THE INADEQUANCY OF LEGAL REPRESENTATION

A Dissertation submitted in partial fulfillment of the requirments for the Degree of Bachelor of Laws of the University of NNairobi.

by

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DEDICATION

This work is decicated to my parents and my daughter Nelly Wanjiru Njoroge.

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ABBREVIATIONS

A. C.	-	Appeal Cases
Cr. App.	-	Criminal Appeal Cases.
E. A. L. R.	-	East Africa Law Reports.
E. A. L. J.	-	East African Law Journal.
J. C. L. I. L.		Journal of Comparative Legislation and International Law.
L. Q. R.	-	Law Quarterly Review.
V. L. R.	-	Vanderlain Law Reviews.

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INTRODUCTION

Every society irrespective of its nature of organization has laws that enable human beings to lead a predominantly happy life. When disputes arise, as they must then parties thereto are entitled to justice. They also have the right to be legally represented in the course of arbitration or adjudication of such disputes.

This dissertation examines legal representation in Kenya with special emphasis on criminal cases. The major objects will be first to examine the historical background of legal representation in Kenya. Secondly, to show the main objectives of legal representation and how far these objectives have been met. Thirdly to expose the major shortcomings in so far as legal representation is concerned emphasizing the reasons for these shortcomings and finally to suggest some possible solutions to the shortcomings.

Chapter one contains analysis of the historical background to legal representation in Kenya. The main object here is to show how the English system was imported into Kenya and how a complex system of laws imposed on the traditional society thereby creating the need for legal representation.

Before the advent of colonization, we observe that in the African community the elders were the arbitrators of justice. They resolved disputes

involving the clan or the whole community. Their main pre-occupation was on promotion of reconciliation rather than punishment of any of the parties. The small size of the community and its high level of inter-action meant that everybody knew everybody else and the structure of the society was such that everybody knew what the law was and what was required of him. Customary law was applied, and since everybody knew the law, there were no complexities or other problems which would necessitate any of the members to be specially trained to interprete the law.

However, with colonization, a foreign complex system of laws was introduced. The adoption of English law in Kenya was by virtue of Kenya Colony Order-in-Council 1921. Article 4 paragraph (2) of the order provided that the jurisdiction of the supreme court and of surbodinate courts shall, so far as circumstances admit be exercised in conformity with the substance of the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897 for nay one.therefore to inferprete the foreign complex laws there was the need for legal training and legal representation in the courts.

Chapter two of this dissertation discusses the objectives of legal representation and then shows whether these objectives have so far been met.

The English adversary system was imported into Kenya and a complex system of laws was imposed on the African. These laws were totally alien and unknown to the Africans, yet they were to govern the traditional society. There was therefore the need for litigants to be legally represented in court by legally trained lawyers. But the question as to whether all litigants are legally represented in court is inevitable. From experience I observe that the number of cases that go unrepresented far outweighs the represented ones. Such an observation the question as to the extent to which justice is done or is seen to be done is unavoidable. Laws and procedures in courts are both complex and technical. No layman is expected to understand them. For a fair trial to be conducted therefore, there is the great need for lawyers.

The right for an accused to be legally represented has been enhanced by the constitution Section 77 (2) (d) which provides that "every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice. Section 193 of the Criminal Procedure Code also provides that "any person accused of an offence before any Criminal Court or against whom proceedings are instituted under this code in any such court, may of right be defended by an advocate."

However, both the bench and the bar view the violation of the right to be legally represented with a relaxed attitude. This attitude has prevailed even after independence. In relation to capital offences, the law has been less harsh. Volunteers from the bar maintain a poor people's list. But it has operated with little success. Firstly, most people are not aware of its existance, and secondly, lawyers are reluctant to volunteer and help a poor accused. They would rather take up briefs in which they make more money. Therefore we find that most accused persons go unrepresented.

Chapter three will highlight the shortcomings of legal representation. It will also include an attempt to show the reasons why it has failed to meet its objectives. African population in general was a late starter in the legal profession. This was due to the attitude adopted by colonilists towards the Africans. They felt that lawyers were basically political, the profession awakened society to their rights and demands. So the colonial administration provided facility for training of lawyers. Though the situation is improving quite fast, it has been incapable of coping with the increasing population. It is also unfortunate that the majority of lawyers are concentrated in urban areas with the result that the majority of Kenyans do not have easy access to the members of the profession.

