INTOXICATION AND CRIMINAL LIABILITY IN KENYA

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by

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DEDICATION

Dedicated to my parents Mr. and Mrs. Masilia and my six months daughter Miss Consolata Mwende Wambua.

ABBREVIATIONS

Cap	Chapter
E.A.L.J.	East African Law Journal
Y.L.J.	Yale Law Journal.

STATUTES

1. Criminal Procedure Code, cap. 75, Law of Kenya.

2. East African Order in Council, 1902.

3. Penal Code Cap 63, Laws of Kenya.

4. Trial of Lunatics Act, 1883.

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INTRODUCTION

Criminal law is one of the many mechanisms of control of human behaviour. It's function is to prevent harm and to punish the wrongdoer. It does not compensate the victim of the crime. The victim may of course secure redress from the wrongdoer in a civil action. Criminal law defines conduct that is thought to undermine or destroy community values. It seeks to protect life, liberty, dignity and property of the community and its members by threatening to deprive those who contemplate such conduct and inflicting sanctions upon forbidden activity.[1]

The sanctions authorized whether intended to punish, restrain, reform or deter constitute a deprivation of life, liberty and property of the wrongdoer. It is because of this deprivation that the courts, before they can inflict sanctions must overcome the presumption of innocence which favours all of us by establishing beyond reasonable doubt each element of the offence charged. By defining crimes in terms of such traditionally material elements as a voluntary act purposely causing a specific result the law seeks to exclude from the criminal liability, those who are not "appropriate" subjects for a given sanction or indeed for any sanction. Thus if the state fails to produce evidence which establishes each

element of a crime or put another way, if the accused introduces evidence which leaves in doubt any material element, no sanction can be imposed for the offence charged. To illustrate, the state cannot hold a person responsible for murder if there was no causal relationship between the shot fired and the death of the victim if the shot was not fired with intent to kill even though death was caused by the shot.

Criminal culpability generally requires two components. These are mens rea[3] and actusreus.[4] This means that even after causing the Actus reaus there may be a defence to the act that is, that there was no mensrea. A defence may be either special or general. In our law, there are seven such defences.[5] These have been formulated by the courts after recognising that the elements of a given offence may not be sufficiently precise to excuse all those who ought to be free of criminal liability in an endeavour to vindicate preferred values. The evaluation of any device for sorting out who is not an appropriate subject and who is for criminal sanctions requires, identifying the values in issue. No device haunts the criminal law and clouds the values it seeks to re-enforce more than intoxication as a basis for relieving persons of criminal liability. The following discussion is confined to the law relating to the defence of intoxication in Kenya. Kenya's criminal law and more so the law relating to the defence of intoxication is virtually English law.[6]

In looking at the law relating to the defence of intoxication therefore, its background in the English law will be traced together with its importation into Kenya and its subsequent development (if any) up to the present day.

Criminal law and its defences reflect the views of the society to which the law applies. It is necessary therefore to know the society in which it operates in order to understand the law. This can be done if the history of the people, the social and economic conditions are traced. As a result an attempt has been made to look at the African society before the English law was imposed on us. After this it will be possible to determine whether the law relating to the defence of intoxication expresses the view of the Kenyan society.

I propose in chapter one therefore to trace the historical development of the defence of intoxication in England, its importation into Kenya and development under customary law. In this chapter the state of the English law in connection with, Meade's[7] case will be discussed. My main concerntration will be on the rules laid down in Beard's case[8] and their effect on the law.

Chapter two gives an authoritative statement of the law relating to the defence of intoxication in Kenya. pointing out some instances where the defence has been rejected or upheld.

Chapter three is an analysis or assessment of the defence of intoxication. In this chapter a critical assessment of the application of the defence will be given. Questions as to whether the defence is applied fairly or not will be answered especially in view of the increase in numbers of crimes committed by persons under the influence of drink or alcohol.

Lastly, chapter four which is actually the conclusion deals with reforms and recommendations.

CHAPTER ONE

HISTORICAL BACKGROUND:

In this chapter the discussion is centred on the development of the defence of intoxication under the law of England and the changes (if any) that have taken place after its importation into this country.

1.1 Intoxication under English Law:

The development of the defence will be divided into three stages namely;

(a) position before Meade's case.

(b) Meade's case.

(c) position after Meade's case.

1.1a Position Before Meade's Case:

Under the English law as it prevailed until the early nineteenth century, voluntary intoxication was never an excuse for criminal misconduct and indeed the classic authorities[1] broadly assert that voluntary drunkenness should be considered rather an aggrevation than a defence. This view was based upon the principle that

> "a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man."[2]

An early statement of the law is to be found in Roniger & Fogosa,[3]

> "if a man that is drunk kills another, this shall be felony and he shall be hanged for it and yet he did it through ignorance for when he was drunk he had no understanding or memory, but in as much as that ignorance was occasioned by his own act and folly and he might have avoided it, he shall not be privileged thereby."4

In Hales pleas of the crown,[5] the learned author says,

> "This vice (drunkenness) doth deprive men of the use of reason and puts many men into a perfect but temporary phrenzy and therefore according to some civilians such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for the drunkness answerable to the nature of the crime occasioned thereby, so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it, but by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgement as if he were in his right senses."6

Blackstone in his Commentaries says;

> "As to artificial contracted madness which depriving men of their reason puts them into a temperary phrenzy our law looks upon this as an aggravation of the offence rather than an excuse for any criminal misbehaviour."7

Judicial decisions[8] extending over a period of nearly a hundred years make it plain that the rigidity of the above rule was gradually relaxed in the nineteenth century. These decisions establish that voluntary intoxication which was previously an aggravating factor warranting a punishment of more than ordinary severity[9] is a defence to a criminal prosecution if,

(i) it causes such a disease of the mind as to bring the M'Naghten rules into operation

(ii) a specific intent is an essential element of the offence and drunkenness is such as to prevent the formation of this intent. This means that if the accused person was so drunk that he was incapable of forming the intent required, he could not be convicted of a crime charged. This does not mean that drunkenness in itself is an accuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of the crime. In a charge of murder based upon the intention to kill or to do grievious bodily harm, if malice aforethought is not established, the accused cannot be convicted of murder But since unlawful homicide has been committed without malice aforethought, the charge is reduced from murder to manslaughter.[10]

In situations where intoxication is not caused voluntarily, it has been said that if the involuntary drunkenness negatives mensrea, it is a defence. There is no English authority on this matter. It is thought that involuntary drunkenness not negativing mensrea is not a defence but only a mitigating factor.[11]

In cases where insanity produced by drunkenness is pleaded, the law is as follows;

> "That insanity whether produced by drunkenness or otherwise is a defence to the crime charged."12

The insane person cannot be convicted of a crime but upon a verdict of insanity is ordered, to be detained during her majesty's pleasure.[13] The law takes no note of the cause of insanity. If actual insanity infact supervenes, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. That was the rule regarding the defence of intoxication as held in Roniger & Fogosa[14] before Meades case.

