at the shop. I used not to take credit. I deny ever owing anything on credit: I paid cash for everything. I again say I took nothing on credit. If accused complained against me to Bwana Jack I do not know. If he had the Bwana would have called me and taken me to the shop.

I was ill that day: I walked there slowly: I had not been to work that day: I was lying down: spent all a.m. lying down: had not left house all the day. I leant on a stick as I went there, being weak: I found Ndonga there also Chui and Njeroge and Njau: they were all there before me: I arrived last: Kairu asked me to go there: he called me and did not wait for me: he went on in front: Njau came about the time the affair started: we started talking, not till he came: when he came we had not started to speak. Accused made ready to take the money out; I do not know where the money was, if in his pocket or elsewhere: he put his hands to his side as if he were feeling in his pocket saying "Let me pay Sh.20" and at once we went out. When we got outside I told the people to go to the European and get a letter to go to Kiambu. We were afraid of the Government. Ngari, Ndonga and Kairu went towards the European's and I went back to my hut and back to bed. I had much pain: I have a scar now.

Accused came to my house at night: I got up and opened door for him: I live alone in house. I did not go to Njeroge's hut. I was sleeping near fireplace alone. I called a young man Murithebi from his house quite close to mine and sent him to Njeroge's. Njeroge's is not so close. There is a piece of shamba in between, with grass growing. Njeroge did not come back to my house: he went



home afterwards. I do not know the time: it was at night: - I was not feeling well: I had been asleep since I got back from shop. I went to shop at 3 o'clock and I came back at 5 o'clock. I did not go out again. I went to bed. - I have no idea how long afterwards it was that I saw accused. I do not know if it was 6, or 7 or 8 o'clock. Everyone had gone to bed. Work people go to bed any time when tired. In the Lower Court I was not asked about accused's visit at night: so I said nothing about it. I went straight home from the shop: and lay down: I did not stop outside on verandah: I went straight back: I could not walk fast. My leg was bleeding when I arrived at the shop. I do not know if it was 2 o'clock by the clock in shop when Kairu arrived at shop. I had heard about accused having connection with the boy at my house while I was lying down: Kairu told me and asked me to go there. At the shop accused was wearing shorts of khaki above the knee. When we were squatting down I could see his knee. If Ndonga says they were trousers that is his affair. I was sick for a month. I show the scar on my ankle.

XXXd. When I received information from Kairu, he was speaking to me from the road which is quite close to my house. I did not see him: I was lying down: door open: I heard his voice.

C.A.G. Lane.

10th P.W. NGARI WA RUEYA affirmed, pagan.

Work for Major Pedler and live on his farm. I do not know European dates: I know Kairu: I remember one day some time ago he went to Kiambu: that day I went to work and knocked off at 2 o'clock: I went to my hut and lay down: then I was awakened by a woman who gave me certain information: then I went to the shop finding many people there: some of them were driven away by

home afterwards: I do not know the time: it was at night: I was not feeling well: I had been asleep since I got back from shop. - I went to shop at 3 o'clock and I came back at 5 o'clock: I did not go out again. I went to bed. I have no idea how long afterwards it was that I saw accused. I do not know if it was 6, or 7 or 8 o'clock: Everyone had gone to bed. Work people go to bed any time when tired. - In the lower Court I was not asked about accused's visit at night: so I said nothing about it. I went straight home from the shop: and lay down: I did not stop outside on verandah: I went straight back: I could not walk fast. My leg was bleeding when I arrived at the shop. I do not know if it was 2 o'clock by the clock in shop when Njau arrived at shop. I had heard about accused having connection with the boy at my house while I was lying down: Kairu told me and asked me to go there. At the shop accused was wearing shorts of khaki above the knee. When we were squatting down I could see his knee. If Ndonga says they were trousers that is his affair. I was sick for a month. I show the scar on my ankle.

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accused. I stayed there and went inside, with Kairu, Njeroge, Ndonga, ~~Wari~~ Njau and Mutembei and accused.

I heard conversation there. The Indian took out Sh.20. He said he would pay Sh.20 to settle the matter: the matter of having connection with the boy: this is what we did when we got into the shop: he closed the door: he said he would pay Sh.20: we refused and asked why he was offering Sh.20: he said he wanted to settle this matter, of having connection with the boy: we said we would not agree to this: Mutembei told us to go to the European to get a letter: we went out and Kairu went to the European: I went back to my house.

Before going into the shop I saw many people there: I heard people saying "Why did he have connection with a boy? Could he not find a woman?" At the time the accused was standing by the door and was calling us, who went in, to go <sup>in</sup> to the shop. Ndonga was wearing a shirt with stripes like this one exhibited Exhibit B and khaki shorts. They were lying on the seat of the shop, outside, wet with water. At the time Ndonga was wearing a shuka.

XXd. Accused was wearing shorts: I did not look carefully: I could see the wound on his knee. If he had been wearing long trousers I could not have seen the wound on knee: I pointed out to the others the wound. Mutembei saw it before me. We entered at the same time. I had gone to the place alone. Mutembei was in front of me. I was a little behind him, when he entered the shop. I did not see him on the verandah. I went in as soon as I arrived. I saw Njau inside the shop: He came a little after me. I did not see Mutembei arrive at the place. When I arrived we were excited and I could not say the order in which they all arrived. I entered the shop at the invitation of the accused. Ndonga while he was working for the Indian slept at our place, in the labour

camp, and fed with us. My hut is separate from Kairu's and I feed separately from him. I am not related to Kairu. We met there at work. My hut is next to Kairu's. Mutembei is a distance, at one end of the camp; there are huts between; I cannot say how many. I was called by a woman, not by anyone else: I did not go along with Kairu.

I do not know what time it is now: it is very difficult for me to tell the time: I am in the town: I go to work when the sun has risen: I come back from work at night when I feel sleepy: I do not know the time: I know Njau: I saw him inside: I was in the shop before him, a very short time: the door was closed after he came: I do not know if he or Mutembei was the last to enter.

XXXii. Nil.

C.A.G. Lane.

Xd.Ct. When I got to the shop there was a crowd of Kikuyu there who were angry: and accused was in the shop: he was alarmed by the crowd and suggested the others should go away and that the few of us should go inside.

C.A.G. Lane.

Accused's statement in lower Court is read and put in Exhibit 4.

Crown case.

Accused informed of rights Sec.289(2) Criminal Procedure Code.

Accused elects to give evidence on oath:

1st D.W. MOHINDAR SINGH S/O KARAM SINGH, Sikh, sworn.

work for Nathu Ram in shop on Major Pedler's farm: I have been in country 8 or 10 months: when I came I could not speak any African language: no Kikuyu yet: can speak a little Kiswahili, ask for water etc, can count a little and know enough to work in shop: I have been all this time at same shop. The boy Ndonga had been

working for my employer for 2 days at shop. I remember day there was this crowd at the shop: as to the allegation that this was because of what I had done to him, i.e. unnatural offence, I did not do that. As to allegation that I went down to river after and washed these two garments I never went to the river and I did not wash these or any other clothes that day: I gave him no soap: As to allegation that I offered him bread as a ruse, I did not call him or offer him bread: As to allegation that on that afternoon I offered Sh.20 to the people in shop, I did not offer them Sh.20 or any money at all. As to my statement alleged that I was only playing with the boy, I did not say this. As to Njeroge's statement that I called him at night, I did not go after him: did not go to Mutembei's: I had no occasion to go there. I never asked Njeroge to do me a favour then or at any other time: I never offered him Sh.4 if he would accompany me to Kiambu: I never spoke to him about it. I did not even say "If Kairu has not gone to Kiambu I will give him Sh.50".

On this day 14th December - Ndonga's work was to herd cattle and sweep out cattle shed: this day I told him to sweep because he had not swept the place: he looked at me with eyes crossed and did not do it: he did not understand my words and just stood and looked at me: this was at 12 noon: he took the one ox out and went away: he went and stood near the cow dung, just outside the shed: I saw that he was not sweeping: I took him by the neck and pushed him: he fell down: I went back to shop to sell things to natives: I do not know what the boy did. I did not see him till half an hour later about 1 p.m. the boy returned with two other boys (he points to Njeroge and Kairu Prosecution witnesses). They asked me why I had beaten the boy: they looked

very angry and one had a pang. I said in Swahili "hii bado fagia" (he has not swept). I said the owner of shop would be angry with me if he came and saw the place not swept. They argued with me for some time and a large crowd collected. I got afraid and went into shop. I had closed one side of shop; while I was closing the other side the same two boys came in and said "You have beaten the boy, we want baksheesh Sh.20". I refused. I said I had beaten him because he had not swept, not for nothing. They went thinking I was not going to pay anything. I did not know they were going to Kiambu. As they were going they said "We will let you know later - we will make a big shauri - you will know later" Up to the time that I saw the European Police officer and the Indian Police officer I had no idea that they had gone to Kiambu.

As to scar on my knee, one day I fell off cycle and scratched my knee: I can show it now: but my trousers are too tight to pull up now. It was on my left leg. That day I was wearing the trousers (Punjabi tight trousers) that I am wearing now. I do sometimes wear shorts. That day I was wearing the tight trousers. In the early a.m. we Sikhs wear shorts but to start work we wear these Punjabi trousers. That day at midday I was wearing them.

Adjourned till 9.45 to-morrow.

Accused released on same bail.

C.S.G. Lane.

5.2.37

6.2.37 Accused  
Court as before.

ACCUSED (on same oath) XXd. Phillips.

I have heard the evidence about the conversation which I was said to have taken part in. I know only enough Swahili for my business. I cannot carry on a

long conversation. I did not know enough Swahili to carry on the conversation described by Crown witnesses. The evidence about this is false: In Swahili "The owner of the shop will get angry" I can say that - "Hii takiya tapiga kelele kama hapana lagia" that is what I should say. I have only been doing job at shop for 2 or 5 months and cannot talk Swahili properly, only enough for doing business in the shop. I do not know enough to carry on conversation as described ~~at the shop~~ by witnesses. I know enough to talk to boys about things at the shop. On 14th December I started work at 7 a.m. In a.m. I had a native assistant at shop; he left for Kiambu before noon. It was 12 noon when I beat Ndonga. I did not look at the time. I look at my watch from time to time: I had had my food; I finished it at 11.30. I thought it was 12 o'clock. I beat the boy about 12 noon. I smacked the boy on the back of the neck with each hand. First I gave him two or four slaps in the shop, then in the shed as he had not swept I took him by the neck, slapped him 2 or 4 times and pushed him down. First 2 or 3 times on the neck in shop, then again 2 to 4 times in shed because he stood and did not sweep. I said the owner of shop would get angry with me because shed was not <sup>swept</sup>. I had first hit him in shop: he ran towards the shed. I followed him there; I had told him "Kwenda chukua mawi ya ngombe lagia"; he did not look at me properly; that is why I struck him: I hit him in shop because I had told him to clear the shed: he looked at me as if he was angry with me. He understood me all right. I gesticulated to him to explain what I wanted. In the a.m. I had first told him to sweep the place: he did not do it then, so at 12 o'clock I got angry. I was selling things at shop; he went out with the cattle and took them out by back; this was 8.30

I was angry with him because he was late and I had told him to sweep up the cattle dung: he understood what I meant as I had motioned with my hand, with a sweeping motion. I said yesterday he did not understand because he did not listen to me: I meant he did not listen to me or obey my order: I told him how to do it "kwenda chukua mawi ya ngombe, kwenda fagia" I said. When I said he did not understand me he understood me but he did not obey me. Yesterday I said he did not obey me or listen to what I said. In our language there is no difference between "obey" and "understand".

ASSESSOR NO.1. In Punjabi the words are "samja" to understand and "sumya" to hear. There may be a mistake about it.

The interpreter explains that there are two different words:

The Assessor No.1 is a Khoja and does not naturally understand Punjabi, in which he proceeds.

ASSESSOR NO.2. To say "he did not understand my order" and "he did not obey" are two different words in Punjabi.

Km. resumed:

The boy took the cattle out of shed to herd them and herded them on the grass on Major's farm, near the shop and a little distance away. He did not come to me. He was wearing a shuka. I did not see any other clothes; he may have been wearing other clothes; I did not see shirt and shorts. Boy did not say anything to me either at shop or shed - he spoke but I could not understand him - Kikuyu - when I was telling him to sweep the shed. At the shed he had put the dung into a karai and was going to take it out when I left him; this was after I had beaten him; I left then to attend natives who were standing at the shop; he had started to do what I wanted after I had beaten him: I beat him hard with open hand on back of neck 4 or 5 times; they may have hurt but not enough to cause any injury that



that could not be seen. There would be a mark if person is slapped on face but not on back of neck. I always beat the boy in this way, not with a stick. I had beaten the boy in the a.m. when I told him to move the dung. In a.m. I gave him one slap because he came late. In shop I gave him 2 or 3 slaps and in shed I gave him 2 or 4 slaps. I was not asked about the slap in the morning yesterday. I only beat him in the way that one ordinarily beats a mtoto: not the sort of blow that would cause any serious injury: no need to go to hospital it is a common thing to beat a boy like that; if he had been a grown up boy I would have found fault and turned him out but as he was a mtoto I wanted to teach him his work just as teachers do at school to small boys.

Only two came into shop and with them the boy: Mutembei did not come in, I did not see Ngari, Njau came afterwards; Njeroge came in and Kairu and the boy: they did not come into the shop, they came to the shop and stood outside and abused me. I did not see Mutembei outside: I should have recognised him if I had seen him: I did not know Ngari: I should not recognise him. In our language "gari" means a cart: (the witness Ngari appears) sometimes this man used to come to the shop: I do not know his name. I did not know Njeroge well: he used to ask for goods on credit: I used to refuse this. Kinyanjui (or Chui) I do not know at all: Kairu I did not know at all. I knew Mutembei who used to buy flour at my shop: he was headman and used to buy flour for the Major for his boys: I knew him well: he had a serious grudge against me: he used to buy on credit and send no money: I reported to Bwana Jack and next day he brought the money. Two or three days later he came and cried before my employer and said this was a disgrace to him: he did not pay for 3 months: he said "We will see you later" to me: it was the third or

fourth day after I had reported; in October last year: then the Major stopped buying posho from us: because I had complained against Mutembei he had told Major that our posho was not good so he stopped buying posho from us; and as he was he drove all the boys followed him. Mutembei may have been very pleased at getting his own back on us. I do not know if he has finished with me: an enemy may retain a grudge up to the end of his life. I cannot say as to whether Mutembei has induced the others to give false evidence against me because of this. They are all Fikuyus, of the same tribe: why don't the other boys of a different tribe whose huts are quite close to shop, come to give evidence? I do not know if Mutembei was very annoyed because I had beaten the boy. At the time he did not come up to the shop. As to whether he would give a false charge against me because I had boxed the boy's ears, I cannot be Mutembei's friend. Njeroge, Mairu and Idonge came to my shop about an hour after I had closed. They were all angry with me during the inter-tribe war. They were all very angry they were all very angry. They were all very angry they were all very angry. I was angry with them because they collected me. I was angry with them because they beat me. Njeroge and Mairu were angry with me because I was closing the door; they were angry with me because I was taking baksheesh for 10 to 15 minutes. They were angry with me because they cleared off: it was the same as they were outside for another hour. During that time I did not see Mutembei, Ngari or Njau. There were many there: I do not know if they were angry with me. Only Njeroge and Mairu were angry as far as I know. They had a panga: I closed shop at once as I was frightened but not badly enough to get in. I thought they might hit me with panga. They said "You have beaten this boy; come outside we will see" They are not holding or beating me: when I said this.

they went away. I did not go and report matter to Police; I would have reported if they had beaten me; fact that they forced way into shop I did not think worth repeating to Police. Did not even report to Major Pedler; would have done so if they had beaten me. Reason why they threatened me and tried to extort money was because I had beaten the boy; only reason. They were in the shop for only 10 minutes. They stood outside for an hour. I was wearing my long trousers I am wearing now. No one asked me about mark on my knee. No suggestion and nobody asked me about the offence alleged. I knew nothing about it till Police arrived.

I suggest all the native witnesses have fabricated the case against me. Dr. Anderson has not. His evidence I do not suggest is false. If Doctor says someone has committed an offence with boy it must be someone else.

Q. Do you suggest that no one committed such an offence with the boy?

A. I don't know.

All the native evidence is false. Ngari is living close to complainant's brother and is of same tribe; I do not know of any other reason why he should give false evidence against me. I did not know him except by sight. Never had any sort of quarrel with him. As to Kinyanjui, I think he is a friend of Njeroge and Njeroge must have influenced him. Njau used to carry tales about me to my employer at Nairobi. He had a grudge against me. He may have been delighted to damage me. He had a grudge because he wanted things from shop for nothing; I refused to give him. He has been with my employer for 2 or 3 months: for first 15 days he worked well and after that he began having trouble with me. I did not complain of him to my employer. Njau lived on premises near shop; I lived there. Did not suggest he should be discharged. All the native witnesses have made the false allegation.

against me. It all arose from fact that I beat the boy that a.m. They must have been angry at my beating the boy and decided to make false charge. They threatened: when they left the shop they said they would make a big shauri because I would not give them baksheesh. This was at 2.30 p.m. I do not know where they went. They must have prepared the false charge after they went away that afternoon. It all arose out of my beating the boy.

I deny that I washed the boy's clothes at the river. I never wash my native boy's clothes. I would not do it; it is not my business. I do not know if it would be a suspicious circumstance if what Njeroge and Kinyanjui say were true.

BURKE: Witness's opinion as to value of this evidence is not evidence. I object.

COURT: it is allowed.

I do not know if such a thing would be suspicious if true I did not give the boy the soap: I did not give soap to anyone. I sell it. I should not do this in ordinary course of events.

All the time I am supposed to be busy at the shop. Customers come and go: I am busy at the shop. There were natives standing at the shop and within half a minute I came back to shop. When I slapped boy in shop there were customers there. They saw it. I do not know who they were: they were strangers going towards Kiambu.

When mtoto came to shop at midday he entered from front. I do not know what he came in for. I asked him to go and remove the dung. I had not called the boy. He stood there: he did not say anything: I was selling things. He was angry since the morning because I had hit him: not frightened of me: when I beat him again he went inside to the shed: he stood there: I followed him and told him to take away dung: I hit him again: all this time he had not said anything: he went away: he had

put dung in karai and was lifting it: I left him and went to shop. I heard the boy's evidence, and I saw the demonstration the boy gave. I do not know if it would be possible to commit the offence as he suggested.

XXIn. Nil.

Xd.Ct. The main road goes past the shop; there is a good deal of traffic on it: as to suggestion that I could have attracted assistance during the 1 1/2 hours that the crowd was gesticulating outside, I was not being beaten: the natives were not fighting with me and I was not in danger

C.A.G. Lane.

At Burke's suggestion Court calls

D.M. STEPHENS Sworn.

Assistant Superintendent Police, Kyambu. The distance from the shop to Kiambu Post Office is 5 1/2 miles and the Post Office adjoins the Police Station. Checked on my speedometer which I believe is correct.

XXn. Nil.

C.A.G. Lane.

PHILLIPS ADDRESSES:

Charge amply proved. Evidence of boy corroborated in particulars.

1. Evidence of Anderson: tear in anus: recent tear: had happened not less than 2 hours and not more than 12 hours. Could not suggest any explanation except by such offence or introduction of foreign body: not in course of nature. Some one committed offence on boy: i.e. accused.

2. Boy: Discrepancies in story; remarkable if not: very young: 4 hours in box: cross-examined in great detail, skilfully: confusion between what he had seen and what he had heard. cf. last answer, tendency to embroider: said to make statement and have to stick to it. Ask is to say whether main substance of boy's evidence is true. Inconsistencies not sufficient to dispose of whole Crown Case:

Question of position - perhaps unexpected. Shorts on ankles: legs through accused's armpits: prevented from spreading: position possible if legs flexed and bent at knee: impression of what he described: difficult for child to remember all details: frightened. Knees under accused's armpits, ankles lower and ankles and shorts round them near his buttocks: that is how shorts soiled with discharge - fact that he shows this unusual position is proof of truth: if concocted he would have suggested a more ordinary position. Fabricated? Out of fitina? Entirely child or by elder natives in collaboration. Quite incredible that the story was framed.

Tear in anus? Caused by foreign body simply to make evidence against accused?

Explanation? because he had beaten the boy: a slap is common enough: would all the other boys ~~xxx~~ (some were strangers) have collaborated to make up false story because ears boxed?

Kairu himself did not believe him at first. Report to Kiambu same evening.

Adjourned till 10 a.m. on 8th inst.

Accused released on the same bail.

C.A.G. Lane.

8.2.37 Accused. Court as before.

• PHILLIPS resumes:

Fitina? Manufactured story? impossible to believe native Motive? that they made up this case just because boy had been slapped - no visible injury - inadequate motive for complaint. Fitina - Mutembei - grudge not proved. Not sufficient to make Mutembei act like this. Chui - Ngari - no reason at all - Same tribe? only living on Pedler's farm for short time

and did not know Ndonga. Beating - no signs of beating by doctor.

Men bursting into shop threatening with panga though people outside and passing along road - 1 1/2 hours - he would have called for assistance. - He would have reported to Police or Pedler. - Accused says not till 2.30 they stopped quarrelling: complaint to A.S.P. at 3.30 - 3 miles walk - travel at 2 1/2 miles per hour = at least 2 hours walk.

? all complicated story fabricated in this short time - between quarrelling and starting to Kianbusi, i.e. plot formed among different witnesses.

Accused's story improbable and unconvincing.

? Fabricated by Ndonga or by grown up witnesses? Very feeble shaken. In general not shaken: if accepted very strong corroboration as matter of law and of fact.

e.g. inconsistency - Ndonga in lower Court no money produced - in this Court saw 2 notes.

Corroboration (1) Medical evidence. Tear in anus.

(2) made immediate complaint to brother: proves consistency of story.

(3) subsequent conduct of accused himself: gave soap and told Ndonga to wash clothes: he went to river and washed clothes: admitted he would not do either ordinarily offering to pay money - testified to by number of witnesses  
C. . . . .

Demeanour of man who knew he was guilty - said only playing with boy.

Jerome saw accused come down and wash clothes. to scene in shop or to what happened that night. shaken at all. As to whether accused came to river once or twice. Nothing said about first visit in lower Court.

Difficulty about interpretation; main difficulty about accused's alleged visit at night: confirmed by Mutembei. In lower Court he said accused had offered him Sh.4 to go after complainant and offer Sh.50 not to make complaint. Denied that here. Difficulty. Explain. Evidence to be looked at as whole.

Ngari not shaken at all. Truthful witness.

Njau accused's allegation of fitina against Njau not established - if then why was Njau not discharged.

Chui no allegation of any wrong motive.

Any inconsistencies less remarkable than general dependability of and coherency of prosecution story.

Reject defence and suggestion that story is false.

Corroboration very strong.

**BURKE:** Strength of prosecution case? these points establish its weakness:

Medical evidence very weak: Boy brought in evening, no signs of spermatozoa - anus - explained by defecation.

Explanation? of absence of semen on his body. The main weakness:

1. See boy's story: man caught him by legs: my shorts still on - shirt up to chest. he did not complete - drew out penis - semen got on to shirt - got on to shorts. How no seminal fluid on his body? Anal orifice and stomach? Doctor found nothing after careful examination. Therefore not corroboration from Doctor. Therefore on Doctor's evidence unsound to convict of offence.
2. Complainant went round to this man and said "You have spoilt my clothes; give me soap". Accused chased him away. Afterwards gave him soap. You cannot believe because story suspicious that story comes from another witness. Boy did not go through G he went round shop - went down to river. Although he asked for soap he did not wash clothes. He made statement to witnesses in reply to



questions - told by Njeroge and went to brother - reaction of brother is to tell him he is a liar. Brother took no steps till Njeroge came. As result of what Njeroge said they got off. Njeroge invents stories - difficult - insurmountable - he invented to Kairu - he invented the visit at night - the 3.4 - the 3.50 - he denied the...

What motive. Njeroge is the origin of the whole case. Why does Njeroge go to Kairu? What does he say to Kairu? Njeroge self-confessed perjurer. Ndonga went to brother very soon after alleged offence but he did not go to brother in erisis circumstances that any reliability could be placed on brother.

Story after this confused. Labour camp is 400 yards from shop. Kairu and Njeroge says he told Njau and got to shop in 3 minutes.

Mutembei - it took him 10 minutes to get there. Were they there for a short time or for 1 1/2 hours? What did they go there for? To make a show of annoyance to get money out of accused?

Mutembei - it took him an hour from camp to shop. Did Mutembei get there at crucial time when evidence offered, just as Njau did?

Njeroge and Mutembei go story of night visit... believed. Had to limp slowly. He left home at 5 - other witnesses say they left shop at 3 to Pedler's at 3. Story does not hang together. They could not have all been there at 2 o'clock in the circumstances related by the natives.

No part of accused's duty to suggest reason why people should give false evidence. Need only show that evidence is incompatible and therefore false, even in one particular. No reason to find out why they have done it. Impossible to believe story is manufactured because boy's ears were boxed. I say it was made up by Njeroge.

at own story because of Kairu's reaction. It could have been more convincing if he had said he believed story.

left here at 3 and got back at 5

rt entitled consider abilities.

otive. roge didn't the boy or



happened on a.m. of 19th following that some boy  
went to river: as result of conversation with ... he  
went of direction to ... brother told him  
he was a liar: sent him away: Jerome goes to brother -  
tells him something: ... and Jerome go, lose to -  
accused a place: could not have found a crowd but crowd  
collected: later arrival was Katenbei - ditto Ijau -  
Ijau called by a woman.

Finding of unnatural offence would be in face of  
medical evidence that no seminal fluid on boy's body.  
Impossible by being that he rolled on ground to explain  
absence - not consistent - this would not get rid of  
seminal fluid.

But - entitled to benefit. Accused's evidence  
not shaken. Very lowest must give at least benefit of  
doubt but on evidence particularly doctor - unworthy of  
belief.

#### NOTES OF SUMMING UP.

Law (1) s.140 P.C. Unnatural offence. Carnal knowledge  
against order of nature = penetration per anum. Consent  
of passive agent not material. Slightest penetration  
sufficient: penetration alone is sufficient without  
emission.

Corroboration of evidence of young boy required: Young  
boy accomplice? Not apparently in this case.

If evidence fails to make out entire charge against  
accused he may be convicted of attempt.

(2) s.146. Indecent assault on boy, under 14 years.  
(Consent immaterial in case of person of age of culprit.)  
= assault accompanied with circumstances of indecency on  
the part of the accused, i.e. attempt to commit sodomy -  
i.e. without penetration. Corroboration required as in (1)

(3) s.146B. Indecent practices between males.  
i.e. committing an act of gross indecency with another

male person. Evidence of complainant needs corroboration. as matter of prudence though the child was sworn not consenting party but consent immaterial in case of child-like complainant.

EVIDENCE: Ndonga: said he was actually penetrated after accused had made attempt to get him into shop first by offer of bread and later in cattle shed by ordering him to come.

Evidence as to positions - passing of semen - Emission inside - discharge on clothes as withdrew after struggle - tail of shirt might be near anus though front would be on chest. Mark on clothing - scar on accused's knee.  
? Would semen be on shirt and shorts if position as described by complainant.

? Would accused be able to have intercourse with legs of complainant in position described and with shorts round complainant's ankles.

Corroboration: Evidence of Doctor that tear in anus: recent: position possible even with shorts: knees flexed: but no seminal marks - anus accounted for by defecation. Semen on complainant's body - great stress on this, but consider possibility that clothes took the seminal discharge as accused was withdrawing after having complete emission. Evidence that complainant brought to Kiambu that very evening by Kairu and examined promptly.

Njeroge and Chui. (admission of accused I was only playing), What they saw at river: in consequence of complainant report sent ~~accused~~ to Kairu: Indian washing clothes after telling complainant to wash them. Would they invent this? Clothes seen wet afterwards by many witnesses and still wet by A.S.P. at Kiambu. Careful thought if this concocted piece of evidence. Offer of Sh.20 - all witnesses agree but inconsistency of Ndonga - exaggerated by saying he saw Sh.20 in notes.

Kairu. Told Ndonga he was lying: Njeroge came and he believed - went to shop. Would Kairu have invented this about telling boy he was lying. Inconsistent if he did. Njeroge and Chui saw boy come back crying. Callboy Mutembei on way - Ngari called and came later - was there - Njeroge with Kairu - Met Chui with Ndonga near shop. Kairu not shaken. Admission of accused "I was playing with boy".

Njeroge. Same story but inconsistency about the night visit. Suggested Njeroge was prime mover in inventing story. Not for defence to suggest reason but Court entitled to examine ~~poss~~ probabilities.

No reason for this invention. No friendship with complainant or enmity with accused.

Story of night visit. Mentioned in lower Court. Substantiated supports story - difference in evidence as to offering of 1.4 to say he would pay 1.50 to Kairu to stop making complaint.

see p.40

Discrepancy as to what accused saw bearing in shop - boy says trousers - others say shorts - they differ as to colour of shorts - all say they saw mark on knee. Chui bore out Njeroge - not shaken - seemed genuine.

Mutembei alleged to have grudge against accused. If so why did he not take more active part? Why did he not go to shop when called by others. If he was still would he choose that day to invent story? Admission "I was playing with boy". He gave evidence about night visit but had not mentioned it in lower Court.

Ngari called by woman and went to shop. Spoke of scene in shop - not shaken.

Accused's story that all invented because he had slapped boy. Crown says witnesses would not have made up case on such minor pretext. Do you think they would? Would Kairu and boy have taken trouble to go to Kiambu

in evening to tell false story because of this?  
Accused shown to know enough Swahili to converse.  
Other alleged incentive was because of quarrel with  
Mutembei.

If threatened by crowd for 1 1/2 hours would accused have  
called for help?

Story as to time given by native witnesses is consistent  
on the whole. They are not likely to be exact about time.  
Assault at about 2 - scene in shop for 1/2 hour - journey to  
Kiambu - arrival 6.30.

Reasonable doubt:

Facts in accused's favour - absence of semen on boy's body

Inconsistencies in evidence.

JURIDICTION OF ASSESSORS:

1. Ibrahim Premji.

All the witnesses for prosecution are different; I there-  
fore think accused innocent: absolutely.

2. Desraj Bahul.

I heard case carefully. I consider accused not guilty.

First charge is unnatural offence: Firstly the legs cannot  
be widespread while the shorts are at the ankles: One leg  
was under one arm and the other under the other. Secondly

no sign of semen though boy had not washed. Act was done  
forcibly: when he was released it is very common thing for  
small boy to go to his elders. He would have run at once

to his brother. He only went after being told by George  
and Chui. He would have protested on the spot to his  
brother. Act said to have been done in cattle shed: rough  
floor: there ought to have been scratches on boy's back.

Doctor did not see any.

Thirdly money offered: boy said he saw two notes:

discrepancy: Not guilty of first charge.

3. Anwar Ali:

Doctor found no sign of semen. Boy said he rubbed on the  
ground. This could not remove signs. He did not wash

before going to Hospital. Boy would have had scar placed on concrete for offence.

Boy of this age if he found that offence of this kind done to him he would have cried out. I think accused Not Guilty.

Record of lower Court proceedings put in as ex.

Judgment reserved till 11th February.