The assumption that everybody knows the law has worked untold unfairness to a large section of the people. The majority of the Kenya population are ignorant and poor and they are not even aware of their existing rights.

Legal practice is by its very nature a profession that is seen in a free market economy as a money spinner. As such lawyers cannot be the best dispensers of charity. Their training produces skilled people and their services are therefore costly.

The numerical supply of lawyers has always been low compared with the population. With the prevailing shortcomings in the legal profession, there is the urgent need for reaction so as to grant true social justice to all people irrespective of their status in life.

Need for solving these problems is a great one. The literature of legal profession suggests that there are ways and means of increasing lawyers' productivity and reducing costs in certain respects. Solution also lies in the provision of legal aid by the state. Legal aid is a service which the modern state owes to its citizens.

However, one should not jump the conclusion that nothing can be done by way of a start. Therefore, the solutions are both short-term and long-term to cure the existing evil of social injustice success can

can only be achieved with co-operation from both the bar and the bench and the Kenya Government.

Finally, a conclusion of all that has been considered in the dissertation.

CHAPTER ONE

HISTORICAL BACKGROUND TO LEGAL REPRESENTATION IN KENYA

A proper understanding of the history of legal representation in Kenya can only be achieved through a two pronged approach.

Firstly, by examining the African traditional society before the coming of the Europeans, and secondly by showing how with the coming of the Europeans an adversary system was superimposed on the African society and therefore creating need for legal representation.

It would be quite erroneous to assume that before the arrival of the British, the indegineous people had no laws to govern their various societies. It is indeed clear that there were indigenous legal institutions which were customary in origin and type. As in all societies of the world, social order and peace were and are recognised by African peoples as ~~eneritual~~ essential and secred. The prevailing factor in the African traditional society was communalism. This kind of organisation is conceived primarily in terms of kinship relationshps since everybody is related to everybody else.

Where the sense of corporate life is so deep, it is inevitable that the solidarity of the community must be maintained otherwise there is disintegration

and destruction. There existed therefore, many laws custom, self form of behaviour regulations and taboos constitutioning the moral code and ethics of a given society or community. This gives sanctity to the customs and rugulations of the community. Any broach of this doe of behaviour is considered evil wrong or bad for it is an injury or destruction to the accepted social order and peace. Therefore it must be punished by the corporate community of both the living and the dead. God may also inflict punishment and bring about justice.[2]

Within this tightly knit corporate society where personal relationships are so intense but not so wide one finds perhaps the most paradoxial areas of African life. Everybody knows everybody else and a person cannot be individualistic. Everybody also knows what is expected of him. However, in the same society, there are manifestations of evil. Those include stealing, rapes, robberies, cruelty especially against women, murders, bad words and disrespect of a person of higher status.[3]

We therefore find that each community has its own set up for restitution and punishment for various offences both legal and moral. These range from death for offences like practising sorcery and witchraft to paying fines in the form of cattle, sheep or money for minor cares like accidental

injury to one's neighbour or ~~which~~ those goats escape and eat potatoes in the neighbour's field. Elders saw to the welfare of the people. They had the duty of keeping law and order and expecting justice in their respective areas.

Among the Kikuyu, in every homestead the father acted as the judge and settled all minor disputes between members of the family. If there was a big dispute, it was necessary to call together heads of families within a Mbari (kinfolk) who acted not only as the heads of their particular immediate families, but also in their capacity as elders of the kiama.[4]

These elders acted as arbitrators rather than judges and they pointed out the required or recognized tradition and custom of the family to be followed. The chief object of their trial was find ways and means by which they could bring the warring parties into a mutual agreement or compromise and to avoid any ace of vengeance which might result in breaking up the family group.

Oath was the most important factor in controlling court procedures. Among the Kikuyu, there were three important forms of oaths which were so terribly feared morally and religiously that no one dares to take them unless he was perfectly sure and beyond any doubt that he was innocent or that his claim was genuine.

There was muma generally taken on minor disputes. The symbol of this oath consisted of a lamb which was killed and contents of the stomach mixed with herbs; water and a little blood from the animal.

The second oath was karinga thenge (to swear by killing a male goat) and it was administered in a big care involving a lot of property and more than one or two persons. A small male goat was brought before the kiama and parties concerned were asked to take an oath by breaking the limbs of the animal.

The third form of oath was gethathi taken mostly in criminal cares such as murder or stealing. Symbol of this oath consisted of a small red stone with seven natural holes in it.