Position in Meades Case;

In Meades[15] case, the prisoner was charged with murder. He brutally ill-treated the deceased person during the night of her death, broke a broomstick over her and struck her a violent blow with his fist rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievious bodily harm and consequently that the verdict should be manslaughter. Lord Coleridge J... directed the jury as follows;

> "In the first place everyone is expected to know the consequences of his acts. If he is insane, that knowledge is not presumed, insanity is not pleaded here but where it is part of the essence of a crime that a motive a particular motive (meaning intent) shall exist in the mind of a man who does the act, the law declares this, if the mind at the time is so obsecured by drink, if reason is dethroned and the man is incapable therefore of forming such intent, it justifies the reduction of the crime from murder to manslaughter."16

The trial judge proceeded to convict Meade of murder.

The court of criminal appeal's objection was that the summing up led the jury to believe that to justify

a verdict of manslaughter, they must find that the prisoner is insane or in a state resembling insanity whereas the direction should have been that if there is absence of intention, infact it was manslaughter. The Court of Criminal Appeal otherwise upheld the conviction. It held that the direction was a proper one and that the defence of drunkenness would only have been available to the accused if he had shown that his mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous, that is, likely to inflict a serious injury.[17] Meade's case was on voluntary drunkennness and its decision relaxed the law regarding the defence of intoxication as it then existed to a great deal. Instead of intoxication being only an aggravating facts it became a complete defence as earlier stated if it could be shown that the accused's mind was so affected by the drink that he was incapable of knowing that what he was doing was wrong, that is, likely to inflict a serious injury.

1.1b. Position in Beard's[18] Case:

The respondent was convicted of murder on October 21, 1919 at the Chester Assizes before Bailhache J. and was sentenced to death. At the trial it was proved or admitted that on 25th July, he ravished Ivy Wood, a girl of thirteen years and that in aid of the act of rape, he placed his hand upon the mouth to stop her from screaming at the same time placing his thumb upon her threat with the result that she died of suffocation.

The respondent pleaded drunkenness as a defence and contended that at the same time when the crime was committed, his mind was so affected by the drink that the crime ought to be reduced from murder to manslaughter. In summing up the judge directed the jury that the defence of drunkenness could prevail if the accused by reason of his drunkenness did not know what he was doing and he gave an example of the case of a man who cut the throat of a woman thinking that he was cutting the throat of a pig.

In the House of Lords, Birkenhead formulated some basic principles on the defence of drunkenness as follows;[19]

(1) Insanity whether produced by drunkenness or otherwise is a defence to a charge of murder. If actual insanity supervenes as a result of alcoholic excess, it furnishes a complete answer to the crime charged.

(2) Drunkenness which renders the accused incapable of forming a specific intent required should be taken into account in determining whether or not the accused had the intent.

(3) Drunkenness falling short of proved incapacity, but merely making a man give way more readily to some violent passion does not rebut the presumption that a man intents the natural consequences of his act.

Where drunkeness as opposed to insanity is the defence, a jury should be asked to consider whether the accused knew that what he was doing was wrong."

In Beard's case, the court of Criminal Appeal had substituted a conviction of murder by the trial judge with that of manslaughter because the jury had not been told to consider whether Beard, who pleaded drunkenness knew that what he was doing was wrong. But the House of Lords restored the conviction for murder as "the capacity of the mind of the prisoner to form the felonious intent which murder involves "was" to be explored in relation to the ravishment; but not in relation merely to the violent acts which gave effect to ravishment."[20] It was not suggested that Beard was so drunk as to be incapable of forming the intention to commit rape, a felony of violence and because of this intention, he had malice a forethought according to the law as it stood when his case was decided.

The meaning of specific intent has caused alot of problems. In Beard's case it was said that intoxication was a defence only if it rendered the accused incapable of forming the necessary mens rea. If incapacity is proved, it means that mensrea is not present. What is clear is that it is a defence to a sober man that, though he was perfectly capable of forming the intent required, he did not do so on the occasion in question. Even a drunken man may be capable, notwithstanding his drunken condition of forming the intent to kill and yet not do so.[21] The question is taking the accused's intoxicated state into account did he actually form the necessary intent? The onus of proof is on the prosecution to establish

that not withstanding the alleged intoxication the accused formed the necessary intent.[22] If the accused's drunkenness is not such as to negative mensrea, it is no defence for him on any charge to say that he would not have behaved as he did but for the drink. The effect of alcohol, to use Smith and Hogan's[22(a)] language, is to weaken the restriants and inhibitions which normally govern men's conduct. So a man may well commit murder or a theft for example when drunk which he would never dream of committing when sober. If he had the mensrea for the crime he is guilty even though the drink impaired his mind or the drink made him incapable of resisting the urge to act.

The principles stated above apply only.to crimes requiring specific intent where the drink or drug was taken voluntarily or involuntarily. They don't apply where the accused is charged with a crime not requiring specific intent and the drink or drug was taken voluntarily. This rule, which was obsecurely stated in Beard[23] was confirmed by the House of Loards in D.p.p.v Majewski.[24] In this case, it was stated that evidence of self induced intoxication negativing mensrea is a defence to a crime requiring a specific intent but not any other crime. The nature of "specific intent" is thus of great importance and some judges like Lord Elwyn Jones suggested that the test is that crimes not requiring specific intent are crimes that may be committed recklessly.[25]

Smith and Hogan[25(a)] say that the conclusion is that "crime requiring specific intent" means a crime where evidence of voluntary intoxication negativing mensrea is a defence; and the designation of crimes as requiring or not requiring specific intent is based on no principle but on policy.[26] In order to know how crimes are classified for this purpose, one should look only to the decisions of the courts.[27].

From the above discussion it is clear that in England before Meade's [28] case, the law regarding the defence of intoxication was that intoxication was not a defence to any criminal charge but only an aggravating factor. After Meade's[28] case the law regarding intoxication was relaxed and intoxication became a defence if it could be proved that the accused was so drunk as to be incapable of knowing that what he was doing was wrong and that intoxication is a defence if it comes within the M'Naghten rules.

1.2: Defence of Intoxication under Kenyan Law:

Originally, the country we call Kenya was occupied only by black people that is, Africans but after colonization the country came to be occupied by people of different races. These are Africans, Asians and Europeans. The defence of intoxication under Kenyan law can only be viewed with the Africans in mind since they are the indigenous people and therefore the majority. The Africans in Kenya had their own institutions for solving disputes

before the British came to colonize them. These institutions were referred to as councils of elders. For example, the Kamba community had its own ways of solving disputes. According to the Kamba legal system crimes and other wrongs were identified and dealt with in various ways depending on their nature, character and effect on the society. For example criminal offences such as murder, rape, adultery assault and theft were dealt with differently from civil wrongs such as the ones arising from family quarrels, inheritance and distribution of property.

