~~190~~ 198

1925

KENYA

C.O.
10387
5 MAR 25

Gov. Coryndon. Conf. 16

DATE 5th Feb, 1925.

[...]LATION:—

Remission of fine imposed on natives.

Submits arguments in explanation of his decision, and hopes that matter may be reconsidered

[...]S. of S. [...] Shuckburgh

[...]U.S. of S.

[...]U.S. of S.

[...]ry of State.

Previous Paper

GN. 31063/24

~~Mr Ehrhardt~~

~~Mr Bushe~~

MINUTES

~~Mr Bottomley~~ Will you do [...]

WCB 6.3.25

This case illustrates the dangers connected with such an abnormal piece of legislation as "the collective punishments Ordinance 1909" and suggests to my mind that the question of its repeal should be seriously considered. Its enactment was no doubt justified in 1909 when the Country was merely under a Protectorate régime and the administration was not in a position to accept the full responsibility of a Colonial Government but now that Kenya is a Colony + its inhabitants British subjects and the Government has full ~~and unfettered~~ responsibility + adequate equipment, the necessity for the Ordinance would seem to have disappeared. The position of affairs disclosed by this case would be hard to justify.

The exceptional provision in S.8 reveals the

[...] Brett

Subsequent Paper

A.G. 40203

the Secretary of State's apprehension that the Ordinance might be made the instrument of injustice and this case shows the reality of the apprehension.

In my opinion this Ordinance has been wrongly applied to the natives from whom fines have been collected for the following reasons:-

(a) The natives concerned are not the inhabitants of any village area or district within the meaning of the Ordinance, nor are they being dealt with for this purpose as Members of a tribe or community - they are residents on Mr.H's farms and come from various districts and belong to various tribes.

(b) No charge was apparently made against the persons fined and no opportunity was given to them of defending themselves. This latter circumstance is an offence against ~~natural~~ elementary justice which it would be impossible to defend.

There may have been difficulties in holding an enquiry ~~in this case~~ as the Ordinance directs but that circumstance indicates the fact that the case does not really fall within the Ordinance and the Ordinance has been stretched unduly to inflict punishment on these ~~persons~~ persons against whom the offence of the fine
If an attempt had been made to hold an enquiry, it would at once have been seen to be necessary to formulate a charge and to give an opportunity for defence. If the charge had been suppressing evidence, those proceeded against would have been entitled to ask what evidence they were charged with suppressing; - if the charge had been collusion - it would have been incumbent on the authorities to prove (1) that a crime had been committed and (2) that circumstances proved the complicity of the accused.

If the alleged charges could have been substantiated there would have been no necessity for recourse to this exceptional

exceptional Ordinance, the ordinary law would have been adequate to meet the case, + the accused cd have been proceeded against either as principals or accessories after the fact.

I have considered the copy of the Magistrate's

(31063) file in the case out of which these proceedings arose and am clear (1) that it fails to establish that any crime was committed; there is nothing in the evidence which is inconsistent with the fire having arisen either accidentally or through negligence; (2) that assuming (as we are not entitled to do) that a crime was committed, the evidence did nothing more than suggest very flimsy suspicion against two of the accused; and (3) that there is nothing to justify the opinion wh: the Gov: states he formed that the acquittal was due to any suppression of evidence. In my opinion our former decision should be upheld and the fines remitted. The Govr. wd appear to have overstepped the law & the seizure of the cattle of these natives was an illegal act for wh. the owners could bring an action for damages against those who took part in it.

A. E.
11/3

I agree. The defence which the Crt. have pick up is so flimsy as to border on the ridiculous. I trust that Mr Maxwell's effort does not show him at his best.

HH 13

H/3

At least we need not have said that the S. of S. had no business to question the Governor's exercise of his powers.

I would not argue, but say that [illegible] the S. of S. considers [illegible]

that the cattle (or the proceeds if they have been sold) should be expended

(2) it seems undesirable to leave the Ord^ce in the case of native "squatters", who can only be regarded as a community in a very restricted sense

(3) it is worth consider whether the Ord^ce may not now be regarded as unnecessary and be replaced by the ordinary ~~[illegible]~~ law. (I would not go further than that).

G.G.B. 11.3.25.

I find that similar Ordinances — almost in the same words — exist in Uganda (Chap. 58 of Laws) T.T. (No 24 of 1921) & Nigeria (Chap. 80, edition of 1923). I believe the law is often found most useful in certain backward territories, & I do not believe that the conversion of Kenya into a Colony has had any magical effect. There must be numerous areas quite as backward as they were in 1919.

As proposed by Mr. Bottomley. C.S.
24.4.25
At once

200
J.

KENYA.
No. 16.
CONFIDENTIAL:

GOVERNMENT HOUSE,
NAIROBI,
KENYA.

5th February, 1925.

Sir,

I have the honour to acknowledge the receipt of Colonial Office Confidential despatch of September 19th, regarding the imposition of a fine of Shs:2,860/- under the Collective Punishment Ordinance, 1909, on 56 natives resident on the farm of Captain Hewitt in the Trans Nzoia district.