These oaths served two purposes. On one hand, it prevented people from giving false evidence and helped to bring offenders to justice through guilty conscience and confession.

On the other hand, it ruled out corruption and bribery and ensured impartial and unbiased judgement For not only parties to a care were subjected to take an oath but also elders of the kiama before being allowed to try a case.

Nowadays, these oaths are neglected and discouraged by the present court administration. Instead, courts have adopted the form of raising hands or kissing the Bible or Koran as symbols of oath. It can definitely be said that this form of oath has little meaning. if any to an African. It has no binding force, moral or religious.[5]

From the foregoing analysis one clearly observes that the main concentration of the traditional judicial body was on promotion of reconciliation rather than punishment of any of the parties. In other words the whole object of customary law was to maintain what Cottran terms"equilibrium".[6]

Penalties whether punitive or by way of compensation are directed not against specific infraction, but to the restoration of 'equilibrium'. One also realizes that customary law is basically positive rather than negative in the sense that itsstates what the right conduct should be.[7]

However, the African traditional society was not to remain in its original nature for long. In the later half of the 19th century, the society began to experience some changes in its structure. These changes came with British colonization.

Historically, Kenya came into the British Imperial map first through the work of the explorers

with their dubious diverse motives. This was then followed by the establishment of actual colonial rule. Declaration of a protectorate over much of what is now Kenya was on 15th June, 1895 which marked the beginning of official British rule, which was to endure until 12th December, 1963. The Mandate of administering the protectorate was given the Imperial British East Africa Company. But on the company running bankrupt the government now assumed a direct involvement in the Imperial expansion.[8]

In theory the British advanced two reasons for colonization. Firstly to stop slave trade and secondly to introduce legitimate commerce and trade. But this was to strategic more to camouflage the true imperial designs as illustrated by the notorious maasai case.[9] None other than Professor Robert Seidman puts the matter in its true perspective. The received law he as courts

> "... provided the going rules of private enterprise economy so far as Africa was to be developed by Englishmen and to supply Europe with cheap raw materials."10

The main reasons for British colonization were to get raw materials, and also a ready market for their manufactured goods.

The policy of British colonization and administration was to interfere little with the administration of customary law in the traditional societies. Despite this, in practice the colonial

period resulted in a gradual transformation of the character of customary law. The colonial period, therefore imposed upon Kenya's legal system the basic characteristics which it still exhibits.[11]

With advent of colonization capitalism because the law mode of production. Capitalism served the purposes of the ruling class in Britain and dictated upon the nature a superstructural features established in the colony. To serve their needs, and meet their ends English law had to be introduced to replace customary law. This was in direct confliect with the initial official position that English law was to apply only to immigrants who to use Jenkin's words

> "... carries with him the English law and liberties into any unoccupied where he settles"12

This view is given further credibility by the decision in the Australian care of Copper v. Stuart.[13] This explains why Kenya law to a large extent resembles English law.

The earliest reception of English law in Kenya took place under the African Order-in-Council, 1889 which expressly stated that jurisdiction shall "so far as circumstances permit be exercised upon the principles of English law and in conformity with the substance of the law for the time being in force in England."

The East Africa Protectorate Order-in-Council, 1902 replaced the 1889 Order-in-Council with a proviso that the juridication of High Court be exercised so far as circumstance. permitted in conformity with Indian Criminal Procedure Civil Procedure and Penal Codes. To remove any doubts there was the Ordering Order of 1911 and the reception was now declared to be of the "substance of common law, the doctrines of equity and statutes of general application of England.[13] The 1911 order was restored by the 1921 Order-in-Council Article (4) paragraph[14] (2)

The general provision for the reception of English law in Kenya has ever since been continued by saving clauses in one statute after another and is now in the judcature Act of 1967 cap. 8 of laws of Kenya. Section 3 (1) provides for the application of "the substance of common law the doctrines of equity and statutes of general application in force in England on 12th August 1897, and the procedure and practice observed in courts of England at that date."