As far as criminal liability was concerned no distinction was made btween cases of intoxication leading to insanity and intoxication not leading to insanity. If a person committed an offence when intoxicated by drink or drug he had to pay compensation to the aggrieved person. In case of insane persons, their families were the ones who paid the compensation to the aggrieved person. But the council of elders had to be abit lenient since the insane person committed the offence through no fault of his. It did not matter whether the person took the drink or drug voluntarily or involuntarily. What was clear was that an offence had been committed and the council of elders was called upon to decide the appropriate compensation. There was nothing like mensrea. To the Wakambas a person was guilty if he committed an injurious act and that was all that was required to constitute an offence. The wakambas knew nothing about a guilty mind.

The Akamba legal system did not allow much room for inhuman punishments. Innocent people remained so within this system until proved otherwise and rigorous processes were followed before a suspect was punished for an alleged offence or crime. The Akamba council of elders (Atumia ma Nzama) ensured that there was justice which was seen to be done and also approved by the community. Before a person could be called an offender, it was necessary to establish beyond reasonable doubt that the offender was guilty. In doing so various diviners and witch doctors were consulted and the elders could only act if the views of the various diviners and witch doctors agreed with the known facts. These views were given under oath to the council of elders to avoid distortions. The oath was referred to as "kithitu". Even after the final decision was made the family of the offender were the first people to enforce the punishment as a recognition of the relative's crime.

The Akamba criminal system rarely allowed capital punishment.[29] This punishment was only meted out to those members of the community who were involved in evil deeds designed to bring calamity to the society at large. Such offenders included witches, wizards, robbers and murderers. Various methods were used to kill these offenders but more often than not they left their homes and went to other places and no one followed them. Even for murder, the killer was not sentenced to death, instead,

a form of payment called blood payment was exacted. For a mans life roughly 11 cows and one bull had to be paid. The bull went to the council of elders. Ten cows went to the victim's relatives while one cow went to the widows of the deceased as a sort of compensation. Even where such a killer was unable to pay the fine the legal system was such that it allowed time for his relatives to raise the necessary fine if he was too poor to pay himself.

So when the British arrived and finally established their rule in Machakos, the Akamba of this area had already evolved a firm legal system to deal with their economic, social and cultural problems. The British tried to make changes by introducing concepts and legal procedures from their country. The killing of one person by another previously settled by the payment of a certain' number of cows and goats, was classified by the British system as murder or if accidental, manslaughter- murder punished by death, manslaughter life imprisonment. The British included in the Penal Code defences such as intoxication which were not known to the Akamba legal system.

1.2a Reception of the English Law in Kenya:

It should be clear that right from the very beginning the settlers in Kenya wanted to lead a kind of life similar to that of their fellow countrymen in England. They therefore demanded that English law be introduced in Kenya to replace the existing barbaric law which could

not make any sense to them. This was done by first introducing the English law in an Indian Code.[30]

English law was therefore introduced in Kenya contained in the Indian Penal Code. Before proceeding on, it should be made clear that the only English law applicable to Kenya was the English law as it existed before 12th August, 1897. The 1902 order in Council reception clause stated as follows:

> "Her Majesty's Criminal Jurisdiction in the protectorate shall in so far as circumstance admit be exercised in conformity with the enactments of the governor of India and where applicable shall be exercised in accordance with the common law and the statutes in force in England on 12th August, 1897."31.

The above clause made no reference to customary law hich was the governing law for the natives. This meant that the English Law imported into Kenya was meant to apply to those people who led an English way of life and those were the settlers. The reasons for preferring the Indian Criminal law[32] to pure English law was because India was a British Colony and the law was codified to operate under the circumstances obtaining in a colony. This law was clearly stated in the Indian Penal Code.

1.2b The Indian Penal Code:

This was a codifieation of the English law as it was 1860. Two factors contributed to the application of the Indian Penal Code to Kenya. The first factor is

that the penal code contained some customary law law offences[33] which gave it a native touch and it was acceptable to Africans. The contact that existed between the East African Coast and India was the second factor. This contact meant that Indian law was not all that new to Africans. But a question arises, was this law going to be acceptable to the settlers who opted for a pure English law as it existed back home? The settlers rejected the Indian Penal Code and advocated for the enactment of a code (based on pure English Law) to replace the Indian Penal Code.

1.2c The Kenya Penal Code:

The Kenya Penal Code was enacted at a time when Kenya was already a British Colony. This was in 1930. This code had the Nigerian Penal Code as its base. The mistake made was that very many customary offences were left out meaning that the views of the African who were the majority were not taken into account in determining what should be made crimes and what should not. To the Africans many of the offences included in the code were foreign, bigamy being a very good example. This code states that English law as it existed in England in 1930 and hence the law relating to the defence of intoxication is as it was in that year. Today there is very little change that has been made to this code and it remains virtually as it was during the time it was enacted.

The colonial government was unable to get rid of the customary law which was their main aim in introducing English law to Kenya. It refused completely to include customary law offences in the penal code. At independence the Kenya constitution came into effect and section 77(8) of it did away with the African criminal customary law. It states as follows;

> "No person shall be convicted of a criminal offence unless the offence is defined and the penalty therefore is prescribed in a written law."

No African customary law offence is written and it therefore follows that the above section did away with all the customary law offences which were not included in the penal code.

CHAPTER TWO

2. Intoxication under Kenyan Statutory Law:

The law relating to intoxication is stated both in the penal code[1] and the criminal procedure code.[2]

2.1 The Kenya Penal Code:

Section 3 of the penal code states the general rule of interpretation as follows;

> "This code shall be interpreted in accordance with the principle of legal interpretation obtaining in England and expressions used in it shall be presumed so far, as is consistent with their context and except as may be otherwise expressly provided to be used with the meaning attaching to them in the English Criminal Law and shall be construed in accordance therewith."

The above quotation means that in interpreting the code judges are not barred from seeking help in English decisions.[3] The problem arises since it is not clear whether the English decisions which Kenyan Courts refer to are those made before or after the enactment of the code. It is argued that the English decisions passed before the enactment of the code are the ones which should be referred to but in practice present day English decisions are regarded to be persuasive and Kenya Courts are not barred from following them. From the above argument it is clear that the Kenyan law relating to the

defence of intoxication is more or less the same as the English Law since Kenyan Courts do follow the English decisions.[4]

Under Kenyan Penal Code, an accused person is presumed to be of sound mind, and to have been of sound mind at any time that comes into question until the contrary is proved.[5] This means that if a person has committed an offence, he is held to be guilty of the offence unless he raises a defence such as the defence of intoxication. When it is proved that an accused person was temporarily insane due to intoxication at the time he committed the offence with which he is charged, section 13 of the penal code applies which states as follows;

"13(1) save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof, the person charged at the time of the omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane temporarily or otherwise, at the time of such act or omission.