2. I respectfully submit that whilst the interpretation given to the Ordinance in the despatch under reference may be correct, the Ordinance is capable of the alternative interpretation which I have given to it. In paragraph 2 of your despatch you speak of the Governor being satisfied, "after an enquiry", but I would point out that the words of the Ordinance are "after enquiry". Section 6 speaks of "an Inquiry" under this Ordinance, following the laws of Criminal Procedure. It may be that in spite of its phraseology, Section 2 does require "an Inquiry" in addition to the requirement of Section 6, but I would submit that this is not an immediately obvious reading of the Ordinance.

3. The view was taken that a criminal case having originated before a magistrate and having broken down, in the opinion of the magistrate, through the suppression of evidence - an opinion in which I concurred after seeing the record - point the nature of the investigation -

RIGHT HONOURABLE
LIEUTENANT COLONEL
L. C. M. S. AMERY, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET, LONDON, S. W.,

investigation, so conducted by the magistrate, was sufficient compliance with Section 6.

4. If it should be held that in a case of this character a second Inquiry is necessary, a second magistrate would be required to conduct the Inquiry and presumably the principal witness who would be examined in the second Inquiry would be the magistrate who had conducted the investigation into the criminal case. This would amount to a revision of one magistrate's case by another. An alternative would of course be to appoint a special administrative officer to hold a further enquiry. There are obvious objections to either course and in any case it is unlikely that any further evidence of value would be forthcoming.

5. If on the other hand the circumstances were that a case never proceeded beyond the realms of suspicion and that the suppression of evidence was sufficient to prevent a charge ever being formulated I am advised that, in order to comply with the Ordinance, "an Inquiry" by a magistrate under Section 6 to establish this contention would then be requisite and that subsequently "after enquiry" under Section 2 fines could be imposed.

6. In the present case, however, the necessity for the three stages referred to in your despatch did not appear to arise, and the requirements of the Ordinance and of justice seem to have been amply satisfied by the two stages that in fact were completed.

7. With regard to the final paragraph of your despatch, I am advised that the words "inhabitants of an area" and "community" in Section 2 are sufficiently wide to bring native squatters within the provisions of the Ordinance, if after enquiry I am satisfied that evidence has been suppressed by such community or inhabitants. Whether squatters form a

community -

community, or inhabitants of an area, is a question dependent upon the facts. In many instances a considerable number of squatters on a farm would live close together and would appear to have sufficiently close relations between themselves to justify their being regarded as a community. Any other reading of the Section renders the Ordinance inoperative in the situations and localities in which its aid is often likely to be required. I submit that the obligation to assist in the discovery and investigation of crime is not restricted to natives living in reserves.

8. I annex copies of reports from the Chief Native Commissioner and from the Attorney General.

9. I was of opinion that the suppression of evidence by the squatters acting in combination on Captain Hewitt's farm was established, and I made my order accordingly.

10. A number of cattle sufficient to pay the fine has been handed over and arrangements have been made for their sale by public auction. It would be difficult now to arrange for their return to their owners and for their being again collected if it is decided that the fine should stand. To keep the cattle pending final decision would entail considerable expense. I consider, therefore, that the best course is to sell the cattle and keep the proceeds in deposit, when the monies obtained can be refunded to the cattle owners if you decide that the fine should be remitted. I earnestly trust, however, that you will now be prepared to consider the opinion expressed in your despatch of 19th September, 1924.

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

R. T. Coryndon

GOVERNOR.

ENCLOSURE
Kenya Capt.
In Despatch No. 46 of 5 2 1925
203

5/2/1

NATIVE AFFAIRS DEPARTMENT
Nairobi,
18th December, 1924.

CONFIDENTIAL

The Honourable
the Colonial Secretary,
Nairobi.

Reference your No.10606/7/28 of the 27th October.

I regret the delay in answering your letter. It has been due entirely to pressure of work and almost continuous absence from my office.

2. I find it a little difficult to offer comments because the questions raised by the Secretary of State are almost purely legal questions which will doubtless be dealt with by the Attorney-General, but as you have asked for my remarks I have to offer the following observations.

3. I venture to suggest, with the deepest respect, that action in a matter of this kind is complete when the Governor has made his order and has reported it to the Secretary of State, together with a statement of the grounds of his decision and the proceedings; (vide Section 3 of Ordinance No.4 of 1909).

4. It would seem unusual for the Secretary of State to question the propriety of the decision unless there has been an appeal or petition by or on behalf of the natives upon whom the collective punishment has been imposed, for the only action it would seem that the Secretary of State can take is on His Majesty's behalf to direct that the Royal prerogative be exercised and the punishment remitted.