Accused released on the same bail 11th Feb.

C.A.G. Lane.

11.2.37.

Accused on bail

Court as before

Adjourned for Judgment till 13th February.

Accused released on the same bail.

C.A.G. Lane.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 11 OF 1937

REX . . . . . PROSECUTOR

versus

MOHINDAR SINGH S/O KARAM SINGH . . . . . ACCUSED

J U D G M E N T

The accused is charged with committing an unnatural offence against one Ndonga, a Kikuyu boy aged about 9 years, contra Sec.145(1) Penal Code, on 14th December: there are two alternative counts, Indecent assault upon a boy aged less than 14 years, contra Sec.146A. Penal Code, and Indecent practices between males contra sec. 146B Penal Code.

The offence is said to have taken place at a shop belonging to Nathu Ram situated upon Major Pedler's farm, Kiambu District, adjoining the Kiambu-Nairobi main road, at a distance of 5½ miles from Kiambu boma.

The accused is a Sikh employed as Manager of the shop who has been in Kenya only a few months; this is said to be his first employment in Kenya.

The Crown case is shortly this; that the boy Ndonga had been working at the shop for only a few days as cattle herd, looking after some working oxen which are kept at the shop and which at night are stabled in a shed at the back of the shop; that on 14th December the accused sought to entice Ndonga into the shop at about 1 p.m. (Ndonga being outside) by offering him some bread: that having failed in this the accused then called him into a shed at the back of the shop on the pretext of finding fault with him for not having cleaned out the cattle shed, seized him, threw him down and committed an unnatural offence upon him: that some seminal discharge having got upon Ndonga's clothes, Ndonga demanded to be given some new clothes, that accused refused this but gave him a piece of soap and told him to wash the clothes:



that Ndonga went down towards the river crying and was seen and questioned there by two men Njeroge and Kinyanjui (also called Chui); that at Njeroge's direction Ndonga then went to his brother Kairu in the labour camp a short distance away and complained to him of what had occurred: that Kairu would not believe him and told him to go away; that Ndonga returned, crying, to the river and told Njeroge and Kinyanjui this, whereupon Njeroge went to see Kairu himself: that meantime while Ndonga had been away to see his brother, the accused had come to the river and washed Ndonga's clothes which had been left there, in the river and gone away again; that Kairu and Njeroge then went to the shop, where by this time a number of natives had collected, and with several others were called inside by the accused: that there the accused admitted that he had been "Playing" with the boy and offered \$2.00 to settle the affair: that this was refused and that Kairu with Ndonga went to his employer who was given a letter to the Police at Kiambu and proceeded to Kiambu boma where they arrived at about 6.30: that they saw Mr. Stephens, Assistant Superintendent of Police at Kiambu, who caused Ndonga to be examined by the doctor, who saw a fresh tear in his anus which might have been caused by an unnatural offence having been committed upon him. It is also alleged that the accused interviewed Mutembei and Njeroge, two of the witnesses, that night and endeavoured to persuade Njeroge to follow Kairu and attempt to induce him not to lay a complaint at Kiambu.

The accused denied the whole story; he said that he had had occasion to find fault with Ndonga for not cleaning the cattle shed and in doing so had smacked him several times; that Ndonga and the witnesses were annoyed at this, that demands were made for money as compensation and that when these were refused, they concocted the story of the unnatural offence, seemingly in revenge.

The evidence of Ndonga requires corroboration; the Crown allege that there is ample corroboration provided by the medical evidence and by the fact that Ndonga complained at once to his brothers and by the accused's own conduct, i.e. that he was seen to wash Ndonga's clothes, and later offered money to hush the matter up and that his demeanour was that of a man who had done wrong, also that he admitted that he had played with the boy.

To consider Ndonga's evidence in more detail; it was to this effect; Ndonga was looking after the cattle which were grazing near the shop and about 1 p.m. went to shelter from the sun in the shop verandah: accused was in the shop; no one else was near: accused first called him inside to receive some bread; Ndonga went in but seeing that there was no bread, he went back to the verandah and then outside to the cattle: the accused then called him to the shed at the back: found fault with him about not cleaning the cattle shed, pushed him into the room next door, threw him down and committed the offence: the positions described were that accused knelt down, having unbuttoned his shorts, held Ndonga with his back on the ground, his buttocks on accused's lap and his legs under accused's arms, and inserted his penis into Ndonga's anus; he penetrated and had an orgasm, emitting semen; Ndonga struggled, accused withdrew his penis and some of the seminal discharge went on Ndonga's shorts and shirt: accused went through into the shop, Ndonga going round outside to the front of the shop and demanding to be given new clothes because his were spoilt: Accused chased him away, throwing a stone at him: Ndonga returned to the verandah and accused gave him a piece of soap and told him to go to the river and wash the clothes: Ndonga went towards the river crying, and was followed by accused who called to him to wash the clothes;

at the river Ndonga saw two men washing, Njeroge and Kinyanjui (also called Chui); they asked him who he was, not knowing him, and what was the matter: they heard the accused call to Ndonga to wash the clothes; Ndonga gave them some information; as a result they told him to go and inform his brother, Kairu, in the labour camp near by; he went; as he went he saw accused washing the clothes; Kairu did not believe him and he returned crying and informed Njeroge and Kinyanjui; Njeroge went to Kairu and Kairu and he made their way to the shop; Ndonga and Kinyanjui going there, Ndonga carrying the shirt and shorts which were wet from the river: there they saw a crowd of Kikuyu; the accused asked them to send the crowd away and to come into the shop; they did so, Kairu, Ndonga, Njeroge, Njau, Ngari and Mutembei; the accused offered Sh.20 to settle the matter which was refused: Ndonga had noticed a scar on accused's knee which was thought likely to have been caused by his scraping his knee on the rough cement floor of the shed where the offence was said to have occurred; he had in the interval seen the accused change his clothes and rub his legs with a sack; according to Ndonga at the interview in the shop when money was offered accused was wearing long trousers but he pulled one leg up to scratch himself and the scar was then noticed by Ndonga on his knee. After the money had been offered and refused Kairu and Ndonga got a letter from Mr. Pedler and went to Kiambu, arriving at about 6.30, Ndonga being examined by the doctor, Dr. Anderson, at about 7 p.m. Now Ndonga was in the witness box something like 4 or 5 hours: he was very strenuously cross-examined: he is of course very young: he gave a good impression and appeared to be a witness of truth; he did however break down on one or two points: one was with regard to the money; he said the accused produced two notes from his cash box, whereas all the remaining witnesses said the

he merely offered it and felt in his clothing as if to take out money or a key and did not produce any money. Ndonga also in the lower Court had said that no money was produced. Ndonga was apparently embroidering his evidence on this point and he practically admitted it.

Another point was with regard to the clothes which the accused was wearing when the money interview took place: Ndonga said he had changed into trousers; other witnesses said that he was wearing shorts; the accused said he was wearing trousers; possibly Ndonga may be right as to this therefore and the other witnesses wrong: there is however the discrepancy.

In the lower Court Ndonga had not said that accused followed him down to the river when he went down and saw Njeroge and Kinyanjui there. He was however corroborated in this by Njeroge and Kinyanjui and his evidence on the point had the imprint of truth, so that I am disposed to believe him on this point.

Generally as I have said Ndonga gave a good impression as a witness. I received the impression that he was genuinely taken aback by the alleged act committed upon him, that his naive story of demanding new clothes because his were spoilt was a genuine one, and also that neither Kairu nor Ndonga would have walked all the way to Mianbu at 2.30 or 3 o'clock that day merely to make a false report to the authorities about the accused.

How is the story corroborated? Firstly by Dr. Anderson, who saw a <sup>fresh</sup> tear in Ndonga's anus which could only have been caused by an unnatural offence or by the insertion of some object specially into the anus purposely to mislead and create false evidence. It seems incredible that Ndonga, Kairu or the other witnesses would have been sufficiently designing and ingenious to have thought of this.

The same would apply to Ndonga's clothes: they were

wet when Mr. Stephens at Kiambu saw them. I do not believe that any of these witnesses would have been far-seeing enough to fabricate corroborative evidence of this kind.

As regards the Medical evidence, I pause here to consider two points; Dr. Anderson said that supposing accused had held Ndonga in the position described (which he considered a feasible position for the offence) Ndonga's knees could have been flexed and the act of penetration per anum could have been effected even though Ndonga's shorts were round his ankles. The defence raised this point as disproving Ndonga's story but as I have said the Medical evidence is that the act could have been done. Further there were no marks of semen on the boy's body when seen by the Doctor. The defence made a great point of this, since Ndonga had not washed himself before the medical examination. As the boy had defecated, absence of semen in or round the rectum indicated nothing; but absence of semen on the body was more remarkable. For the defence it was assumed that the accused was alleged to have withdrawn his penis before completing an orgasm, but this does not follow from the evidence of Ndonga: the latter said that there was an emission in the anus and that accused withdrew: the orgasm may have been completed: in any event the clothes may have been in such a position as a result of the boy's struggles that it received any seminal discharge upon withdrawal. I do not think that absence of seminal marks on Ndonga's body proves the story untrue. In face of the positive evidence of the tear, it establishes nothing.

Corroboration of Ndonga's evidence was afforded by Njeroge and Kinyanjui: i.e. that they saw him come to the river followed by the accused who told him to wash the clothes; that when Ndonga went to Kairu they saw the accused go and wash the clothes in the river and they

asked him why he was doing this; that he said "Never mind", put the clothes down and went away; and that he subsequently offered the Sh.20, having admitted that he had played with the boy.

Njeroge was described in the course of Mr. Burke's argument in defence as a witness who was the chief agent in concocting a story against the accused. It was true that there were two discrepancies in his statement: in the lower Court he had made no mention of accused coming twice to the river, i.e. once following Ndonga and once later on to wash Ndonga's clothes after Ndonga had gone to Kairu; in this Court he mentioned these two visits: he said however that the first time the accused did not go as far as the river but spoke to Ndonga from a distance: his description of what occurred appeared to me to be very genuine and I can only think that he omitted the full story in the lower Court in error or that his story was not fully understood. I do not think that a witness of this class could possibly have invented the story about accused washing Ndonga's clothes.

The other inconsistency was with regard to the alleged visit of accused at night to Mutembei's hut, when he, Njeroge, had been called and when accused had, according to him, offered him money to go after Kairu, with the accused, to stop Kairu making a report to the Government. In the lower Court Njeroge had said that accused had offered him Sh.4/- to follow Kairu and said "and if he has not gone I will give them (i.e. Kairu and Ndonga) Sh.50/-" In this Court he omitted the reference to the Sh.50/- and denied giving this statement. This was certainly a discrepancy and probably showed Njeroge guilty of exaggeration in one of the proceedings but in my opinion it was not sufficient to discredit the corroboration which he provided of Ndonga's story. I believe that Njeroge was a true witness in regard to his main evidence: certainly

cause was shown why he should have invented this story against accused or have particularly desired to assist Ndonga or Kairu.

Kinyanjui who was not shaken in any way, corroborated Njeroge in the major part of his evidence.

Kairu bore out the evidence of the others as to Ndonga's complaint and his telling him to go away because he did not believe him; as to going to the shop when called by Njeroge and as to the interview in the shop, the partial admission by accused and the offer of 20/-. He appeared a fair witness without bias and was not shaken. As I have said before I do not think it in the least likely or even possible that he invented the evidence about the wet clothes all the different witnesses who spoke as to the interview at the shop say they saw the wet clothes lying there; nor would he invent the story that he first disbelieved Ndonga and sent him away. This would be too ingenious for this witness to invent in collaboration with Ndonga and Njeroge; and there would seem to be no reason for him to do so.

Mutembei, the farm headman, was evidently laid up that day with a bad leg; there is evidence that he was called to the shop and limped there, finding a crowd already there; that he went in with others, and as a person in authority he questioned the accused. Mutembei's evidence (borne out by the other witnesses) is that the accused admitted "playing" with the boy and offered 20/-; that they refused and went out and this witness went home and lay down. It was suggested that he had had a dispute with accused at the shop and this was why he had concocted a false story against him the accused. It seems incredible that Mutembei should choose a day when he was feeling ill to concoct and carry out an elaborate plot; in any event it is not clear why he should feel any particular ill-will against the accused nor why supposing he had decided to concoct a plot and had secured the co-operation of other witnesses, he did





in full view of traffic. If such a state of affairs prevailed the attention of passers-by would certainly have been attracted. The time-table outlined by the prosecution is much more likely and in accordance with facts: i.e. that the meeting at the shop lasted a short time, that the complainant and Kairu set out to their employer at about 6.30 and thence to Kiambu, arriving at 8.30.

I consider that Ndonga's story is amply corroborated and that the story of the accused is unworthy of belief.

I therefore convict him of an unnatural offence contra sec.145(1) Penal Code upon the first count, and upon the second count of an indecent assault contra sec.146 A Penal Code.

No record against accused:

Allocutus: I don't know how to satisfy the Court that I have not done the offence; if I have done anything like this God will punish me; I cannot interfere with what the Court does. It is false allegation.

I sentence accused under Section 145(1) Penal Code to two years imprisonment with hard labour and under Section 146 A. Penal Code to six months imprisonment with hard labour, the sentences to run concurrently.

C.A.G. Lane.

13.2.37.

13.2.37. Certified as a fit case for appeal on any ground.

C.A.G. Lane.

SUMMING UP

Gentlemen, Assessors, I will start by explaining the law. This man is charged on three counts, as you have heard. The first is unnatural offence and that is the chief count. The elements of the offence are that he is alleged to have had carnal knowledge against the order of nature with the boy and for it to be established you must be satisfied that he penetrated the boy's anus. The slightest penetration is sufficient in law to constitute the offence and it is not actually necessary to establish emission of semen, nor is it necessary in the case of a small boy like this to establish that the offence was done against his consent. It does not matter whether he consented or not; it would still be an offence if the evidence is there. Actually, of course, in this case it is alleged that it was done against his consent.

In an offence of this kind it is necessary that the boy's evidence should be corroborated and the Crown, as you have heard, say that it has been sufficiently corroborated. In law if the evidence fails to make out a complete charge against the accused, that is to say, penetration of the anus the Court is at liberty to convict the accused of an attempt always supposing that the evidence establishes an attempt without actual penetration.

The second charge is indecent assault on the boy, who is alleged to be under 14 years of age, under Section 146.A. of the Penal Code, and the essentials of this offence are that there shall be assault accompanied by circumstances of indecency on the part of the person who is accused. It is necessary to have corroboration and it is immaterial whether the boy consented or not.

The third charge is under Section 146.B. of the Penal Code, namely, indecent practices between males; the essentials of the offence are that the accused person should have committed an act of gross indecency with another male.

person. On this count it is necessary for the complainant to be corroborated and in the case of a boy of this age it is not material whether he consented or not. For the purposes of this case there is very little difference between the two latter counts because the Crown alleges that the accused did in fact commit an unnatural offence, and the defence is, of course, a complete denial of anything of the kind.

I will now turn to the evidence. I do not think it is necessary to go into the evidence in very great detail because you have had it all put to you very clearly by Mr. Phillips and Mr. Burke. The boy Ndonga said he was actually penetrated by the Accused. He said the Accused tried to get him into the shop by offering him some bread and that ruse failed because there was no bread, that later the Accused then called him into the cattle shed on the pretext that he had failed to clean up the shed and that he thus got the boy into the shed and committed the offence. You have heard Ndonga's evidence as to the position which the accused is alleged to have adopted after throwing him down; that he held him with his back resting on the ground and his legs pulled up under the accused's arms and his anus on or near the accused's lap. This boy said he had never had any experience of anything like this before and was taken aback completely and did not know what was happening to him, so that if he cannot describe everything meticulously it is perhaps not surprising. According to the boy it all happened within a very short time; it is only to be expected that if a person were committing an offence like this he naturally would not take any longer than he could help in case somebody came along and found him out.

The boy said that the accused put his penis inside the anus and discharged inside, there was a struggle and as the accused withdrew some of the semen went on the boy's

person. On this count it is necessary for the complainant to be corroborated and in the case of a boy of this age it is not material whether he consented or not. For the purposes of this case there is very little difference between the two latter counts because the Crown alleges that the accused did in fact commit an unnatural offence, and the defence is, of course, a complete denial of anything of the kind.

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The boy said that the accused put his penis inside the anus and discharged inside, there was a struggle and as the accused withdrew some of the semen went on the boy's

clothes. You will remember that the shorts were said to have been near the boy's ankles and his shirt was supposed to be pulled up over his chest, but you must remember that he is a very small boy and the actual distance between his chest and his private parts is naturally much less than in the case of a grown-up person. The defence has made a point which you have to consider, as to how the semen could have got on to the clothes while the clothes were in that position. It is reasonable to imagine that in the struggle and the boy obviously was struggling according to his own statement — some part of the tail of the shirt might have got down under his anus even though the front part was pulled up, and supposing that the boy's knees were bent and his shorts were hanging down over his ankles that some part of the shorts might have come in contact with the accused's penis as he was withdrawing it. It is for you to say whether you think it is possible or likely that the semen could have been able to get on to the clothes as the accused was withdrawing from the anus, and also whether it would be possible for the accused to hold the boy's legs like this under his arms and have intercourse with the shorts in the position described round the ankles. The doctor said that he considered it would be possible assuming that the boy's knees were flexed; he also said there was no reason why they should not have been flexed.

You have heard what the boy said about going down to the river and about the clothes and the accused following him and telling him to wash the clothes and that before this happened he (Ndonga) went round to the front of the shop and said to the accused "You have spoiled my clothes. You have to give me some more". It has been pointed out by the defence that it is a rather extraordinary thing for the boy to have done after he had been assaulted in this way. The boy gave the impression that he really

hardly knew what had happened to him. He said he had had no experience of unnatural acts in the past and he rather naively implied "The first thing I thought about were my clothes". The explanation might be that he had only had clothes for a day or two. He had only been working for a few days and he may never have done any work before for a European or an Indian and he may have been proud of his clothes and so have thought of his clothes before anything else. It is a naive statement and possibly for that reason you may think that it gives an air of genuineness to what the boy said. It seems rather difficult to imagine a person inventing a thing like that. If he had wanted to invent a story he would probably have said "I was feeling desperately upset. The first thing I did was to rush away to tell my brother". That is the boy's story and I leave it to you to say whether you think it is a genuine one.

After that he was alleged to have gone down to the river and the accused was said to have followed him and told him "You must wash those clothes. I have given you a piece of soap". Njeroge and Chui it is said told him to go off and tell his brother. They say they first asked him whose boy he was because they did not know the boy at all. Then you have the story that Njeroge and Chui saw the accused go down to the river, hastily wash the clothes and put them back on the bank; that they asked him why he was washing this boy's clothes and that he said "Never mind".

Then you come to the complaint. Kairu, according to the story, told the little boy he did not believe him, to go away and not disturb him and the boy is said to have come back still crying. Then Njeroge is said to have gone to explain to Kairu what it was all about and to have convinced Kairu that there was something wrong and that they went up to the shop.

I pause here to say that I would like you to

consider whether, if these people had invented the story, they would have thought of inventing the part about Kairu telling the little boy he was a liar. If they had all made up their minds to invent a story they would probably have said something like this: "We were all so infuriated at what had happened to this little boy that we rushed up to the European after taxing the Indian with what he had done and then went off to the Police", but the story told is that Kairu said "I am tired, go away, you are disturbing me for nothing, you are a liar", and that after Kairu was convinced, he and the other natives taxed the Indian at the shop. I would like you to consider whether it sounds a genuine story or not, and then I would remind you that the clothes which accused is said to have washed were seen to be wet by somebody who had no reason to invent anything at all and that is Mr. Stephens of Kiambu. The witnesses said that they saw them wet at the shop. Of course they may have invented that, but if the story had been concocted it would have required very careful thought and very great ingenuity on the part of Kairu to have made the clothes wet before Mr. Stephens saw them.

Then you come to the story of the Rs.20/-. There was an inconsistency about that. All the witnesses agree that the interview in the shop did not take very long. There was a crowd outside who were excited and the Indian was alarmed at this. One may suppose he being responsible for the safety of the shop would be alarmed; he evidently told the other people to go away as he wanted to talk to the ones actually concerned, and these six people went in; they agree in their evidence that the question was put to the accused "Is it true that you did this thing to this boy?" and that he answered "I was only playing". Then that he felt in his shirt or round his waist and

said "I will give you Sh.20/- to settle the matter". The inconsistency in this evidence was the statement of the little boy in cross-examination who said that he actually saw Sh.20/- in notes. The other witnesses all said no money was produced; and that they refused the offer before any money had actually been produced. I would like you to consider whether this discrepancy proves that they were all lying and that the whole story is false or whether it is merely a stupid exaggeration on the part of this little boy who thought fit to embroider his story.

As regards Kairu I have already commented on his part in the affair. He was not actually shaken on any point in cross-examination and his story did corroborate the boy and it also corroborated Njeroge and Chui. Native witnesses are not to be relied on very exactly about time but I think it is pretty clear from Kairu that he came back from work and was lying in his hut about 2 o'clock resting when he was called to the shop; that he had this interview with the accused and very shortly afterwards went with the boy to his employer, waited there for a time until his employer was ready, was given a note and went to Kiambu arriving at 6.30; according to that time-table the interview at the shop cannot have taken very long. I think it is reasonable to believe that Kairu was truthful when he said that it would take him 2 1/2 hours or so to get to Kiambu with a little boy who could not walk as fast as a grown-up person.

Njeroge was the person, as you know, who with Chui saw the boy first. There was an inconsistency in their evidence about the accused visiting the river twice. In the lower Court there is nothing to show that they said anything about the accused having come down to the river twice. In this Court they spoke of two visits by the accused to the river; one gathered that what they meant



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was that the first time he came about half way down the stream and called to the boy "You must wash those clothes quickly and then go back to the cattle" and that he then went back up the hill and when he saw the boy was going in the direction of the labour camp without washing the clothes he came down to the river and hastily plunged the clothes in the river and went back again. I would like you to consider as to whether you think it is a serious inconsistency about the two visits to the river.

It is suggested by the defence that Njeroge was the prime mover in inventing this story against the accused. It has been quite rightly said by Mr. Burke that it is not for the defence to suggest any reason why a person like Njeroge should invent a story, but I do say to you that you as Assessors and I as Court are entitled to examine the probabilities of such a story. No reason has been suggested as to why Njeroge, who appeared to me to be a frank sort of person, should invent the story. He was not shaken in his statement that he had never seen this boy before and I do not think the accused man has suggested that Njeroge disliked him in any way, so that we are entitled to consider those probabilities. There is an inconsistency in Njeroge's evidence, the story of the visit of the accused at night to Mutembei's hut and Njeroge being called to the hut. Njeroge mentioned this visit in the lower Court and stated that the accused said "It is better for me to give you Sh.4 - to follow M'ira to the I. they have gone to Kiambu and if he has not one I will give them Sh.50/-". But it is not so said in the lower Court but in this Court he said that the Accused offered him Sh.4/- to go to Kiambu to follow M'ira but he made no mention of the Sh.50/- and he denied saying this in the lower Court. Well there is an inconsistency there and whether it shows that Njeroge was lying throughout I leave it to you to say. Mutembei corroborated Njeroge

about the accused's visit at night but I would remind you that Mutembei did not say anything about this in the lower court. He explained this by saying "I was not asked about it", but I would point out to you that Mutembei did not appear to try to embroider the story in any way. He said "I was ill. Accused came and said he wanted Njeroge, and asked me to send somebody for Njeroge. When Njeroge came accused asked him to go outside and they went outside and I went back to bed. I didn't hear what they said".

Then Chui (who is also called Kinanjui) bore out Njeroge and he was not shaken in any way. His story was that the boy was seen coming down to the River when they were washing and that the accused came after him and told him to wash the clothes, and so on. He seemed to be a genuine witness as far as one could judge.

Mutembei has been commented on already. He was the headman of the farm and he is said to have had a grudge against the accused about some posho that he complained about. It is quite possible he may have had a grudge against the accused, but if so, why was he not the person who started this plot? According to the defence it was Njeroge who started the plot but if Mutembei was the person who had the grudge why did he not start the plot? He was ill that day; apparently he was dragged out of his hut with some difficulty and took part in this interview at the shop. He arrived, according to himself, when the people were going into the shop already and he questioned the accused and said "Is it true that you did this to the boy?" and according to him the accused admitted to some extent by saying "I was only playing". Mutembei goes on to say that he heard this offer of Sh.20 and saw the accused feeling in his shirt or at his waist either for money or possibly to get out a key and they refused it and he went away.

It does occur to me that if Mutembel had been the person who really wanted to get the accused into trouble why should he choose a day when he was feeling very ill to do it? Alternatively, if he had once started on this course of inventing the plot why did he not carry it through by going to Major Pedler or Bwana Jack and saying "We have caught this man doing so and so"? Instead of which he is said to have gone back to his hut.

Mgari again was apparently resting after work in his hut when he was called by a woman to go to the shop and he gave a statement which bears out the others as to what took place in the shop and was not shaken in cross-examination.

Then there was Njau who said he arrived and heard this offer of the £20. I would also remind you of the very important corroboration provided by the Doctor. The Doctor, of course, is an unbiassed witness; he has nothing to gain by telling a lie or exaggerating anything and he naturally would not do so. He saw a tear in this boy's anus which could only have been caused by an unnatural offence or by something in the shape of a penis being inserted deliberately into the boy's anus, and the tear was a very recent occurrence. That is very strong corroboration. He also gave evidence that the position described by the boy for the commission of this offence was a possible position if the boy's knees were flexed, as he assumed they were, but that he saw no marks of semen on the boy. Well, any semen that was in the anus would have been discharged when the boy relieved nature so there is nothing very much in that. Mr. Burke has stressed the fact that the Doctor saw no marks of semen on the boy's body and he says that that is so important as practically to negative this charge. All the boy said was "In withdrawing his penis some of the discharge went on my clothes"

and I do not think it is outside the bounds of possibility that there may have been no discharge on the boy's body at all. He is a very small boy and his body covers a very small area and it is just possible that the whole amount of the discharge, which after all may not have been very great as he had already emitted inside the anus, may have been taken by the clothes. But there is the fact, there was no mark of semen on the boy's body; he did make a rather extraordinary statement, as Mr. Burke has pointed out to you, by saying that he rubbed himself on the ground and destroyed the marks. Possibly that was a piece of exaggeration and he thought he would account for it in that way. I would remind you that the Doctor's evidence of the tear is strong corroboration. There was a discrepancy as to the trousers which accused was wearing at the interview at the shop. Ndonga says that he had changed from shorts into trousers. Other witnesses say that he was wearing shorts; they differ as to the colour of the shorts. They all say, however, that they saw a scar on the accused's knee.

The accused's story is shortly this, that the story was invented because he slapped the boy because he did not clean out the cowshed hence he told him to do so. The Crown argument is this, would these people have made up this very serious case against the accused, who was a person whom they had no particular reason to dislike or general grudge against simply because he had slapped the little boy? The accused admitted that it was quite an ordinary thing to do, that when you have a little boy working for you and he does something wrong you give him a slap. Even if Kairu and the boy wanted to get the accused into trouble would they have taken the trouble to go to Kiambu at a late hour to tell the false story because of this minor occurrence? As you know natives like Kairu who have been working are inclined by 2 or 3 in the afternoon to look on the day as finished.

and to go to bed early and in the ordinary way they would not move far from their houses; so that it does seem a big undertaking for Kairu to go to Kiambu to complain after working since morning on account of a minor thing like the boy being slapped.

The accused showed that he knew enough Swahili to carry on an ordinary conversation and he gave the story of the quarrel with Mutembei. He described the situation at the shop thus, that there was <sup>an</sup> excited mob outside the shop for an hour and a half. The main road goes just past the shop, you have probably seen it yourselves, and motor lorries with produce etc. go past constantly; according to the accused he did nothing to protect himself or get help in the course of this hour and a half. An ordinary shop-keeper would have been somewhat concerned for his own safety and for the contents of his shop if an infuriated mob had raged outside for an hour and a half and would have sought help.

Now I think those are the facts but I would remind you that the accused must be given the benefit of any reasonable doubt you may have. The facts in his favour are, the absence of semen on the boy's body and the inconsistencies in the evidence which I have pointed out to you. You know that there are three counts, the first being unnatural offence, the second being indecent assault and the third being indecent practices between males - they are alternative, of course, - and I leave to say whether you consider him guilty or not guilty on these three counts.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 11 OF 1937

REX

PROSECUTOR

versus

MOHINDER SINGH S/O KARAM SINGH

ACCUSED.

DECLARATION VERIFYING TRANSCRIPT OF  
SHORTHAND NOTES OF SUMMING UP

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the Summing Up at the trial of the above case, to which Transcript this Declaration is annexed, I the said James Stanley Templeton certify that this is a correct record of the Summing Up at the said trial.

DECLARED at Nairobi this 24<sup>th</sup>

— day of February, 1937,

Before me:

*James Stanley Templeton*

*Edward H. Smith*

REGISTRAR,  
H.M. SUPREME COURT OF KENYA.

KENYA.

NO. 99



248  
GOVERNMENT HOUSE  
NAIROBI,  
KENYA

8 February, 1937.

Sir,

Gov 21323  
-----  
In accordance with the instructions contained in Mr. Thomas' despatch No. 762 of the 18th July, 1924, I have the honour to transmit two copies of the transcript of the shorthand notes taken at the trial of one, Raymond Letcher who was charged before the Supreme Court of Kenya in Criminal Case No. 136 of 1936 with the offence of causing grievous harm to Odongo son of Bodo, contrary to Section 214 of the Penal Code.

2. The accused was found guilty and sentenced to imprisonment with hard labour for twelve months.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*W. Ormsby Gore*  
ACTING GOVERNOR.

THE RIGHT HONOURABLE  
W. ORMSBY GORE, P.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.



274

I N D E X

PLEA . . . . .	1
CHARGE TO THE JURY . . . . .	2
OPENING ADDRESS FOR PROSECUTION . . . . .	5
<u>EVIDENCE FOR THE PROSECUTION:</u>	
GOBHANBHAI VALLABHAI PATEL . . . . .	Examined 7
	Cross-Examined 8
ODONGO S/O BODO . . . . .	Examined 8
	Cross-Examined 13
WILLIAM HARVEY GOWANS . . . . .	Examined 14
AWINDA S/O BODO . . . . .	Examined 15
	Cross-Examined 20
	Re-Examined 25
PERCY BOOTH . . . . .	Examined 25
	Cross-Examined 25
GEORGE MORRISON BOOTH . . . . .	Examined 25
	Cross-Examined 25
NEIL ALEXANDER KEITH . . . . .	Examined 26
	Cross-Examined 27
THOMAS KERR . . . . .	Examined 27
	Cross-Examined 28
WANJAIL S/O OKINDA . . . . .	Examined 29
EDWIN EWART BRISTOW . . . . .	Examined 30
	Cross-Examined 35
	Re-Examined 37
ABDI NOOR . . . . .	Examined 37
	Cross-Examined 38
MULWA S/O MONGIN . . . . .	Examined 38
	Cross-Examined 39
<u>EVIDENCE FOR THE DEFENCE:</u>	
RAYMOND LETCHER (ACCUSED) . . . . .	Statement 40
	Cross-Examined 45
EDWARD JAMES LETCHER . . . . .	Examined 66
	Cross-Examined 70
	Re-Examined 71
FURREST LOUDON MEGSON . . . . .	Examined 72
MUSA S/O OTUNGA . . . . .	Examined 74
	Cross-Examined 75
MBANGA S/O MYOGUTO . . . . .	Examined 78
ADDRESS BY ACCUSED: . . . . .	80
SUMMING-UP . . . . .	82
VERDICT OF JURY . . . . .	84
SENTENCE . . . . .	85

IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HOLDEN AT KITALE

19th January, 1957

B E F O R E

HIS HONOUR MR. JUSTICE HORNE

(AND A JURY)

CRIMINAL CASE NO. 156 OF 1956

R E X

versus

RAYMOND LETCHER

Transcript of Shorthand Notes taken by J.S. Templeton,  
Official Shorthand Writer to H.M. Supreme Court of Kenya.