(3) where the defence under subsection (2) of this section is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this code and those of the criminal procedure code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) for the pruposes of this section, "intoxication" includes a state produced by Narcotics or drugs"

The words of the above section imply that for the defence of intoxication to succeed, the one raising it must have been, when committing the offence incapable of knowing what he was doing or that what he was doing was wrong.

2.2 Criminal Procedure Code:[6]

Under the criminal procedure code, the issue of intoxication arises to show that the accused was not responsible for the acts or omissions with which he is charged Where intoxication is leading to insanity is pleaded section 13(3) of the penal code which states that;

"Where the defence under subsection 2 of this section is established, then in a case falling under paragraph (a) thereof the accused shall be acquitted and in a case falling under paragraph (b) the provisions of this code and those of the criminal procedure code relating to insanity shall apply."

Section 166(1) of the criminal procedure code states as follows;

(a) where any act or omission is charged against any person as an offence and it is given in evidence on the trial of such a person for that offence that he was insane so as not be responsible for his acts or omissions at the time when the act was done or the omission made, then, if it appears to the court before which such a person is tried that he did the act or made the omission charged but was insane as a foresaid at the time when he did or made the same the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane as a foresaid when he did the act or made the omission.

(b) when such special finding is made the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

(c) the President may order such person to be detained in a mental hospital, prison or other suitable place of safe custody.

(2) The officer in charge of the mental hospital, prison or other place in which any person is *detained* by an order of the President under subsection (1) of this section shall make a report in writing to the minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report."[7]

The President has got also power to order the person to be discharged subject to such conditions as to supervision so as to ensure safety and welfare of the person in respect of whom the order is made for the safety of the public as he thinks fit. The section goes on to say that the President may also order the person so detained to be transferred from the prison to a mental hospital or from any place in which he is detained or remains under supervision to either a prison or mental hospital.[7(a)] As the section shows, the President has powers to deal with people who are detained under these circumstances,.[8] From the above quotation it is clear that subsection 166(1)(a) disregards completely one of the requisite ingredients of a crime.[9] It appears to treat all offences committed by insane person as offences of strict

liability.[10] Again, as we shall see later on the section as a whole is very unfair to the intoxicated people since they are put on the same footing with people who are permanently insane while their insanity is infact of temporary nature.

2.3 Intoxication as Interpreted by Kenyan Courts:

An important fact has to be borne in mind that when Kenyan courts are interpreting the provisions concerning intoxication in the penal code, they follow methods used by the English courts in the interpretation of the Beard's[11] case and the provisions laid down by Lord Birkenhead in that case.

2.4 Interpretation of the Penal Code:

The important section in this code is section 13(2) which states as follows;

> "Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know that what he was doing was wrong."

and section 13(4) which states as follows;

> "Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence."

2.4a Nature and Quality of the Act:

An act is taken to be wrong if it is contrary to law. The widest interpretation of the word wrong was that given in Rex v. Kamau s/o Njoroge[12] (involving insanity) where the appellant had killed an Indian. There was evidence that for a period of three years the appellant had been suffering from epileptic insanity. There was no evidence to show that at the time of the killing he was legally insane. In holding that the defence of legal insanity failed, the Court of Appeal for Eastern Africa said; "the standard to be applied is whether according to the ordinary standard adopted by a reasonable man the act was right or wrong in law"[12(a)] In Phillip Muswi s/o Musele N.R.[13] the Court citing Windle[14] held;

> "the words wrong in the section means contrary to law."

2.4b Specific Intent:

The question of specific intent has caused a great problem to the courts since it is not clear what Lord Birkenhead in his formulations in the case of Beard[14(a)] meant by specific intent. In Wreh v. the King[15] the appellant was convicted of murdering one Bai Kamara and appealed to the West African Court of Appeal on the grounds that the presiding judge misdirected the jury by failing to direct them that they were entitled to find the appellant guilty of manslaughter and not murder if they were of the opinion that the accused was so intoxicated as not to be able to form an intent to inflict grieveous bodily harm. In referring to the defence, the learned Judge said;

> "Now in the first place, I must tell you that the law presumes that every sane man intends the natural consequences of his acts, if a sane man stabs another in the way Bai Kamara was stabbed, then the law will presume an intention to kill that man if the man dies. There can be no doubt ~~about~~ that drunkenness in itself alone is no defence to a charge of this nature, but it would be a defence if it so affects the accused as to render him for the time being temporarily insane so that he did not know the nature and quality of his acts. If the drunkenness was so severe as to render the accused altogether incapable of forming the intention to inflict that serious injury upon Bai Kamara then he is entitled to a defence on the grounds of intoxication."15(a)

The learned judge went on to say that the question whether a dangerous weapon[16] was used is very important in ascertaining malicious intent. Lord Birkenhead in Beard's[17] case said;

> "If a man use a stick, you will not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it as you would if he had used a different kind of weapon, but where a dangerous weapon is used, which if used would produce grieveous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party. Drunkenness might affect the jury's view of the intent, but that the use of deadly weapon in that case showed the malicious intent so clearly that the drunkenness of the accused could not alter it."18.

From Lord Birkenhead's judgement and the classes of cases referred to therein, it would seem that the classes of cases in which it might properly be held that drunkenness had produced an incapacity to form the intent required would be such cases as;

(i) killing by the intemperate use of a stick as envisaged by Baron Alderson in Meakin's case[19]

under such circumstances as to reduce the charge to manslaughter,

(2) cases in which drunkenness may take from the act all criminal intent as on a charge of breaking into a store by mistake and under such circumstances as to indicate inability to form any definite purpose and especially to form the purpose of committing larceny.

Kenyan position is slightly different from the English one because in the Kenyan one the intent can be either specific or otherwise while the English position is that it has to be specific.

2.5. The Issue of Intoxication:

As stated earlier, drunkenness is no defence to any criminal charge. So when we talk of the issue of intoxication we are referring to temporary insanity which is treated by the courts in the same way as insanity arising out of another cause. As a defence to a criminal charge the issue of insanity (temporary insanity due to intoxication) arises at the trial of the offence as shown by section 166(1) of the criminal procedure code.

2.6 The Plea of Insanity:

As is the case with all other defences[19] the issue of temporary insanity is raised by the accused. The courts are cautious in murder cases and to make sure that an accused was not insane when he did the killing,

the magistrates are required[20] to enquire from the authorities at the Mathare Mental Hospital as soon as possible whether there is any record of the accused showing that he has ever suffered from any mental disease.[21] This is so inorder to avoid the danger of unknowingly convicting insane people.