Throughout the colonial era law had a dual role. As Professors Chai and McAuslan[15] pointed weapons of wasr in the establishment of colonial rule. It was also used to coerce Africans to make them perform the various roles for benefit of colonialistic especially in the alienation of land.[16]

For these purposes to be achieved the courts and criminal law which were an integral part of administration were used. These courts were generally of English type and were also meant to facilitate maintenance of "law and order" as colonizers saw it. Frederick Luggard has himself very succintly stated that

> "It was the task of civilization to put an end to slavery, to establish courts of law, to inculcate in the native a sense of individual responsibility liberty and justice, and to teach' their rulers to apply these principles."17

The first local legislation dealing with the legal system established a triple system of courts namely the supreme court, which applied English law, Muslim Courts applied muslim law and lastly, the native tribunals staffed by African and applied customary law.[18]

At this juncture two important changes are notable. Firstly, legal introduction of English law which is alien and unknwon to the Africans. Secondly, establishment of courts to replace the traditional elders as arbitrators. The law introduced is meant to implement justice largely English justice and therefore English system of settling disputes is to be applied instead of the traditional way of settling disputes.

This in effect means that a foreign cultural background foreign procedural laws and foreign substantive laws have been imposed on the Africans. Even in the native tribunals, customary law was not obligatory. It was to guide courts "so far as it was not repugnant to justice and morality"[19] as perceived in English law. So the native tribunals had no connection with the group it represented for which it was established. It was more or less English in structure.

In a civil case, it gave a judgement which represented victory for one side and defeat for the other. In criminal cases, it had to enforce a law external and foreign to the Africans.

The informal ~~other~~ often protracted reconciliation procedure which characterized the traditional society was replaced by a formal trial in which there was procedure to mark off plaintiffs and defendants prosecution from accused and the various stages of a trial. There was also the need to keep a record.

In such a legal system where the laws and procedure are foreign and complicated there is the demand for specialization in the law and court procedure. This will enable them to interpret the foreign law and its application on individuals in the society and hence the need for legal representation in the courts.

CHAPTER TWO

THE OBJECTIVES OF LEGAL REPRESENTATION: HOW FAR HAVE THEY BEEN MET??

The question as to whether a person having a legal problem should have the right to the assistance of a lawyer has been the topic of numerous discip discussions and it has been advocated that the very exercise of any just and fair legal system depends on the machinery of justice that is effective. This in effect means that it should comand the confidence of all into impartiality equality and fairness.

Legal representation therefore becomes an essential commodity in the administration of justice. The rule of law demands that there is protection of the law, and access to law for all citizens. It is therefore a requirement of the rule of the law that legal services are part and parcel of public services and they are provided as a matter of right to which all people are entitled to full measure. It is my contention that this is the conclusion flowing from the guarantee and protection of human rights and liberties, proclaimed in the universsal declaration of human rights and embodied in the Kenya constitution.[1]

Apart from playing the important role in the administration of justice, legal representation has also

this important objective of assuring that a fair trial is conducted. The fundamental rights as embodied by the constitution[2] not only deal with liberty of the individual but also the legal provisions concerning arrest and subsequent trial. Fairness is a basic ingredient of any trial. These rights to a fair trial cannot be achieved effectively if citizens are hindered by the conditions they live in, in particular lack of opportunity of achieving the ability to comprehend his rights as embodied in law. The lawyer should therefore ensure that his client receives a fair trial as it is required by the law. The lawyer has also the objective of making a significant contribution to the legal needs of the public at large. The legal services would not only serve the legal needs of only a small sector but to the mass-human equality and degnity would be available to everyone with a legal need, not only those who can afford the high costs of legal services It is important to discuss these objectives in greater and indicate how effective they have been.

The Effective Administration of Justice in Courts of Law.

The Rule of law as explained by A.V. Dicey[3] requires the absolute supremacy of the law, equality before the law or subjection of all classes to the law was embodied in the United Nations Charter, universal declaration of human rights and contained in many modern constitutions. All these proclaimed

the fundamental rights. It may be necessary to pose a question: What role is played by the bar in safeguarding the rule of law and the human rights and liberties?

The administration of justice in any court of law is not a luxury. It is the child of a man's free spirit. It is as important as the other necessities for three basic reasons. It is a man's natural right. Secondly, without justice a society is undermined and lastly it is also an indespensable ~~fact~~ for development and reform of social institution.

In this respect, lawyers become the most important in assuring that justice has not only been done but has been manifestly seen to be done in a court of law. The legal profession in general has always claimed to be its special responsibility to safeguard individual fundamental rights. This aspect particularly of the lawyers has received great prominance in the last decade through organisation, such as the international commission of jurists. In representing his client, the lawyer should ensure that he receives justice from beginning of the trial to the end of it. It is a requirement of justice that the judge should have his attention drawn to all legal requirements and that the trial should take a reasonable time for justice delayed is justice denied. It is important to realize

that during a trial, the accused's liberty is at stake and therefore there has to be an effective administration of justice in convincting or acquiting. Criminal process is one of the necessities of life in any society but it is at its best when we are convinced that justice has been done even though convinction or condemnation is not a happy event.