5. In this case there were criminal proceedings conducted by a Magistrate ... ... "under the Laws relating to Criminal Procedure", (vide Section 6). Exception is apparently taken to the fact that the proceedings were not held twice over, once for the criminal case and again for the purposes of this Ordinance. Whether such a duplicate procedure is necessary is a legal point which it is not for me to decide, though if I may say so I can see nothing in the Ordinance to indicate that it is essential.

6. Whether a group of squatters constitutes a community or not seems to be a question of fact to be decided by the Officer holding the enquiry. In some cases squatters might live scattered over a large area although all under contract in respect of the same farm, and might know nothing of each others actions or movements and thus might be held not to constitute a community. On the other hand where a group of squatters live together in one corner of the farm and are in daily communication and intercourse with each other, I think that a Court would

- probably -

INCLOSURE
In Despatch No. 16 of 5 2 1925
203

25/2/1

NATIVE AFFAIRS DEPARTMENT
Nairobi,
18th December, 1924.

CONFIDENTIAL.

The Honourable
the Colonial Secretary,
Nairobi.

Reference your No.10605/7/28 of the 27th October.

I regret the delay in answering your letter. It has been due entirely to pressure of work and almost continuous absence from my office.

2. I find it a little difficult to offer comments because the questions raised by the Secretary of State are almost purely legal questions which will doubtless be dealt with by the Attorney-General, but as you have asked for my remarks I have to offer the following observations.

3. I venture to suggest, with the deepest respect, that action in a matter of this kind is complete when the Governor has made his order and has reported it to the Secretary of State, together with a statement of the grounds of his decision and the proceedings; (vide Section 8 of Ordinance No.4 of 1909).

4. It would seem unusual for the Secretary of State to question the propriety of the decision unless there has been an appeal or petition by or on behalf of the natives upon whom the collective punishment has been imposed, for the only action it would seem that the Secretary of State can take is on His Majesty's behalf to direct that the Royal prerogative be exercised and the punishment remitted.

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- probably -

probably hold that for purposes of collusion they might be properly held to be a composite community.

Sd. C. V. Maxwell.

CHIEF NATIVE COMMISSIONER.

1918 /24.

ATTORNEY GENERAL'S OFFICE,
NAIROBI,
11th December, 1924.

The Hon'ble Colonial Secretary,

N a i r o b i.

**Re:COLLECTIVE FINE ON CAPT.HEWITT'S SQUATTERS.
Ref. your No.S/ 10615/7/30 of the 5th November, 1924.**

Possibly it might have been advisable that a separate enquiry should have been held after the discharge of the accused, but it is difficult to see what fresh matter for enquiry there would be.

The Magistrate heard evidence upon oath from which it was apparent that the squatters could have given evidence in the criminal case.

The evidence was not forthcoming and the Magistrate was satisfied that they suppressed evidence.

His Excellency from a perusal of the record was likewise satisfied of the fact.

A second enquiry could have been no more than a repetition of the first.

With regard to the final paragraph of the Secretary of State's despatch I should have thought that the words ("inhabitants of an area") were wide enough to include native squatters whom the Secretary of State does not regard as a community but rather as farm labourers which from an English point of view they are not.

The offence is concealing crime and it is not easy to see why a native village can be fined for the offence while native squatting on the farm cannot be so punished though one would expect that the obligation to discover the crime was even greater in the case of natives who occupied a position in some respects resembling servants of the injured farmer.

P.T.O.

So far as I am aware the practice in the present case is that which has generally been followed since the date of the Ordinance.

Your File No.S.10615/7 is returned herewith.

W. W. Lyall Grant

ATTORNEY-GENERAL.

So far as I am aware the practice in the present case is that which has generally been followed since the date of the Ordinance.

Your File No.S.10615/7 is returned herewith.

W. W. Lyttelton Grant

ATTORNEY-GENERAL.

Gov 10387/25 Kenya

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[stamp] Ind

Ausd 57404

29 April 1925.

DRAFT.

OAG

MINUTE.

Mr. Brett April 27
Mr. Allen 28
Mr. Bottomley 28
Sir J. Shuckburgh.
Sir C. Davis.
Sir G. Grindle.
Sir J. Masterton Smith.
Lord Arnold.
Mr. Thomas.

Sir,

I have etc. to ack. the recd of your the late Sir Robert Coryndon's Conf despatch No 16 of the 5th of Feb, regarding the fine imposed under the Collective Punishment Ordce 1909 on 56 natives resident on the farm of Captain Stewitt, and to inform you that after consn of the circs, I consider that

The cattle wh. have been

handed over in settlement

should be restored to the owners

of the fine (£) or the proceeds

paid over if the cattle have

~~if they have been sold~~)

been sold.

~~should be refunded~~

2. It seems to me wh be

undesirable to apply the Order

~~to~~ the case of native "Squatters",

who can only be regarded as

a community in a very

restricted sense. I should be glad,

indeed, if you will consider

~~as a matter of~~ whether

the Order may not, with the lapse of time,

be regarded as unnecessary

& be replaced by the ordinary

law.

(for the Secretary of State)
(Signed) W. GRIMSBY