2.7. Onus and Standard of Proof:'

In criminal cases, the onus is on the prosecution to prove the accused's beyond reasonable doubt.[22] This is so even in defences except the defence of insanity which shifts the burden of proof from the prosecution to the accused. Since Woomington's case[23], it is well settled law that the presumption of sanity is the only common law presumption which shifts the burden of proof to the accused in a criminal case. The law was recently stated by Lord Tucker in Chan Kau v. R.[24] as follows:

> "In cases where the evidence discloses a possible defence of self defence the onus remains throughout on the prosecution to establish that the accused is guilty of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from insanity. Since the decisions of the House of Lords in Woomington V. D.p.p.25 and Mancini v. D.p.p.[26], it is clear that the rule with regard to onus of proof in case of murder and manslaughter is of general application and permits of no exceptions save in cases of insanity, which is not strictly a defence."27

The presumption that a man may be taken to intend the natural consequences of his acts is merely an evidential presumption which may, not must, be drawn and it does not shift the burden of proof from the prosecution to the accused. As Viscount Sankey L.C. said in Woomington v. D.P.P,[28]

> "If it is proved that the consciousness of the prisoner killed a man and nothingelse appears in the case, there is no evidence upon which the jury may, not must, find him guilt of murder. It is difficult to conceive so bare and meagre a case but that does not mean that the onus is not still on the prosecution."29

The rules as to onus of proof have recently been stated in Cheminigwa v. Reg[30] when the East African Court of Appeal said;

> "It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea was merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection i the trial court lays the onus of establishing this upon the accused."

In the Kenyan case of Nyakite s/o Oyugi v. R.[31] Windham, J.A. Qouting D.P.P. v. Beard;[32] Woomington v. D.P.P.[33] and Mancini v. D.P.P.[34] repeated the above statement made by the East African Court of Appeal in Cheminigwa v. R.[35] It is thus clear that in Kenya, the burden of proof regarding intoxication is always on the prosecution except in cases of temporary insanity in which case the burden shifts to the accused. When the

defence of intoxication is raised and the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know that what he was doing was wrong and the state of intoxication, was caused without his consent by the malicious or negligent act of another person, the accused will be discharged. But where the person charged was by reason of intoxication insane temporarily or otherwise at the time of such act or omission the provisions of the penal code and those of the criminal procedure code relating to insanity apply as a foresaid.

2.8 Evidence to Prove Insanity by Reason of Intoxication:

Evidence that is usually adduced to prove insanity is that of the circumstances surrounding the act in question, mental history of the accused and also medical evidence.

2.8a Circumstances Surrounding the Act:

To detect whether an accused was sane at the time he committed the act or made the omission one should observe what the accused did, how he did it and sometimes the words he uttered at the time.[36] This is the kind of evidence that is mostly relied on by courts in cases of insanity.

In Nyinge s/o Suwatu V. R.[37] the accused had killed a police officer while under a delusion that the officer was planning his death. After the killing he surrenderd himself to the police saying;

> "I have come here to be killed because they wanted my head."[38]

The accused did not explain who "they" referred to but it was easy to conclude that he meant the police. This statement was taken to show that the accused was not so insane as not to know that what he was doing was wrong. In A.G. for Northern Ireland v. Gallagher,[39] the defendant was charged with the murder of his wife. He used insanity as a defence or alternatively that at the time of commission of the offence, he was so intoxicated that he was incapable of forming the intent requisite to commit a crime and hence was guilty of manslaughter not murder. Before drinking the liquor the defendant had intended to kill his wife. The trial judge directed the jury to apply the M'Naghten test to the time when the liquor was taken and not the time of killing. The Court of Criminal Appeal allowed an appeal from a conviction for murder and the A.G. appealed to the House of Lords. It was observed;

> "In the case at hand, the accused while sober was suffering from a disease of the mind, but he knew what he proposed to do, to kill his wife and he knew that it was wrong. Then he got himself drunk and while drunk as a combination of both drink and mental disease, he did not know that what he did was wrong. The defect of reason was induced by the drink and hence he is guilty of murder, the trial judge was therefore correct in his instruction to the jury."[40]

In Gallagher's case, the fact that the accused had prior to becoming drunk formed the intention to kill his wife shows that the accused was not so drunk as not to know that what he was doing was wrong.

In Nguyai v Republic,[41] the appellant was convicted of killing a girl he loved. The killing was

brutally done and in the presence of a witness. The appellant was carrying one of the deceased's dresses when he killed her. He had left two letters at the scene of the killing. In one of the letters presumably meant for the deceased, he had expressed his love for her and the hope of seeing her in the next world. In the other letter directed to the boss, he described the killing as an "incident". The Court of Appeal for Eastern Africa was of the view that these were not the sentiments of a person aware of the appalling nature of his contemplated acts, but more consistent with a thoroughly disturbed personality.

2.9 Mental History of the Accused:

We have stated earlier that the magistrates are required to enquire into the Mental history of one who is accused of murder before trial commences. What the magistrates are interested in is whether the accused or any relative of his has ever suffered from a mental disease. In Nguyai v Republic[42] attacks of Schizophrenia in relatives on the mother's side were considered in showing that there was a likelihood of the accused having been under an attack of the disease. Having been treated of a mental disease is regarded as raising a probability of a re-occurence of a similar attack. It must be emphasized that in cases of intoxication, it is only intoxication leading to temporary insanity at the time of the commission of the offence which require the magistrates to enquire into the mental history of the

accused in murder cases for purposes of establishing insanity.

2.10 Medical Evidence by a Psychiatrist:

In cases of temporary insanity a psychiatrist's views are reliable[43] but not binding on the court. They are treated as an expert opinion. It is the duty of the court not the doctors to determine the issue of temporary insanity due to intoxication or otherwise at the time of the commission of the offence.[44] In Nyinge s/o Suwatu v R.[45] Widham J. stated that a court is not obliged to accept medical evidence if there is a good reason for not doing so. From this it can be argued that where there is no reason for not accepting medical evidence, the court should accept it.[46] In Nguyai v R.[46(a)] The trial judge had ignored the medical expert's evidence referring to it as a mere expression of opinion. But the Court of Appeal for Eastern Africa admitted the evidence saying;

> "Dr. Mustafa is a distinguished practitioner in the field of psychiatric medicine and is highly qualified both professionally and through long experience... his evidence ... was a considered view, arrived at after more than one year's observation of the appellant, with knowledge of the facts of the case and of the appellant's family history of insanity."47

The opinion that the appellant was suffering from Schizophrenia at the time he committed the offence, which impaired his judgement of right and wrong was admitted as evidence.