Legal representation therefore is not so much particular interests of the accused or plaintif as to the importance of equal justice and proper functioning of the rule of law.

However, the right to equal justice and equality for all before the machinery of justice, owing to its equal access becomes a dream to those who for varying reasons do not have the access to the services of a lawyer. The right to be legally represented in a court of law has been the provision of the constitution section 77 (2) (d) which states that

> "every accused person shall be permitted to defend himself before the court in person or by a legal representative of his own choice."

The right has also been provided under section 193 of the Criminal Procedure Code. "Any person accused of an offence before any criminal court or against whom proceedings are instituted under this code in any

such court, may of right be defended by an advocate." Both the constitution and the Criminal Procedure Code assume that the accused understands the legal system well and is financially able to hire a lawyer.

Despite the legal provisions of the right to bellagally represented, it has been violated either through court's failure to wait for the lawyer provided to the accused or through court's failure to afford a lawyer for the accused. This in effect is a tantamount to a deprivation of justice. In an English case of Mary Kingston[5] on the trial of the appellant the counsel who had been briefed for her defence was not in court owing to a misunderstanding. The trial judge declined to postphone the trial and the accused was tried unrepresented. On appeal it was held that it was tantamount to a denial of justice. The English court of appeal quashed the conviction indicating that the course adopted was tantamount to depriving the appellant of the right which she had to be defended by a counsel.

In another case of Galos Hired v King.[6] It was the absence of a counsel at the hearing of an appeal (against a conviction for murder) which was being considered by the privy council. An advocate had been assigned to the Appellants under the Poor Persons Defence Ordinance.[7] In Somaliland, but he had to travel from Aden, but he arrived shortly after the time fixed.

An adjournment could have enabled him to argue therefore it was held by the privy council that the assignment of a counsel was made of no legal effect and the case was restored for hearing in circumstances that would enable the advocate to conduct the defence. The above two cases may be regarded as authorities for the proposition that if an accused is deprived of the right to be legally represented through no fault of his own, and through no fault of his counsel and a conviction follows, it should be quashed on appeal.

The East African Courts of Appeal also emphasised the observance of the right to legal representation in Robert Canfait V. R.[8] where Bacon J.A. observed that

> "the wrongful refusal of legal aid in fact occasioned a failure of justice for the accused was denied the skilled assistance of a lawyer which the law deems necessary for his proper defence."

These cases illustrate how ineffective the administration of justice has been in courts of law. This is contributed to by both the attitude of the bar and the bench. This right has been viewed with reluctance even after the attainment of independence. This is reflected in the case of R.Vs. Mark Mwithoga[9] The appellant was convicted by a magistrate's court of assault causing actual bodily harm and wilfully and

unlawfully damaging property. One of the grounds of appeal was that the appellant had been denied adequate time and facilities to prepare his defence in contravention of section 77 (2) (d) of the Kenya constitution.

The court of appeal noted that the appellant's right to a fair trial had been violated but refused the appellant to raise the constitutional right on the ground that it was not raised in the court of first instance. The major question which arises in this case is whether the right to invoke the Bill of rights can be abrdiged by technicalities of litigation. The court's decision can hardly be reconciled with the view of the role of the constitution.

From the foregoing discussion I came to the conclusion that the objective of legal representation in ensuring the effectiveness administration of justice in courts of law has been achieved to a very limited extent. Reasons lie in both the attitude of the bar and the bench to the right to legal representation. Though it has been given great emphasis theoretically, in practice, it leaves a lot to be desired.

The fundamental rights as embodied in the constitution not only deal with the liberty of a person but also the legal provision concerning arrest and subsequent trial.[10] The lawyer has an important role to play in safeguarding the individual's

right to a fair trial.

The practical implication was clearly and forcefully shown in Powell v. Alabama[11] by Justice Moody: "left without the aid of a counsel, he may be put to trial without a proper change and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks the skill and knowledge adequate to prepare his defence even though he has perfect one he requires a counsel at every step of the proceedings against him. Without it though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence." These dangers became more pronounced in Kenya where there is widespread ignorance and the fact that the machinery of justice was previously playing the role of suppression and its alien to the majority of the people.

