

1925

KENYA

127

16053

FROM *R. G. ...*  
*...*

326

DATE

*14 March, 1925*

REC'D  
PL. 7 APR 25

FOR CONSULTATION

Mr.  
Mr.  
Mr.  
Asst. U.S. of S.

*S.S. "Swarahili"*

*Sends memo. by atty.  
Genl. and corres.*

Perm. U.S. of S.  
Pass. U.S. of S.  
Secretary of State

Previous Paper

*10000. 14505*

MINUTES

*Mr. Ritchie Bottomley*

*If you agree to my  
record within we can wait  
to hear from the Commission.*

*Oct 16. 4. 25*

*1/3  
7/1 + Oct 17. 4. 25*

*attence*

*copy to ... 23 JUN 1925*

Subsequent Paper

*M. 11509*

on Mr. Omsky from 5/2

Mr. Morrison called on the 15th April. *h*  
*Beale & I were present*  
 (1) He said that his clients were determined to pursue the matter in both the Privy Council and the House of Commons and in one way or another to make the Government pay. The Award he said, is definitely against the Government; it is a valid award and the Government must face the odium of ~~awarding~~ <sup>ceding</sup> it on a technicality. The Secretary of State can save them from this position by ordering Kenya to pay £5,000 net.

(2) It was pointed out that Kenya held that the Award was wrong on the legal point, since the arbitrator had ignored the representations of the Government Council, and was monstrous in amount. The "Swahili" had cost £3,500, completed on the River Juba, twelve years earlier, and was nevertheless a sound hulk. The Award was based on replacement value, and there was at no time any intention of replacing the vessel.

(3) It was sought to take advantage of the oversight of the Attorney-General's Department to enforce an unreasonable award and to turn down the contentions of the Kenya Government on both grounds. The issue of a fiat was a prerogative matter resting with the Governor; if the case were decided by the Privy Council against the Government there was an end of the matter, but it was asking a great deal of the Secretary of State that he should intervene on the strength of possible criticism in the

the

the House of Commons.

(4) Could Mr. Morrison help us by abating the demand to a reasonable sum? It would be to his clients' advantage since at the best their irrecoverable costs would be very heavy. He asked for a figure but none was offered, and it was finally said that he should consult his clients.

(5) On our side Mr. Deputy Clerk said that the matter would be laid before Mr. Avery on his return.

On details Mr. Morrison quoted at length the comments of the members of the Judicial Committee of the Privy Council, which appeared to have gone beyond the earlier dictum of Lord Carson adduced on the sheet attached to Gov. S150/25. Further, he mentioned that security for costs of the further hearing had already been arranged. It is not certain if Mr. Morrison is quite so adverse to a compromise as he seemed at first, but my own hopes of saving the Government a good part of the expenditure which it has let itself in for are weakening.

In our talk after the meeting the question arose whether the Attorney-General himself was responsible for the muddle. The Award was filed in Court and the time began to run on the 7th April 1924. Mr. Igall Grant reached the court on return from leave on the 19th. The notice expired on the 21st and I think he is

absolved

absolved from responsibility. He is in the position of putting up a thoroughly bad series of arguments in order to defend the man who acted for him.

W.C.A. 16. 4. 25

KENYA.

No. 326.



130  
GOVERNMENT HOUSE,  
NAIROBI,  
KENYA.

14th March, 1925.

16053

REC'D  
7 APR 25

Sir,

*only  
11697  
25  
10352  
26*

With reference to my telegram No.110 of the 11th March and to Kenya despatch No.114 of the 26th January, relative to the application to the Judicial Committee of the Privy Council by the Plaintiff in Civil Appeal No.9 of 1924, the English Navigation and Trading Company, Limited, versus the Attorney General - S.S. "Swahili" - I have the honour to transmit a memorandum by the Attorney General commenting upon your telegram of the 3rd March, together with marginally noted correspondence.

from Attorney General  
Dated 7-3-25.  
from Mr. J.O.W. Hope  
dated 15-1-25.  
from Capt. R.F. Rainsford  
dated 20-1-25.  
Capt. E.N. Erskine  
Statement.

*you  
2150  
27*

I have the honour to be,

Sir,

Your most obedient, humble servant,

ACTING GOVERNOR.

THE RIGHT HONOURABLE

LIEUTENANT COLONEL L.C.M.S. AMERY, P.C., M.P.,

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

1/25.

7th March, 1925.

The Hon'ble Ag. Colonial Secretary,

W a s i n g t o n.

re: THE ENGLISH ASSOCIATION, Petitioners

vs  
THE GOVERNMENT OF THE COLONY

Ref. Your No. S/A. 100/1/25 of the 25th Jan 25

I assume the Secretary of State's cable message of 17th Feb. 1925 on facts before me this case being justified, that the plaintiffs action is justified.

It does not appear to me been made clear to the Secretary of State why we defend this case when both courts in this Colony decided in our favour. The answer is, first because there is no cause of action against the Government, secondly because the Arbitrator's award is bad inasmuch as (1) he declined to state a case on points of law for the opinion of the Court as he was requested to do; (2) damages were assessed on the basis of cost of replacement whereas the true measure of damages (assuming any to be payable) is the actual value of the ship at the time of her loss together with the value of existing charter parties (if any). There was no evidence of value of ship at the time of her loss before Arbitrator; (3) the opinion set out in paragraph 12 of the award is wrong in law and is unsupported by the evidence.