It is easy from the above cited cases and argument to conclude that cases of temporary insanity due to intoxication are treated in the same way as cases of insanity due to other causes and where insanity appears as a defence in such cases, the procedure to be followed when deciding the case is that followed in cases of insanity due to other causes.[48]

CHAPTER THREE

3.1 Analysis of the Defence of Intoxication:

All that the leading cases[1] establish is that voluntary intoxication is a defence to a criminal charge if it causes such a disease of mind as to bring the M'Naghten rules into operation or if it renders a person incapable of forming a specific intent and that specific intent is an essential element of the offence. Voluntary intoxication has only been recognized as a defence within the last hundred and fifty years.[2] Previously it was an aggravating factor warranting a punishment of more than ordinary severity.

The older law before Meade's case[3] regarded intoxication as only an aggravating factor and it is no way afforded an excuse for the commission of a criminal deed; for unlike insanity, it had been produced voluntarily and to produce it was wrong both morally and legally.[4] But at the present the effects of drunkenness upon the criminal must be considered in the light of the ordinary rules, as to Actus reus and mensrea. This means that actual insanity produced by any other cause should exempt a person from criminal liability to the same extent as insanity resulting from less reprobated causes.[5]

Where a person is intoxicated through no fault of his own for example as a result of medical treatment or the fraud of malicious companions this was even under the older rule regarded as carrying the full exemptive force. There seems nowadays to be no reason on principle why there should be retained any idea that because a man has voluntarily indulged in intoxicating liqour he should be held fully liable for every consequences which may follow without regard to the question of his mental ability when under the influence of alcohol which he has consumed. On the other hand, it is clear that in law he cannot be allowed any excuse because the alcohol may have inflamed his passions,increased his audacity or reduced his self control.[6]

Medical research has shown that a common effect of alcohol upon a man is to produce in him a much exaggerated notion of his abilities while at the same-time it infact reduces them, so that a position is created in which he is prone to take excessive risks.[7] At common law a man who consciously takes risks of causing harm is acting with mensrea and will be criminally responsible if he does such harm however confidently he may have expected that his skill would enable him to avoid it.[8] But if the man can establish that the alcohol has affected his mind in such a way as to make

him unable to appreciate that he was taking any risk at all, a finding of mensrea on his part is negatived by that fact. Where the measure of intoxication is said to be not enough to excuse from conviction the point may then arise as to whether or not it may mitigate punishment.[9] The above point carries different views from different judges but it is submitted by Cross[10] that the question falls more in the province of ethics than of law.

3.1a Intoxication Relevant in Establishing Mistake and Intent:

Kenny says that if the ordinary criterion of liability is observed it will be found that drunkenness may be relevant to establish mistake.[11(a)] Thus a drunken man may fancy someone else's umbrella to be his own or think an innocent gesture to be an assault and hit back in supposed self-defence.[11(b)]

3.1.b To Negative the Existence of any Intent at all:

Where it is a question of intention, drunkenness may be of very great importance though not an excuse as held by Patteson J. In R V Cruse;[12(a)]

> "Although drunkenness is no excuse for any crime whatsoever, yet it is often of great importance in cases where it is a question of intention. A person may be so drunk as to be ~~able~~ utterly unable to form any intention at all."

The intent referred above is general as opposed to specific intent.

3.1c To Negative the Existence of Some Specific Intent:

In R v Meade[12]; it was held by the court of Criminal Appeal that if a man were so drunk as to be incapable of knowing that what he was doing was dangerous, that is, likely to inflict serious injury, this would rebut the presumption that he intended the natural consequences of his acts.

A few years later the judgement in Meade's case came under consideration in D.p.p. v Beard and it was laid down that evidence of such drunkenness as renders the accused, incapable of forming the specific intent, essential to constitute a crime should be taken into consideration with the other facts proved inorder to determine whether or not he had this intent.

3.2. A Critital Assessment of the Application of the Defence of Intoxication.

The law relating to the defence of intoxication has been an unsatisfactory compromise of a number of attitudes and principles. On the one hand, it is felt that drunkenness should never be taken into account in ascribing responsibility for a crime because it is a voluntary condition and, moreover a reprehensible one. Drinking is a vice and it is a man's own fault if he commits a crime under the influence of drink. As Hume says;

> "One cannot well lay claim to favour on the ground of that which itself shows a disregard of order and decedency."13

On the other hand a man who gets drunk and commits a crime sometimes arouses sympathy and indignation. Take for example a University graduate who gets too drunk and commits a crime at his graduation party. In such a situation, talk of wickedness and vice appears irrelevant and it seems unfair to treat such a man as if he were a deliberate criminal.

The law too is concerned with the number of crimes which are committed under the influence of alcohol. So if it were to sustain the defence three quarters of the whole crimes in the country would go unpunished; for the slightest experience must be sufficient to convince everyone that almost every crime that is committed is directly or indirectly connected with drink. Self induced intoxication due to drink has been increasingly a factor in crimes of violence committed in Kenya though in most cases the accused people do not raise the defence. Although the law grew up in the contest of alcoholic intoxication, it applies to other forms of intoxication such as those caused by drugs.[14]

Whatever the nature and effect of the plea of intoxication it must be limited to cases of gross intoxication. The plea can only apply only in those cases where the crime would not have been committed but for the drink and even then only when

the accused has been so affected by the drink as to be unaware of his actions or at least to be unable to exercise his normal self control. Judges who do not wish to give effect to a plea of intoxication explain their refusal to do so by saying that if intoxication were a valid plea, "if anybody was going to commit a crime all that he need to do would be to take a sufficient amount of liquor and commit it and then say "oh you can't hold me for this because I was drunk."[15]

This fails to take note of the distinction between the man who gets drunk and then decides to commit a crime and the man who decides to commit a crime and gets himself drunk to get dutch courage. It is clear that in the latter situation the accused is guilty of an intential crime since he formed a sober intention of committing a crime. If C decides to kill B and then takes drink inorder to give himself dutch courage he is guilty of murder whatever his state of intoxication at the time of killing.[16]

3.2a Insanity Caused by Alcoholism:

It is accordingly clearly recognized that insanity caused by intoxication is a good defence to a criminal charge like any other insanity.

> "If the mind is deseased, then that is insanity which will take away all criminal responsibility. If there be such insanity it matters not what the exciting cause. It may be drunkenness - or it may be indulgence in any other vicious property - it is of no consequence which it is, if insanity is actually produced and is

> present at the time". To hold a person responsible for an act which he did when insane would be very unfair since it would be like holding a person responsible for an act which he would not estimate when he did it because the presence of an actual disease prevented him from having sane control of his actions."16(a)

3.2b Involuntary Intoxication:

One difficulty about involuntary intoxication is that as Hall put it:[17]

> "The surprising thing about the factual situations in the relevant cases is that involuntary intoxication is simply and completely non existent."