THE HONOURABLE THE ATTORNEY GENERAL (MR. W. HARRAGIN) - with  
him MR. A. PHILLIPS, CROWN COUNSEL, appeared for the  
Prosecution.

The Accused was not defended by Counsel.

P L E A

THE DISTRICT OFFICER: Raymond Letcher, you are arraigned  
before this Honourable Court on the Information of the  
Attorney General on behalf of our Lord the King charged  
with the offence of causing grievous harm contrary to  
Section 214 of the Penal Code in that on or about the  
7th day of September, 1956, in the Rift Valley Province  
you unlawfully did grievous harm to Odongo son of Bodo.

HIS HONOUR MR. JUSTICE HORNE: Before you plead as you are  
not defended by Counsel I think I ought to explain the  
charge. You are charged with causing grievous bodily  
harm without any specific intent and it is an offence  
for which you may be liable to imprisonment; the maximum  
period is seven years. It is for you to say how you  
wish to plead.

THE DISTRICT OFFICER: Do you plead guilty or not guilty?

ACCUSED: I plead Not Guilty.

(The Jury were drawn:

A.M. Barberton.

A.W. Down.

W.J. Carter.

W.B. Tisdall.

R. Cardale Luck)

Accused was warned to challenge but made no objection.

The Jury were sworn and appointed W.B. TISDALL to be their foreman.

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THE DISTRICT OFFICER: Gentlemen of the Jury, the Prisoner Raymond Letcher stands charged on this Information with causing grievous harm in that he did on or about the 7th day of September 1936, in the Rift Valley Province, unlawfully cause grievous harm to Odongo son of Bodo. To this Information he has pleaded Not Guilty and it is your charge to say, having heard the evidence, whether he be Guilty or Not Guilty.

THE ATTORNEY GENERAL: May it please Your Lordship, I appear for the Crown. Mr. Phillips is with me.

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THE HONOURABLE THE ATTORNEY GENERAL OPENED THE CASE ON BEHALF OF THE PROSECUTION.

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THE HONOURABLE THE ATTORNEY GENERAL ADDRESSES  
ON BEHALF OF THE CROWN:

May it please Your Lordship, Gentlemen of the Jury, as you have heard the prisoner is charged under what is known in our Code as Section 214 which reads as follows:-

"Any person who unlawfully does grievous harm to another is guilty of a felony, and is liable to imprisonment for seven years."

A very simple, straightforward charge, and there will be no intricacies of the law to worry you and the facts which will be disclosed if the witnesses for the Crown give the same evidence before you as they did in the lower Court are also simplicity itself. The facts are as follows:-

At the beginning of September the accused who is a Planter living about 17 miles away from here, a maize Planter, was returning to his estate some time during the morning. As he turned in from the main road to the road which leads to his estate, a road which in fact does not run actually through his estate but runs through the adjoining land-owner's estate I should say about 20 or 30 feet away from his boundary the whole way down, and when he had proceeded along this road an extremely short distance, some 20 or 30 yards, he appears to have seen two natives. They were separated by a distance of about 30 to 40 yards. These two natives happened to be brothers and the native who was injured in this particular case also, unfortunately for the Accused, happened to be the second headman on the accused's neighbour's estate and also this native had obtained leave from his master because his eyes were troubling him and he wanted to go to see a Doctor, and was going along the road which he and everybody else used in order to get to the main road from his master's estate. Now it appears that when the accused turned into this side road which, as you

probably all know, is a road of access though it is not a public road, he appears to have become suspicious of these two natives. He stopped the two natives and asked them various questions and I may tell you that the first native was carrying a basket in which he had a blanket. Behind him was his brother who was carrying nothing and he says he was in the road of access when the accused accosted him. There will be a conflict of evidence as to whether he was in the grass at the side of the road or on the road itself. I will explain the lie of the land. If you are proceeding into the estate on your right hand some 20 feet from the road you will find — or if you had been there on that day you would have found — the mealies belonging to the accused. You will hear from the Crown evidence that in fact those mealies were quite unripe and were in no state even for a native to pick. On the left hand side is just ordinary thorn bush and grass; No cultivation whatever, so that from the point of view of the Crown's case it is immaterial to me whether the injured man was on the road or whether he was on the grass. Wherever he was, the accused shouted to him. The injured man did not come up to him as he expected but started to move away whereupon the accused started up his car and went after him and to cut a long story short he pursued him, because the native started to run, for a distance approximating 300 yards over this thorn bush land.

The first point I wish to make with regard to that is this, it is a matter of fact, I will come to the law later. If you pursue a person over country such as that for a distance of approximately 300 yards you cannot express surprise if at some point he should fall. The Crown case is that it is quite possible that while he was being pursued he did trip and fall and at this stage the accused was pursuing him closely and was either driving immediately

behind him or when he saw the native doubling he tried to get him off. Actually the Crown case of what happened is that the native doubled round and made an attempt to get to the road. Seeing that he would have been in a far worse position if he had got to the road he attempted to double back. The accused made a short turn to the right and to put the matter very shortly he crashed into this native and broke his back and the native is lying a cripple to-day. After the event the accused did the proper thing. The native was dragged a short distance and the accused got him out and eventually put him in his car and had him washed and took him to the Hospital. This has nothing to do with the case but I only mention it to show that the accused did do the proper thing and took the native to the Hospital.

Those are the short facts and I think there will be very little in dispute as to the main details of those facts, but I would like to point out to you, Gentlemen of the Jury, that it is an unlawful thing to hunt a native in the same manner as you might hunt a pig when pig-sticking. It may be a crude way of putting <sup>it</sup> but from the Crown's point of view that is exactly what did happen. The accused called the native and because he did not get the reply he desired or for some other reason best known to him the accused, in a car which was not the newest type of car nor with the best brakes, pursued him over this rough land. Let me mention again that from the Crown's point of view it is perfectly immaterial whether the native stumbled or whether he was knocked down because in any event I say that it was unlawful for the accused to have chased the native in the way he did. It is unlawful to put anybody in terror either of their lives or of grievous hurt or anything else. I mention as an example a case which was tried at the Cambridge Assises of which Your Lordship will

know where a man with the intention of frightening another deliberately aimed a shotgun at him having not the slightest intention of firing that shotgun but merely to give him a fright. The frightened man caught hold of the gun and in the struggle the gun went off and there is no suggestion that the accused deliberately pulled the trigger. The Court tried the case and the accused was convicted, rightly convicted, of unlawful wounding.

Now in this present case there is no question of intent for you to consider at all. The Crown has not sought to prove that there was any intent. What we say is that the accused unlawfully did grievous bodily harm to this native by the name of Odongo. You will hear from the Doctor that the native has his back broken — that is the most serious part of it — that he had two teeth knocked out, though I am not suggesting that it was the motor car of the accused which did this, and he had various other injuries.

My first point will be that grievous harm was done, and the next point is that it was done unlawfully; and I suggest to you that it will be for you to say — and you will take the law from His Lordship when he sums up to you — that it is an unlawful thing for anybody to chase another and to run him down whether he deliberately intends to run him down or only to chase him and to put him in dread. The whole of that vicinity is perfectly flat ground and he drove in such a way that although he knew he was chasing a man who was doubling hither and thither he was quite unable to prevent his car from running over that man.

I want to make this point clear to you, that so far as the Crown's case is concerned it makes no difference whatever to the case for the Crown whether the man was actually running when he was hit or whether he fell down before he was hit. It makes no difference whatever. The accused hit the man and unfortunately for him he will have to stand

his trial.

That, My Lord, is the case for the Crown

THE CASE FOR THE PROSECUTION

GORDHANBHAI VALLABHAI PATEL sworn:

EXAMINED BY THE ATTORNEY GENERAL:

- Q. 1. Your full name is Gordhanbhai Vallabhai Patel? --  
A. Yes Your Honour.
- Q. 2. Are you the Assistant Surgeon in-charge of the Kitale Native Civil Hospital? -- A. Yes.
- Q. 3. Do you remember the 7th September last? -- A. Yes.
- Q. 4. Who was brought in that you can remember on that day?  
A. Odongo son of Bodo.
- Q. 5. At what time did he arrive? -- A. At about half past one.
- Q. 6. How did he get to the Hospital? -- A. Mr. Letcher brought him.
- Q. 7. What was his condition on arrival? -- A. He was not quite conscious. He had injuries on his back and he was bleeding from the mouth.
- Q. 8. And that was all you saw at first? -- A. Yes.
- Q. 9. Did you then examine him? -- A. Yes sir.
- Q. 10. And then what did you find had happened to him? --  
A. He had a fracture and dislocation of the spine and two upper teeth gone.
- Q. 11. Recently knocked out, you mean? -- A. Yes sir.
- Q. 12. Did you notice anything about his eyes? -- A. Yes, he had swelling of one eye.
- Q. 13. Now just let us clear that up at once. Do you think that the swelling of the eye had anything to do with an accident that day? -- A. Yes, the eye was in connection with the accident.
- Q. 14. Now with regard to this injury to the back, could you give the Court any idea of how it might have been caused? -- A. It could have been caused by a heavy



knock on the back with something blunt.

Q.15. How did Odongo progress in Hospital? Did he get quite well? -- A. He is still paralysed. His lower limbs are paralysed.

Q.16. Is there any indication that he will get better? -- A. I don't think his paralysis will get better.

Q.17. In other words as far as you can tell he is paralysed in his lower limbs for life? -- A. Yes.

CROSS-EXAMINED BY ACCUSED:

Q.18. ACCUSED: When Odongo arrived in Hospital you say he was semi-conscious? -- A. Yes.

Q.19. How long did it take him to regain consciousness? -- A. He came to consciousness at about 3 o'clock; about an hour and a half after coming to the Hospital.

Q.20. When I came to the Hospital were you there? -- A. No you came to my house to fetch me.

Q.21. What time was that? -- A. About half past one.

NO RE-EXAMINATION

ODONGO son of BODO affirmed: (Jaluo Interpreter Onyango Oluthi duly sworn  
EXAMINED BY THE ATTORNEY GENERAL: (Interpreted)

Q.22. On the 7th September last year where were you working? A. I was working for Mr. Booth.

Q.23. Were you working on that day? -- A. That day I did not work. I asked permission from my master.

Q.24. What were you going to do that day? -- A. My eyes were bad so on that account I spent the whole day at the house.

Q.25. Did you leave the house at all? -- A. I did not spend the whole day at the house. I went part of the way with my brother who came to see me on Sunday.

Q.26. Do you say your brother was with you? -- A. Yes.

Q.27. What is his name? -- A. Awinda.

Q.28. Did you go anywhere with your brother? -- A. As he was going away I went with him a part of the way

with the intention of returning home when we reached the main road.

- Q.29. You went with him with the intention of returning when you reached the main road? -- A. Yes, the P.W.D. road.
- Q.30. What course did you take in order to reach the main road? -- A. There is a small road which leads from our farm to the main road. We took that road.
- Q.31. Did you get as far as the main road? -- A. We did not reach the main road but we were near it.
- Q.32. What happened when you were near it? -- A. When we had nearly reached the main road I remained a little behind and my brother was in front.
- Q.33. What happened then? -- A. My brother met the Bwana.
- Q.34. Which Bwana? -- A. Bwana Letcher who is here in Court.
- Q.35. When your brother met Bwana Letcher first tell us how Bwana Letcher was proceeding. Was he walking or riding or what? -- A. Bwana Letcher was in a motor car.
- Q.36. When your brother met Bwana Letcher how far were you away? Point out to us. -- A. From where I am now to where I crossed the main road. (Between 30 and 40 yards).
- Q.37. When your brother met the accused whereabouts were you? -- A. I was on the road.
- Q.38. And was your brother also on the road? -- A. Yes.
- Q.39. Do you know if any conversation took place between your brother and the accused? -- A. Yes.
- Q.40. Could you hear what was said? -- A. Yes, I could hear.
- Q.41. Was your brother carrying anything? -- A. He had a kikapu (basket) inside which he had a blanket.
- Q.42. And were you carrying anything? -- A. No.
- Q.43. Did your brother have a stick do you know? -- A. Yes he had a small stick.
- Q.44. Did you have anything? -- A. I also had a small stick.

- Q.45. Now you tell me you could hear what the accused said to your brother. What did he say? -- A. I heard the Bwana asking "Where have you come from".
- Q.46. What did your brother reply? -- A. My brother replied "I have come from Mr. Booth's place".
- Q.47. What else did you hear? -- A. I heard him asking "Where is your kipande?"
- Q.48. What did your brother say? -- A. My brother said "I had a kipande but I forgot it yesterday at the place where I was working".
- Q.49. Yes, what next? -- A. I heard the Bwana telling my brother "If you go walking about like this without your kipande I will beat you".
- Q.50. What happened then? -- A. My brother passed on and continued to walk ahead. Then the Bwana came towards me in his motor car. He drove his motor car and came towards me.
- Q.51. What happened next? -- A. When the Bwana came up to me I moved away on the grass to give him room. Then I saw he was still following me on the grass.
- Q.52. You say he was following you on the grass. Up to this point had he spoken to you? -- A. No, he did not speak to me.
- Q.53. When you saw him following you on the grass what did you do? -- A. I started to run.
- Q.54. Tell us in which direction. -- A. I ran on the grass towards our shamba.
- Q.55. And what did the accused do? -- A. He proceeded to chase me in the motor car until he caught me in the front and made me take another direction.
- Q.56. And when you took another direction which direction did you take the second time. You say you were going towards your shamba the first time and now you say you turned in another direction. -- A. He cut me off and made me come back.

- Q.57. Where did you come back to? -- A. I turned back running towards the road where I came from.
- Q.58. Then what did the accused do? -- A. I got tired then.
- Q.59. Had you run some distance then? -- A. Yes I had run for a long distance.
- Q.60. And then what happened? -- A. When I was tired he came with the motor car and hit me.
- Q.61. What was your position at the time you were hit? -- A. After I was hit with the motor car the motor car went over me and then I was without any strength.
- Q.62. At the time you were hit were you running, lying down, walking, or what were you doing? -- A. I was very tired and I had stopped running and was walking slowly.
- Q.63. You were walking at the time you were hit? -- A. Yes, slowly.
- Q.64. Immediately before you were hit were you going along in your normal way or did you stumble? -- A. I did not stumble.
- Q.65. What part of your body did the motor car hit? -- A. My back (Witness points to a spot about the waistline)
- Q.66. Do you mean that the motor car came up behind? -- A. Yes.
- Q.67. At that time the motor car was not trying to head you off? -- A. No.
- Q.68. Was the motor car going slowly when it hit you? -- A. It was going fast.
- Q.69. After you were knocked down did the accused get you out, put you in the motor car and take you to the Hospital? -- A. After I was hit the motor car dragged me as far as from here to the wall (Witness indicates a distance of 6 or 7 yards). The Bwana took me from under the car and put me down and he drove the motor car away and left me there.

- Q.70. And what happened then? -- A. Then he came back and asked "Are you still here" and I said "How could I walk after you have killed me?". He asked me "Whose boy are you" and I told him I was Mr. Booth's boy. Then I told him he was a friend of Mr. Booth and he had seen me passing there every day and I asked him why did he hurt me. At this time a lot of blood was coming from my mouth. I had lost 4 teeth. I also lost Sh. 12/- which was in my trousers.
- Q.71. And could you walk? -- A. No, I could not walk.
- Q.72. Now to go back a little, why did you run? -- A. I saw the motor car was coming towards me and it was going to run me over so I ran away.
- Q.73. Can you give the Court any idea as to why the motor car was running after you? -- A. I don't know. It was the Bwana's affair.
- Q.74. Did the Bwana say anything to you before he started chasing you in the motor car or whilst he was chasing you? -- A. No.
- Q.75. Had you got your kipande with you at the time? -- A. No I had left it in my house. If the Bwana wished to speak to me when I was tired he could have got out of his car and spoken to me but he only wanted to kill me.
- Q.76. I want to know whether the accused said anything to you before he started to make you tired. -- A. No he did not say anything to me before he started to chase me.
- Q.77. Do you know Mr. Letcher's maize? -- A. Yes.
- Q.78. Had you been into his maize that day? -- A. No, our Bwana on our shamba had planted a lot of maize for us and it was quite unnecessary for us to take anybody's maize.
- Q.79. Did you go into the maize either to take it or for anything else? -- A. No I did not go into the maize

Q.80. And can you give the Court any idea at all why the accused wanted to chase you? -- A. I do not know. This is only the affair of the Bwana because I left the road to make room for him to pass.

CROSS-EXAMINED BY ACCUSED:

- Q.81. ACCUSED: Did you ask permission to harbour a friend of yours from Mr. Booth on Sunday night? -- A. No I did not go to the master. At the time he came it was raining heavily and I did not go to see the Bwana to get permission.
- Q.82. Were you not too sick to walk up to the main road from Mr. Booth's labour lines? -- A. I was not very ill. It was only about the eyes.
- Q.83. Were you carrying anything at the time you saw my car coming along the road? -- A. I was carrying nothing.
- Q.84. Why did you both leave your kipandes at home? -- A. I did not intend going far away. I was only going a short distance and coming back again.
- Q.85. Did you hear me talking to your brother Awinda? -- A. Yes.
- Q.86. Did I do anything to him? Did I frighten him or do him any harm? -- A. You did not get down from your car but you spoke to him and quarrelled with him and told him not to go about without his kipande.
- Q.87. Did I stop my car after I left your brother? -- A. No.
- Q.88. Did I actually chase you in the car? -- A. Yes, you chased me.
- Q.89. Did you run straight or did you dodge or what did you do? -- A. I went on straight. I did not dodge.
- Q.90. Did I cut you off at all? -- A. When you had nearly caught me you cut me off in the front.
- Q.91. Was my car facing you then? -- A. Yes.
- Q.92. How did I strike you in the back then if my car was facing you? -- A. When you cut me off in front I

turned round and I was running again in front of your motor car.

Q.95. Did you actually try to run across the front of my car whilst I was in motion? -- A. You turned round and I was running in front of your motor car.

Q.94. You didn't try to pass me at any time? -- A. No.

Q.95. If you were so tired after I chased you why did you not stand? -- A. I got tired but I did not stop. I was walking very slowly. I was powerless. Even if you had got out of your motor car you could have caught hold of me.

Q.96. Were there any trees there that you could hide behind? -- A. There were trees down below.

Q.97. Were there no trees that you could hide behind whilst you were running? -- A. No.

Q.98. Not even one? -- A. There were trees in front of me but I was defeated. The motor car caught me before I reached those trees.

Q.99. Do you smoke bhang at all? -- A. No. When you were carrying me away did you find any bhang or anything like it in my possession?

NO RE-EXAMINATION.

WILLIAM HARVEY GOWANS sworn:

EXAMINED BY THE ATTORNEY GENERAL:

Q.100. Is your name William Harvey Gowans? -- A. Yes.

Q.101. And are you a Medical Practitioner practising in Kitale? -- A. Yes.

Q.102. Do you remember seeing the last witness Odongo? -- A. Yes.

Q.103. About what time did you see him? -- A. Some time in the afternoon, on 7th September.

Q.104. What was he suffering from shortly? -- A. Fractured dislocation of the spine and many abrasions.

Q.105. Were the injuries that you saw consistent with his having been knocked down by a motor car? -- A. Yes.

Q.106. And if he had been knocked down by a motor car what part of his body would it have been that came in contact with that car? -- A. His back.

HIS HONOUR MR. JUSTICE HORNE: What injury had he to his back that you could notice? -- A. A fracture and dislocation.

HIS HONOUR: Whereabouts? -- A. In the small of the back.

HIS HONOUR: What particular place do you call that in medical language? -- A. The dorsal lumbar region.

HIS HONOUR: Could a man get an injury like that by being run over in a different way; by being struck sideways, for example? -- A. I do not think so.

HIS HONOUR: Do you definitely attribute the injury to being struck by a car while standing up? -- A. Yes.

NO CROSS-EXAMINATION BY ACCUSED:

AWINDA son of BODO affirmed.

EXAMINED BY MR. PHILLIPS: (interpreted)

Q.107. Do you know the injured man Odongo who has just given evidence? -- A. Yes.

Q.108. Is he related to you? -- A. Yes he is my elder brother.

Q.109. Do you know how he received his injuries? -- A. Yes.

Q.110. How? -- A. I remember he was injured by a motor car. The motor car hit him on the back and his teeth were knocked out.

Q.111. Were you present when that happened? -- A. Yes.

Q.112. About how many months ago was that? -- A. About 5 months ago.

Q.113. What were you doing on that day? -- A. My brother was taking me a part of the way.

Q.114. Where from? -- A. We were coming from Mr. Booth's shamba.

Q.115. Was that where Odongo worked? -- A. Yes.

Q.116. Where did you work at that time? -- A. On Mr. D'Olier's farm.



- Q.117. What were you doing there at that time? -- A. I went to see my brother Odongo.
- Q.118. Did you go on that day? -- A. I went there on Sunday.
- Q.119. And when was Odongo injured? -- A. On Monday.
- Q.120. Did you spend the night with Odongo? -- A. Yes.
- Q.121. And you say that he was coming to see you on your way? -- A. Yes.
- Q.122. Where were you going? -- . I was going to the place where I worked.
- Q.124. Were you carrying anything? -- A. I had a kikapu.
- Q.125. Was there anything in it? -- A. There was a blanket in the kikapu.
- Q.126. Were you carrying anything else? -- A. Only a blanket.
- Q.127. Was Odongo carrying anything? -- A. No.
- Q.128. Had he anything in his hand at all? -- A. He had a small piece of cloth.
- Q.129. Nothing else? -- A. No.
- Q.130. Did you and your brother walk together or were you separated? -- A. He was behind me a little bit.
- Q.131. And what road did you take? -- A. The road which goes from Mr. Booth's farm to the main road.
- Q.132. Did you meet anyone when you were going along that road? -- A. No.
- Q.133. Did you go all the way home without seeing anyone? -- A. We met this Bwana here (Accused).
- Q.134. Was he on foot? -- A. He had a motor car.
- Q.135. Were there any other people with him? -- A. His child was with him.
- Q.136. Where were you with reference to the main road when you first saw his car? Had you reached the main road or not? -- A. We had not reached the main road.

- Q.137. Can you indicate how far away you were from the main road when you saw his car? -- A. From here to the other side of the Hospital. (100 to 150 yards).
- Q.138. And you said Odongo was behind you. How far was he behind? -- A. As far as from here to the hedge outside the Hospital Compound. (About 50 yards).
- Q.139. Do you know where Odongo was walking at that time? Was he on the road? -- A. He was on the road.
- Q.140. And you say that you saw the accused coming in his car? -- A. Yes.
- Q.141. Did he come up to where you were? -- A. He came near me and he stopped me.
- Q.142. Did he say anything? -- A. He asked me where I had come from. I told him I had come from Mr. Booth's place. He asked me where I was going and I told him I was going to Mr. D'Olier's place. He asked me for my kipande and I told him I forgot my kipande at our shamba.
- Q.143. Did he say anything else? -- A. He asked me "Are people allowed to walk about without their kipandes?" Then I went away.
- Q.144. In which direction did you go away? -- A. In the direction of our shamba.
- Q.145. Mr. D'Olier's shamba? -- A. Yes.
- Q.146. Did you see what Odongo was doing while you were having this conversation with Mr. Letcher? -- A. I could see he was following me.
- Q.147. You said the accused had his child with him. Was there anyone else in the car? -- A. Nobody else.
- Q.148. Do you know anything more of what happened after you proceeded on your way? -- A. I saw when Mr. Letcher met Odongo. Odongo went on the grass to make room for the Bwana. He went towards Odongo in the motor car and Odongo ran into the grass.

He chased Odongo on the grass in the motor car. Then he caught Odongo in the front and Odongo was trying to come towards me on the road where I was when he was hit.

- Q.149. I want you to try and remember and to tell His Lordship and the Jury exactly what you saw with your own eyes. If you heard anything about what happened from your brother try and forget about it for the moment. What you are required to say in Court is just what you saw with your own eyes and nothing else. You say you started to walk on after this conversation with Mr. Letcher was finished? -- A. Yes.
- Q.150. You were then facing away from the car-were you not? A. Yes.
- Q.151. Did you turn round again and look behind you? -- A. When he met Odongo I looked round.
- Q.152. Why did you look round? -Did anything attract your attention? -- A. I looked round to see whether the Bwana would speak to Odongo as he spoke to me.
- Q.153. And what did you see when you first turned round? -- A. I saw Odongo move on to the grass to make room for the Bwana and then the Bwana followed him in the car.
- Q.154. When you looked round was the motor car on the road or on the grass? -- A. At that time I saw Odongo on the grass and the Bwana followed him on to the grass.
- Q.155. How far away were you when you turned round? -- A. About as far as from here to that flower. (Witness indicates a flower in the Court grounds about 20 yards away).
- Q.156. Had you reached the main road or not? -- A. Not yet.
- Q.157. Can you indicate about how far you were away from the junction of the main road? -- A. From here to

the hedge outside the Hospital Compound (50 yards).

- Q.158. When you turned round and saw Odongo and Mr. Letcher's motor car on the grass what did you do? -- A. I stood still at the place I was.
- Q.159. Did you watch what happened? -- A. Yes.
- Q.160. Will you tell His Lordship and the Jury exactly what you saw? -- A. I saw him chasing Odongo with the motor car until he got up to him. He knocked him down. He went over him and then I saw him removing him from under it.
- Q.161. Can you say about how far the car had travelled after leaving the road until the accident occurred? -- A. About as far as from here to the Hospital (100 to 150 yards).
- Q.162. Did Odongo run in a straight line all the way until he was struck? -- A. He was not going straight. He was turning about.
- Q.163. In which direction did he run first of all? -- A. In the direction of the forest.
- Q.164. Was that directly away from the road? -- A. Straight from the road to the forest.
- Q.165. When he first turned did he turn to his right or his left? -- A. He turned to his left side.
- Q.166. Was he then going towards the main road or away from the main road? -- A. He was running towards the road and towards the place where he left me.
- Q.167. Did the motor car follow him? -- A. Yes.
- Q.168. Then did he turn again? -- A. No, he did not turn again.
- Q.169. You say you saw Odongo knocked down. Whereabouts was the place where he was knocked down? -- A. In the grass.
- Q.170. Was it near the main road? -- A. No it was not near the main road.

Q.171. How far away was this place where he was knocked down from the road leading to Mr. Booth's farm? --

A. About the same distance as from here to the Hospital (100 to 150 yards).

Q.172. Did you keep the car in sight all the time from the time it left the road to go into the grass until the accident happened or did you lose sight of it?

A. I saw the whole thing. I had the car in sight from the time it left the road until the man got underneath.

Q.173. And did you see Odongo all that time? -- A. Yes I saw Odongo all the time from the time he left the road until he fell down.

Q.174. What was Odongo doing all that time? Was he walking or running or what? -- A. He was running.

Q.175. Was he running fast? -- A. Yes very fast.

Q.176. And was the car far away from him. About what distance was it from him? -- A. About from here to those trees ahead of the car. (Witness indicates trees a short distance away).

Q.177. Did you actually see Odongo knocked down by the car? -- A. Yes.

Q.178. Was Odongo then still running or what was he doing? -- A. He was running.

Q.179. After he had been knocked down what did you do? --

A. I still stood on the road. I was afraid. I did not go there.

Q.180. Did you see Mr. Letcher pick up Odongo and put him in the car and take him away? -- A. Yes.

CROSS-EXAMINED BY ACCUSED:

Q.181. ACCUSED: Did I speak to you again after you turned and left my car? -- A. No.

Q.182. Did I stop my car again after I left you or not? -- A. No.

Q.183. Did you see me swerve my car towards Odongo whilst he was running? -- A. Yes.

Q.184. How could I swerve my car towards him if I was chasing him? -- A. When Odongo gave way to make room for you on the road at that time you went after him.

Q.185. You say you saw me swerve my car. How could I swerve if I was chasing him? -- A. When you cut Odongo off in front and made him come back towards the road I saw you swerve.

Q.186. Did you actually see me cut him off? -- A. At that time he was near the forest. Then you made him come towards the road again.

Q.187. Did you speak to Odongo after I left you? -- A. No.

Q.188. Did you see me pick up Odongo after he had been run over? -- A. Yes.

Q.189. Where was he lying? -- A. He was under the motor car and you took him out from under the motor car.

Q.190. How did I take him out? -- A. You pulled him out with your hands. You looked at him and then you got into the motor car and went away.

HIS HONOUR MR. JUSTICE HORNE: The question is how was he taken out? Describe the taking out. -- A. I saw him pulling him out from under the car and he put him on the side.

HIS HONOUR: How far away were you from him? -- A. I was on the road at the place where he left me. About as far as from here to the hedge. (50 yards).

HIS HONOUR: Was there anything in the way to stop you seeing? A. There was grass between but this could not prevent me from seeing.

HIS HONOUR: All you can say is that you saw him pulled out. Is that all? -- A. Yes.

Q.191. ACCUSED: How did Odongo fall after he had been hit by the car. Did he fall sideways or forwards? -- A. I cannot say how he fell down.

- Q.192. Did you see the car strike him? -- A. Yes.
- Q.193. Surely you can tell whether he fell on his head or his feet if you saw the car strike him? -- A. I saw him being hit by the car but I cannot say how he fell down whether forwards or sideways or backwards.
- HIS HONOUR: Can you not say which side upwards he was lying?
- A. I saw him being pulled out but I cannot say how he was lying.
- Q.194. ACCUSED: Did I pull him out from the front of the car or the back? -- A. From the side of the car at the middle. Not from the front or the back.
- Q.195. Which side, the right side or the left side? --
- A. From the side farthest away from where I was.
- Q.196. Why do you think I followed your brother into the grass in my car? -- A. I do not know. It is your own affair.
- Q.197. Did you have permission to be away from Mr. D'Olier's farm? -- A. No I did not ask permission. I left there on Sunday.
- Q.198. Why did you not return on Sunday? -- A. The reason why I did not return was that I found my brother had sickness in his eyes.
- Q.199. Could you not have left Mr. Booth's farm at 7 o'clock on Monday morning? -- A. It was not necessary for me to go because I knew I was too late to have my ticket marked.
- Q.200. Are all the boys not out working about the time you left Mr. Booth's shamba? -- A. Yes the other boys were doing their work.
- Q.201. You chose a time for leaving when you knew all the boys would be out at work? -- A. I waited for my brother to have some medicine put on his eyes at the Bwana's place and when he came back we sat down and conversed for some time before I started.