It

It should be emphasized that this Government was <sup>132</sup> never asked for and never refused a fiat for a Petition of Right on the original alleged cause of action.

Messrs Morrison and Allan wrote on 10th September, 1924:-

"We have the honour to request you to inform us whether an unconditional fiat will be granted to the above Company if they file an action against the Government under the Petition of Rights Ordinance for the amount of the award and costs".

This was understood to be a request for a fiat to enforce the award and not for a fiat for a petition of right on the original claim. On this reading of the letter Crown Counsel replied that the Attorney General would "not advise His Excellency to grant a fiat for a Petition of Right based on the Arbitration Award". The letter was deliberately phrased so that it would not be taken to be a refusal of a fiat for a Petition of Right on the original claim.

That Crown Counsel's interpretation of Messrs Morrison and Allan's letter was correct is clear from paragraph 15 of Mr. Gabriel's letter of 26th November, 1924, to the Secretary of State.

That letter refers to a conversation between Mr. Morrison and Crown Counsel in which the latter informed Mr. Morrison "that a fiat for an action on the award would only be granted provided the Company allowed the Government to raise objections to the award although they were out of time".

If a Petition of Right for an action on the award were granted and if the Crown were precluded from objecting to the award the Crown might just as well pay over the £5000 because it would be impossible to get a decision of the Court as to whether or not the Crown was liable. A decision on that point could be had on a Petition of Right based on the original cause of action and ignoring the award (which is a bad award) but the whole proceedings in this case suggest that the

plaintiffs

plaintiffs have endeavoured to prevent the question of liability coming before the Court. A fiat was inferentially offered to Mr. Gabriel by Sir Edward Northey on 27th October, 1919, but Mr. Gabriel did not care to avail himself of this offer which would have resulted in a decision by the Court on the legal question of liability.

I may say that if the Privy Council sees fit I have no objection to the Board deciding the question of legal liability and damages and we are quite prepared to argue before the Board that no liability attaches to Government and that there was no evidence to support an award for £5000.

In my opinion the decisions given in our favour are correct and should be supported.

3d/ R.N.Lyall Grant.  
ATTORNEY-GENERAL.

No.10/33/A/25.

134

Senior Commissioner's Office,  
Nyeri, 15th Jan., 1925.

Crown Counsel,  
Nairobi.

Ref. Your No.2020/24 of 31/12/24.

I should say the value of the " Swahili " in 1918 would be the value of scraf iron.

Captain Rainsford of the Police could give you information on the matter as he was adjutant of the 5th K.A.R. at the time and the Swahili was chartered by them to carry stores and Captain Rainsford was often on her.

Sgd/ J.O.W.Hope.

SENIOR COMMISSIONER,  
KIKUYU.



Kenya Police Depot.,  
Nairobi, 20th January, 1925.

The Crown Counsel,  
Legal Dept.,  
Nairobi.

W LIMITED

With reference to your letter No.M.118/25 dated 20th January, 1925.

I was Staff Officer to O.C. Troops Jubaland from 1917-1919 and also Adjutant of the 5th K. A. R. and during this period saw the River Steamer "Swahili" on numerous occasions.

She was in a most dilapidated condition, and being continuously patched up by the owners, and in my opinion only fit for scrap iron, which would have practically no value in Jubaland.

Sgd/ R.F.Rainsford.

Capt.,

Supdt. i/c Police Depot.

STATEMENT BY CAPTAIN E. N. ENSKINE, R.C., ON  
 CONDITION OF THE RIVER STEAMERS "SWAHILI"  
 AND "SOMALI" OF GOWEN.

During the month of August, 1918, I left Serenli on the Juba River for Gobwen with my company on river steamer "Somali".

2. On the voyage down I met the river steamer "Swahili" on which was Lieut. Lumb, 6th K.A. Rifles bringing up troops and their wives to relieve the 5th K.A. Rifles. The two steamers tied up for the night (river custom) and I went aboard the S.S. "Swahili" in the afternoon.

3. Lieut. Lumb mentioned in conversation that the "Swahili" was in such an unseaworthy condition that they could hardly get up stream and that he was doubtful of reaching Serenli at all.

4. I inspected the S.S. "Swahili" and she was certainly in a deplorable condition evidently just having been patched up for the trip.

5. During the Aulihan expedition the "Swahili" was unfit for service and a steamer had to be hired from the Italian Government for trooping.

6. The "Swahili" was a mere hulk up to the time she was fitted out for Lieut. Lumb and troops of 6th K.A. Rifles.

7. Neither of the company steamers was in a seaworthy condition, during the voyage up to Serenli in September-November, 1917, repairs were effected the whole time by the 6th K.A. Rifles' Armourer.

8. The upper deck of the S.S. "Somali" was in such a bad state of repair that a British Warrant Officer.

Officer - Sgt. Major of the King's African Rifles fell through the upper deck and was killed and buried on the Italian Bank.

9. Both the "Somali" and the "Swahili" were leaking badly and the rations on many occasions spoilt by water - vide various Boards of Inquiry in K.A. Rifles records.

10. Neither the "Somali" nor the "Swahili" were in a fit condition to complete their contracts and protests were frequently made by the officers of the King's African Rifles to Mr. Gabriel the representative of the Navigation Company.

11. The "Swahili" when I inspected her, just before she sank when Lieut. Lamb was on board, was a mere collection of scrap iron and appeared to have been recently salvaged from a former disaster.

*Sgt. E. N. Eskine*