There is no Kenyan decision on involuntary intoxication The courts follow the English view that intoxication is involuntary only where the accused is made drunk by fraud or coercion or where he is wholly ignorant of the nature of what he is drinking although the latter would be very difficult to prove. The position was summed up by an American case of Perryman v State[18] where it was said;

> "Involuntary intoxication is a very rare thing and it can never exist where the person intoxicated knows what he is drinking and drinks the intoxicant voluntarily and without being made to do so by force or coercion."

In that case a boy of 16 was plied with ligour by the proprietor of a gambling club which wanted to cheat him and his drinking was held to be voluntary.

In the two leading Kenyan cases on the defence of intoxication, namely Mulungu Kieti v Rex[19] and Nayakite Oyugi v R[20] the issue of involuntary intoxication is not raised. So the Kenyan courts as aforesaid use the reasoning of the English courts that intoxication can only be involuntary if the drink is given to the accused without his consent or on medical grounds.

3.2 Is the Defence of Intoxication of any Help to the Accused Person in the Present Day Kenya?

Kenyan law relating to the defence of intoxication as contained in the penal code[21] and the criminal procedure code[22] does not declare that intoxicated people as such are exempt from responsibility unless the intoxication produces insanity in which case the insanity rules apply or if by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know that what he was doing was wrong and the state of intoxication was caused without his consent by the malicious or negligent act of another person. The intoxication may be the result of either drink or drugs. It is of legal importance only to extent that it is regarded as negativing a mental element essential to the crime charged. If it does the defendant is either

acquitted if the intoxication negatives a mental element essential to the crime charged as aforesaid or he is declared quilty but insane subject to the provisions of section 166(1) of the criminal procedure code if the intoxication produces insanity. Otherwise he is convicted assuming ofcourse the other essentials of criminal responsiblity are present. The usual effect of intoxication is to mitigate the punishment since the judge hopes that the offence if due to drinks or drugs is "out of character" and so is the less likely to be repeated if the defendant is given some moderate punishment or enabled to receive medical treatment. But a person having a record is unlikely to receive any mitigation for having taken drink. The threat of punishment may cause a person to moderate his intake of intoxicants and it may cause even the intoxicated person to control himself. This shows that the defence of intoxication can only help the accused person only to the extent that he is given a moderate punishment in the hope that he will not repeat the offence.

A drug addict or an alcoholic who is convicted of a crime need not be sent to prison. The court may put him on probation for treatment if considerations of deterrence are not paramount and if treatment is available. But most drunkards who commit serious crimes are sent to prison and on conviction for murder the

court has no option as in the case of insane persons. So the defence of intoxication if the intoxication does not produce insanity can help the accused in mitigating the punishment or if he is an alcoholic or a drug addict he can be helped to get treatment. If the intoxication produces insanity as aforesaid the accused person is given a "special verdict" in which case he will at least be safe from prison. If an insane person does not specifically set up an insanity defence he may go to prison.

CHAPTER FOUR

Recommendations and Conclusion:

Public policy, it has been argued demands that no lacuna should exist as a result of which intoxicated assailants may go unpunished. In this connection one may be tempted to suggest that the defence of intoxication be abolished. My submission, however, is that intoxication as a defence should not be abolished. Instead, the defence should be modified in its application to cater for the interest of the offender, the victim or his dependants in case of death and society at large.

4.1 Voluntary Intoxication Leading to Temporary Insanity:

There is no controversy as regards involuntary intoxication. Section 13(2) (a) of the Penal Code provides that intoxication shall be a defence to a criminal charge if the state of the intoxication of the person charged was caused without the person's consent by the malicious or negligent act of another person.

This position appears satisfactory and no suggestions are made with respect to involuntary intoxication.

4.2. Voluntary Intoxication:

The penal code states that where the person charged was by reason of intoxication insane temporarily or otherwise at the time of the act or omission, the provisions of the penal code and those of the criminal procedure code relating to insanity shall apply.[1]

It is very unfair to apply provisions relating to insanity to a person who by reason of intoxication is only temporarily insane. This is because insanity is just temporary, the person is only insane at the time of the commission of the offence and becomes normal immediately the intoxication goes off. If such a person is treated as if he is permanently insane; then this shows that he is being treated unfairly.

A person who by reason of intoxication is temporarily insane at the time of the commission of the offence should be acquitted of the offence but should be made to pay compensation to the victim of the crime since his intoxicated state was caused voluntarily. It is my submission that if such a person is made to pay compensation to the victim of the crime, then it is unlikely that he will repeat the same offence.

4/3 Intoxication Negativing Mensrea.

As mensrea is one of the ingredients of a crime, if the person charged was by reason of intoxication in capable of forming the mensrea required for the crime, he should be acquitted of that crime. The question of basic intent and specific intent should be got rid of and the direction of the judge to the jury should be that if they can find that the person charged did not form the intention to commit the crime he should be acquitted regardless of whether the committed offence requires basic or specific intent.

4.4. Protection of the Public:

The public can be protected in a number of ways;

1). It should be made an offence to make oneself drunk to the extent that he gets intoxicated and commits a crime. The new offence should be made distinct and separate from the actual offence committed by the person in his advanced state of intoxication. The Butler committee[2] suggested such an offence. It suggested that the new offence be restricted to cases where the crime was a dangerous offence" that is one involving injury to the person or sexual attack or destruction of property. The committee further suggested that the maximum sentence for such an offence be two years imprisonment and a person has to be convicted of the new offence only where he has

been tried for a dangerous crime and acquitted for lack of mensrea resulting from intoxication.

2. Granville Williams[3] also suggested that the public interest can be protected by making it an offence to be drunk and dangerous. In Kenya, it is an offence to be drunk and disorderly but this offence should be emphasized by giving the offenders imprisonment sentences but not fines only.

Punishment it is said, is before all things deterrent and the chief end of the law of crime is to make the evildoer / an example and a warning to all like minded people. But it is clear that by punishing a person who committed the offence in an intoxicated state by way of imprisonment or fines without making him pay compensation to the aggrieved person no warning is given to the others. So the only good solution is to make the offender in cases of voluntary intoxication pay compensation to the aggrieved person or in case of death, to his dependants as as foresaid since this would deter him and others from repeating the same offence. As offences are committed by reason of a conflict between the interests, real or apparent of the wrongdoer and those of the society at large, it will neither benefit the society nor the evildoer if the evildoer is taken to prison or made to pay fine only. It is my submission that if the evildoer is made to pay compensation to the victim of the crime or his dependants as well as being

imprisoned and made to pay fine this will deter him from repeating the same offence. If the above recommendations are implemented the law relating to the defence of intoxication will be greatly improved.

FOOTNOTES

INTRODUCTION

1. Goldestein and Katz, "Abolish Insanity in Kenya" Y.L.J. 1963.

2. By the word "Appropriate," it is meant those people whose offences have the two components of a crime, that is, mensrea and Actus reus.

3. This is defined as "guilty mind." Not all offences require mensrea. Offences of strict liability and those of vicarious liability are exceptions.

