

EAST AFR. PROT.

28266

C. O.
28266

23 AUG 09

Number, No.
412

1909

July

Previous Paper

16569

187

Collective Punishment Ordinance

Two copies of papers by principal judge
for advocate + Secy for Native affairs agrees is
the better that Ordⁿ is a perfectly proper one +
that the Colles is not justified in his assumption
that admin^g off^{rs} will utilise it to have themselves trouble in
investigating crime

W. Cox

I think that it would be well to
let the matter stand over until Sir P.
Garnard has arrived in the Port^l +
has been able to discuss it with the local
Officer + report on it. His N. N. if you
experience should help him here.

With regard to the principal judge's
views it is a matter for the
higher authorities to consider
the matter. The principal judge is
opposed to the ordinance being
the same

H. J. R.

25/VIII

Lieut. J. H. Wood

Approved but I should like to say

in Judge Hamilton's points. The Gov has
power to make laws for peace order
of good fort gale persons in Africa
& the Ct is not given exclusive
jurisdiction. Legally the Africa
Bench is very weak & it is also
rather pompous & we must try to
strengthen it. Sir P. is
fully alive to this necessity.

15/12

2578

Filer

26.1

at me

Governor's Office,
Nairobi,

July 27th 1909.

EAST AFRICA PROTECTORATE.

No. 412

(Incl. 4)

C.O
28266

REC'D
23 AUG 09

My Lord,

Es
16569

With reference to Your Lordship's despatch No. 312 and previous correspondence relating to the Collective Punishment Ordinance, I have the honour to transmit herewith copies of a letter from the Principal Judge, a Minute by the Crown Advocate and two letters from the Secretary of Native Affairs on the subject.

Mr. Hamilton
May 26th

Mr. Combe
Jun. 4th

Mr. Hollis
Jun. 15th

do.
Jul. 21st

2. I agree with Mr. Combe in thinking that this Ordinance, which has been allowed by Your Lordship both in Uganda and in this Protectorate, is a perfectly proper one, and I do not think that Mr. Hollis is justified in assuming that administrative officers will utilize it to save themselves trouble in investigating crime.

3. At any rate the provision by which every order under the Ordinance is issued by the Governor himself sufficiently safeguards the interests of the natives against any such mal-administration.

I have the honour to be,
With the highest respect,
My Lord,
Your Lordship's most obedient,
humble servant,

J. J. Baker

H.M. PRINCIPAL SECRETARY OF STATE

FOR THE COLONIES,

DOWNING STREET,

LONDON, S.W.

2779
INCLOSURE No. 277-1909
In Dispatch No. 277-1909

2048
25 09
C.O.
8266

HIGH COURT,
NOMBASA,

23 AUG 09

26th May 1909.

1059 A

Sir,

I have the honour to address Your Excellency on the subject of the Collective Punishments Ordinance No.4 of 1909, and the question of referring to the Judges proposed legislation affecting the jurisdiction of the courts before it is passed into law.

The Bill in question was first published in the official Gazette on the 2nd March 1909 and I observed that it proposed most revolutionary changes in the jurisdiction of the courts established in the Protectorate under Orders in Council, and I was therefore not a little surprised to see that the Bill was published as an Ordinance in the Gazette of the 1st May having been passed into law on the 24th April without any reference whatsoever having been ^{made} on the matter to the Judges.

I have serious doubts whether the Ordinance as it stands is not ultra vires. It is laid down in the Order in Council 1902 that the High Court shall have full Criminal Jurisdiction over all persons and all matters in East Africa, the Governor and his property alone excepted.

The Collective Punishments Ordinance removes directly from the jurisdiction of the courts all persons in East Africa who are charged with the commission of certain

offences

EXCELLENCY,
GOVERNOR JACKSON C.B.C.M.G.

HAIKORI.

offences against the existing laws and replaces Judicial trial by an enquiry by any Magistrate together with liability to punishment at the hands of the Governor himself.

It does not stop here but provides further that no person aggrieved thereby shall have any right of appeal or right to bring a civil suit to remedy a wrong which he may have suffered thereunder.

This appears to me to be so utterly subversive of the principles associated with the Administration of Justice throughout the British Empire upon which the Judicial system in East Africa is based that I would request Your Excellency to inform H.M. Secretary of State of the objections which I have raised and to forward him a copy of this letter.

I have the honour to be,

Your Excellency's,

Most obedient and humble servant,

(sgd) R. W. Hamilton.

Principal Judge.

INCLOSURE 112

In Despatch No. 112 of 27.7. 1909

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The Principal Judge's No. 59 A of May 26th 1909.

Your Excellency,

The Principal Judge expresses the opinion that an Ordinance which confers upon the Governor of this Protectorate the power to impose, administratively, a fine on a Community for certain acts or omissions of the Community specified in the Ordinance and directs that an order made by the Governor under the Ordinance shall be final to be subversive of the principles associated with the Administration of Justice throughout the British Empire, and he further expresses a doubt as to the legality of such an Ordinance.

It would seem that the Judge is not opposed to the imposition of communal fines, but claims that no person or Court should be empowered by law to impose a fine except the High Court or a Court subordinate thereto.

He bases this claim on Article 15 (1) of the East Africa Order-in-Council 1902 which provides for a High Court with full jurisdiction over all persons and over all matters in East Africa.