From experience,[12] in the overwhelming majority of cases, a poor applicant who cannot afford the services of a lawyer will not be able to enforce his rights or even defend himself. It is a requirement of justice and fair trial that something approximately to the true facts, should emerge at the trial and that the judge should have his attention drawn to all the relevant legal authorities. Most of the accused persons are inarticulated and confused and do not know what they

are required to say. Therefore it was a most impossible to conduct a fair trial.

An effective process of administration of justice is one that decides cases according to their merit. This in effect means that, the cases are decided indiscriminately and the accused is convicted or acquitted provided that it is done in the most just manner. The lawyer therefore has the important role to play in safeguarding the individual's right to a fair trial.

From experience, the criminal process usually consisted of a brief police investigation and they are more interested in clearing cases than with the subsequent need for a proper and fair trial being conducted. The officials of the court, in determining whether to acquit or to convict rely on the findings of the police and rarely conduct any considerable investigations of their own. The inadequacy of the process results of the individual's dignity and liberty regarded as fundamental are violated. In such cases, the only solution lies in the services of a lawyer who can interrogate the police and get the clear and correct facts of the case.

Language and its understanding is another major problem in the courts where language used is English or Swahili which the accused may not understand and interpretation may not be coherent. Question

arises as to whether the accused knows what he is charged with, or whether there is proper communication and interpretation. An understanding of the proceedings is very important. The accused's liberty being at stake needs every opportunity to be defended. Proper and correct interpretation was emphasized in the case of Andrea vs. R.[13] The appellant a foreigner from Mozambique was convicted of being in possession of prohibited literature. He appealed against his conviction contending inter alia, that he had been denied the right to engage an advocate and the right to an interpreter. It was evident that he had never asked for an advocate and therefore, his appeal could not have succeeded on this ground. However, the High Court ordered a retrial on the bases that the appellant could not have understood the proceedings which were conducted in Swahili and English without the services of an interpreter. With legal representation, all the factors hindering a fair trial will not exist and for ensuring that an accused receives a fair trial he should avail himself the services of a lawyer.

However, it is clear that although the rights of the accused may be on paper, practical problems make it difficult for them to be exercised. The effectiveness of these rights depends on the extent of access to the services of the lawyer. However, in

some instances, the accused has an advocate but either through the fault of the court or his own, the accused appears in court unrepresented. In such cases, the objective of ensuring a fair trial totally fails. A good illustration is the case of Karisa Turi vs. R.[14] Counsel for the accused was not given an opportunity to attend a preliminary inquiry. He had not been notified of the date of the inquiry, although he had informed the trial magistrate that he was so acting and also the police investigation. During the proceedings of the inquiry the accused made a statement which be would not have made if he was represented and which was used against him in the trial. On appeal, it was conceded that the circumstances under which the preliminary inquiry was conducted with the accused unrepresented caused grave prejudice to the appellant's defence. The appellate courts odered a retrial, holding that the magistrate's failure to inform the appellant's counsel of the date of inquiry had infriged the appellant's right to legal representation. The court followed the reasoning in Galos Hired vs. King (supra) and considered this case a stronger one than Mary Kingston (supra) and However, unlike the English Court of Appeal, the East African Court of Appeal merely ordered a retrial instead of quashing the conviction. In t is respect, I would submit that it is the duty of the trial court to give

sufficient weight to all relevant considerations one of these is the right of the accused to be legally represented which is such an important principle in criminal procedure and the constitution. The possibility of a miscarriage of justice resulting from the improper denial of the right is so obvious that there must be strong reason to deprive the accused of it.

It is also the objective of legal representation to contribute to the legal needs of the public at large.

As I indicated in chapter I the criterion for legal representation, lies in the destruction of traditional laws and institutions that provided legal service to the people.

The formal legal system was imposed by the colonial rule on the traditional society and it has inherently created problems because of the underlying assumption, that all the people understand the legal system that and therefore aware of their fundamental rights and protection under the law, and one is financially able to hire a lawyer. However, it is common knowledge that the majority of the people are poor and cannot afford to pay for the services of a lawyer. Majority of the people are also illiterate and unaware of their existing rights. This is

where legal aid becomes an important social institution. The lawyer is a counsellor in various aspects of social and political organization and lawyers exist to serve the legal needs of the public. No sector of the public should be excluded from the provision of services of a lawyer. President Kaunda addressing the Zambian Law Scoeity in 1970 put it very clearly

> "The lawyer in a developing society must be something more than a practising professional man, he must be even more than the champion of fundamental rights and freedoms of the individual. He must be seen in the fullest sense a part of the society if he is able to participate in its development and the advancement of the economic and social well being of its members."