- Q.202. Did you not tell your brother to run quickly? --A. No.
- Q.203. When you first saw me which side of the road were you walking on? -- A. On the left side of the road.
- Q.204. Is that the side nearest the maize? -- A. The maize was on my right hand side.
- Q.205. Were you going from Mr. D'Olier's to Mr. Booth's or from Mr. Booth's to Mr. D'Olier's? -- A. I was going from Mr. Booth's to Mr. D'Olier's.
- Q.206. And you say the maize is on your right? -- A. Yes.
- Q.207. Did you have anything in the kikapu you were carrying?
- A. Yes. I had a blanket.
- Q.208. Nothing else? -- A. No, nothing else.

RE-EXAMINED BY THE ATTORNEY GENERAL

- Q.209. You are working on a ticket? -- A. Yes.
- Q.210. Does that mean that you have to work 30 days out of 42 days or do you have to work every day? -- A. I work every day. They mark my ticket every day.
- Q.211. Do you have to work every day or do you have to work 30 days out of 42? -- A. I have to work 30 days on the ticket.
- Q.212. Before you get paid? -- A. When I complete 30 days on the ticket then I get paid.
- Q.213. When the accused met you you say you had a kikapu? --
- A. Yes.
- Q.214. Did the accused search the kikapu? -- A. No.

PERCY BOOTH Sworn:

EXAMINED BY THE ATTORNEY GENERAL:

- Q.215. Your name is Percy Booth? -- A. Yes.
- Q.216. You are a farmer near the Endeless Road? -- A. Yes.
- Q.217. Do you know this boy Odongo who got injured? --
- A. Yes.
- Q.218. Is he a labourer of yours? -- A. Yes.
- Q.219. What exactly is he on the farm? -- A. Sub-Headman.
- Q.220. Do you remember the day that he got injured? --
- A. Yes.



- Q.221. Was he working that day? — A. No.
- Q.222. Had he got leave of absence? — A. He had leave to be absent from work.
- Q.223. How long has he been with you? — A. To my knowledge 2 years but my brother knows more about it.
- Q.224. Do you remember the accused coming to you that day? — A. Yes.
- Q.225. What caused him to come? — A. I saw he had a boy in the back of the car and he met me and said he was afraid he had run over one of our boys.
- Q.226. Did you see who the boy was? — A. Yes.
- Q.227. You saw it was Odongo? — A. Yes he asked me to go up and see.
- Q.228. And did you see that the boy Odongo was in fact injured? — A. Yes.
- Q.229. Did you ask accused what had happened? — A. Yes.
- Q.230. And what did he say? — A. He said that coming down the track from the main road he had seen two boys on the road. He asked them to stop and one boy ran away. He went after him in the car calling on the boy to stop. He said the next thing he knew the boy had fallen and he had run over him.
- Q.231. Now this road that he was on, what sort of road is it? I think you said it was a track? — A. It has always been a track for years leading from our place to the main road but just about that time we had applied to have it made a road of access and actually we just heard it had been made a road of access a few days before this happened.
- Q.232. And whose land is this road of access on? — A. It starts on Mr. Letcher's land and finishes on ours.
- Q.233. How long have you known that road to be used though it has only just become a road of access? — A. It has been used for 10 years.

- Q.254. Can you explain to the Court the lie of the land as you are going from your place to the main road. What sort of land is it? -- A. On the right hand side is grass and bush and on the left hand side is maize belonging to the accused.
- Q.255. Is it flat land? -- A. Yes.
- Q.256. At that time of the year what height was the grass? -- A. About 3 feet.
- Q.257. Just to refer back to this road for the moment - has the road always been exactly on that alignment or has it been changed comparatively recently? -- A. Yes it has been changed comparatively recently.
- Q.258. From where has it been changed? -- A. Only a matter of a few yards.

CROSS-EXAMINED BY ACCUSED:

- Q.259. ACCUSED: Was this road not made by my waggons? -- A. Yes.
- Q.240. Did the old road run through my shamba, the present maize land, or not? -- A. Yes on the edge of it.

NO RE-EXAMINATION:

GEORGE MORRISON BOOTH Sworn:

EXAMINED BY THE ATTORNEY GENERAL:

- Q.241. Your name is George Morrison Booth? -- A. Yes.
- Q.242. And you are a neighbour of the Accused? -- A. Yes.
- Q.243. Do you remember the day that Odongo got hurt? -- A. Yes.
- Q.244. Why was he not working that day? -- A. He was on sick leave that day.
- Q.245. Had you given him sick leave? -- A. Yes.

CROSS-EXAMINED BY ACCUSED:

- Q.246. Why had you given this boy sick leave? -- A. He came and reported in the morning that his eyes were hurting.
- Q.247. Were his eyes swollen? -- A. There was a little matter in his eyes.

Q.248. Could he see all right? -- A. Yes he could see all right.

Q.249. Did he report to you that he had a friend sharing his hut with him that night? -- A. No.

HIS HONOUR MR. JUSTICE HORNE: Did you actually doctor his eyes that morning? -- A. No, I took it to be a cold in the eyes and told him to lay up for the day.

HIS HONOUR: Is it a very serious crime for any of your boys to have their friends in their huts? -- A. If they are found out.

HIS HONOUR: What is the offence? -- A. I do not like them to have any strangers.

HIS HONOUR: And what would be the penalty? -- A. I just give them a warning.

(NO RE-EXAMINATION)

NEIL ALEXANDER KEITH Sworn:

EXAMINED BY THE ATTORNEY GENERAL:

Q.250. Your name is Neil Alexander Keith? -- A. Yes.

Q.251. And do you work at a store owned by Mr. Albert Boy? -- A. Yes.

Q.252. Where is that store? -- A. At Endeless.

Q.253. Do you remember the accused coming into your store at the beginning of September? -- A. Yes sir.

Q.254. Did you notice anybody with him? -- A. Yes sir.

Q.255. Who was with him? -- A. He had his son Edward and a native boy.

Q.256. Did you notice anything about the native? -- A. The native appeared as if he had been injured.

Q.257. Did the accused tell you anything about the native? -- A. Yes sir.

Q.258. What did he tell you? -- A. He told me he had run over the boy.

Q.259. Did he explain to you how? -- A. Yes he said he was coming along the edge of the maize with his car

and he saw two boys. He called on them to stop and the one boy stopped and the other one ran on and he chased him in the car.

- Q.260. Anything else? -- A. The boy slipped and fell in front of the car and the car ran over him.

CROSS-EXAMINED BY ACCUSED:

- Q.261. ACCUSED: Did I tell you I had chased the boy or followed him? -- A. He was running on ahead of you and you followed him.

- Q.262. Yes, but did I say I had chased him? -- A. No, you didn't say you had chased him, You said you had followed him in the car.

NO RE-EXAMINATION:

THOMAS KERR Sworn

EXAMINED BY THE ATTORNEY GENERAL:

- Q.263. Your name is Thomas Kerr? -- A. Yes.
- Q.264. And you work for the firm of Kerr & Howse Ltd. Kitale?  
A. Yes.
- Q.265. You are a Motor Engineer? -- A. Yes.
- Q.266. Do you know the car belonging to the accused? --  
A. Yes, I examined it.
- Q.267. When did you examine it? -- A. I cannot tell you the date without referring to my letter.
- Q.268. Which letter are you referring to? -- A. I wrote a report to the Police.  
(Exhibit 8 of Lower Court Record handed to Witness)
- Q.269. Is that your Report? -- A. Yes.
- Q.270. From your Report what do you gather was the date on which you examined the car? -- A. 9th September, 1966.

- Q.271. And what was the condition of the car? Take for instance the brakes; were they all right? --

A. The brakes were working but not in good order.

- Q.272. Did you do any experiments with the car? -- A. I took the car out on the road and tested it for speed.

I also gave it a test for the brakes.

Q.275. Will you tell His Lordship and the Jury the result of the brake test? -- A. I took the car out on the road and tested it up to a speed of 35 miles per hour. The brakes were also tested and the braking distance at 20 miles per hour on the speedometer taking a mean of three tests was 68 feet.

Q.274. Was that braking hard? -- A. Yes.

Q.276. Speaking generally would you say it was an old or a new car? -- A. It was an old car. I mean in point of use, not so much in point of age.

Q.276. It had the appearance of an old car? -- A. Yes.

HIS HONOUR MR. JUSTICE HORNE: What sort of brakes are they?

Ordinary 4 wheel brakes? -- A. Yes.

HIS HONOUR: And they took 68 feet? -- A. Yes.

CROSS-EXAMINED BY ACCUSED:

Q.277. ACCUSED: If this car had struck a boy would there be any marks on the car to show? -- A. I cannot say, but I did not find any marks.

Q.278. No marks to show that the car had bumped into the boy? A. No, there is a tie bar between the lamps of light construction and I should have expected to find that damaged or the lamps damaged had a boy been struck by it.

Q.279. Which part of the car would most likely strike a boy first - a boy who was walking? -- A. So much depends on the position of the car with relation to the boy. The probabilities are that the dumb-iron, the front end of the car which holds the spring, would have struck the boy first but if the boy was walking right in the middle of the car then the lamp tie bar would strike him.

Q.280. Would the lamp tie bar be sufficient to break the man's back if it struck him? -- A. I am not in a position to say. I do not know how easily a man's

spine breaks.

Q.281. How far is the bar from the level ground? -- A. I have not measured that. The distance would be about just over three feet I should say.

Q.282. Travelling at say 15 to 20 miles per hour do you think it possible to pull the car up at say 15 or 20 feet? -- A. On a road, no.

Q.283. Was it wet or dry the day you tested the car? -- A. When I made the test the road was dry.

Q.284. Can you remember if the District in general was wet or dry about that time? -- A. I cannot remember. The road I tested the car on was a firm surface, no sand on it.

HIS HONOUR: Going through bush country and grass do you expect a brake to work quicker? -- A. Yes sir.

HIS HONOUR: How much quicker? -- A. It should halve the distance at least sir.

NO RE-EXAMINATION:

WANJAIL son of OKONDA affirmed:

EXAMINED BY MR. PHILLIPS (Interpreted)

Q.285. Do you work for Mr. Booth? -- A. Yes.

Q.286. Do you remember the day when Odongo was injured? -- A. Yes.

Q.287. Did Mr. Letcher come to Mr. Booth's farm on that day bringing Odongo in the car? -- A. Yes.

Q.288. And did you accompany them in the car? -- A. Yes.

Q.289. Did you have any conversation with Mr. Letcher? -- A. I asked him how the man was injured. He said "This man slipped in the grass and the motor car went over him. This man has brought trouble on me for no reason at all".

Q.290. Where did you go in the car? -- A. We went to Endeless.

Q.291. Did you stop at the store at Endeless? -- A. Yes.

Q.292. And while you were there was Odongo washed? -- A. Yes.

Q.293. And then did you go on to Kitale to the Hospital? --

A. Yes.

Q.294. And was Odongo left in the Hospital? -- A. Yes.

Q.295. Did Odongo say anything to you? -- A. No he did not say anything to me.

NO CROSS-EXAMINATION:

COURT ADJOURNED AT 12.45 p.m. AND RESUMED at 2 p.m.

EDWIN EWART BRISTOW Sworn:

EXAMINED BY THE ATTORNEY GENERAL:

Q.296. Your name is Edwin Ewart Bristow? -- A. That is correct sir.

Q.297. You are the officer in charge of the Police at Kitale?  
A. Yes sir.

Q.298. On the 7th September last year did you receive certain information? -- A. I did sir.

Q.299. From whom? -- A. From the accused Mr. Letcher.

Q.300. And in consequence of that information what did you do? -- A. I first of all visited the injured native in the Hospital. Later at about 4 p.m. I proceeded to the scene of the accident.

Q.301. Who did you go with? -- A. I went with the accused, his son Edward, two plain-clothes Constables and Second Grade Assistant Inspector Tyler.

Q.302. Did you do anything with the accused's car? -- A. The accused's car was impounded by me before we left and we proceeded to the scene in the Police car.

Q.303. When you got to the vicinity of Mr. Letcher's farm was anything pointed out to you? -- A. Yes sir.

Q.304. By whom? -- A. By the Accused.

Q.305. And what was pointed out to you? -- A. Car tracks across grass lands.

Q.306. Let us just get the picture clearly before the Court. Going from here to Mr. Letcher's farm where you turn off the main road to go to the farm on the right is what? -- A. On the right is the accused's maize.

- Q.307. And on the left? -- A. Grass lands.
- Q.308. Anything else in the grass? -- A. Grass lands with thorn bush.
- Q.309. You heard in evidence this morning reference was made to trees which people could hide behind. Were there any trees in the immediate vicinity of the road which a person could hide behind? -- A. None.
- Q.310. Further away were there any trees? -- A. Further away there were trees.
- Q.311. Just give the Jury some idea of how far they would be roughly? -- A. There is grass from the road roughly to a depth of 125 large paces.
- Q.312. Was it over this grass land that the accused pointed out tracks to you? -- A. It was sir.
- Q.313. Were the tracks visible to the naked eye? -- A. Quite easily.
- Q.314. To this day can you see the remains of the tracks? -- A. One can, and I did yesterday.
- Q.315. Did you make a plan of the tracks which were shown to you? -- A. I did sir.
- Q.316. Is that the original plan and some copies? (Exhibit 1 and copies produced) -- A. Yes sir.  
(Copies of plan handed to the Jury)
- Q.317. Will you explain this plan to His Lordship and the Jury? -- A. Yes sir.
- HIS HONOUR MR. JUSTICE HORNE) Is it drawn to any particular scale? -- A. It is not a scale plan My Lord.
- HIS HONOUR: It is merely a sketch? -- A. That is so, My Lord
- Q.318. Did you do some measurements on the spot? -- A. I did
- Q.319. And you will be able to tell us from time to time the number of paces different lines represent? -- Yes, sir.
- Q.320. What is point E on the road leading from Mr. Booth's and Mr. Letcher's farms? -- A. That is the point where I was shown the car of the accused first entered the grass lands.



- Q. 521. Does the white line represent the track as you followed it along? -- A. It does sir.
- Q. 522. Did you find any marks on the ground to indicate where any person had fallen? -- A. There was a slight mark on the ground.
- Q. 523. At what point on your map? -- A. Approximately in the centre of the track just on the right of where it is marked "slight hollow" and a small "g". There was a mark on the ground there.
- Q. 524. What is point H? Before we leave that, you said there was a mark. What sort of a mark? -- A. It was a small place about the size of the palm of my hand and the bottom parts of the grass looked as if they had been broken from the ground, as if something had hit them. Not severed them completely but half severed them.
- Q. 525. Was there anything else to indicate where a body had laid? -- A. From the point H which is in the centre of the track to the point marked C the grass in the tracks was very much beaten down as if a body may have been dragged that distance. The distance from H to C was 18 feet 6 inches. On the track to the right of point C there was an impression in the ground as if a body had laid just off the track where there are three little arrows or marks.
- Q. 526. So that as far as you could judge from viewing the ground itself the point of impact was somewhere about H? -- A. Correct sir.
- Q. 527. Now can you tell us approximately how far it is from E, that is where the tracks enter the grass, to point H following your white line? -- A. Walking along the centre of the track from E down and round the skid marks to H was, myself taking large steps, 541 paces.

- Q. 528. Now from point H there is a track now leading down towards the trees. Would that be towards a stream? -- A. That would sir.
- Q. 529. And then you traced the return track from the trees? A. Yes sir.
- Q. 530. And that comes out eventually on to the road at the point marked J. Is that correct? -- A. Yes sir.
- Q. 531. And just to get it perfectly clear, you are not suggesting that that last track we have mentioned had anything to do with the accident? -- A. Nothing whatever sir.
- Q. 532. These were just the last tracks you saw and therefore you put them in? -- A. Correct sir.
- Q. 533. What is the distance from the road roughly from J to H, to the point where you think the accident took place? -- A. Approximately 60 large paces.
- Q. 534. Will you explain to the Jury what you mean by "slight hollow"; just before the place where you suggested the body might have lain you put the words "slight hollow"? -- A. That was a place approximately a yard wide or a yard square and approximately 4 inches in depth.
- Q. 535. Over the whole of that area we are talking about, the grass land, was it even or uneven? -- A. 99% even.
- Q. 536. From a point in the road -- I am referring to this side road -- would it be possible for anyone standing in the road to see what was taking place over the area covered by your white line? -- A. Yes it would.
- Q. 537. Have you actually tested that yourself? -- A. Yes.
- Q. 538. And you yourself from the vicinity of the junction of the main road and the side road were able to see a person standing, for instance, at H? -- A. Yes, I did.

HIS HONOUR MR. JUSTICE HORNE: At the junction of the main road and this road? -- A. Yes sir.

HIS HONOUR: You posted a man at H? -- A. That is correct, I did sir.

Q.539. What was the width of these tracks? -- A. 5 feet 4 inches.

Q.540. Did you measure the accused's car? -- A. I did sir.

Q.541. And did this correspond with the width of his tyres? -- A. It did sir.

Q.542. What sort of a road is this side road? -- A. It is grass land that has been worn flat owing to vehicles and perhaps motor cars or waggons passing over it and making a track.

Q.543. Is it clearly defined? -- A. Yes, quite clearly.

Q.544. And about what width would you say this track was? -- A. I measured it and it was 4 paces.

Q.545. And what do you judge your pace to be? -- A. (Witness demonstrates. Roughly 4 yards).

Q.546. Are there any trees at the side of the road? -- A. Not until one gets to the end, just against the Endeless Road.

Q.547. Let us take a particular spot. Is there any drain at the spot where you saw the tracks? -- A. No sir.

Q.548. So that there would be no difficulty about a person in a car leaving the road? -- A. None whatever.

Q.549. Having made your investigations what did you do? -- A. I returned to the spot on Wednesday the 9th at about 2 p.m. and from the point E on the map to the point J, on the right hand side of the road corresponding to those, I examined Mr. Letcher's maize.

Q.550. Before you go any further, what condition was this maize in? -- A. It was young maize and unripe.

Q.551. Why did you make this examination? -- A. Because

I wanted to see if we could find any traces of anybody having entered the maize or of any cobs being stolen out of the maize.

Q.553. What part did you play in the search or examination?

A. I stayed on the edge and looked into the maize and I had a constable a short distance into the maize and another constable further in.

Q.553. And did all three of you make a thorough examination

A. We did sir.

Q.554. And as a result of that examination what can you

tell the Court to-day? -- A. That no footprints were found and there was no evidence of any maize being stolen.

Q.555. Is there anything else you want to say? -- A. One thing the Jury might like to know and you, My Lord, and that is that between the maize and the road there was grass to a depth of 4 or 5 more paces.

Q.556. So that the road in other words does not run contiguous with the maize. There is a grass verge of 4 or 5 paces? -- A. Yes sir.

Q.557. Looking at your plan for a moment and looking at point B at the bottom of the turn - is that drawn exactly? Is it a sharp turn? -- A. Yes sir, it appeared that someone coming down from above had made as quick a turn as possible with a car.

CROSS-EXAMINED BY ACCUSED:

Q.558. ACCUSED: Did you examine the maize further down from the point J? -- A. I did not go beyond that.

Q.559. You only went to J? -- A. Yes from E to J.

Q.560. Could you say whether the maize was ripe further on or was it all the same? -- A. I could not say. I did not examine it.

Q. 361. You have some trees marked on this map. Do you think those trees could afford shelter to a man wishing to hide from another? -- A. They were thorn trees and not more than 9 inches to 1 foot wide. I do not think anybody could have hidden behind them. They could have tried to hide but I think they would have been unsuccessful.

HIS HONOUR MR. JUSTICE HORNE: You mean 9 inches in the diameter of the trunks? -- A. Yes sir.

Q. 362. ACCUSED: What I wish to know is could not a man stand behind one of those trees and be more or less safe from being hit by a car? -- A. If the car did not hit the tree he would be safe but if the car hit the tree with any force it would be liable to snap off.

Q. 363. This hollow at point G - do you think a boy running full out would be likely to stumble and fall? -- A. It would be possible.

Q. 364. Were there any other holes round about this hollow? A. The land did strike me as being uneven in other parts, similar perhaps to this hollow.

Q. 365. Did you notice any pigholes close to this hollow? A. No, not an actual pighole.

Q. 366. Did you search around Mound K for anything? -- A. Yes, at the request of the accused My Lord I did search round that mound.

Q. 367. Did you see any signs of a boy having sat down or moved about round this mound? Was the grass disturbed at all? -- A. I don't think it was.

Q. 368. Were there any signs of a boy having sat down there in two or three different spots? -- A. Not to my memory.

Q. 369. Would you say the tracks leaving the road were made by a stationary car or by a car in motion? -- A. I am afraid I could not say. It is a very difficult thing for me to say.

HIS HONOUR MR. JUSTICE HORNE: You mean whether there was any sign of a car having stopped at the point E? --

ACCUSED: Yes sir.

Q. 570. ACCUSED: Is the track not at right angles to the road A. To start off with it is; approximately as drawn.

Q. 571. Could a car travelling at any pace make those tracks at right angles like this? -- A. I do not think so. If the car was on the road I don't think it could have got that right angle turn but if the car went away to the right of the road and then swung in it might be possible.

Q. 572. But do these tracks show any signs of a car having swung out either way? -- A. No.

Q. 573. You would not like to say that the car was stationary prior to making these tracks? -- A. No I could not say that.

Q. 574. I showed you the whole of those tracks on the map did I not? -- A. Yes Mr. Letcher.

RE-EXAMINED BY THE ATTORNEY GENERAL:

Q. 575. First with regard to pigholes, did you make a special search for pigholes? -- A. I looked all round in the vicinity of H.

Q. 576. And did you find any pigholes? -- A. No sir.

Q. 577. With regard to the mound K, just tell the Court what you were asked to look for? -- A. I was asked to look for anything that might have been left there by Odongo or whether he had relieved himself sitting down there.

Q. 578. And you found no evidence as you said before? --  
A. None sir.

ABDI NOOR Sworn:

EXAMINED BY MR. PHILLIPS:

Q. 579. What is your name? -- A. Abdi Noor 2nd Grade Police Constable No. 86.

- Q.580. Are you a Somali? -- A. Yes.
- Q.581. Are you a Constable in the Kenya Police stationed at Kitale? -- A. Yes sir.
- Q.582. Do you remember going with Mr. Bristow on 9th September last? -- A. Yes sir.
- Q.583. And another Police Constable called Mulwa? -- A. Yes.
- Q.584. Where did you go? -- A. To Mr. Letcher's shamba.
- Q.585. On Mr. Bristow's instructions did you carry out any sort of search there? -- A. Yes sir.
- Q.586. Where did you search? -- A. When we arrived at the shamba Mr. Bristow told the brother of Odongo to follow the track.
- Q.587. Did you make any examination in the maize on the other side of the road? -- A. Yes.
- Q.588. What did you search for? -- A. We were looking for footprints of a man or if any maize was broken.
- Q.589. Did you find any signs of any of these things? -- A. No.

CROSS-EXAMINED BY ACCUSED:

- Q.590. ACCUSED: How far did you search? -- A. We went in 12 paces.
- Q.591. How far did you search along the road? -- A. About 100 paces up to the point where the Bwana came out from the grass.
- Q.592. How far does my maize go along that road? -- A. A long way.
- Q.593. Much further than you searched? -- A. We only looked about half the length of the maize.

NO RE-EXAMINATION:

MULWA son of MONGIN affirmed:

EXAMINED BY MR. PHILLIPS:

- Q.594. Your name? -- A. Mulwa s/o Mongin, 1st Grade Police Constable No. 655.
- Q.595. You are a plain clothes constable attached to the Kenya Police at Kitale? -- A. Yes.

- Q.596. Do you remember going on 9th September last with Mr. Bristow and Abdi Noor? -- A. Yes.
- Q.597. Did you go to a track which ran between some maize and grass land? -- A. Yes.
- Q.598. Was the maize Mr. Letcher's maize? -- A. Yes sir.
- Q.599. Did you together with Mr. Bristow and P.C. Abdi Noor make a search in that maize? -- A. Yes.
- Q.400. What did you look for? -- A. We were looking to see if we could find footprints or a place where the maize had been broken.
- Q.401. Did you find any footprints? -- A. No.
- Q.402. Did you see any signs of any interference with the maize? -- A. No.
- Q.403. What was the condition of the maize? Was it ripe or not? -- A. It was quite raw; not ripe yet.

CROSS-EXAMINED BY ACCUSED:

- Q.404. How far along did you examine this maize? -- A. From the place where the motor car went on the grass up to the place where it came out.
- Q.405. Could you see the maize beyond? -- A. Yes we could see it.
- Q.406. Was that ripe or not? -- A. About 60 paces beyond the maize was ripe.
- Q.407. You did not examine the maize beyond the car tracks? -- A. No, we did not go beyond that.

HIS HONOUR: What was the weather like at this time? Had it been raining recently? -- A. No sir, no rain.

HIS HONOUR: Are you a tracker? -- A. Yes.

HIS HONOUR: Would it be easy to have seen footprints if anybody had been there? -- A. Yes the footprints could be seen if someone had entered.

EXAMINATION): \_\_\_\_\_

THE ATTORNEY GENERAL: That My Lord is the case for the Crown. There is another witness, the young son of the Accused. For obvious reasons I do not intend to



call him although he has been summoned and is available if the Defence want him.

HIS HONOUR: As long as you have your witnesses here you are not bound to call them.

THE ATTORNEY GENERAL: He is in attendance.

HIS HONOUR: Is there any statement?

THE ATTORNEY GENERAL: There is My Lord. When called upon to plead the Accused said "I plead Not Guilty and reserve my defence".

HIS HONOUR: (To Accused). There is a prima facie case against you and you have the opportunity either to address the Court or to give evidence on your own behalf; that is, to be sworn and give evidence. If you do give evidence you are liable to be cross-examined by Counsel for the Crown and if you do not wish to do that you may make an unsworn statement. You can also call witnesses if you have them and I presume you will call your son who was in the car. You are not bound to do so of course but if you wish to call witnesses you should state so now.

ACCUSED: I would like to call witnesses My Lord.

HIS HONOUR: Do you wish to make your statement unsworn or on oath?

ACCUSED: I would like to give it on oath My Lord.

RAYMOND LETCHER (ACCUSED) Sworn:

HIS HONOUR: Your name is Raymond Letcher? -- A. Yes My Lord.

On the morning of the 7th September I was returning home and I turned into this road, this track along my maize. Immediately I turned into this track I saw two boys approaching. I should say they were about 500 to 400 yards away approximately. I could only see their heads and part of their shoulders and they were walking one behind the other. The

boy in front was carrying a kikapu over his shoulder. I could not see whether the boy behind was carrying anything or not as they were in the bend of the road. There is a bend in the road at this point which bends towards my maize and practically borders the maize.

I was proceeding slowly when I saw the boy at the back walk off as if to enter my maize. He came out of the maize again and when I saw him leave the maize and walk across the road I stopped my car as it appeared to me he was acting in a suspicious manner. I awaited the arrival of Awinda the boy who was leading and when he came up to me I asked him where he was going and where he was from to which he replied he was going to Mr. D'Olier's from Mr. Booth's. The boy was not standing whilst replying to me. He was on the move. He appeared very nervous for some reason or other and as a matter of fact he was 2 or 3 yards behind my car after I had asked him the last question. I asked him if he had a kipande and he said he had left it at home.

At this stage My Lord the complainant had walked across the road practically at the spot where I had seen the two of them first or perhaps a little further on. He walked straight across the road and sat down behind the mound marked K on the map. I could just see the top of his hat. I asked Awinda who the boy was hiding in the grass. He said to me in Kiswahili "Mimi sijui Bwana. Mtu nafuata mimi burra" (I don't know sir. A man following me for no reason at all).

I naturally thought it all very funny as they were walking one behind the other within two or three yards of each other I should say. So I said to him

"You had better get home as you are knocking about without a kipande before you get into trouble". I did think of getting out of my car and examining the parcel he had on his shoulder but on second thoughts I could see a blanket sticking out of the top of the kikapu and I was not really very interested in blankets so I moved my car on. I was stationary with the engine stopped. I started up my engine. I moved on and stopped my car and switched off the engine and I called to the boy whom I could see hiding in the grass or behind this mound. I said in Kiswahili "Come here". The boy got up, hesitated a bit and then I heard the other witness Awinda shout to him in Jaluá so I looked round and I saw Awinda running down towards the thorn trees and the complainant started off to run as well. I do not speak Jaluá My Lord but I heard this boy shout several times "Ringi ringi opiyo" which I understand means "Run run quickly". When I saw them both running, especially after Awinda had told me he did not know this man who was hiding in the grass, I naturally thought they were up to something or other, either they had been stealing my maize and when I saw the boy at the back of Awinda walk towards the maize shamba I thought he might have dumped something on the edge of the maize or in the grass.

I had other reasons to suspect theft. I have a lot of thefts at different times, especially of maize. I also have boys' huts down to where this road leads at my maize crib. My boys are all away at work between the hours of 11 and 12. If they had not stolen maize I thought they might have been helping themselves to something else from the boys' huts having had several complaints in the past.

I started up my car. By this time the complainant had had a good 100 yards start. I followed him into the grass and bush as I know all that country pretty well. I tried to drive past him in order to cut him off but before I got up to him he looked round. I shouted to him "Simama" but he immediately turned round sharply and more or less went back in the direction he had been coming, slightly North. He ran back towards the road — towards my mealie shamba. There were two or three trees just at this point on my right and between me and the boy. I went round these trees and then turned my car due East. The boy was then running quite a long way from me back to the road and looked as though he was running towards the mealie shamba. I continued my course due East and instead of the boy running into the mealie shamba as I thought he had done when I last looked at him he had more or less changed his direction and was running down towards Mr. Booth's maize and incidentally in towards the thorn bush, thick thorn bush. I was not very far from him at this point so I swung my car round and I came face to face with him. I put on my brakes as I intended jumping out of the car here and going for him with my hand. To my surprise he stopped running in the direction he was taking and changed his direction and cut across the front of my car going as hard as he could. I shouted to him to stop two or three times here again. He looked round, hesitated and fell down in front of my radiator. I thought he had trodden in a pighole or tripped in some way as he seemed to lose his balance. I applied my brakes and got out of my car. I naturally expected to find him behind the car as I knew I must have gone over him, but to my horror I found him under the

car. It did strike me when I saw him disappear in front of my car to swing the car right or left but as I could not see the boy I knew I had to act quickly and I realised this would be dangerous. I did as I thought the only thing to do to let the car go straight over him and straddle him. Whilst he was lying under the car I naturally was upset. I wondered how I was going to get him out. I looked down and tried to pull him out but I couldn't. He was lying right underneath the sump of the car. I looked round for help. I saw nobody so I realised I had to act quickly. The boy appeared to me to be dying under the car. I could not see him; it was in the long grass. I got into my car again and reversed it 2 or 3 inches to release him if he was caught up anywhere. I eventually dragged him out between the two wheels under the running board. I realised that some water might revive him so I went to my car to look for water. I found there was not any so I left him on the grass and got back into my car and drove down towards the swamp where I knew there was water and a river, and having gone a few yards I found myself tied up in thorn bush country so I decided it was no use wasting time with the risk of getting a flat wheel as I had no spare. I returned to the spot where I had left him, stopped my car and I lifted him into the back of my car which has a door at the back on hinges. I asked him whose boy he was. He said he was Mr. Booth's boy. He was naturally cursing me and saying all kinds of things to which I merely replied "Why did you run away?" He replied to me by saying in Kiswahili "Wait, I will kill all your children". I took no notice of this. I drove down to Mr. Booth's

farm which was about a mile and a half away, that is the homestead. I was met by Mr. Percy Booth. I asked him to identify the boy and told him that I had gone over him in the grass. I then asked Mr. Booth to give me a boy to help me hold him and look after him as he was wanting to jump out of the car. All the way down to Mr. Booth's farm he was trying to jump out and kept on telling me to stop. I got a boy from Mr. Booth and I brought the boy into Hospital calling at the Endeless duka on the way. I arrived at the Hospital and found the Doctor at lunch. I then called for some stretcher bearers and had him taken from my car into the Hospital and I went off to fetch the Doctor with one of the orderlies. After returning to the Hospital with the Doctor I drove down to the Police Station at Kitale and reported the matter to the Police. The Police officers were just returning from lunch. That is all I wish to say in connection with the accident.