If the claim could be supported on that or any other ground the result would be most serious in a country a large portion of which can at the present time only be governed by Administrative Orders and containing large areas wherein any process of the High Court would be ineffective unless supported by an armed force.

The Article referred to cannot I submit be properly interpreted as making the High Court the Supreme Authority in the Protectorate the jurisdiction of which cannot be limited by laws made by the Governor and the Legislative Council under the powers conferred by the Order-in-Council. So far from such being the intention of the Order-in-Council reference to Article 18 of the same Order which provides for the constitution of Courts of special jurisdiction from the decisions of which there shall be no appeal to the High Court, will show that it was contemplated that it might be necessary to take certain areas or matters out of the jurisdiction of the High Court and place them under a Court of special and distinct jurisdiction.

W. H. Cornhill

CROWN ADVOCATE.

4.6.09

INCLOSURE 113

In Despatch No. 412 of 27.7.1909

Native Affairs Office,
Nairobi,

15th June 1909. 193

I had no opportunity of discussing in Council the Collective Punishments Ordinance as the standing orders were suspended at the second reading when I was absent, whereupon the Bill passed its third reading and became law. I am therefore glad to be able to express my views on the Ordinance.

2. I regard the Ordinance as a retrograde step. In 1902 when the Village Headmen Ordinance was enacted it may have been necessary to inflict a fine on the headman and inhabitants of a village within which an outrage had occurred if the perpetrator of the offence was not discovered. But great strides have been made in the administration of the country during the past seven years, and with the increased efficiency of our police force it should not now be necessary to resort to measures of this nature in our dealings with the natives. Though I do not think it was the intention of the Government to remove the control exercised by the High Court over Magistrates, this has as a matter of fact been done, for in future when certain offences are committed the ordinary procedure need not be followed, but a magisterial enquiry can take the place of a judicial trial and all or any of the inhabitants of a tribe may be punished by the Governor, against whose decision there is no appeal.

3. Stock thefts are in reality not very numerous in this Protectorate, as the minute of the Honourable the Crown Advocate of April 8th would lead one to suppose, and where they do occur, viz in the areas round white settlement the country

country is thoroughly administered and is not "governed by administrative orders wherein any process of the High Court would be ineffective unless supported by an armed force". It is often not realized that some of the stock thefts are simply retaliation on the part of the natives. It is well known that farmers have fined natives a few head of sheep or goats for trespassing on their lands, whereupon the native promptly takes other stock from the farmer's neighbour. One rarely hears of the first case, but there is a great outcry as soon as the white man is robbed. I do not dispute the statement that occasionally a gang of thieves not residing in an area in which they commit their offences remove the stolen property to some other area; but if suspicion falls on any specified area a small police patrol under a tactful officer might be sent to the spot, as I recently recommended in the case of stock thefts occurring near Kyambu, the perpetrators of which are believed to reside on the outskirts of the Fort Hall District.

Sd/- A. C. Hollis.

Secretary for Native Affairs.

M I N U T E .

Since writing the above, the Collective Punishments Ordinance, Judge Hamilton's letter and my Minute have been discussed by the Executive Council, and it has been pointed out to me that one of the main objects of the Ordinance is to legalize the levying of tribal fines which are at present levied illegally. In that case I withdraw my objections as it is preferable that if such fines are to be levied at all they should be levied by His Excellency the Governor and not by a District Commissioner. But I desire to record the fact that I am on principle opposed to tribal fines in areas where our administration is supposed to be effective. I regard such fines as a sign of weakness on the part of our administration or incompetence on the part of our officials, and I consider that by having recourse to such measures we are alienating the feelings of the natives. It only recently came to my knowledge that fines of this nature were levied in the Protectorate and I am of opinion that the Government should deal with such illegal acts on the part of officials with a stern hand. The following ^{is} the case which came to my knowledge.

A bridge was broken at Kyambu. No attempt appears to have been made to discover the culprits but the nearest natives were ordered to pay the amount of the damage in order that the bridge might be repaired by the Public Works Department. It is highly

highly probable that the nearest natives had nothing to do with the offence - in fact it is not known that the bridge was broken by natives at all - but for all that they had to suffer.

As long as people are punished for other people's offences, and chiefs and headmen are able to enrich themselves at the expense of their subjects, we cannot hope to rule over a contented race. If the natives of the Kyambu District are guilty of the recent stock thefts from Somalis and Swahilis, I attribute these thefts and other acts of lawlessness of which they are said to be guilty largely to the fact that their chiefs and headmen have been permitted to fine them in goats when they have refused to go and work for Europeans, as was shown to be the case as recently as March last. The natives having suffered a loss retaliate on some defenceless Somali or Swahili in much the same way as they retaliate on the European farmers. By such administration we not only make the natives discontented but we place a premium on crime.

Nairobi,

July 21st 1909.

Sd/- A.C. MOLLIS.

Secretary for Native Affairs.

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MINUTE.

- Mr. Parkman 248
- Mr. Reed 268
- Mr. Fiddes
- Mr. Just
- Mr. Cox
- Sir C. Lucas.
- Sir F. Hopwood.
- Col. Seely.
- Lord Crewe.

for canon

Sir,

I have the honour to
ack. the receipt of your
despatch N^o 412 of the 27th
June, transmitting copies
of a letter from the Principal
Judge, a Minute by
the Crown Advocate & two
letters from the Sec^y of
Native Affairs on the
subject of the Collective
Punishment Ordinance,
& to inform you
that