Human equality and dignity should not only be available to those who can afford the costs of the services of a lawyer. This would lead to the credibility to the marxist contention that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too expensive.

Lawyers are closely related to the public interest and consequently to the courts and the system of administration of justice as well as to his client. For the lawyer then, the question should be how he can use his legal training to assist the client to contribute to the public at large and particularly so when most of the public are poor.

Being closely related to the public legal interests, he has important obligations to the court and the system of administration of justice. The lawyer's rules requires a particularly lightened appreciation of the kind of ethical pressures that tend to develop out of the continuing interpersonal relationships there is the great need to maintain the highest standard of ethical conduct as guide to resolution of conflicting pressures. In addition to the role of representing the client, the lawyer is also an officer of the court and charged with the duty of fairness. He should represent his client within the bound of the law.

However, this noble objective has failed where human equality and dignity has been available to only those who can afford the cost of legal services. It is hence that legal aid as a social service becomes badly needed.

One might raise the argument that hereased legal aid might make people more litigitious. But litigation is the sanction and therefore the cornerstone of the law. Increase in litigation may mean an increase in actual amount of justice which the law has made to prevail. It is better that legal battles should be fought than that suppression of rights hould prevail.

In present day, it is unfortunate that although the rights of the accused may be on paper practical problems make it difficult for them to be put into practical use. This is the reason why one observes that the number of unrepresented cases for outwieghs the represented ones. In this respect, it is my submission that it is of no use to grant people rights if there is no possibility of enforcing those rights for in effect they serve no purpose.

From the foregoing analysis, I would conclude that the objectives of legal representation have been met merely to a very limited extent. This links us with the subject of the next chapter, the problems or shortcomings in legal representation.

CHAPTER THREE

SHORTCOMINGS IN LEGAL REPRESENTATION AND SUGGESTIONS OF POSSIBLE SOLUTIONS

The problem of inadequacy of legal services as it exists in Kenya is a legacy of over half a century of imperialism that in Kenya, was primarily spearheaded by the British. The imported English legal system and normative values far from rendering justice to the mass of the people generally, have instead worked untold unfairness to a large cross-section of the people. The most hard-hit are the majority.

The explanation for this is largely based on the fact that the English system of law is based on assumptions that are non-existent in Kenya. The assumptions that Kenya was on the same social and economic stage of development that everybody knows the law and understands the legal system well, are wholly unsound and unfounded as the social stratifications of the Kenya communities were different and reflected the economic organisation of the African traditional societies. Apart from this there are many features of local situations in Kenya which raises practical problems with regard to the effective exercise of the constitutional right to counsel. These include, the relatively small number of practising advocates in proportion to the total population, general concentration of practising advocates in urban

areas often a considerable distance from most of the rural population who form the overwhelming majority of the inhabitants combined with difficulties and delays in transport and communications make it difficult to contact a lawyer. All these problems hinder the effective realization of the right to council. Theme problems will now be discussed in greater detail.

The Deliberate Policy of Colonial Order to Curtail Legal Education for Africans

For a long time there were no institutions in Kenya and indeed in East Africa for training lawyers. The legal profession was preserved for a few non-Africans trained in Britain or other commonwealth countries particularly India. The reasons behind this were both political and functional. It was ~~fiet~~ that legal education would inevitably lead Africans to agitate politically; the last thing the colonial order would have wished to see let alone encourage. The effectiveness of this policy is vividly demonstrated by the fact that at independence in 1963, Kenya had only six African lawyers. The first African lawyer qualified in September, 1954 having penetrated the colonial, political iron curtain on the pretext that he was going to London to study Economics. In the same year, Kenya's first African

Chief Justice arrived in England to study. He was the first African to have gone to England with the declared intention to study law.[1]

Anybody who wished to study law in Britain could do so only at his own expense. Few Africans could afford the cost of a trip to Britain. It was also not easy to obtain a Government Scholarship to study law.

It is not therefore surprising that the legal profession is dominated and controlled by non-Africans mainly Europeans and Asians.

The other feature of this deliberate policy was the intention of the colonial order to keep Africans from the influence of other types of laws. This was made effective by the enactment of a local legislation establishing a triple system of courts. There was the National Supreme Court, the Muslim Court and the Native Tribunal exclusively for African. The position remained the same until 1967, when there was created an integrated court system. The colonial administration also provided the policy of exclusion of advocates from native tribunals. Its legal implementation was in the Native Tribunals Ordinance 1930.[2] It was felt that their presence would impede the administration of justic. There

was never any recognition that the advocate was there to assist in the administration of justice.