CROSS-EXAMINED BY THE ATTORNEY GENERAL:

- Q.408. Now Mr. Letcher, As you turned off the main road and got on to your side road you say you saw these boys 300 to 400 yards away? -- A. Approximately sir.
- Q.409. And they, at the time you saw them, were coming down the track? -- A. They were walking along the road towards me.
- Q.410. So that when you first saw them there was nothing suspicious about them? -- A. Nothing whatever.
- Q.411. And you say the road bends there? -- A. It bends slightly where I first saw them in towards my maize.
- Q.412. And you proceeded on your way? -- A. Yes sir.
- Q.413. How far along that side track did you go before you stopped? -- A. a matter of 3 or 4 yards.

- Q.414. So that you were within how many yards of the main road when you stopped? -- A. I should say roughly 10 to 12 yards. I was proceeding slowly and I stopped my car when I thought things were not quite right with them.
- Q.415. Are you suggesting that either of these boys actually went into the maize or that on account of the bend you had an optical delusion and that the walking along the road looked to you as if they were going into the maize? -- A. It would certainly look like that, but the boy actually went towards the maize.
- Q.416. You will agree that there is at least 20 feet from this track to your maize? -- A. Not at this point.
- Q.417. I was there yesterday and I would be interested to know how far from the main road you cease to have a verge of grass. I suggest nowhere on this plan. Nowhere along there? -- A. About the spot where I first saw these two boys the grass and the road practically adjoins my maize shamba. There is only a verge of perhaps a foot.
- Q.418. The point J was where you came out from the grass? -- Yes.
- Q.419. How far from the point J would be the spot where you first saw them? -- A. I don't know exactly where I first saw them.
- Q.420. You say there is a verge? -- A. There may be 1 yard.
- Q.421. Do you still think in the light of what you know now that either of the boys went into the maize? -- A. I actually saw the boy at the back go into the maize.
- Q.422. Can you suggest to the Jury any reason now why that boy should have gone into the maize? -- A. The only reason I can think of is that he might have been carrying something. I could not see from where I was.

- 47 -
- Q.423. Don't you think it would have been easier for him to just put what he was carrying down where he was instead of going into the maize? -- A. No, I don't think so.
- Q.424. Do you think it is better for hiding? -- A. I think he realised that the maize did not afford him the cover he thought.
- Q.425. So we really agree that it was a silly thing for him to try to hide? -- A. I think so but I don't think he realised.
- Q.426. Do you still suggest that he hid something there? --  
A. I do not know.
- Q.427. You saw him afterwards cross the road. Was he carrying anything when he crossed the road? --  
A. No.
- Q.428. Therefore if what you say is correct immediately after the accident you would have known more or less where to go to look for what he had been carrying? -- A. More or less sir.
- Q.429. Did you look? -- A. No.
- Q.430. Don't you think it was probably the most important bit of evidence in the whole case? -- A. At this point I was more concerned with the boy's life.
- Q.431. I realise that. I am not trying to be clever at your expense. You have told us an apparently straightforward story, that you saw the boy going into the maize, you believed he had something to hide. We know about this accident; we know you took him to Hospital. From that day to this have you ever looked for something he might have hidden? -- A. Yes I have looked.
- Q.432. Did you tell the Police on that day .....

HIS HONOUR: I do not think you should have statements made to the Police.

THE ATTORNEY GENERAL: No sir.



- Q. 453. Did you tell anybody that day that you suspected he had hidden something in the maize? -- A. I don't think so sir.
- Q. 454. I suggest that you never told a soul and that you yourself never went to look. -- A. I did sir.
- Q. 455. Did you find anything? -- A. No sir.
- Q. 456. So you know now that there was nothing to hide? -- A. I do.
- Q. 457. And knowing that there was nothing to hide and that there was nothing to steal because it was not worth stealing, can you suggest why he went into the maize? -- A. I cannot, except to hide something or to hide himself.
- Q. 458. You are not suggesting that he was going into the maize to steal the maize? -- A. No sir.
- Q. 459. And we now know that he hid nothing and I suggest to you now that the boy never went into the maize at all and that what really happened was my first suggestion, that you thought he went into the maize because of the bend on the road? -- A. Not at all sir.
- Q. 440. After this he and his friend continued along the road didn't they? -- A. No they did not.
- Q. 441. Well now, the spot you told us where he went into the maize was somewhere about J? -- A. Yes sir.
- Q. 442. Looking at that plan where do you suggest the boy went into the maize? I suggest somewhere near where you turned off? -- A. It may be somewhere near there.
- Q. 443. I suggest to you that he never went into the maize at all, but even if he did he came out again and walked across the road into the grass towards the mound and sat down and hid himself. Is that so? -- A. Yes sir.

- Q.444. So that he was walking towards you? -- A. No sir.
- Q.445. The mound is there and you were somewhere about here; therefore he was walking towards you? -- A. I would not say towards me.
- Q.446. He was not getting further away from you was he? -- A. No sir.
- Q.447. Then he was getting nearer to you. He was safe here when he first saw you but instead of staying here he proceeded to come nearer to you and having got comparatively close to you he then proceeded to hide himself behind a mound where he could be seen? -- A. Yes sir.
- Q.448. Are you suggesting that this boy is a lunatic? -- A. He was acting like one sir.
- Q.449. The particular lunacy, I suppose, was the fact that he came near you at all? -- A. No, the fact that he was hiding if he had nothing to hide.
- Q.450. Are we agreed on that, that he had nothing to hide? -- A. I don't know.
- Q.451. You know how that the boy lived in and around that district for several years. He would know your maize and he would know you and your car would he not? -- A. He might.
- Q.452. You would not be surprised if he did? You would expect him to? -- A. Yes sir.
- Q.453. And he sees your car and he seizes that moment to go into the maize. Is that the suggestion? -- A. Yes sir
- Q.454. So that would be the first act of lunacy. -- A. He was hidden from me by grass and the maize.
- Q.455. But he could see you? -- A. He might have done.
- Q.456. But from that spot could he see you? -- A. He should have been able to.
- Q.457. I suggest that he must have seen you and that he seized that moment to go into your maize.--A. Yes sir.

- Q.458. And having gone into your maize he then comes out and gets nearer and nearer to you and sits down behind a mound? -- A. Yes sir.
- Q.459. You were very suspicious of these two boys? -- A. I was sir.
- Q.460. And you could see that when the complainant in this case crossed the road he was carrying nothing? -- A. Yes sir.
- Q.461. But the other boy who came on towards you was carrying a kikapu? -- A. Yes sir.
- Q.462. You asked him these questions? -- A. Yes sir.
- Q.463. Did you get out of your car to search the kikapu? -- A. No sir.
- Q.464. And you suggest to the Court and the Jury that you were quite satisfied because you could see a blanket? -- A. I was not interested in these boys or in a blanket.
- Q.465. But your movements show that you were interested. -- A. Only afterwards.
- Q.466. And you told us that it flashed across your mind that they might have seized the opportunity to go and steal whilst your natives were away working? -- A. Yes sir.
- Q.467. I suppose none of your natives had blankets? -- A. Yes
- Q.468. And when you saw the blanket you say you were not interested? -- A. I was interested but I did not worry about it very much. I was quite prepared to let him go and if when I got back I found a hut of mine had been opened I could have found out about it as I knew more or less who the boys were.
- Q.469. You knew they were travelling without kipandes? -- A. I thought it strange but didn't worry a great deal about it.
- Q.470. Did you shout at him at all? -- A. No I spoke to him as an ordinary individual.

- Q.471. And he unlike an ordinary individual hastened by? --  
 A. I was not stationary while I was speaking to him.
- Q.472. And you still did not think it worth your while to go after him? -- A. No.
- Q.473. I suggest to you that you were very annoyed. -- A. I was not sir.
- Q.474. You were not at all? -- A. No sir.
- Q.475. And that you shouted at him. -- A. I did not shout louder than was necessary.
- Q.476. And why didn't you shout when he went away without answering your questions? -- A. I realised he was near the main road.
- Q.477. Because it was near the main road? -- A. It is easier for him to run along the main road than for me.
- Q.478. I suggest that it was easier for him to run into the grass? -- A. You are going by his statement.
- Q.479. Do you say that statement is incorrect? -- A. I should say 75 per cent is incorrect.
- Q.480. But you must agree that on the main points we are in absolute agreement. You chased him? -- A. I followed him into the grass.
- Q.481. Well that is what we call chasing. You tried to cut him off from time to time? -- A. I did not follow him along those tracks. He admits that I cut him off which means that I didn't follow him.
- Q.482. Are you suggesting that there is any difference. If you were hunting a pig would you follow immediately behind him or would you try to cut him off? --  
 A. You would not be certain of catching a pig if you tried to cut him off.
- Q.483. We are not certain of anything in life, but <sup>it</sup> would save you a few yards would it not? -- A. Not necessarily sir.

- Q.484. You at any rate went into this grass and whether you followed him or cut him off you manœuvred about? --  
A. Yes sir.
- Q.485. Until you knocked him down? -- A. I did not knock him down.
- Q.486. Well then until he fell down and you ran over him. --  
A. He deliberately ran across my tracks.
- Q.487. Are you suggesting that he tried to commit suicide? --  
A. He deliberately ran right across my car and I accelerated. I was naturally excited at this point and he disappeared in front of my car.
- Q.488. Is it not a fact that you accelerated and hit him? --  
A. I didn't hit him. The car ran over him.
- Q.489. That is all I am suggesting. What right had you to follow that boy? -- A. I suspected that he had been either stealing maize or else he would not have acted in this manner.
- Q.490. You now know as a fact that he had been doing nothing wrong? -- A. I would not like to say that.
- Q.491. You have found not the slightest evidence of that boy having done anything wrong. -- A. Is there anything to prove that he did not run back and pick up something?
- Q.492. It is for you to do the proving of all this. I suggest it is entirely a myth. -- A. I don't know that he did not go back.
- Q.493. But as far as this Court is concerned you have not got a tittle of evidence to show that this boy did anything wrong. That is a fact, is it not? --  
A. No sir.
- Q.494. You will not even say you have not got a tittle of evidence? -- A. I would not like to agree to that sir.
- Q.495. What evidence is there then. If you will not agree

to it let us hear what it is. -- A. I maintain that boy might have dumped a bag or something in the maize or in the grass. Awinda might have gone back and recovered it whilst I went to Mr. Booth's. There is nothing to prove that he did not.

- Q.496. The trouble is there is nothing to prove he did. You chased him really because you thought he was running away. -- A. I did not chase him.
- Q.497. You followed him then. -- A. Only for a few yards.
- Q.498. A few yards! Do you suggest that the track on that plan is not 360 paces? -- A. He did not take that track. I eventually tried to cut him off and came face to face with him but I did not follow him nor chase him.
- Q.499. Were you not endeavouring to cut him off at every turn? -- A. I don't think my tracks suggest that.
- Q.500. If you were not trying to cut him off how did you hit him? -- A. I came face to face with him; then he doubled past my car, slipped and fell and I went over him.
- Q.501. He was running somewhere towards the road and your maize. He then decided to double back? -- A. He came towards me according to his own statement.
- Q.502. I am asking you what your statement is. You say he decided to double back and go towards Mr. Booth's place? -- A. Yes sir.
- Q.503. What happened according to your story is that he had thought of going back and then decided to double back this way? -- A. Yes sir.
- Q.504. I suggest to you that when you saw him doubling across you turned hard meaning to cut him off and you hit him? -- A. He was running all out and had he not slipped and fell I would not have hit him.
- Q.505. He was trying to get away and he must have run two or

- three hundred yards. -- A. He ran 350 odd yards.
- Q.506. And he was still going all out? -- A. Yes sir.
- Q.507. And I suggest to you that you would expect any human being on that ground and in that grass to fall at any moment. -- A. Yes sir.
- Q.508. Therefore when you were following him up you well knew that he was likely to fall at any moment? -- A. For that reason I kept out of his way.
- Q.509. We know how well you kept out of his way. The result has been seen this morning. If you were trying to keep out of his way why did you turn round to cut him off? -- A. Because he had actually passed me and had he not fallen he would have been all right.
- Q.510. But you did your best to stop that man? -- A. I did not.
- Q.511. You said in your evidence that you accelerated. You accelerated to go faster didn't you? -- A. I expect so.
- Q.512. And the result of going faster was to catch him, just what you intended to do. -- A. Not at all sir.
- Q.513. Were you not trying to catch him? -- A. I wanted to get him to find out what he was doing.
- Q.514. I am entirely with you there, and I say you were meaning to get him at any cost. -- A. Not necessarily sir.
- Q.515. I know you were not doing it for your own amusement. You had an object which was to catch that boy. That is why you were on that grass at all. Is that not so? -- A. Yes sir.
- Q.516. And you followed him right up until you did catch him? -- A. Yes sir.
- Q.517. And do you think you are allowed, even in this country, to chase down human beings like that whom you don't know have done anything wrong? -- A. No sir.

- Q.518. Why did you take him to Mr. Booth's? -- A. Because he told me he was his boy.
- Q.519. You did not believe him? -- A. No sir.
- Q.520. There is a boy practically dead and you are so anxious to see whether he was Mr. Booth's boy or not that you take him to Mr. Booth's rather than to the Hospital? -- A. He had no kipande, sir, for all I knew he might have been anybody.
- Q.521. But what you did know was what you told us a moment ago, that there was a human being underneath your car whom you thought was dying and having got this dying man out you thought so little about his death that you went three miles out of your way to have him identified -- A. After I had got him out he was making such a song about the whole affair. Had I been a quick-tempered man I might have gone further.
- Q.522. It would have been a very brave thing to have done to a man with a broken back. -- A. I did not know his back was broken.
- Q.523. You knew he was hurt. You talk about him lying in the car making a fuss. Would you not have done so? -- A. I probably would sir.
- Q.524. So it was a natural thing to do. You agree to that? A. Yes sir.
- Q.525. You rather tell us as though he was being provocative or something. Are you suggesting to the Jury that he was saying he wanted to get out because he thought you might take him to the Police Station? A. I don't think he was very pleased when I took him to Mr. Booth's.
- Q.526. Can you tell me why he did not want to go? -- A. For one thing he had got leave to be absent from work because he was ill and here he was nearly 5 miles from home.



- Q.527. Was Mr. Booth in any way annoyed? -- A. I don't know sir.
- Q.528. Did he intimate to you that he was in any way annoyed at the boy being away? -- A. No sir, I am just suggesting that might be one of the reasons for his not wanting to go.
- Q.529. Do you also suggest that you really think that this boy with his broken back was going to jump out of the car? -- A. Yes sir, he tried.
- Q.530. He tried with his broken back to jump out of the car? -- A. Yes sir.
- Q.531. He must have been in great pain to do that. --A. He probably was sir.
- Q.532. Did you do anything to try and alleviate his pain or did you just accelerate again so as to get to the end quicker? -- A. I laid him on his back, I thought that the proper thing to do and I did not know what was wrong with him. I proceeded slowly down to Mr. Booth's farm.
- Q.533. You told us you had a lot of thefts. -- A. I have sir.
- Q.534. How many have you reported within the last 6 months? -- A. Two or three.
- Q.535. To the Police? -- A. One has been reported to the Police.
- Q.536. But you said you had a lot? -- A. Not necessarily in the last 6 months. I actually got a conviction last year for the theft of maize from my maize crib.
- Q.537. Last year? -- A. Yes.
- Q.538. What was the name of the boy you ran? -- A. He was a Kitosh boy.
- Q.539. If you tell me the date we can chase it up quite quickly? -- A. It was in 1955 some time.

Q.540. You call 1935 last year? -- A. 1935 or 1936, I am not quite sure.

Q.541. I am merely asking so that I can look it up. Can you give me any idea as to when the book should be examined? -- A. Say the end of 1935 or beginning of 1936.

Q.542. And you do not know the name of the boy? -- A. I will try and think of it. I cannot remember it.

Q.543. Since the end of 1935 or beginning of 1936 have you reported one single case to the Police? -- A. I found sir that unless you had definite grounds for reporting these matters it was a waste of time to bring a case to the Court where there was no definite evidence of the boy having stolen.

Q.544. I am glad to hear that they require a little proof in this part of the country. -- A. Perhaps more than a little proof.

Q.545. The fact remains that you have not seen fit to report a case during this last year. -- A. I have not actually had a theft concerning me personally.

THE ATTORNEY GENERAL: My Lord it is now 4 o'clock and if Your Lordship please I suggest that we adjourn. I have no objection to bail being continued.

HIS HONOUR MR. JUSTICE HORNE: Is Mr. Boy, the Surety for £50, willing to continue?

(Mr. Boy attends and signifies his willingness to continue the Bond).

HIS HONOUR: You are still both bound on the Bond until the conclusion of the matter is reached.

COURT ADJOURNED TO 9-30 a.m. ON WEDNESDAY

20TH JANUARY 1937.

20TH JANUARY 1957. 9-50 a.m.

COURT RESUMED - COURT AS BEFORE

RAYMOND LETCHER (ACCUSED).

CROSS-EXAMINATION CONTINUED.

- Q.546. THE ATTORNEY GENERAL: Just to clear up that very small point that was raised yesterday, Mr. Letcher, was the name of the servant of yours who was convicted Okoretu? -- A. Yes sir.
- Q.547. That you can take from me was in January 1955, 2 years ago. -- A. It may be sir.
- Q.548. So it would not matter if it was 10 years? -- A. I would not say that.
- Q.549. And you say you are always having trouble with thefts?  
A. I am having it at the moment sir.
- Q.550. I put it to you that you keep these things to yourself?  
A. Not necessarily.
- Q.551. You then by way of proving to me that thefts are taking place bring up something that happened two years ago. I should have thought that was pretty much one theft in two years? -- A. I have had more than one but that is the only one I had definite proof and got a conviction on.
- Q.552. Have you brought any single other case in this Court for the last two years? -- A. I have not sir.
- Q.553. Well how do you know you would not have got a conviction? What do you mean? -- A. I have been in this country a number of years and I know that unless you have definite grounds and witnesses to prove everything against an accused no Magistrate is going to convict.
- Q.554. You must feel very happy that that is the law of the land? -- A. I think that is the law wherever you go.
- Q.555. Referring to immediately before the accident -- I was you to correct me if I am wrong. You say "I was

not far from him. I swung round and came face to face with him. I put on my brakes intending to jump out. To my surprise he changed direction and cut across the front of the car going as hard as he could. I shouted to him to stop two or three times. He looked round, hesitated, and fell in front of the radiator. I thought he had tripped and fallen in a "pighole" and then later on you say "When he disappeared in front of the car I thought it was better to straddle him" -- A. You must realise sir I had not much time to think.

- Q.556. I realise that. I suppose it was a matter of seconds or even less than that. -- A. Yes sir.
- Q.557. Therefore you will agree with me that you were right on top of the boy when he changed direction. You were within 2 or 3 yards of him and nothing could be done. -- A. Entirely due to his movements, sir. Had he stood still or had I knocked him down it would have been a different matter.
- Q.558. Do you remember telling us that that is more or less a true plan as far as it goes? -- A. Yes sir.
- Q.559. You also told us that just immediately before the incident the boy had been going towards the road and your maize and then he suddenly swerved back to go towards these trees or Mr. Booth's lines. Was this while he was still running? -- A. Yes whilst he was in full flight.
- Q.560. I am not up in these sporting terms. I don't know what you mean by a native being in full flight.  
A. I mean whilst he was running.
- Q.561. He was running in the direction of the road whilst you were doing this circle. He then changed his ideas about the road and turned to go back. Was he going in the direction of the trees? -- A. He

was more or less following the tracks. He got down towards those trees a little to the right. (Witness indicates on plan).

- Q.562. Not quite parallel with the road going East. And you saw him turn and make this new manoeuvre going East? -- A. I had more or less prepared to stop my car and put on my brakes and then when I saw him start up at full speed and swerve I naturally thought I would have to make up another round.
- Q.563. What actually happened was that immediately he started going East you swerved hard round to cut him off. -- A. My tracks show that I braked full on and I would have stopped my car before I completed that circle had the boy not moved in front of my car.
- Q.564. Am I or am I not right in suggesting that if you want to turn quickly the best motor drivers brake hard and some of the racing motorists do all their turns with the brakes? -- A. I am not a racing driver and I don't know if they employ this method.
- Q.565. But when you have been attempting to avoid other peoples' carelessness have you not found that when you brake hard it swerves your car? -- A. Yes.
- Q.566. And I suggest to you that if you were in a hurry and wanted to make a quick turn you would brake suddenly and the tail of the car would swerve round. I suggest that is what you did on that day. Is that not so? You admit you did brake?-- A. The braking marks on the map show that the car was fully braked long before I hit the boy.
- Q.567. Do you agree with that plan? -- A. Yes sir.
- Q.568. Assuming there was no boy and you had to make as short a turn as possible is that not exactly

what a good driver would do? -- A. You might agree with me sir, on grass land if you did what you say I did the car would swerve practically round on its tracks and face the way it was going.

- Q.569. Is it not a series of tufts of grass? -- A. No, the grass was long.
- Q.570. Will you agree with me to this extent, leaving out what happened on that day entirely, if some wicked person had wanted to cut off that native going East and he happened to be going hard as you were, that the way to cut him off would be to brake in exactly the same way as those tracks. That would be the quickest way of cutting him off? -- A. I don't see anything unusual about that track.
- Q.571. And the fact of the matter is, Mr. Letcher, that you were so close on to him that when he disappeared by falling or whatever it was you could do absolutely nothing about it? -- A. I could do nothing as he fell in front of my car. If a man falls in front of your car you cannot do anything. Had he not fallen he would have got away.
- Q.572. You don't think you would have been able to get him with the right wing or something? -- A. I doubt it, as he more or less fell on the right hand side. The marks on the ground show that I think, and the fact that I pulled him out from the right side of the car would go to prove that he was more to the right than to the left.
- Q.573. I am quite prepared to admit that, but if you had managed to swing over another foot and a half left you would have missed him altogether. -- A. I had to think quickly sir. I did what I thought was the right thing at the time. I could not see him and I thought by going right or left there was a chance of the wheel hitting him. I did what I

thought was the right thing at the time.

- Q.574. But is it not a fact that you were so close to him that you had to go on? -- A. I could have swerved left if I had been excited. I might have done that if I had lost my head.
- Q.575. But your difficulty was that you were trying to cut him off from the trees? -- A. No sir, I was not.
- Q.576. You really thought he had gone on and you were going to stop him at any cost. That is the whole case. -- A. Don't you believe it sir.
- Q.577. To turn to something else, going back to the original conversation between you and the two boys Awinda and Odongo, when you stopped these boys did you tell the first boy Awinda words to this effect, that "if you have not got a kipande I will arrest you"? -- A. As a matter of fact on thinking over the matter I did not actually stop him; if he had wished he could have gone straight past.
- Q.578. You spoke to him, did you not? -- A. As he came up to my car I asked him where he was going.
- Q.579. Did you tell him that if he had no kipande you would arrest him? -- A. No, I said after I had finished with him and he was moving off "You had better get back home before you get into trouble as you are walking about without a kipande".
- Q.580. Therefore when you stopped him or he stopped to speak to you you said, after the first words whatever they might have been "If you have not got a kipande I will arrest you" -- A. No sir.
- Q.581. And if anybody says that it is untrue? -- A. Yes.
- Q.582. And when you spoke to him did the boy become very nervous? -- A. He was already nervous. He was not speaking like an innocent person.
- Q.583. Did he get frightened and go on? -- A. He certainly moved on after I had spoken to him.

- Q.584. Had he his kipande with him? -- A. He said he had not.
- Q.585. And if you had said that you would arrest him that would have been sufficient to make him frightened?  
A. If he had his kipande what was the point of him telling me he had not got it, in which case I should not have interfered with him.
- Q.586. I am saying in answer to your suggestion about his guilty conscience that if a native is walking in the vicinity of your estate without a kipande and you stop him and say "If you have no kipande I will arrest you" that would be sufficient to make him move off? -- A. It may be sir. I maintain it is in the interests of the law.
- Q.587. That we all agree about. I am only trying to get at the mental attitude of this man, and I ask you once more did you not say to one or other of these natives "If you have no kipande I will arrest you"? -- A. No sir. I didn't say "I will arrest you".
- Q.588. Or anything like that, because I do not want to quibble over small words? -- A. I cannot quite remember the words I used. I simply said "If you don't get back to where you come from you are likely to get into trouble walking about without a kipande".
- Q.589. And the other boy, I suppose sitting where he was on this mound he would have heard this? -- A. I doubt it sir.
- Q.590. You were not shouting at him? -- A. No, I was sitting with my engine switched off and there was no need to shout.
- Q.591. The other boy was about what - 15 to 20 yards away? -- A. At least 50 to 60.



- Q.592. If anybody says 15 to 20 it is untrue? -- A. I should think so sir.
- Q.593. Did you call him? -- A. Not then sir.
- Q.594. Didn't you say "Kuja hapa"? -- A. Only after I was right opposite him. Where my tracks turn on that map I stopped my car and said "kuja hapa".
- Q.595. And so you didn't address him from where you addressed the other boy? -- A. No sir.
- Q.596. When you got to this place wherever it was when you did address him you called him? -- A. I merely said "kuja hapa"
- Q.597. And did he move in your direction? -- A. He then got up and hesitated. I don't think he quite knew what to do and then I heard the other man saying "Ringi ringi opiyò" He then started off at a quick walk.
- Q.598. In the opposite direction do you mean? -- A. In the direction he went round to the bush.
- Q.599. After you said "kuja hapa" did he ever come one step towards you as if coming to talk to you? -- A. No.
- Q.600. Would it be true to say that you shouted at him? -- A. No sir.
- Q.601. If anybody says you shouted twice that would not be true? -- A. I may have shouted at him after I started the car but not before.
- Q.602. I suggest to you that when you called "kuja hapa" the first time that he started to come in your direction. He came about a yard in your direction as if coming to you. That is not correct? -- A. I would not like to say it is correct but he walked across. I was facing B and he more or less went in that direction but I would not like to say he came a step nearer to me. It would depend on the eyesight of a person witnessing it.

- Q.603. Did you then shout at him twice and did he then start walking off in the other direction? --  
A. When I saw him walking away and heard the other boy shouting I then shouted again "kuja hapa wewe"
- Q.604. Now did he run because you were shouting at him? --  
A. I do not think so sir.
- Q.605. In other words, did he not run until you had shouted at him? -- A. He was running when I shouted at him.
- Q.606. He had already started to run and therefore it would not be true if anybody said he ran because you were shouting at him? -- A. I would not say so.
- Q.607. Now did that native when he was running and when you were following him ever try to get round to the back of the car? -- A. That is a point that I might explain sir. I told you that I swerved my car round and faced him. As I explained he tried to cut across which would mean that he was more or less travelling the way I had been coming and from a witness who could not explain himself too well it could be taken that he was trying to go behind the car. I think that is quite natural.
- Q.608. What is natural to one person is natural to another. Therefore you thought he was trying to get behind.  
A. It might be said he was travelling in that way if the car was more or less facing him.
- Q.609. He tried to dodge behind. -- A. No sir.
- Q.610. And you cut him off. -- A. No, not at all sir.
- Q.611. Do you remember saying "To my surprise he changed direction and cut across the front of the car going as hard as he could"? -- A. Yes sir.
- Q.612. How far away from you would he be when he changed direction? -- A. When he changed direction he

must have been I should say the full length of two cars. (Length of Court House diagonally).

Q.613. And when he changed direction you then shouted at him several times? -- A. I then shouted "Simama"

Q.614. That means "stop"? -- A. Yes, it means "stand".

Q.615. And it was at that moment while you were shouting "Simama" that he threw himself in front of your car? -- A. I would not like to say that sir. I shouted at him several times and as I say I thought he had got away. When I started to accelerate I had more or less swerved the car round and he tripped and fell in front of the car. I don't remember if I shouted at the time or before. I don't think I shouted at the time he fell.

Q.616. The position is this, that he started to run across your bows when he was that distance away and you tell the Court that you couldn't avoid him? -- A. For the simple reason that as I swerved my car he turned across, fell in front of my car and I couldn't avoid him.

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HIS HONOUR: (To Accused) Do you want to give any further evidence? -- A. No thank you My Lord.

HIS HONOUR: I just want to give you an opportunity if there is any other point you think you have left out.

A. No My Lord.

HIS HONOUR: Do you want to call your son now? -- A. Yes, My Lord.

EDWARD JAMES LETCHER 7 years old. (Unsworn):

HIS HONOUR: What is your name? -- A. Edward James Letcher.

HIS HONOUR: How old are you? -- A. 7 years old.

HIS HONOUR: You know that the proper thing is that you must speak the truth, don't you? -- A. Yes sir.

HIS HONOUR: And you know it is very wrong not to speak the truth? -- A. Yes sir.

EXAMINED BY ACCUSED:

- Q.617. Do you remember travelling down the road with me on the 7th,Edward? -- A. Yes.
- Q.618. What time was it? -- A. Before breakfast, after lunch.
- Q.619. Did we see anything whilst travelling down the road?  
A. Yes.
- Q.620. Will you tell the Judge and Jury what we saw? --  
A. Two boys.
- Q.621. What happened when you saw the two boys? -- A. One went into the maize and one came on further.
- Q.622. What did I do then? -- A. You stopped.
- Q.623. And then what happened to the boy who came on further?  
A. You stopped and talked to him.
- Q.624. What did I say to him? -- A. Nataka wapi. (Where have you come from?)
- Q.625. And what did he reply? -- A. Bwana Booth's.
- Q.626. And then what did I say to him? -- A. Wapi kipande. (Where is your kipande?)
- Q.627. And what did he say? -- A. Hakwisha wacha nyumbani. (I have left it at my house)
- Q.628. Did I say anything else to him? -- A. Yes.
- Q.629. What did I say to him? -- A. "Nani ile mtu nakaa ndani majani?"(Who is that boy sitting in the grass?)
- Q.630. What did he say then? -- A. Mimi hapana jua. Nafuata mimi bure"(I do not know. He is following me for no reason).
- Q.631. What did I do then? -- A. You started up the car and went further.
- Q.632. How far did I go? Where did I go to? -- A. To where the boy was sitting in the grass.
- Q.633. Did I go along the road or did I go into the grass? -  
A. You stopped on the road.
- Q.634. Are you sure I stopped? -- A. Yes.
- Q.635. How did I stop? -- A. You pushed the key in.
- Q.636. Where was this other boy then? -- A. Sitting in the grass.