4. This is the legally prohibited act.

5. Those are infancy, insanity, mistake of fact, intoxication duress or coercion self-defence and necessity.

6. See the Kenya penal code (cap 63 of the laws of Kenya) section 3 where the interpretation of the code is said to be in accordance with principles obtaining in England and expressions used with the meanings attaching to them.

FOOTNOTES

CHAPTER ONE:

1. Rex v Rennie 1823 1 Law cc 75.
   Rex v Burrow's 1825 1 Law cc 76.
2. Cases and Materials on Criminal Law and Procedure by M.L. Friendtand (1974), 538.
2. Renniger v Fogosa 1 Plowd 1, 19.
4. Ibid. 1, 19.
5. Hales pleas of the Crown v I.
6. Ibid. pg. 32.
7. Blackstone in his commentaries Vol. iv c.2 S.II, pg. 25.
8. Some of these cases are; Rex v Carrol 7c p 145 Rex v Burrow Supral, Rex v Rennie supral.
9. Cross A.R.N. An Introduction to Criminal Law (1972) 7th Ed. pg. 91.
10. Per Stephen J. in Doherty's Case 16 Cov c.c. 306/
11. Smith and Hogan 4th Edition Criminal Law pg. 189.
12. Ibid.
13. See Trial of Lunatics Act, 1883.
14. Supra 3.
15. 1909 IKB 895.
16. Ibid.
17. See the Court of Criminal Appeal's decision in Meade's case ibd.

18. 1920 A.C. 479.

19. Ibid. 500.

20. Cross A.R.N. Introduction to Criminal Law, pg. 92.

21. Smith and Hogan 4th Ed. Criminal Law, pg. 185.

22. Pordage 1975, Criminal L R 575.

22(a) Smith & Hogan 4th Ed. pg. 155.

23. Supra 18.

24. 1976 7 All E.R. 142,

25. Smith & Hogan Criminal Law, 4th edition pg. 187.

25(a) Ibid.

26. Ibid.

27. Ibid. pg. 187.

28. Supra 15.

29. An Interview held with an elderly man in my village.

30. East African Order in Council 1902, article 15(2), stated that Criminal Law was to be exercised in conformity with the Indian Penal Code.

31. SQR 576 of 1902.

32. The law was virtually English law so that term "Indian Criminal Law" is a bit misleading.

33. Adultery and enticement which were known to native law were found in the Indian Penal Cod.

CHAPTER TWO

1. Cap 63 Laws of Kenya.
2. Cap 75 Laws of Kenya.
3. The English decisions which are binding on the Kenya Courts are those passed before 12th August, 1897.
4. Section 3 of the Kenya Penal Code (cap 63 of the Laws of Kenya) says that the interpretation of the code should be in accordance with the principles obtaining in England and expressions used with the meaning attaching to them.
5. Section 11 of the penal code.
6. Supra 2.
7. Section 166 (1)(a) c.p.c.

7(a) Section 166 (3) c.p.c.

8. Section 166 (5) of the c.p.c. gives the president power to order the transfer of a person from any place in which he may be detained to either a mental hospital or a prison or to be transferred between these two institutions.
9. The requirement of mensrea (guilty mind).
10. In cases of strict liability, one is held liable for an offence without having had a guilty mind.
11. 1920 A.C. 479.
12. 1939 E.A.C.A. 133.

12.(a) Ibid. at pg. 133.

13. 1956 23 EACA, 622.
14. 36 Cr. App. R. 85.

14(a) Supra 11.

15. 13 vv. A.C.A. 327 (Sieraleone) 1951.

15(a) A source book of the Criminal Law of Africa by Robert Seidman pg. 407.

16. Supra 15 pg. 327.

17. Supra 11 pg. 479.

18 Ibid

19. 1836 7 C & P 297.

19(a). The other defences are self help, infancy, insanity, duress, coercion, necessity and mistake of fact.

20. Refer to circular to magistrates No. 2. of 1937, 17 KLR 130.

21. The circular does not only require the name of the person but also fingerprints and any other particulars to be sent to the superindent of the hospital.

22. Refer to Woomington v D.p.p. 1935 A.C. 462.

23. Ibid.

24. 1955 2 WLR pg. 194.

25. Supra 22 pg. 462.

26. 1942 A.C.1

27. Supra 24 pg. 194.

28. Supra 22.

29. Supra 22 pg. 48.

30. EACA No. 450 of 1955. (unreported).

31. EACA 1959 322.

32. Supra 11 479.

33. Supra 22 pg. 462.

34. Supra 30.

35. Ibid.

36. Words like, "we will meet in the next world" are of importance: (Nguyai v R.).

37. 1959 E.A. 979.

38. Ibid.

39. 1963 A C 349.

40. Ibd

41. EACA No. 75 of 1975 (unreported).

42. Ibid.

43. Supra 20.

44. Judges have not little knowledge of medicine if any.

45. Supra 37.

46. The circular for magistrates requires that medical evidence should be got.

46(a) Supra 41

47. Supra 41 pg. 8.

48. Section 13 (2) (b) of the penal code.

CHAPTER THREE

1. The leading modern authorities on intoxication are Rex v Meade, 1909 IKB 895.
   D.p.p. v Beard 1920 A.C. 479 A.G. for Northern Ireland v Gallagner.

2. Cross A.R.N. An introduction to Criminal Law pg. 91.

3. 1909 IKB 895.
4. See Reniger v Fogossa (1550) 1 Plowel 1, 19.
5. This is exactly the present day law as advocated in D.p.p. v Beard 1920 A.C. 479. by Lord Birkenhead.
6. Ibid pg. 502.
7. See Kennys outlines of Criminal Law 19th edition edited by J.W.C. Turner pg. 62.
8. R v Doherty 1887 16 Cox 306, 309.
9. R v Morton, Criminal Law Appeal Reports pg. 255.
10. Supra 7 pg. 63.

11(a) Ibid pg. 63.
11 b Ibid
12. Supra 3
12(a) 1838 8c and p541 at pg. 546.
13. Hume pgs 45 - 46.
14. R v Lipman 1970 IQB, pg. 152.
15. Kenned v H.M. Adv. 1944, J.C. 171.
16. A.G. for Northern Ireland v Gallagner 1963 A.C 349.
16(a) G.H Gordon on Criminal Law (2nd edition pg 402)
17. I Hall 539.
18. 1916 120 OKL Cr. Appeal Reports 500. Hall 538.
19. ~~E.A.C.A.~~. 1959, ~~322~~. E.A 797
20.
21. Cap.65 of the Laws of Kenya.
22. Cap. 75 of the Laws of Kenya.

CHAPTER FOUR

1. Section 13(3) of the penal code.
2. Cmnd 6244 paras. 18. 51, 18, 59.
3. Granville Williams Textbook on Criminal Law pg. 422.

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