- Q. 637. Was he just sitting there like a boy herding sheep or how was he sitting? -- A. Sitting down.
- Q. 638. And what happened then? -- A. You shouted to him.
- Q. 639. Did I shout loud? -- A. No.
- Q. 640. How loud did I shout? -- A. Not too loud.
- Q. 641. What did the boy do then? -- A. He stood up.
- Q. 642. What did I shout to him? -- A. "Kuja hapa" (come here)
- Q. 643. Did he come? -- A. No.
- Q. 644. What did he do? -- A. He went away.
- Q. 645. What did I do then? -- A. Started up the car.
- Q. 646. Was the boy just walking when I started up the car? --  
A. No he was running.
- Q. 647. Did I shout to him again? -- A. Yes.
- Q. 648. What did I say? -- A. "Simama" (stand).
- Q. 649. Did he stop? -- A. No.
- Q. 650. What did he do then? -- A. He ran.
- Q. 651. Did he run hard or slowly? -- A. Hard.
- Q. 652. What did I do then? -- A. You started up the car.
- Q. 653. What did I do after I started up the car? -- A. You went after him.
- Q. 654. How far did I go after him? -- A. Into the trees.
- Q. 655. And what happened then when we got into the trees?  
Did I speak to the boy again or did I just go on?  
A. You went on.
- Q. 656. Did I speak to him? -- A. Yes.
- Q. 657. What did he do after I spoke to him again? -- A. He turned round then.
- Q. 658. And what did he do when he turned round? -- A. Tried to pass the car.
- Q. 659. When he tried to pass the car did he try to run past the car just as I turned round? -- A. Yes.
- Q. 660. Where was he when he tried to run past the car? Was he near the road or in the grass? -- A. In the grass.

- Q.661. Was he near the road or off the road? -- A. Off the road.
- Q.662. Why do you think he tried to run past the car? Are you sure he tried to run past the car? -- A. Yes.
- Q.663. He didn't try to run away from the car? You are sure he tried to run past the car? -- A. Yes.
- Q.664. And what happened then? -- A. He fell over.
- Q.665. How did he fall over? Did the car hit him? -- A. He fell into a hole.
- Q.666. You think he fell into a hole? -- A. Yes.
- Q.667. Did you see the hole? -- A. Yes.
- Q.668. Are you quite sure you saw a hole? -- A. Yes.
- Q.669. What happened when he fell down? -- A. The car went over him then.
- Q.670. What happened after the car went over him? -- A. You stopped then.
- Q.671. And where was the boy? -- A. Under the car.
- Q.672. Did he stay under the car? Did I leave him under the car? -- A. No.
- Q.673. What did I do? -- A. You pulled him out then.
- Q.674. What was he doing when I pulled him out? Was he laughing or what? -- A. He was shouting.
- Q.675. Did he say anything after I pulled him out? -- A. Yes.
- Q.676. What did he say? -- A. He said "Nitaua watoto yako yote"(I will kill all your children).
- Q.677. You are quite sure you heard him say that? -- A. Yes.
- Q.678. It is not what I told you to say? -- A. No.
- Q.679. What did I do then? -- A. You went to the trees to look for some water.
- Q.680. Did I find any? -- A. No.
- Q.681. What happened? -- A. You turned round and came back again.
- Q.682. And then? -- A. You picked him up and put him in the back of the car.
- Q.683. And what happened after that? -- A. You took him to

Mr. Booth's.

- Q. 684. Did I go fast to Mr. Booth's? — A. No.
- Q. 685. Are you quite sure? — A. Yes.
- Q. 686. Did we travel slowly? — A. Yes.
- Q. 687. Are you sure we travelled slowly? — A. Yes.
- Q. 688. What was the boy doing whilst we were going to Mr. Booth's? — A. shouting.
- Q. 689. Was he doing anything else in the back of the car? — A. Trying to get out but he could not.
- Q. 690. What happened when we got to Mr. Booth's? — A. We stopped then and Mr. Booth came.
- Q. 691. What happened after we saw Mr. Booth? Did I say anything to Mr. Booth? Did I ask him for anything? — A. Yes you asked him for a boy.
- Q. 692. Did he give me a boy? — A. Yes.
- Q. 693. What happened then? — A. You started up the car and turned.
- Q. 694. And where did we go to? — A. To Mr. Boy's duka.
- Q. 695. And did we stay at Mr. Boy's duka or what did we do? — A. We didn't stay very long.
- Q. 696. Did we do anything whilst at Mr. Boy's duka? — A. Washed the boy and gave him a drink of water.
- Q. 697. And then? — A. Put him in the back of the car again and started up and went to Kitale.
- Q. 698. Where did we take him to? — A. To Hospital.

HIS HONOUR MR. JUSTICE HORNE: Whereabouts was this boy sitting down in the grass? — A. Beside a bush.

HIS HONOUR: How far away from the edge of the road do you think he was? Was he near or far? — A. As far as those trees outside (Witness indicates a distance of about 27 yards).

CROSS-EXAMINED BY THE ATTORNEY GENERAL:

Q. 699. Sonny, this was rather good fun, wasn't it? Chasing the native all over the grass. Didn't you think it was good fun? — A. No.

- Q.700. Why didn't you like it? Don't you like chasing people? -- A. No.
- Q.701. Do you never chase other little boys? -- A. No.
- Q.702. What a good boy? And the native was dodging all about? -- A. Yes.
- Q.703. And Daddy was dodging about after him? -- A. Yes.
- Q.704. And eventually Daddy caught him? -- A. Yes.
- Q.705. And Daddy was so close on him that he went right over him? -- A. Yes.
- Q.706. That is the whole story is it not? Yes.
- Q.707. When you said he was trying to get past the car you mean he was trying to get behind the car don't you? -- A. No.
- Q.708. Do you remember saying when you gave evidence before that he was trying to get behind the car? -- A. No.
- Q.709. Didn't you say that? -- A. No.
- Q.710. What happened was that he was trying to get back into the bushes? -- A. Yes.
- Q.711. And Daddy cut him off? -- A. Yes.
- Q.712. That was all wasn't it? -- A. Yes.
- RE-EXAMINED BY ACCUSED:**
- Q.713. When the boy ran away from where he was hiding did I chase after him? -- A. No.
- Q.714. You have just told this gentleman that he was dodging all over the place and that I was dodging all over the place behind him? -- A. Yes.
- Q.715. Is that right? -- A. Yes.
- Q.716. And was I dodging? -- A. Yes, going in and out of trees.
- Q.717. Was the boy running along in front of the car? -- A. Yes.
- Q.718. When was he running in front of the car? -- A. As soon as you started.
- Q.719. Did he run in front of the car all the time? -- A. No.
- Q.720. When did he stop running in front of the car? -- A. He went one way and you went the other.



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- Q.719. Did he run in front of the car all the time? -- A. No.
- Q.720. When did he stop running in front of the car? -- A. He went one way and you went the other.

Q.721. Which way did he go? -- A. He went that way and you went that way. (Witness demonstrates).

Q.722. Did he go into the grass? -- A. He came out of the thorn bushes.

ACCUSED: Will you take it My Lord that he means the boy went to the left and I went to the right?

HIS HONOUR: I have got down what he said.

Q.723. Did he try to run away from me when I said "Simama"? Did he try to run away? -- A. Yes.

Q.724. Did he stand still? -- A. No, he ran.

Q.725. Where did he run to, the front of the car or the side of the car? -- A. To the front of the car.

Q.726. And what happened then when he ran to the front of the car? -- A. He tried to pass the car.

Q.727. What happened then? -- A. He fell in a pighole.

FORREST LOUBON MEGSON Sworn:

EXAMINED BY ACCUSED:

Q.728. Mr. Megson, you are a Justice of the Peace? -- A. Yes.

Q.729. Do you remember taking a statement about the 7th of September at the local Native Hospital? -- A. Yes.

Q.730. Was it a sworn statement? Was it under oath? -- A. It was under oath.

Q.731. Who did you take the statement from? -- A. I took it from a native called Odongo .

HIS HONOUR: On what date did you take the statement? -- A. I am trying to refresh my memory.

THE ATTORNEY GENERAL: The statement is here and can be produced so that he can see it if he wants to.

HIS HONOUR: He had better see it then (Statement produced to Witness).

WITNESS: I dated it 7/9/36 5 p.m. If I remember rightly I read it over to Odongo on the following day at 10.15. 8/9/36.

HIS HONOUR: He was not on oath was he? -- A. Yes he was on oath.

Q.721. Which way did he go? -- A. He went that way and you went that way. (Witness demonstrates).

Q.722. Did he go into the grass? -- A. He came out of the thorn bushes.

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HIS HONOUR: He was not on oath was he? -- A. Yes he was on oath.

HIS HONOUR: I cannot exclude it from the Defence. It is quite admissible as far as I am concerned.

THE ATTORNEY GENERAL: I do not know the object of it and at this stage I am not prepared to object. I can only say in passing that as far as I remember nothing was said to Odongo of what he said on this occasion but naturally we would not want to take advantage of the accused if he did not know.

HIS HONOUR: We will hear it then. (To Accused) You want to put this statement in I take it?

ACCUSED: If it pleases you My Lord.

HIS HONOUR: Before it is put in I had better read it.  
(Statement handed to His Honour)

HIS HONOUR: (To accused) You were present too?

ACCUSED: Yes My Lord.

HIS HONOUR: And cross-examined the man?

ACCUSED: Yes My Lord.

HIS HONOUR: Do you really want this in as part of your defence?

ACCUSED: If it pleases you My Lord I would like Mr. Megson to read it out.

HIS HONOUR: I cannot very well exclude it.

THE ATTORNEY GENERAL: And I certainly will not raise any objection if the accused wishes it. I have not read it actually.

HIS HONOUR: (To Accused) If you will be advised by me, I am supposed to consider your defence as you are undefended and my opinion is that it is not worth your while to trouble with it, but if you insist you may have it.

ACCUSED: My Lord may I cross-examine Mr. Megson?

HIS HONOUR: Not on hearsay statements. You can either adopt the course you were planning to do; that is, to put the whole thing in front of the Jury if you wish. I cannot say more.

THE ATTORNEY GENERAL: I think it would be only fair if I mention to the accused at this stage that if he wants anything out of that statement I am going to have the whole statement. The moment he puts that in I am going to ask Your Lordship to allow the whole statement to go in.

ACCUSED: I do not quite understand My Lord.

HIS HONOUR: You do not understand but I think I have intimated to you that if I was advising you as defender I should not put it in.

ACCUSED: I thank you My Lord.

HIS HONOUR: But you are perfectly at liberty to have it if you wish.

ACCUSED: Thank you My Lord.

HIS HONOUR: You do not want to pursue the matter further?

ACCUSED: No My Lord.

HIS HONOUR: Have you any other witnesses?

ACCUSED: I would like to call my headman if he is here.

MUSA son of OTUNGA Christian Sworn: Marama Tribe.

EXAMINED BY ACCUSED:

Q.752. You are my Headman? -- A. Yes.

Q.753. How long have you worked for me? -- A. 4 years now.

Q.754. During that time have you known of any thefts on my farm? -- A. I know there are very many thefts on the shamba. Even now they are stealing.

Q.755. What are they stealing? -- A. They start by stealing maize while it is raw and the dry ones are stolen and put in sacks.

Q.756. Were you on my farm when a boy stole some maize and was convicted? -- A. Yes I was there.

Q.757. Have there been any thefts since? -- A. Yes there have been thefts after that. Raw maize was stolen but we could not catch the thieves. After that there were more thefts. One whole bag of maize was stolen.

- Q.738. Have there been any thefts recently? -- A. Last Sunday the 17th two sacks of maize were stolen.
- Q.739. This last theft you are speaking about, you will admit that it is still under investigation? -- A. Yes we are still investigating.
- Q.740. Have you got any clue? Do you know where the bags might have gone? -- A. We have been searching. We went with a nete to Mr. Booth but we could not find where they were taken to. We are still searching.
- Q.741. Nevertheless there have been thefts steadily ever since the boy was put in gaol? -- A. The thefts are still going on even in the houses. When we go out to work people come to our houses and steal the fowls even and take them away.
- Q.742. Have you ever seen me interfere with any boys without reason at any time during your 4 years' service? -- A. No I have not seen you.
- Q.743. Where were you when I had this accident and Odongo was run over? -- A. I had gone on leave to my country for one month.
- CROSS-EXAMINED BY THE ATTORNEY GENERAL:
- Q.744. You say you have a great many thefts on the shamba? -- A. Even now they are still stealing.
- Q.745. When you say on your shamba do you mean that people come and steal at your shamba from outside or that you are harbouring thieves yourselves? -- A. We do not know where the thieves are. We find things missing and we cannot find who took them.
- Q.746. And you always report these to the Bwana? -- A. Yes.
- Q.747. And he gets very upset about it I suppose? -- A. Some times he sends a report to Endeless and the Police are trying to search for the thieves and they cannot get any thieves.
- Q.748. When did that happen last when the Police searched? -- A. Near Christmas last year.

- Q.749. Do you mean 3 or 4 weeks ago? -- A. The year before the last.
- Q.750. Are you referring to the old story of this boy Okoretu who got sent to prison? -- A. No, not Okoretu.
- Q.751. Another boy? -- A. Yes.
- Q.752. And they also steal clothes from the boys huts? -- A. Clothes, fowls, sufurias, cooking pots.
- Q.753. And blankets? -- A. Yes.
- Q.754. So if you were to meet a strange boy in your land carrying a kikapu with a blanket you would have a look at the kikapu to see what was in it? -- A. If I had information about a boy I would look his basket.
- Q.755. If you saw a strange boy with a kikapu would you look to see? -- A. Now I would look the basket but usually I am at work and have no time.
- Q.756. But if you did happen one day to meet a stranger near your land carrying a kikapu and you saw blankets sticking out would you search him? -- A. When I am at my work and some people pass in the grass .....
- Q.757. On Sunday then when you are not at work? -- A. If I saw one yes I would stop him, but I cannot do it if I do not see anyone.

HIS HONOUR: You have been there four years? -- A. Yes four years.

HIS HONOUR: Do you know the boy Odongo? -- A. There are many Odongos working at my place.

HIS HONOUR: Do you know a boy Odongo who is second headman at Mr. Booth's? -- A. No I don't know the people at Mr. Booth's place.

NO RE-EXAMINATION:

SULEMANI NUNGI S/O NJASI called but not present.

Witness Summons served by H.R. Walker on 9/1/57.

HIS HONOUR: Is he one of your own boys?

ACCUSED: He was discharged a week ago and said he would stay here till the case came on.

HIS HONOUR: Is he absolutely essential to your defence?

ACCUSED: Only to record certain evidence he heard whilst in Hospital. He happened to be in Hospital and overheard certain conversations which took place in Hospital which might be of some use.

THE ATTORNEY GENERAL: The position is Your Lordship that the Police have no information whatever as to where he is now. They have actually been looking for him since yesterday and they have sent out askaris all over the place and there is no sign of him.

HIS HONOUR: Have you got a statement from this witness?

ACCUSED: No My Lord.

HIS HONOUR: Is there any possibility of the Police finding him?

THE ATTORNEY GENERAL: It is an extremely difficult question. He was supposed to be in the Location but they have had that combed out and he is not there and has not been there for some days.

HIS HONOUR: I am afraid you will have to go on without him.

ACCUSED: Very well My Lord.

HIS HONOUR: If you could have got a statement from this man: if you had something in writing and I could see whether this was going to affect your case in any way I might take a different view.

THE ATTORNEY GENERAL: I do not want to do anything that might be unfair to the accused. Might I suggest to Your Lordship that if the Jury withdrew and the accused could then state the substance of the evidence then you could come to your conclusion.

THE JURY WITHDRAW.

Accused states the substance of Sulemani's evidence:

HIS HONOUR: I do not think it is sufficient to justify a



postponement.

ACCUSED: I do not wish to hold up the proceedings My Lord.

JURY RECALLED:

HIS HONOUR: Does that conclude your witnesses?

ACCUSED: I have one other witness My Lord. Might I call

Mwanga, the boy in charge of my maize crib.

MWANGA son of MYOGUTO affirmed:

EXAMINED BY ACCUSED:

Q.758. Do you work for me? -- A. Yes.

Q.759. How long have you worked for me? -- A. I was engaged  
in the year 1935.

Q.760. Do you live anywhere near my maize crib? -- A. Yes.

Q.761. Where is this maize crib of mine? -- A. Near my  
place.

Q.762. Yes, but is it in the shamba or where? -- A. Near  
the road.

Q.763. What road is this? -- A. The waggon road.

Q.764. Where does this waggon road go to? -- A. Up to the  
Bwana's house.

Q.765. Does it not go anywhere else? -- A. No, it goes up  
to the Bwana's house only.

Q.766. Is this crib near a mealie shamba? -- A. Not very  
near.

Q.767. But there is a mealie shamba not far away is there  
not? -- A. Not very far.

Q.768. Is there a road near the mealie shamba? -- A. No,  
the road is far away.

Q.769. I am not talking about the main road. -- A. There is  
the road from the store.

Q.770. Which way does it go? How does it come out to the  
main road? -- A. It runs from the store along  
the side of the shamba and joins the main road.

Q.771. Is this road near Mr. Booth's farm? Is it on Mr.  
Booth's farm or on my farm? -- A. The road is  
between your farm and Mr. Booth's farm.

- Q.772. Where is the maize crib in relation to this road? --  
A. The store is one side and the road is on the other side.
- Q.773. Does this road not go from the store at all? Is there no road from the store? -- A. The waggon road goes to the store, then from the store to the Bwana's house.
- Q.774. To my house? -- A. Yes.
- Q.775. Is that the same road which comes from the main road? -- A. That is the only road.
- Q.776. If you were going from my maize crib to the main road you would take that road? -- A. Yes.
- Q.777. Have there been any thefts of maize from this crib of mine? -- A. Yes.
- Q.778. When did the last one take place? -- A. Near Christmas Day.
- Q.779. Were there any thefts before that? -- A. Yes.
- Q.780. How long before? -- A. In the year 1964.

NO CROSS-EXAMINATION:

HIS HONOUR: Do you want to address the Jury now?

ACCUSED: I would like to call a witness to give evidence regarding my past. I maintain that the Crown have tried to prove to Your Lordship and the Jury that I am a rash driver and a reckless character. I would like to call Mr. Albert Boy who has known me longer than anybody in Kenya and who is also a past member of the Police Force.

THE ATTORNEY GENERAL: There has been no evidence whatever called with regard to the accused's driving except on this particular day and the whole case for the Crown is that he is an extremely good driver and that is how he managed to run this man to earth.

HIS HONOUR: I do not think it is necessary for you to call a witness. It is always assumed, and in fact there

- Q.772. Where is the maize crib in relation to this road? --  
A. The store is one side and the road is on the other side.
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- Q.776. If you were going from my maize crib to the main road you would take that road? -- A. Yes.
- Q.777. Have there been any thefts of maize from this crib of mine? -- A. Yes.
- Q.778. When did the last one take place? -- A. Near Christmas Day.
- Q.779. Were there any thefts before that? -- A. Yes.
- Q.780. How long before? -- A. In the year 1934.

NO CROSS-EXAMINATION:

HIS HONOUR: Do you want to address the Jury now?

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THE ATTORNEY GENERAL: There has been no evidence whatever called with regard to the accused's driving except on this particular day and the whole case for the Crown is that he is an extremely good driver and that is how he managed to run this man to earth.

HIS HONOUR: I do not think it is necessary for you to call a witness. It is always assumed, and in fact there

is no question arising here as to character or anything like that.

THE ATTORNEY GENERAL: There is just one point I would like to mention at this stage. Rather than that the accused should suffer from any sense of injury because this witness cannot be found I am prepared, if Your Lordship grants an adjournment, to turn out every askari and search the whole place. I do not want any question to arise afterwards of the Crown suppressing witnesses. I understand he is supposed to be in the Location but so far he has not been run to earth.

HIS HONOUR: I am perfectly prepared to grant an adjournment if you insist to see if this witness can be found but personally I do not think his evidence is of much importance. I do not think the Jury will pay much attention to it. I think you can leave that safely in my hands but at the same time to be absolutely certain you may have an adjournment and we will see if we can find him.

ACCUSED: I doubt, My Lord, if you will find him. He was being searched for yesterday afternoon. I doubt if it would be of much use. I am prepared, My Lord, to close my case.

HIS HONOUR: You did not address the Court before you opened your evidence so I take it you have the right to address the Court now on any point you wish to stress or make.

ACCUSED ADDRESSES THE COURT:

If it pleases you, My Lord, I would like to point out to Your Lordship and the Gentlemen of the Jury that in this case the two chief witnesses are both brothers. They have trumped up a charge and given false evidence to get me

convicted of deliberately going out of my way to do this man Odongo grievous bodily harm.

The evidence is false, My Lord, and the chief witness Awinda has, I think, more or less proved that. In the first place he stated that after I chased his brother into the grass his brother went to the left when he actually turned to the right. He then said that his brother tried to get back to where he was standing when it has been proved by the car tracks that his brother was running actually in the opposite direction.

I maintain, My Lord, that if these witnesses spoke the truth and nothing but the truth the case would be different. I do not deny the fact that my car went over Odongo but had he acted as the first man Awinda acted nothing would have happened. That is all I wish to say  
Your Lordship.

---

SHOWING-UP BY HIS HONOUR MR. JUSTICE HORNE:

Now Gentlemen of the Jury you have to consider your finding and it is necessary to review the evidence somewhat because the case has lasted for a couple of days.

The prisoner, as you can see from the Information, is charged that he did grievous bodily harm to this man Odongo. Now you can have no doubt that grievous harm has been caused because you have the two Medical witnesses Dr. Gowans and the Indian Doctor who both tell you that the man is suffering from a fractured and dislocated spine and that is clearly grievous bodily harm. The matter is thus boiled down this way, that we can have no doubt that that harm was done by an act of the Accused because the Accused has given evidence on oath in which he states that he did run over this man; that he did go after him in the grass and while running about in his car after this man the man slipped and fell and he went over him. Well, in a case like that, once those facts are admitted by him, it becomes necessary for him to show that this was a lawful act; that he had some proper grounds for behaving in this manner, and if the Crown clearly shows to you by their evidence that no felony had been committed on that day upon his property, nothing of that kind had been done, then I have to tell you this in law, that he has no legal right whatsoever to try and go after that boy in that way. The mere fact that when a native is passing along the road you can call him to come and he does not come does not give you the right to arrest him or to attempt to arrest him, or, even if you had a right to arrest him, to attempt to arrest him by such means as chasing after him in this manner.

Now, therefore, that being the outline of the evidence I will deal with it in detail in order to see if there is any fault in the body of evidence which is before you which will enable the accused to establish his defence.

But his defence, so far as I can understand, is that he has a right to behave in this way because some thefts were committed at his place a long while ago, in 1935; but even if thefts have been committed since that time he has no right at 10-30 or 11 o'clock in the morning to jump to the conclusion that these people have committed thefts and in order to justify himself he has got to show that the thefts have actually been committed or, if not, that he had reasonable grounds for suspecting these particular individuals. That is the state of the law in this country.

Now the Accused has asked you to cut the evidence of Awinda right out and you may do so, but none the less it leaves the evidence of the injured man Odongo and there is a conflict of evidence between his story and the Accused's which is not very material but I will deal with it; as to whether the other boy told him to run or not. If what the Accused says is true, that the other boy told him to run, there must have been some reason which is not explained. I want you in considering that to remember that Mr. Percy Booth and Mr. Keith gave evidence and their evidence was of admissions made by the Accused on that day to this effect: He saw two boys; he asked them to stop; one boy stopped and the other ran away; that he, the Accused, went after him; he slipped and fell and was run over. That was the Accused's statement that day and it is practically the Accused's statement this time and I fail to find in that any legal defence to this charge which is brought against him here. His own evidence more or less convicts him of the charge here brought. It does not seem to me to matter very much whether the boy was hiding behind this mound or whether he was actually sitting in the grass. It does not seem to affect the matter one iota, and how can you rely

exactly on the Accused's evidence as to what happened to the other boy because his immediate attention was on the boy he was going after and whom he has always admitted he went after. I do not wish to labour this. If I could find something to say for the Accused's defence I would point it out to you, but he goes into the box and he makes these admissions and they are in my opinion damaging admissions and I have to leave it to you to decide. You will consider your verdict.

THE JURY RETIRED AT 11.20 A.M. AND  
RETURNED AT 11.35 A.M.

THE DISTRICT OFFICER: Gentlemen of the Jury, are you agreed upon your verdict?

THE FOREMAN OF THE JURY: Yes.

THE DISTRICT OFFICER: Do you find the Accused Raymond Letcher guilty or not guilty of causing grievous bodily harm to Odongo son of Bodo.

THE FOREMAN OF THE JURY: We find him guilty sir.

THE DISTRICT OFFICER: You say he is guilty and that is the verdict of you all?

THE FOREMAN OF THE JURY: Yes.

THE DISTRICT OFFICER: Prisoner at the bar, you stand convicted of the felony of causing grievous harm to Odongo son of Bodo. Have you anything to say why the Court should not pass sentence upon you according to law?

ACCUSED: Nothing My Lord.

HIS HONOUR MR. JUSTICE HORNE: Is there anything known against the Accused?

THE ATTORNEY GENERAL: Nothing known against him. In other words he is of good character.

HIS HONOUR: Have you been in this country long?

ACCUSED: I have been here since the War. I came to this country with the Troops in 1918. My Lord.



S E N T E N C E

Raymond Letcher, you have been found guilty by a Jury of your fellow countrymen of this offence and it is my unpleasant duty to pass sentence upon you. There are, of course, powers under the Code for dealing with first offenders and for imposing a fine, putting you on probation or binding you over, but this is a class of case where I think I should be false to my Judicial Oath if I did not impose a sentence of imprisonment. On the other hand, the circumstances of the case show that at the start you were far from expecting the results of your very rash and negligent act; of your wrongful act, but that act might have produced consequences even far more serious than have happened. I know from residence in Africa myself that it is extremely difficult to deal sometimes with natives and one is apt to sometimes become more angry than the occasion warrants, but taking all these factors into consideration, nevertheless I feel that you must be sentenced to something which will mark the general disapprobation of your conduct and I sentence you to imprisonment with hard labour for twelve months.

ACCUSED: Thank you, My Lord.

HIS HONOUR: You will surrender yourself to Mr. Bristow.

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IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HOLDEN AT KITALE

CRIMINAL CASE NO. 156 OF 1956

R E X

v e r s u s

RAYMOND LETCHER

29TH JANUARY, 1957

DECLARATION VERIFYING TRANSCRIPT OF SHORTHAND

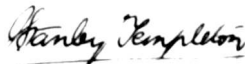
NOTES OF TRIAL

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the trial of the above case, to which transcript this Declaration is annexed, I, the said James Stanley Templeton, certify that this is a correct record of the proceedings at the said trial.

DECLARED at Nairobi this  
29th day of January, 1957,  
Before me,



Registrar,  
Supreme Court of Kenya.



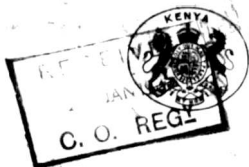
**Kenya Farmer Sent to Gaol.**

An unusual story was told in the Supreme Court, Nairobi, in mail week, when a farmer, Richard Litcher, a resident in the Kitale area, was sent to prison for twelve months' hard labour on a charge of "causing grievous harm."

When driving round his farm in September last, the accused saw a native whom he suspected of stealing maize. He chased the man by car, and eventually ran over him. The native was removed to hospital, where he was found to be suffering from a fractured spine and other injuries. He is still under medical attention.

KENYA.

No. 686



332  
2  
GOVERNMENT HOUSE  
NAIROBI  
KENYA

28 December, 1936.

Sir,

In conformity with the instructions conveyed in Mr. Thomas's despatch No. 762 of the 18th of July, 1924, I have the honour to transmit a copy of the transcript of the shorthand notes taken at the trial of Agutu s/o Andata in Supreme Court Criminal Case No. 158 of 1936.

Gov/21323/24  
Not sent by  
2/11

2. The accused was sentenced by the Trial Judge to 20 lashes and 8 years imprisonment with hard labour.

I have the honour to be,

Sir,

Your most obedient humble servant,

*A. D. Gore*  
ACTING GOVERNOR.

THE RIGHT HONOURABLE  
W. ORMSBY GORE, P.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.

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I N D E X

P R E A	2
ASSESSORS EMPANELLED	2
OPENING ADDRESS FOR PROSECUTION	5
<u>EVIDENCE FOR THE PROSECUTION:</u>	
ANDERSON, GERALD VICTOR WRIGHT,	Examined 6
DIAS, EDWARD	Examined 7 Cross-Examined 15
DIAS, ROSA	Examined 16 Cross-Examined 18
DIAS, SIMPLICIA LULU	Examined 19 Cross-Examined 21
CHAUDHRY, MOHAMED ISMAIL	Examined 22 Cross-Examined 22
MAGNER, MATHEW	Examined 25
MWANIKI WA THUO	Examined 25 Cross-Examined 25
BONIFACE S/O MACHARIA	Examined 25
MASWE S/O MUITA	Examined 25

EVIDENCE FOR THE DEFENCE:

ACCUSED IN WITNESS BOX	Examined 27 Cross-Examined 27
SUMMING UP	30
ASSESSORS' OPINIONS	31
JUDGMENT	33
SENTENCE	35

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LIST OF EXHIBITS

1. Native carved wooden figure.
  2. Sketch Plan.
  5. Accused's Statement in Lower Court.
-

IN HIS MAJESTY'S SUPREME COURT OF KENYA  
SESSIONS HOLDEN AT NAIROBI

9th December, 1956

B E F O R E

HIS HONOUR MR. ACTING JUSTICE LANE  
(AND ASSESSORS)

CRIMINAL CASE NO.158 OF 1956

R E X  
v e r s u s  
AGUTU son of ANDATA

Transcript of Shorthand Notes taken by J.S. Templeton,  
Official Shorthand Writer to H.M. Supreme Court of Kenya.

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THE ACTING SOLICITOR GENERAL, MR. T.D. WALLACE, appeared  
for the Crown.

---

MR. WALLACE: Perhaps I should tell Your Lordship that the  
Police inform me that they have been approached by  
Dr. Dias with the request that this case should be  
held in camera.

HIS HONOUR MR. ACTING JUSTICE LANE: I think in view of  
the fact that the Complainant is a very young child  
and the racial elements involved it would be  
desirable. I agree.

THE REGISTRAR OF THE SUPREME COURT (MR. EDWARD J.O'FARRELL):  
Agutu son of Andata, You are arraigned before this  
Honourable Court on the information of The Honourable  
The Attorney General on behalf of our Lord the King  
that you Agutu son of Andata are charged with the  
following offence:  
First Count: RAPE contrary to Section 122 of the

Penal Code, that you Agutu son of Andata on or about the 11th day of November 1956 in the Central Province had carnal knowledge of Rosa Dias without her consent. Do you plead guilty or not guilty to that count?

ACCUSED: She consented herself and I could not take her by force because I was not mad. If she insists that I took her by force we shall have to take oath that I took her with her consent. (Plea of Not Guilty entered)

Second Count: Agutu son of Andata you are charged with defilement of a girl under the age of sixteen years contrary to Section 128(1) of the Penal Code, that you Agutu son of Andata on or about the 11th day of November 1956 in the Central Province had carnal knowledge of Rosa Dias, a girl under the age of sixteen years. Do you plead guilty or not guilty to that count?

ACCUSED: She herself consented. She closed the door and she allowed me to have connection with her. The bigger girl her sister closed the door and she was keeping a watch to see that her father was not coming. She allowed me and I could not refuse. I can't know if she is sixteen or not. I held her and she consented. (Plea of Not Guilty entered).

Assessors summoned:

1. Juma bin Hassan
2. Okelo bin Rono
3. Mnyedadi bin Mukumba
4. Opondo bin Odima
5. Okulo bin Nyabuku
6. Oduolo bin Munjalo

Assessors empanelled:

1. Juma bin Hassan
2. Okelo bin Rono
3. Mnyedadi bin Mukumba

The Assessors are warned as to their duties.

Accused states that he understands Kiswahili and does not require an interpreter in his own language.



MR. WALLACE ADDRESSES ON BEHALF OF THE CROWN:

May it please Your Lordship; Assessors: The Accused as you have just heard, is charged on two counts. Firstly that he raped the girl Rosa Dias, and secondly that he defiled this girl who is a girl under the age of 16 years.

In a moment or two I propose to outline to you the facts upon which the Crown relies to substantiate these charges but before doing so it might be as well for me to tell you very briefly what in law are the ingredients of these offences. His Lordship will no doubt explain the law to you at a later stage of this case and of course you will realise that any remarks which I may make in this respect are subject to any observations which His Lordship may address to you. My only object in explaining the law to you is in order that you may be able to appreciate the evidence of the various witnesses whom I propose to call and the reason why it is necessary for the Crown to tender such evidence.

Now with regard to the first count, that of Rape, our law says that any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, is guilty of the felony termed rape. It is clear, therefore, that before the accused can be found guilty of this offence it is necessary for me to satisfy the Court of two things; firstly that the accused had carnal knowledge of this girl Rosa Dias, and secondly that it was without her consent or that if it was with her consent such consent was obtained by force, threats or intimidation.

In order to prove carnal knowledge it is unnecessary for me to prove the actual emission of seed but on the other hand it is necessary for me to prove penetration, but I should tell you that penetration of the slightest

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Now with regard to the first count, that of Rape, our law says that any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, is guilty of the felony termed rape. It is clear, therefore, that before the accused can be found guilty of this offence it is necessary for me to satisfy the Court of two things; firstly that the accused had carnal knowledge of this girl Rosa Dias, and secondly that it was without her consent or that if it was with her consent such consent was obtained by force, threats or intimidation.

In order to prove carnal knowledge it is unnecessary for me to prove the actual emission of seed but on the other hand it is necessary for me to prove penetration, but I should tell you that penetration of the slightest

degree is sufficient. It need not, for instance, be of such a depth as to injure the hymen. If, therefore, I am able to satisfy the Court by evidence that the accused penetrated this girl without her consent, or with her consent but under duress, there is no doubt that in law he is guilty of rape.

With regard to the other charge, defilement, the law of this Colony is that any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony. The difference, therefore, between this charge and the charge of rape is that whereas in rape it is necessary for me to prove that the accused penetrated this girl without her consent, in defilement if I can prove that he penetrated the girl and that she was under the age of sixteen years of age it does not matter whether she consented or not unless it appears to the Court that he had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

Now in this case when you have seen the girl and heard the evidence of her father it will, I think, be quite obvious to you that it was impossible for the accused to suggest that he believed that this girl was above the age of sixteen.

There is only one other aspect of the law to which I would like to draw your attention and that is that although the accused has only been charged with these two offences it is open to you if you consider that the Crown has not proved penetration to advise His Lordship that in your opinion the accused is guilty of either attempted rape, attempted defilement or indecent assault, and if you do so advise, His Lordship under the provisions of our law can, if he agrees with your advice, convict of one of these offences. I refer of course, My Lord, to the provisions contained in section 175 and section 180 of the Criminal Procedure Code.

I now propose to turn to the facts: The complainant Rosa Dias is a girl of 9 years of age and she lives with her father Dr. Dias, her mother, her brothers and her sisters in River Road. The accused was employed by Dr. Dias on the 11th of July last year and his duties were to look after the youngest child aged three and to do the washing and ironing of the family's clothes. The child's mother Mrs. Dias is a dressmaker and she leaves the house in the morning at 8.50 after the elder children have gone to school and she does not return until 6 o'clock in the evening. The children return home to lunch about one o'clock and with the exception of the eldest boy they as a rule play in the house during the afternoon. Dr. Dias goes to his surgery every morning about 9 o'clock and returns about 12. He remains in the house as a rule until 4 o'clock in the afternoon and then he goes back to his surgery and stays there from 4 to 6.50. It will be obvious to you, therefore, that between the hours of 4 and 6, both parents are as a rule out of the house and the children are alone.

On the 11th November last Dr. Dias and Mrs. Dias were as usual out of the house after 4 o'clock but Dr. Dias, contrary to his usual practice, returned home unexpectedly at about 5 o'clock and found all the children with the exception of the child Rosa in their mother's room playing. He then rushed into the adjoining bedroom and there he found the child Rosa sitting on the bed with her dress up and her private parts exposed. She had nothing on under her dress and her knickers were thrown on the next bed. The accused was sitting beside her very close and bending over her thighs. The Doctor asked his daughter what she was doing with the boy and she started crying and said that the boy was rubbing the inside of her thighs. The accused averred that he was removing a dudu from her foot but Rosa said that she had no dudu in her foot, and there was

certainly no sign of either a needle or a dudu.

The child Rosa will tell you that the accused had that afternoon after her father had gone out at 4 o'clock pulled her into the bedroom, pulled off her knickers, put her on the bed and had connection with her against her will and her sister Simplicia will tell you that she was there and that she saw the accused take Rosa into the room where the Doctor found them.

Dr. Anderson who was called in by the child's father to examine the child that same evening will tell you that the hymen was intact but that there was soreness round the aperture of the vulva and that her condition was consistent with penetration as far as the vulva.

That, Assessors, is a brief summary of the facts and I do not intend to go into the evidence in detail. You will hear all the witnesses for yourselves and you can judge for yourselves. If you believe the child's story that the accused had connection with her by force, and this is to a certain extent corroborated by the sister's story and by the father, then the accused will be guilty of rape. If, on the other hand, you believe that he had connection with her but that she consented then he will be guilty of defilement.

THE CASE FOR THE PROSECUTION

GERALD VICTOR WRIGHT ANDERSON sworn:

- Q. 1. MR. WALLACE: What is your full name? — A. Gerald Victor Wright Anderson.
- Q. 2. And your qualifications — A. M.S., F.R.C.S.
- Q. 3. Are you a registered medical practitioner in Nairobi? — A. Yes.
- Q. 4. Do you remember on the 11th November last being called to Dr. Dias' surgery in River Road? —  
A. Yes.

Q. 5. When you arrived there did you examine the child Rosa?  
A. Yes.

Q. 6. Dr. Dias' daughter? -- A. Yes.

Q. 7. Can you give us any idea of her age? -- A. I knew her age, but she certainly looked under ten.

Q. 8. What was the result of your examination? -- A. I examined her on information given by the father and I found that she had a certain amount of discharge on her knickers and round about the vulva: that the appearance of the vulva was not of a child approaching puberty in that the entrance to the vulva was red and rather sore: no actual bleeding. I examined the hymen and I found it would admit the tip of my index finger.

Q. 9. Was her condition consistent with penetration? --  
A. It was certainly consistent with injury to the vulva and quite consistent with penetration.

HIS HONOUR MR. ACTING JUSTICE LANE: I take it that the hymen was not ruptured? -- A. No, it was open but not abnormally so. It would be impossible to lay down rules for the size of a normal hymeneal orifice.

No cross-examination by Accused.

EDWARD DIAS Sworn:

EXAMINED BY MR. WALLACE:

Q.10. Are you a Doctor practising in Nairobi? -- A. Yes.

Q.11. What are your medical qualifications? -- A. L.R.C.P & S (Edinburgh), L.R.F.P. & S. (Glasgow).

Q.12. How long have you been in this country? -- A. 29 years

Q.13. You are a married man, are you not? -- A. Yes.

Q.14. How long have you been married? -- A. about 15 years

Q. 15. How many children have you? -- A. Six.

Q.16. What age is the eldest? -- A. Fifteen.

Q.17. What age is the child Simplicia? -- A. Eleven.

Q.18. And what age is the child Rosa? -- A. Nine and a half

- Q.19. Are the other children younger or older? -- A. They are all younger.
- Q.20. What does your wife do? -- A. She is a dressmaker.
- Q.21. Is she out during the course of the day? -- A. Yes, she leaves at 8.30 in the morning and returns at 6 in the evening. She does not return to lunch.
- Q.22. Do any of the children go to school? -- A. All of them.
- Q.23. What time do they go out in the morning? -- A. They leave about 8.30 and return about 1 o'clock for lunch.
- Q.24. What are your movements during the course of the day?  
A. I leave in the morning at 9 o'clock and go to the Social Service Dispensary two minutes away from my house and return home about 12 o'clock.
- Q.25. When do you leave the house again? -- A. I leave again at 4 o'clock and return at 6.50.
- Q.26. Between 1 o'clock and 4 are the children as a rule at home or do they go out? -- A. The eldest boy goes out two or three times in a week for his afternoon lessons and two or three times a week to play. About six times a week he is out.
- Q.27. What about the other children? -- A. The others are in the house.
- Q.28. And do they stay there until 6 o'clock?-- A. Yes.
- Q.29. Then are they alone as a rule between 4 and 6? --  
A. Yes, they are alone. During my office hours I sometimes come back to the house to attend patients in my own dispensary at the house.
- Q.30. How many servants have you got? -- A. Three boys.
- Q.31. What are their duties? -- A. One is my own dispensary boy, his name is Mwaniki wa Thuo; another is the cook, his name is Mcharia wa Chiu and the third is the accused Agatu whose work is to wash clothes and to look after the youngest



child in the morning.

Q.32. Is he here to-day? -- A. Yes he is the accused.

Q.33. When did you employ this boy Agutu? -- A. About a year and a half ago; in July of last year.

Q.34. Where did he iron the clothes as a rule? -- A. He used to iron the clothes outside.

Q.35. Did you ever see him ironing the clothes anywhere else? -- A. Yes, about 2 months ago I saw him ironing the clothes in the children's bedroom with the door opening into the bedroom of my wife closed.

Q.36. Did you say anything to him on that occasion? --

A. I came from my other dispensary and I saw the door closed.

HIS HONOUR MR. ACTING JUSTICE LANE: Which door are you referring to? -- A. From the sitting room opening into my wife's bedroom.

MR. WALLACE: There is a plan here (Exhibit 2) which I do not think is of much use to us.

HIS HONOUR MR. ACTING JUSTICE LANE: I do not think it is very important.

Q.37. Did you say anything to him on that occasion? --

A. I asked him why he was ironing in the children's bedroom instead of outside. I ordered him to move the table outside and I told him to leave all the doors open. I told him to let the children play about.

HIS HONOUR: Where is your house? -- A. On River Road.

Q.38. Do you remember the 11th November last? -- A. Yes.

Q.39. Will you tell His Lordship what happened on that day? -- A. As a result of this closing of the door and this boy ironing inside it raised a suspicion in my mind.

HIS HONOUR: You were suspicious because you had found accused ironing in the house with the door closed

A. Yes.

HIS HONOUR: Perhaps you might explain this a little more.

Was the boy entitled to be in the house as his duty was to look after the child aged three? --

A. Yes, but not with closed doors.

Q.40. MR. WALLACE: I want to bring you to the 11th of November. Will you tell His Lordship in your own words exactly what happened on that day.

A. In the morning I told Agutu and two Indian compounders working at the Social Service League to take the children out for the Armistice celebration. They were taken out for the celebration that morning and when I came back at 12 o'clock to my house the children were not in the house. I asked this boy Agutu where the children were and he told me they had gone to their mother's dressmaking place in Government Road.

Q.41. Did the children all come back to lunch? -- A. They came back to lunch that day.

Q.42. And when did you leave the house that day? -- A. I left the house ~~the house~~ at 4 o'clock.

Q.43. Were all the children there when you left at 4 o'clock? -- A. All except the eldest boy who was out. He had come to lunch and had gone out again.

Q.44. So when you left the house at 4 o'clock your wife was out and your eldest son was out and all the other children were in? -- A. That is right.

Q.45. What time did you return to the house that day? -- A. 5 o'clock.

Q.46. You usually stayed in your office till about 6 or 6.30: why did you return early that day? -- A. I sometimes used to return early and as this thing had aroused a suspicion in my mind I returned

Q.47. When you returned to the house what did you find? --  
A. I found the entrance to my wife's bedroom was closed. I pushed the door open; the lock was holding very lightly, and I found the children all playing in my wife's bedroom except Rosa.

Q.48. Was the eldest boy there? -- A. No.

Q.49. So that all except Rosa and the eldest boy were playing in your wife's bedroom. Is that correct?  
A. Yes.

Q.50. What did you do then? -- A. I opened the next door adjoining my wife's bedroom and the children's bedroom.

HIS HONOUR: The door leading from your wife's bedroom to the children's room? -- A. One door leads from the sitting room to my wife's bedroom and another door from my wife's bedroom to the children's bedroom.

Q.51. MR. WALLACE: And you opened the door from your wife's bedroom to the children's bedroom? --  
A. Yes.

Q.52. Did you go into the children's bedroom? -- A. Yes.

Q.53. And what did you find? -- A. I found Rosa sitting on the other child's bed with her dress up.

Q.54. How far up was her dress? -- A. Just up to the waist.

Q.55. Had she no knickers on? -- A. No.

Q.56. Did she usually wear knickers? -- A. Yes.

Q.57. Did you see them? -- A. Yes, the knickers were on the next bed.

Q.58. What else did you see? -- A. Agutu the accused was sitting next to her leaning over her thighs. As soon as I entered the room Rosa pulled her dress down. I asked Rosa what the boy was doing to her.

Q.59. Was the boy there at the time? -- A. Yes.

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Q.58. What else did you see? -- A. Agutu the accused was sitting next to her leaning over her thighs. As soon as I entered the room Rosa pulled her dress down. I asked Rosa what the boy was doing to her.

Q.59. Was the boy there at the time? -- A. Yes.

- Q.60. And what did Rosa say? -- A. She started weeping. Then I asked the boy what he was doing to her and he said he was taking out a jigger.-
- Q.61. Did Rosa say anything? -- A. I asked Rosa whether she had a jigger and Rosa said No. I asked her what he was doing to her and she said he was rubbing the inside of her thighs. I asked accused what he was doing there rubbing the inside of her thighs and he denied it. He repeated he was taking out a jigger. I asked him "Where is the needle".

HIS HONOUR: I take it you assumed he meant he was taking a jigger out of her foot? --

- Q.62. MR. WALLACE: When he said he was taking out a jigger did you understand him to mean that he was taking a jigger from her foot? -- A. Yes.
- Q.63. And then you say you asked him where was the needle? -- A. He had no needle.
- Q.64. What did you do then? -- A. I asked him again if he was taking a jigger from her thigh and then I hit him two or three times.
- Q.65. What did you hit him with? -- . With my fist.
- Q.66. Where? -- A. Probably on his face or on his chest.
- Q.67. What did you do then? -- . I shouted for my two boys. Both came in. I told them the whole thing. Mwaniki asked accused a question and then I sent for the askari.
- Q.68. What did you do after that? -- A. I took the younger girl Rosa into my room and I just examined her to see if there was any blood on her. There was no blood on her. I came in and asked the other girl questions.
- Q.69. That has nothing to do with this case, but at any rate you talked to the other girl and then what did you do? -- A. As a result of what she told me

- Q.60. And what did Rosa say? -- A. She started weeping. Then I asked the boy what he was doing to her and he said he was taking out a jigger.
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- Q.69. That has nothing to do with this case, but at any rate you talked to the other girl and then what did you do? -- A. As a result of what she told me

I went inside and hit him again. He got very excited.

- Q.70. And were you excited? -- A. Yes I was very excited.
- Q.71. What happened then? -- A. The accused asked the other boys for a knife to cut his throat. He was looking round the room for a knife. He found a wooden doll on the bed.
- Q.72. Do you recognise this? (Exhibit 1) -- A. Yes, that is the one. He hit himself on the head with it 4 or 5 times. He threw himself down and pretended to be unconscious.
- Q.73. And how do you know he was not unconscious? -- A. I saw he was quite all right.
- Q.74. Was the askari there at that time? -- A. The askari came in just as he was lying down. I told the askari what had happened and I handed him over to the askari.
- Q.75. Did the askari take him away? -- A. He asked me if he should take him away and I told him to stay there till I had telephoned the doctor.
- Q.76. Did you telephone for a doctor? -- A. Yes, Dr. Anderson.
- Q.77. And did he come? -- A. Yes, he came to my office
- Q.78. And did you bring the children to the office? --  
A. Yes, I took Rosa and Lulu to my office.
- HIS HONOUR: That is Rosa and Simplicia. Lulu is the same as Simplicia? -- A. Yes.
- Q.79. When you took the children to the office did you leave the boy and the askari behind in the house?  
A. I took the askari with me to the office and left the accused at the house.
- Q.80. What time did Dr. Anderson come to the office? --  
A. About 6 o'clock.
- Q.81. And did he examine the children? -- A. Yes, he examined the two children.



- Q.82. After the Doctor had examined Rosa what did you do then. I assume he left after he had examined the children? -- A. Yes he left and I returned to the house with the askari and the children. I told the askari I was going to consult my lawyer next morning and asked him to leave the matter till the next morning.
- Q.83. Did the askari go then? -- A. Yes.
- Q.84. And the boy remained? -- A. Yes. I signed his kipande that evening and gave him his own wooden box. I could not find his domestic book and I told him to come next day.
- Q.85. Did you go to see your lawyer next day? -- A. No, I went to see Dr. Anderson again and I saw my lawyer the day after. Accused came back for his book and for his pay.
- Q.86. Was that the day after Armistice Day? -- A. No, the 13th.
- Q.87. Just keep to the 12th. You went to see Dr. Anderson and your Lawyer? -- A. I couldn't find them on the 12th. I got them on the 13th.
- Q.88. When you signed off the boy's kipande on the evening of the 11th did he leave? -- A. Yes.
- Q.89. When did he return? -- A. He returned at 12 o'clock next day.
- Q.90. Were you there? -- A. No, I was not there.
- Q.91. When did you next see him? -- A. On the 13th at my office.
- Q.92. What did he come to your office for? -- A. He came for his pay and for his domestic book.
- Q.93. When you went into the children's bedroom at 5 o'clock on the 11th November and found Rosa there with the boy did she appear in any way distressed? A. I entered very suddenly. She did not notice me at first.

Q.94. If she had cried out would the children in your wife's bedroom have heard her? -- A. I do not know. They could have.

HIS HONOUR: You say she became very upset as soon as you questioned her? -- A. Yes.

HIS HONOUR: But before you questioned her she was not very upset? -- A. I entered the room very suddenly. She did not notice me at first. I saw her before she saw me.

HIS HONOUR: When you surprised the boy doing this what was her condition. Was she distressed or not when you first saw her? -- A. She was looking very frightened. She seemed to be in a very frightened condition. It looked to me as though she was relieved by my entrance.

HIS HONOUR: Children of that age have no idea of concealing their feelings. It is very easy to see what they are thinking about. You say she looked relieved when she saw you? -- A. Yes.

HIS HONOUR: And then when you questioned her she began to cry? -- A. Yes.

CROSS-EXAMINED BY ACCUSED.

ACCUSED: Did you ask Rosa if I took her by force? --

A. I asked her what you were doing to her.

ACCUSED: Did she cry before you asked her? -- A. Not

until I questioned her but she looked frightened.

ACCUSED: Was this in the daytime or nighttime? -- A. Five o'clock in the evening.

ACCUSED: How many persons were there in the house? --

A. The other children were there.

ACCUSED: Who closed all the doors? -- A. I don't know. I think you did.

ACCUSED: That is all. I did not take this child by force. I want to take oath in Court.

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ROSA DIAS. (This witness appears too young to understand the nature of an oath and is warned to speak the truth).

EXAMINED BY MR. WALLACE:

- Q. 95. Is your name Rosa Dias? -- A. Yes.
- Q. 96. And is this your father? (indicates last witness) --  
A. Yes.
- Q. 97. Do you know this boy? (indicating accused) -- A. Yes.
- Q. 98. What is his name? -- A. gutu.
- Q. 99. Did he work at your house? -- A. Yes.
- Q. 100. Do you remember Armistice Day? -- A. Yes.
- Q. 101. Tell His Lordship exactly what you did on Armistice Day. Did you go out in the morning to see the celebration? -- A. Yes.
- Q. 102. And did you return home to lunch? -- A. Yes.
- Q. 103. Who was in to lunch that day? Was your father there?  
A. Yes he came back to lunch.
- Q. 104. And were all the other children there? -- A. Yes.
- Q. 105. Did your big brother Eddy go out after lunch? --  
A. Yes.
- Q. 106. What did your father do after lunch? -- A. He went to sleep in his bedroom.
- Q. 107. And after that what did he do. Did he get up afterwards? -- A. He went to work.
- Q. 108. Were you and Lulu and the three other children left in the house? -- A. Yes.
- Q. 109. And what were you doing? Were you playing round the house? -- A. Yes.
- Q. 110. What happened then? Will you tell us exactly what happened? -- A. The boy came in.
- Q. 111. What boy? -- A. The accused.
- Q. 112. Did he say anything to you? -- A. He took my hand. He put me on Lulu's bed. In the bedroom where Lulu and I sleep.
- Q. 113. Where were you when he took you by the hand? -- A. In my mother's bedroom.

- Q.114. Did he lead you into the other room? -- A. Yes he took me by the hand and led me in.
- Q.115. Were Lulu and the other children left in your mother's room? -- A. Yes.
- Q.116. What did he do when he had put you on Lulu's bed? -- A. He fell on me.
- Q.117. Can you just explain exactly what he did? -- A. He put something in between my legs.
- Q.118. Were you wearing knickers? -- A. Yes.
- Q.119. What did he do with them? -- A. He took them off.
- Q.120. When he put something between your legs was it before he had taken your knickers off or afterwards? -- A. After he took my knickers off.
- Q.121. What did he do then? -- A. He put something hard between my legs.
- Q.122. Did you feel anything in between your legs? Did it hurt you? -- A. Yes it hurt.
- Q.123. Was he wearing trousers or shorts? -- A. He was wearing shorts.
- Q.124. What did he do with his shorts? -- A. He undid the buttons.
- Q.125. And then he took something out when he undid the buttons? -- A. Yes.
- Q.126. And was that what he put in between your legs? -- A. Yes.
- Q.127. Did he lie on you for long? -- A. About a minute.
- Q.128. Did you call out? -- A. I shouted but he caught my mouth.
- Q.129. Did he put his hand over your mouth? -- A. Yes.
- Q.130. Did he say anything to you? -- A. He said "If you tell anyone I will hit you till you die".
- Q.131. Did he get up afterwards? -- Yes.
- Q.132. Did you see anything in between your legs? -- A. Yes I saw something like water between my legs.

- Q. 133. Was that hurting you or not? -- A. Yes it was hurting me.
- Q. 134. Did he say anything to you afterwards? -- A. No.
- Q. 135. Was it then that your father came in? -- A. Yes he came in when the boy was just on the bed.
- Q. 136. Did you agree to the boy doing this to you? -- A. No.
- Q. 137. You did not let him do it? -- A. No, I did not want him to do it.
- Q. 138. When your father came back what happened? --  
A. Agutu said he was taking a jigger out of my foot.
- Q. 139. Was he taking a jigger out of your foot? -- A. No.
- Q. 140. What did your father do then? -- A. He hit Agutu.
- Q. 141. Did your father ask you what you were doing with the boy? -- A. Yes.
- Q. 142. What did you say? -- A. I told him he had hurt my leg?
- Q. 143. And then did you cry? -- A. Yes.
- Q. 144. Did your father take you to the office that evening? -- A. Yes.
- Q. 145. And did Dr. Anderson come and examine you? --  
A. Yes.
- Q. 146. Are you quite sure you did not take off your knickers? - Did you take them off or did he? --  
A. He took them off

CROSS-EXAMINED BY ACCUSED.

ACCUSED: Why did you not cry out when I took you into the other room? -- A. Because you frightened me.

ACCUSED: What were you afraid off? -- Do you say that I took you by force? -- A. Yes.

ACCUSED: Do you say that I took your knickers off by force? --  
A. Yes.

ACCUSED: Do you say that I put you on the bed without your consent? -- A. Yes.

ACCUSED: Who closed the door of the room where the bed was? --

A. You did.

ACCUSED: Are you willing to take an oath on the book that it is true that I did this thing? -- A. Yes.

SIMPLICIA LULU DIAS Sworn.

EXAMINED BY MR. WALLACE:

- Q. 147. What is your name? -- A. Simplicia Lulu Dias.
- Q. 148. What age are you? -- A. Eleven.
- Q. 149. What standard are you in at school? -- A. Standard Three.
- Q. 150. Have you been confirmed yet? -- A. Yes
- Q. 151. When? -- A. Last year on 8th December.
- Q. 152. Do you live in River Road with your father and mother and brothers and sisters? -- A. Yes.
- Q. 153. Do you remember Armistice Day this year? -- A. Yes.
- Q. 154. Did you go to the Armistice celebration with your brothers and sisters and two Indians and this boy (Accused)? -- A. Yes.
- Q. 155. What is the name of this boy? -- A. Agutu.
- Q. 156. Does he work in your house? -- A. Yes.
- Q. 157. What does he do? -- A. He washes the clothes and irons them and looks after my little brother.
- Q. 158. On Armistice Day did you all come back to lunch except your mother? -- A. Yes.
- Q. 159. Did you all stay in the house in the afternoon? -- A. Yes.
- Q. 160. Did either your father or your brother go out after lunch? -- A. No.
- Q. 161. Did your father go out later on? -- A. Yes, he went back to his office.
- Q. 162. Did your eldest brother go out? -- A. Yes.
- Q. 163. Can you give us any idea of what time your father went out? -- A. 4 o'clock.
- Q. 164. Had your eldest brother gone out at 4 o'clock before your father? -- A. No, he went after.

- Q. 165. What happened that afternoon after your father had gone out? --A. We were playing in my mother's bedroom and our own bedroom.
- Q. 166. What happened after that? --A. Agutu took me by the hand and took me into the bedroom and told the other children to stay in our mother's room.
- Q. 167. And what happened then? -- A. He closed the other door and he told the children to close the door leading to my bedroom. He forced me on the bed; I was struggling; then he took off my knickers and then he slept on me.
- Q. 168. After he had done this to you what happened? --  
A. He put on my knickers and told me to go back to my mother's room.
- Q. 169. And what happened then? -- A. He called my sister Rosa.
- Q. 170. Into the bedroom? -- A. Yes.
- Q. 171. What happened then? -- A. He told us to shut the door leading to our bedroom.
- Q. 172. When he had closed the door were you and the other children left in your mother's room? -- A. Yes.
- Q. 173. And Rosa and Agutu were in the children's bedroom? --  
A. Yes.
- Q. 174. After he had taken her into the children's bedroom what happened next? -- A. Then my daddy came in
- Q. 175. Did he go into the children's bedroom? -- A. Yes.
- Q. 176. And was there a row then? Did you hear the noise from the other room? -- A. Yes, my daddy asked him what he was doing and he said he was taking a jigger out of my sister's leg. My daddy asked him to show the pin but he had no pin.
- Q. 177. Did your daddy take you and your sister Rosa to the office that evening? -- Yes.
- Q. 178. Did an askari come to the house that evening? --  
A. Yes.



Q. 179. When your father was questioning the accused were the other two boys working in the house there? --

A. They came in.

HIS HONOUR: When Rosa went with Agutu do you think she wanted to go? -- A. No.

HIS HONOUR: Do you know why she went in? -- A. Because he forced her.

HIS HONOUR: Did you see him actually doing anything to her?--

A. I heard him telling us to close the door.

HIS HONOUR: What made her go in if she didn't want to go? --

A. He caught her by the wrist and pulled her in.

HIS HONOUR: Did she call out? -- A. No, because she was frightened.

HIS HONOUR: Do you know what it was that made her frightened?

A. He told us if we called out he would beat us.

HIS HONOUR: Did he say this in the other room when you were all there? -- A. Yes,

CROSS-EXAMINED BY ACCUSED.

ACCUSED: Do you say it is true that I took your sister by force? -- A. Yes.

ACCUSED: Why did she not call out so that other people could hear? -- A. Because she was frightened.

ACCUSED: Why were you frightened of me? -- A. You said you would hit us.

ACCUSED: There was a dispensary boy working for your father. If Rosa had cried out would he not have heard? --

A. She was very frightened.

ACCUSED: Have you not been taught to tell lies in Court by your father? -- A. No.

ACCUSED: Were you crying inside the house when your father came? -- A. Afterwards I was crying.

ACCUSED: You only cried after your father came in, not before  
A. No, because I was frightened you would hit me.

ACCUSED: Did you not only cry after your father came in to make him believe I had taken you by force? --

A. No.

ACCUSED: Are you willing to take an oath that I have taken you by force? -- A. Yes.

MOHAMED ISMAIL CHAUDHRY Sworn.

EXAMINED BY MR. WALLACE:

Q. 180. What is your name? -- A. Mohamed Ismail Chaudhry.

Q. 181. And you are Sub-Assistant Surgeon in charge of the Government Dispensary, Nairobi? -- A. Yes.

Q. 182. Do you remember on 15th November examining a boy called Agutu s/o Andata? -- A. Yes.

Q. 183. Is he here now? -- A. Yes, the accused.

Q. 184. What did you find as a result of your examination? --

A. I examined him and found he had one bruise on the right buttock and he had a small hurt somewhere else, I cannot remember where it was.

Q. 185. Was he seriously injured? -- A. No. The bruise on the right buttock was in my opinion due to a blunt weapon.

Q. 186. Could it have been caused by falling down? --  
A. Possibly.

Q. 187. Would I be right in describing these two injuries as being of a trivial nature? -- A. Yes.

Q. 188. Did you examine him again on the 14th? -- A. Yes.

Q. 189. And you found nothing on that occasion to make you alter the opinion you formerly made? -- A. No.

CROSS-EXAMINED BY ACCUSED:

ACCUSED: You did not examine me properly? -- A. To the best of my ability I examined you.

ACCUSED: You only touched me with your hand and told me to go and have medicine put on. -- A. Yes, that is what you needed.

COURT ADJOURNED AT 1 p.m. AND RESUMED AT 2.15 p.m.

MATTHEW MAGNER Sworn.

EXAMINED BY MR. WALLACE:

- Q. 190. What is your name? -- A. Matthew Magner.
- Q. 191. Are you attached to the C.I.D. Photographic Department? -- A. Yes.
- Q. 192. Did you draw this plan (Exhibit 2)? -- A. Yes, it is a plan of the rooms in Dr. Dias's house. These rooms were indicated to me by Dr. Dias himself. It is a correct plan of the three rooms indicated by Dr. Dias, on 25rd November 1956.
- Q. 193. Did he tell you this was the position of the furniture on the 11th November? -- A. Yes.

NO CROSS-EXAMINATION BY ACCUSED.

MWANIKA WA THUO affirmed:

EXAMINED BY MR. WALLACE:

- Q. 194. Do you work for Dr. Dias as Dispensary boy? -- A. Yes.
- Q. 195. How long have you been working for him? -- A. 6½ years.
- Q. 196. Do you know the accused? -- A. Yes.
- Q. 197. What is his name? -- A. Agutu.
- Q. 198. Did he work for Dr. Dias? -- A. Yes.
- Q. 199. Do you remember the afternoon of Armistice Day? -- A. Yes.
- Q. 190. What happened that afternoon? -- A. The affair happened between Agutu and the child.
- Q. 191. Were you called into the house that afternoon? -- A. Yes.
- Q. 192. At what time? -- A. 5.50.
- Q. 193. What part of the house? -- A. The children's bedroom.
- Q. 194. Who was inside the bedroom when you were called in? A. I found the Doctor and Agutu.
- Q. 195. Dr. Dias? -- A. Yes.
- Q. 196. And where was Agutu? -- A. He was inside.

MATTHEW MAGNER Sworn.

EXAMINED BY MR. WALLACE:

Q. 190. What is your name? -- A. Matthew Magner.

Q. 191. Are you attached to the C.I.D. Photographic Department? -- A. Yes.

Q. 192. Did you draw this plan (Exhibit 2)? -- A. Yes, it is a plan of the rooms in Dr. Dias's house. These rooms were indicated to me by Dr. Dias himself. It is a correct plan of the three rooms indicated by Dr. Dias, on 25rd November 1956.

Q. 193. Did he tell you this was the position of the furniture on the 11th November? -- A. Yes.

NO CROSS-EXAMINATION BY ACCUSED.

MWANIKA WA THUO affirmed:

EXAMINED BY MR. WALLACE:

Q. 194. Do you work for Dr. Dias as Dispensary boy? -- A. Yes.

Q. 195. How long have you been working for him? -- A. 6½ years.

Q. 196. Do you know the accused? -- A. Yes.

Q. 197. What is his name? -- A. Agutu.

Q. 198. Did he work for Dr. Dias? -- A. Yes.

Q. 199. Do you remember the afternoon of Armistice Day? -- A. Yes.

Q. 200. What happened that afternoon? -- A. The affair happened between Agutu and the child.

Q. 201. Were you called into the house that afternoon? -- A. Yes.

Q. 202. At what time? -- A. 5.30.

Q. 203. What part of the house? -- A. The children's bedroom.

Q. 204. Who was inside the bedroom when you were called in? A. I found the Doctor and Agutu.

Q. 205. Dr. Dias? -- A. Yes.

Q. 206. And where was Agutu? -- A. He was inside.

- Q. 197. Was anyone else there? -- A. The child Rosa.
- Q. 198. What happened when you arrived in the children's bedroom? -- A. Dr. Dias asked me "Why has this man lain with my child?" The Doctor slapped Agutu and then slapped him again. Then I told the Doctor to stop beating him and I would ask him a question. I asked Agutu what the shauri was. He said "I had been taking a jigger from the child". I asked him where the jigger was. He could not show me one so I asked him "where is the needle". He could not even show the needle. Dr. Dias then told the cook to call an askari. The askari came and Agutu was kept by him and the Doctor took the children to a European Doctor, I have forgotten his name.
- Q. 199. When the Doctor slapped Agutu did he do anything? --  
A. He asked "Where is a knife that I may kill myself". He could not get one. Then <sup>he</sup> took the doll (Exhibit 1) which is a wooden one, and hit his left eye with it and the Doctor caught hold of the doll.
- Q. 200. Is that the doll he hit himself with? (indicating Exhibit 1) -- A. Yes.
- Q. 201. When did Agutu leave the house? -- A. About 8.50.
- Q. 202. Did Dr. Dias hit him hard? -- A. Not very hard. He only slapped him with his hand.
- Q. 203. What was Rosa's condition when you arrived in the bedroom? Was she upset or did she seem to be quite cheerful? -- A. She had run away to the kitchen. She was not there.
- Q. 204. But you told us a moment ago that the Doctor, Agutu and Rosa were there when you went into the room? --  
A. At the time I went in the child went away.
- Q. 205. Did you see her? -- A. Yes.

Q. 206. Did she appear to be cheerful or upset? — A. She was crying hard. She was not cheerful.

CROSS-EXAMINED BY ACCUSED:

ACCUSED: If the Bwana hit me gently how did the blood come out? — A. I do not know that. The Bwana also hit me.

ACCUSED: When the Bwana hit me and knocked me down this man was outside doing his work.

BONIFACE S/O MACHARIA affirmed:

EXAMINED BY MR. WALLACE:

Q. 207. Are you Dr. Dias' Cook? — A. Yes.

Q. 208. I want you to tell His Lordship what happened on the afternoon of Armistice Day in Dr. Dias' house  
A. At 5 o'clock I was in the kitchen on that day. I was called from the kitchen. I went inside the house. I found the Doctor, Mwaniki Agutu and Rosa. The Doctor described to us how he had found his child and Agutu together. After showing this to us he caught Agutu and hit him. After hitting Agutu Agutu said he was taking a jigger from the child. Agutu was asked where the needle was. He said he had not got it.

Q. 209. What happened then? — A. Then I was sent to call an askari. I brought the askari along and I brought him right inside and I left him inside and went back to the kitchen.

NO CROSS-EXAMINATION BY ACCUSED.

MASWE S/O MUITA affirmed:

EXAMINED BY MR. WALLACE:

Q. 210. What is your name? — A. Maswe s/o Muita. No. 641  
3rd Grade Police Constable.

Q. 211. Were you on duty in River Road on the afternoon of 11th November? — A. Yes.

- Q. 212. Do you know that boy? (indicating last witness) --  
A. Yes.
- Q. 213. Did you see him that afternoon? -- A. Yes, I saw him on the street when he called me.
- Q. 214. Did you go with him? -- A. Yes.
- Q. 215. Where did you go to? -- A. To the house of a Goan, Dr. Dias.
- Q. 216. Did you go inside the house? -- A. I first went to the outside of the house. Then the Goan called me and I went inside.
- Q. 217. What did you see when you went inside the house? --  
A. I saw a man lying on the ground.
- Q. 218. Who was that? -- A. The accused.
- Q. 219. And what happened then? -- A. I asked what the shauri was. The Goan said to me that this was his boy and I asked why he was lying down there and he said "I hit him and he sat down". I asked him why he hit him and he said "He was playing with my child". I asked him "Do you want me to take him to the Police Station or what do you want done" and he asked me to wait while he took the child to a Doctor.
- Q. 220. And did you wait? -- A. I waited there for a short time till he called a Doctor. When the Doctor came he took the children with him to an office where he worked. Dr. Dias and his children and the other Doctor went inside and I waited outside the door. He told me not to allow anybody to come near that place except myself. They closed the door and the window and they pulled the curtain over the window.
- Q. 221. When Dr. Dias and the two children came out of the office did you go back to the house with them? --  
A. I myself went back with the children and I left the Doctor in the office.

Q. 222. Did you arrest the accused that night? -- A. No.

NO CROSS-EXAMINATION BY ACCUSED:

MR. WALLACE: That is the case for the Crown, My Lord, with the exception of the Statement of the Accused which I want to put in now.

(Accused's Statement in Lower Court read to Assessor by the Interpreter and put in as Exhibit 3).

HIS HONOUR: Tell the accused if he wants to make another statement now either on oath or not on oath he may do so. If he makes a statement on oath he is liable to cross-examination, but if he makes a statement not on oath he will not be cross-examined.

ACCUSED: It is the affair of the Government. If they want me to make a statement on oath I can do so.

HIS HONOUR: You need not say anything if you do not want to.

ACCUSED: What I have already said is enough but I want to take an oath and make a statement.

AGUTU S/O ANDATA (Accused) affirmed:

I swear that I did not take her by force.

HIS HONOUR: Is that all you want to say?

ACCUSED: That is all except this. This case happened because I made a complaint against the father of this girl. If I had not made a complaint he could not have brought this case against me.

CROSS-EXAMINED BY MR. WALLACE:

- Q. 223. Do you admit that you had connection with the girl Rosa? -- A. Yes I admit it but I did not take her by force.
- Q. 224. But you had connection with her? -- A. Yes.
- Q. 225. On the afternoon of Armistice Day? -- A. Yes.
- Q. 226. Did you hear the girl Lulu and the girl Rosa give evidence that you took Rosa by the hand and pulled her into the children's room? -- A. I heard them say that but it is a lie. I did not take her by



force. She took her knickers off herself.

- Q. 227. Did you hear Mwaniki and the other boy and Dr. Dias say that on that occasion you said you were taking a jigger out of the girl's foot. Did you say that? -- A. I did say that but I said it after he hit me and my head was going round. I did not know what I said.
- Q. 228. Why did you lie to him when you knew you had connection with the girl? -- A. I was beaten and I had nothing to say. I was not strong.
- Q. 229. You told Dr. Dias a lie on that occasion. Are you sure you are telling the truth to us now when you say you had her with her consent? -- A. I am telling the truth here in the Court. He did not wish this thing to come out and that is why he drove me away from his service.
- Q. 230. You say that Rosa went in from the mother's bedroom into her own bedroom with you and agreed to all this? -- A. She was called from her mother's room by her sister Lulu who asked her to come to that room to play and she came.
- Q. 231. To play with whom? -- A. To play with me.
- Q. 232. Did you tell Lulu to call her? -- A. No I did not. She did it of her own accord.
- Q. 233. And then when Rosa came in Lulu went out. Is that right? -- A. Lulu called Rosa; Rosa came in and Lulu went out and she closed the outer door.
- Q. 234. She closed the door between the mother's bedroom and the children's bedroom? -- A. She bolted the door from her mother's bedroom.
- Q. 235. Do you seriously suggest that Lulu called to Rosa to play with you although you had not told her to do so? -- A. I did not utter a word from my mouth asking her to come. Lulu called her of her own accord.

force. She took her knickers off herself.

- Q. 227. Did you hear Mwaniki and the other boy and Dr. Dias say that on that occasion you said you were taking a jigger out of the girl's foot. Did you say that? -- A. I did say that but I said it after he hit me and my head was going round. I did not know what I said.
- Q. 228. Why did you lie to him when you knew you had connection with the girl? -- A. I was beaten and I had nothing to say. I was not strong.
- Q. 229. You told Dr. Dias a lie on that occasion. Are you sure you are telling the truth to us now when you say you had her with her consent? -- A. I am telling the truth here in the Court. He did not wish this thing to come out and that is why he drove me away from his service.
- Q. 230. You say that Rosa went in from the mother's bedroom into her own bedroom with you and agreed to all this? -- A. She was called from her mother's room by her sister Lulu who asked her to come to that room to play and she came.
- Q. 231. To play with whom? -- A. To play with me.
- Q. 232. Did you tell Lulu to call her? -- A. No I did not. She did it of her own accord.
- Q. 233. And then when Rosa came in Lulu went out. Is that right? -- A. Lulu called Rosa; Rosa came in and Lulu went out and she closed the outer door.
- Q. 234. She closed the door between the mother's bedroom and the children's bedroom? -- A. She bolted the door from her mother's bedroom.
- Q. 235. Do you seriously suggest that Lulu called to Rosa to play with you although you had not told her to do so? -- A. I did not utter a word from my mouth asking her to come. Lulu called her of her own accord.

- Q. 256. What do you say happened when Rosa came into the room and Lulu shut the door? — A. Rosa said to me "I want to play with you". I said "what play". She said "the play of men and women". I saw her taking off her knickers and she called to me to come on the bed. I got on the bed and played with her but I did not go far inside her because it was not enough for a man to go in. Then the door opened and her father came. The door was opened for him by Lulu. The father asked "What are you doing?". I did not say anything then. He asked again "What are you doing?". I did not say anything.
- Q. 257. Tell me this. Do you suggest that Rosa asked you to have connection with her although you did not suggest it to her at all? — A. She herself wanted it.
- Q. 258. And you did not call her in at all? — A. I did not call her. Lulu fastened the door with a bolt. She was there with her other sister. Nwaniki was near the door at the place where he works. Boniface was in the kitchen.

ACCUSED states he has no witnesses to call.

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SUMMING-UP BY HIS HONOUR MR. ACTING JUSTICE LAWE.

May I just remind you that this man is charged on two counts. It may seem to you rather stupid to charge him on two counts when it really seems to be the same thing. You may not understand the object of that, but the point is that there are two Sections in the law, one is the raping of a person whether a grown-up woman or a girl, and the other is defilement of a girl.

The charge of rape applies, as I have told you, to both women and small girls, and for this to be established it is necessary to find that the woman or girl was penetrated and that she did not give her consent. It does not matter whether it was complete penetration or only partial penetration. If those two things are established then it is rape. The section reads in this way: It is rape if it is done without the woman's or girl's consent or if it is with her consent after that consent has been obtained by force, threats or fear of bodily harm.

The other count is simply this: intercourse with a girl under the age of sixteen. In the case of a girl of under sixteen it does not matter whether she has given her consent or not.

In this case the accused has admitted that he had intercourse and partially penetrated this girl, so that that essential element in both counts is established; and it is also clear as regards age that she is much less than sixteen. She is only nine years of age and no one in their senses could imagine that she is anything like sixteen. This other element in the second count is therefore established, and if you agree you must find him guilty on that second count.

The only other question I would like you to answer is whether, as regards the charge of rape, you are satisfied that it was done without the girl's consent or under the influence of threats or intimidation. Rosa has said that

the accused pulled her into the room after telling her and her sister that he would beat them till they died if they said anything to anybody; and that inside the room the accused took off her knickers and put his hand over her mouth to prevent her shouting. Accused says that Lulu called this child in, shut the door and that Rosa then asked him to come and do this thing to her. I would just ask you to consider the probabilities of this. Rosa is a very young child. She appeared innocent and truthful and not a precocious sort of child who knew a lot about that sort of thing. I would also ask you to consider that the accused when he was questioned by Dr. Dias lied and told the story about the jigger.

I ask you do you consider that the accused had intercourse with her without her consent or under the influence of threats. If by any chance you think that he did not actually have intercourse <sup>with</sup> her but tried to do so then he can be convicted of attempt to rape, but I think it is fairly clear from what he said that there was partial penetration.

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OPINIONS OF THE ASSESSORS:

1. Juma. In this matter I find this: that the accused did wrong because the child is not grown up to her normal size. She is still very young. He may not have had complete connection with her but he did wrong because she is still young and it is not her time now to go with men. As to catching her, I do not think he caught her by force because if he did she could have cried out and the others inside could have heard her. The other children could hear and there were other people there in the house. This was in her father's house and she should not be afraid. This is where the great fault lies, that she is very young. Her

father got annoyed because a complaint was made against him on account of pay. If he was angry or annoyed about his child he could have had the accused arrested on the very same day. He would not have left him to go.

2. Okelo. Agutu did wrong in one thing, because he lay with a child who has not reached the age of 16 years. On the question of catching her by force she was not caught by force because there were other children, sisters and brothers, in the house. She could have cried out and her sisters or brothers could have heard. Nobody will be afraid being in the house of his father and mother. This is what I find, that he did wrong in having connection with a young girl who had not reached proper age. The father was angry after accused had complained against him.

3. Munyedadi. The accused did wrong in interfering with a child who had not reached the age of sixteen. If she was taken by force she could have cried out because she was in her father's house. She could not be afraid of crying out there. If the father was annoyed about it he could have asked the askari to arrest him and take him to the Police Station at once.

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COURT ADJOURNED TILL 10 a.m. TO-MORROW FOR JUDGMENT.

COURT RESUMED AT 10 a.m. on 10th December 1956.

Accused present.

Mr. Wallace for Crown.

J U D G M E N T

The accused is charged on two counts, the first being Rape and the second being Defilement of a girl under sixteen, the offences being alleged to have been committed against one Rosa Dias, a child of nine years, on the 11th November.

For the first count, Rape, to be established it must be shown beyond reasonable doubt that there was penetration and that the act was done either without the child's consent, or, if with her consent, then that the consent was obtained by force or by means of threats or intimidation or by fear of bodily harm.

To establish the second count, penetration must be shown to have taken place and that the child was under sixteen. Her consent is immaterial.

The accused has admitted intercourse with partial penetration, and this has been proved by other evidence, that of Dr. Anderson and of Rosa herself. Partial penetration is sufficient for the requirements of Section 122 and also Section 128 of the Penal Code.

The complainant Rosa has been shown to be under sixteen and is clearly so young that not even the most ignorant person could imagine that she was as much as sixteen years of age. The offence of Defilement is therefore clearly established.

With regard to the charge of Rape, I regarded Rosa as truthful when she said that accused had intercourse with her against her consent and that accused threatened her and her sister, and that that was the reason why she was afraid to call out. In this she was supported by Lulu, her sister. Rosa appeared to be an innocent child and a timid one, and

the probabilities are in favour of what Rosa has said. The accused has denied that he did this without Rosa's consent, or that he used force or threatened her or intimidated her. His story is that the elder girl Lulu called Rosa into the room where accused was, then went out and shut the door leaving Rosa and accused alone, and that Rosa then took off her own knickers and invited accused to have sexual intercourse and that he did so. AS I have said, Rosa's story that the intercourse was without her consent and after threats and intimidation is much the more probable, and the accused's story is difficult to believe.

In the evidence of Lulu there is one inconsistency; she said at first that accused called Rosa into the room, and afterwards she said that accused dragged her in by the wrist. The latter statement corroborates what Rosa had said.

The accused has called attention to the fact that Rosa did not call out, although there were two other boys as well as the other children in the house. Unless the child Rosa was completely intimidated by accused it is difficult to see why she did not call out, and this does raise an element of doubt which operates in accused's favour in regard to the charge of Rape. Although I have very little doubt that Rosa was intimidated and that her version is true and that the intercourse was against her will, it is safer to give the accused the benefit of this doubt to which I have referred.

I therefore acquit accused upon the charge of Rape and I convict him upon the charge of defilement contrary to Section 128(1) of the Penal Code. I call on the accused to say anything he may wish why sentence should not be passed upon him according to law.

ACCUSED: I finished all I had to say yesterday and I have nothing more to say.



MR. WALLACE: There is no previous conviction.

S E N T E N C E.

The offence is a sordid and revolting one and there is very little to be said in favour of accused. The only feature which calls for comment is the scandalous neglect on the part of Rosa's parents in leaving her and the other children alone in the house with the accused and other natives regularly each day for a period of time. Such neglect on the part of educated parents who have had a long experience of this country is highly reprehensible since it is a well known fact that the average uneducated native cannot be trusted alone with female children and that sexual offences are common in such circumstances. Such behaviour by the parents, therefore, while it could not condone accused's act, tended to make such an occurrence not unlikely.

The accused is a cripple and lame; this, I do not think, in any way tends to lessen the seriousness of his offence.

I sentence accused to twenty lashes and eight years imprisonment with hard labour.

---

MR. WALLACE: There is no previous conviction.

S E N T E N C E.

The offence is a sordid and revolting one and there is very little to be said in favour of accused. The only feature which calls for comment is the scandalous neglect on the part of Rosa's parents in leaving her and the other children alone in the house with the accused and other natives regularly each day for a period of time. Such neglect on the part of educated parents who have had a long experience of this country is highly reprehensible since it is a well known fact that the average uneducated native cannot be trusted alone with female children and that sexual offences are common in such circumstances. Such behaviour by the parents, therefore, while it could not condone accused's act, tended to make such an occurrence not unlikely.

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The accused is a cripple and lame: this, I do not think, in any way tends to lessen the seriousness of his offence.

I sentence accused to twenty lashes and eight years imprisonment with hard labour.

---

IN HIS MAJESTY'S SUPREME COURT OF KENYA

SESSIONS HOLDEN AT NAIROBI

CRIMINAL CASE NO. 158 OF 1956

M R X

versus

AGUTU son of ANDATA

15th DECEMBER, 1956

DECLARATION VERIFYING TRANSCRIPT OF SHORTHAND

NOTES OF TRIAL

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the trial of the above case, to which transcript this Declaration is annexed, I, the said James Stanley Templeton certify that this is a correct record of the proceedings at the said trial.

DECLARED at Nairobi this  
15th day of December, 1956,  
Before me,

  
REGISTRAR,  
SUPREME COURT OF KENYA.



KENYA

No. 667



11 JAN 1936  
KENYA  
December, 1936.

Sir,

I have the honour to transmit a copy of the Judge's Report and a copy of the Judgment in Supreme Court Criminal Case No. 96 of 1936, *Rex v. Musa Haji s/o Masanja*. The accused was sentenced to death on the 17th September, 1936. He appealed to His Majesty's Court of Appeal for Eastern Africa and the appeal was dismissed on the 20th October, 1936. I enclose a copy of the Judgment.

2. The case was reviewed in Executive Council on the 14th November, 1936 when my Deputy concurred with the advice of the Council that the sentence of death should be commuted. The punishment subsequently imposed was imprisonment with hard labour for life.

I have the honour to be,

Sir,

Your most obedient, humble  
servant,

BRIGADIER-GENERAL.

G O V E R N O R.

THE RIGHT HON. W. ORMSBY GORE, P.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
L O N D O N , S.W.1.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

SESSIONS HELD AT MAKURU ON THE  
14th DAY OF SEPTEMBER 1936.

CRIMINAL CASE NO. 96 OF 1936.

(Original Cr. Case No. 1541/36 of the M.A.'s Court at Kisumu)  
THE PROSECUTOR ..... Prosecutor

versus

MUSA HAJI S/O MASHUNJI ..... accused.

R E P O R T:-

Your Excellency,

I have the honour to report that on the 17th September 1936 at Makuru Sessions I passed sentence of death upon Musa Haji s/o Mashunji, who was convicted of murder. The attempt of the convict to establish that he was drunk, that his companions attacked him and beat him and that in retaliation he stabbed the deceased failed at the trial. There was no apparent motive for the crime.

The convict, the deceased and their companions who were present are all Tanganyika natives- Kinyamwesi- employed in or near Londiani, and profess Mohammedanism. They were all gathered at the hut of Maganga in the Forest Nursery Londiani between 6.30 and 10.30 p.m. on the occasion of the crime, having spent the afternoon at a prayer meeting at Londiani. The convict was allowed, or took upon himself to slaughter a chicken in accordance with the Muslim ritual. He went out of the hut with the chicken and a knife. Shortly afterwards he returned to the hut threw the chicken down hard on the ground, so that it was stunned or killed. The deceased and the witnesses were then in the hut and the deceased arose to go out of the hut. The convict thinking, probably, that the deceased was annoyed at his act of throwing down the chicken and was

moving against him, stabbed the deceased in the stomach,  
so severely that he died within about twenty four hours.

There was no previous enmity between the convict and  
the deceased. There is so far as the evidence goes nothing  
to justify or explain the killing, and no suggestion of  
insanity was raised during the trial. On being called upon  
after conviction the convict had nothing to say. No extenuat-  
ing circumstances of any kind appeared during the trial,  
and I am unable to submit any grounds for the mitigation of  
the sentence.

I have the honour to be,  
Your Excellency's obedient  
servant,

*W. K. M. J. K.*  
J U D G E.

SUPREME COURT OF KENYA.

To,  
His Excellency the Governor,  
through  
The Honourable,  
The Colonial Secretary,  
Nairobi.

ENK.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.  
SESSIONS HELD AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 139 of 1936.

(From original Criminal Case No. 96 of 1936 of  
H. M. Supreme Court of Kenya at Nakuru)

REX ----- Respondent.  
(Orig: Prosecutor)  
versus  
s/o  
MUSA HAJI/MASANJA ----- Appellant.  
(Orig: Accused)

JUDGMENT:-

The learned trial Judge carefully reviewed the whole case and was unable to find anything to rebut the presumption of murder by the appellant. We see no reason for coming to a contrary conclusion. The appeal is dismissed.

20.10.36

Joseph Sheridan.

H. H. Hearne,

I. G. Bates.

I hereby certify that this is a true copy of the original.

  
REGISTRAR.

COURT OF APPEAL FOR EASTERN AFRICA.

12. 12. 36



IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI  
CRIMINAL CASE NO. 96 OF 1936

(Original Criminal Case No. 1541 of 1936 of the  
Resident Magistrate's Court at Kisumu)

at the Sittings holden at Nakuru on the 14th day of  
September, 1936.

REX

Prosecutor

versus

MUSA HAJI s/o MASAHA

Accused.

J U D G M E N T :-

It is not easy to come to definite conclusions of fact in this case. The witnesses give their evidence in a manner that would lead one to believe that they were withholding some part of the story. The impression that they make is, however, conditioned by the story they tell; a story which to the European mind appears at first to be improbable. I am however satisfied that the person dying in hospital as Ali Hassan is the person referred to by all the witnesses. The Crown witnesses say that between the hours of 6.30 to 10.30 p.m. on the night of the 14 June Maganga and his wife Mejuma, Kiula, an old friend of Maganga's, Ali bin Hassan, Alimasi, and Musa the accused were gathered together in a friendly talk at Maganga's hut. On that day there had been a Muslim native prayer meeting at Londiani close by. Ali Hassan Ali Mazi and Musa had come from Turi the Friday before and were staying at Maganga's hut for the purpose of attending. They had been at the prayer meeting, which finished about 4 p.m. and had re-assembled in Maganga's hut about 6.30. The hut consists of one room and a kitchen. A door leads from the hut to the outside; another doorway allows access from the main room of the hut to the kitchen. The party were sitting around a

fire in the hut taking until about 10.30/11 . . . . .  
 Maganga decided they should have food. . . . .  
 then went into the kitchen to make preparations. . . . .  
 then caught a fowl or chicken and gave it, he says, . . . . .  
 Musa in order that he should slaughter it in accordance  
 with Muslim law. Alimazi gives a different account.  
 He says it was the ~~prive~~ privilege of the elder of the  
 guests to slaughter the chicken and that Musa took it  
 without consent of the others. The fact remains he took  
 it and went to the doorway of the hut to go out and  
 slaughter it

I pause to consider the statements of the deceased  
 as to the cause of his death made to the two eskaris  
 called to the scene who arrived about an hour later,  
 and the statement made to the Magistrate in hospital.  
 In all these statements the deceased declares that Musa  
 stabbed him and that there was a quarrel or shauri about  
 a chicken. The deceased's statement that there was a  
 quarrel about a chicken is corroborated by Alimazi but  
 not by Maganga and Kiula. That there was some sort of  
 a shauri about it is fairly obvious, but whether it was  
 of a serious nature it is difficult to discover.

Leaving the matter for <sup>the</sup> moment, the fact remains  
 that according to the Crown witnesses Musa left the hut  
 with the live chicken and carrying a knife with a blade  
 about 5 inches long. The other four men remained in the  
 hut. The next stage as described by the Crown witnesses  
 is that the chicken was thrown down violently by Musa  
 and died as the result. Almost at the same moment Ali  
 Hassan went to go out and met Musa at the doorway  
 leading out of the hut. Maganga says they met outside.  
 Kiula says that Ali Hassan had not left the hut. Ali  
 Mazi does not appear to have seen the blow struck, but

to have heard the noise of the chicken being thrown down and then his attention being aroused noticed that Ali Hassan was wounded. Kiula also avers that he saw the blow struck.

Whatever discrepancies there may be between each of these witnesses the impression they leave is that the stabbing was a sudden and utterly unreasonable and unforeseen event. They all deny that there was anything in the nature of a serious quarrel or that they, though annoyed by the action of the accused, expressed their annoyance by attacking him.

The accused gave evidence on oath and says that the hours from 7 to 10.30 were passed by himself and all the Crown witnesses at the hut of the Buganda foreman near Maganga's hut in drinking tembo. Accused is defended by an advocate and though this foreman has been summoned it has been decided not to call him. As against the accused's allegation that he was drunk by 10.30 at night and that the others had been drinking also, there is the evidence of the askaris and the other Crown witnesses. I therefore cannot accept it as a fact that he was drunk.

The next stage of his defence is that he threw the chicken down and killed it and the other became annoyed or angry and all of them set upon him and punched him. In the course of this punching he struck back with the knife in his hand and didn't know what happened.

It is somewhat surprising that a man who alleges he was drunk, and was attacked can give such a detailed account of the happenings of the evening excepting of course the final act of the knife getting into Ali the deceased. On his own story the others had less tembo than he and would therefore be capable of as exact an appreciation of the occurrence. But I cannot conceive

that the annoyance given to the other men is of such a nature as would cause them to set upon the accused. Four men settling on to one and that one armed with a knife would create a disturbance at the doorway of a hut of which some traces would be obvious to the police witnesses. Moreover the wife Rajra who is in the kitchen with an open door from which she can hear if not see what is going on gives us no hint of a disturbance of such a nature as would be expected to arise from such an attack. Moreover can it be reasonably expected that a man who did not know whether he had stabbed another or not would run away and hide in the bush.

I cannot therefore place any reliance upon the accused's evidence. The tembo drinking is denied and so is the joint attack. And although the witnesses for the Crown are unable to give a very connected account of the occurrence, the very suddenness of it may account for the manner in which they give their evidence. It is at first sight improbable that a man should stab his companion for no apparent cause. It is also of note that the wound is in the left lower abdomen and was deep making several perforations of the intestine. I therefore think that what happened is more or less accurately described by the Crown witnesses viz that All alone went towards the doorway and was stabbed there by the accused.

The statements made by the deceased, however, all point to a quarrel of some kind over the killing of the chicken. The act of the accused in throwing down the chicken so violently as to kill it shows that he had become angry. It is not suggested by the accused that he was provoked by being told he could not kill the chicken. And his own account is that he

was angry because the chicken had escaped and he had to catch it. That statement seems to be borne out by the evidence of Alimazi who said the accused was out of the hut for half an hour before returning with the chicken and throwing it down. Upon this angry act I think words passed between Ali and the accused, and Ali moved from where he was sitting on the floor towards the accused who was then standing at the hut door with the drawn knife in his hand. It cannot be said from the evidence, other than that of the accused, that Ali showed by his movements any intention to attack Musa. From the evidence of Kiula, Alimazi, and Majuma it seems clear that the throwing down the fowl, the movement of Ali the deceased towards the door, and the infliction of the wound upon Ali all followed in quick succession. The accused who was angry used the knife. Even assuming that he thought Ali Hassan was going to attack him, he was nevertheless unarmed.

And where a man kills another suddenly without any or without considerable provocation, the law implies malice. In this case too a deadly weapon is used. It is not a case of two persons quarrelling and starting to fight. And even if it were, the accused is at the open doorway and can retreat.

I am unable to accept the accused's defence that he was drunk and was attacked by four men. I convict him of murder.

W. K. Horne

Allocutis:- I have nothing to say.  
Sentence of death passed on accused.  
Informed of right of appeal.

W. K. Horne  
17.9.38.

Certified fit case for appeal.

W. K. Horne  
17.9.38.

I certify this is a true copy  
of the original  
W. K. Horne  
Magistrate  
Mombasa Court, Mombasa