The final prominent feature to note is the gradual entrenchment of the law society, and also its attitude towards the administration of justice in the colonial courts. Prior to 1949, the legal profession was regularised on a purely voluntary basis with little statutory control. During this time, there was little contact between the legal profession (advocates) and the African-population. Indeed it was not until after the war fears that non Europeans specifically Asians were allowed to practice as advocates. When the law society ordinance was first passed, it was with a view to regulating the operation of the body among the stated objectives was to maintain and improve the standards of conduct of the legal profession to protect, represent and assist members of the profession as regards their conditions of practice, and finally to protect and assist members of the public in all matters concerning law.

The present version of the act retains the same objectives intact. Besides the society was assured of the monopoly in matters of legal counsel.[3]

The society's operation is one structured by strenous and constant efforts by its members to entrench and safeguard their interests. This tendency is manifestly evidenced in the society by stubborn opposition to the training of African lawyers. The intention has been one of maintaining the status quo, by limiting the number of qualified local lawyers and thus enguring a satisfactory pecuniary turn-over. It is no surprise therefore that over as matters stand today the number of lawyers of African origin ~~it~~ is still not impressive.

But for this aparthy towards the training of African lawyers the colonial government shares part of the blmme. More so because it failed to make available facilities for such training and ever proceeded to make it hopelessly difficult for Africans to go abroad for such training.

However, the establishment of the Law Faculty in 1970, marked a departure from the antipathy and wilful neglect that was accorded this aspect of the legal structure. It was realised that if justice has to be administered on a large scale, then more manpower must be produced to meet this need.

It is of importance to note that the neo-colonial lawyers in Kenya mainly Europeans and Asians received their training in England and therefore are not fit to practice law in a neo-colonial state which

in many respects differs from the English society. It is unlikely for such lawyers to come to full grasp of the local social conditions. These neo-colonial lawyers have become isolated from legal problems of the ordinary man.

The Problem of "Identification"

The other major problem encountered in legal representation is what William Twining[4] labels "identification". lawyers and law students have recently come under the increasing pressure to identify themselves with the ordinary people, with dominating political ideology and with the National effort. The law student is called upon to make sacrifices and look on his education as being held in trust for his society to avoid being cut off from the ordinary society. The student is placed in a dilemma, when he participates in political demonstrations or other such action he is open to accusation of 'immaturity and irresponsiblity.' If he remains quiet he may be accused of aloofness or something worse. Participating in self-help schemes is taken as a symbolic act, but there is always the danger that what such efforts are in fact taken to symbolize may be different from what is in fact intended. It may be cynical or an attempt to create a mere facade of commitment.

The problem then is how a lawyer or a law student can use his special skills in a way which meets the genuine needs and which brings him into contact with the common people.

This problem of indentification in Kenya is made acute by a coincidence of a number of potentially embarrasing factors. Firstly, as indicated above, most advocates are non-Africans and it follows that most of their clients are non-Africans. Secondly, the Africanization of the bar is proceeding at a very slow rate because most of the qualified graduates are being recruited into Public Service and only a few enter into practice. Finally, most members of the bar have been trained abroad in a legal tradition which casts lawyers in a narrow role expecially in the economic sphere which has a correspondingly narrow conception of legal education and therefore, the bar has become isolated from the ordinary people.[5]

It is inevitable therefore that the major function of legal profession is perhaps to provide services for the elite, for more prosperous enterprizes in the private sector of the economy. Against this background, the problem of identification can be seen to be a complex problem and one suspects preudo - problems. There is the demand that members of the bar make a maximum contribution to national

development in a manner which involves efficient use of their scarce talents. The bar should also have an understanding and be ready to help the less fortunate members of the society and make a positive contribution to their legal problems.

There is also the demand for good public relations and a good image of the bar. In this respect, I submit that the involvement of lawyers and law students in legal aid work offers the most hopeful prospect for work towards satisfying these demands. More participation in legal aid and advice can make the bar in Kenya a genuinety public profession.

Concentration of Lawyers in the Urabn Areas.

The problem of non-involvement with Africans is even made worse by the fact that there is a massive concentration of advocates in urban areas. Failure to identify with the African population and to change the colonial image means that the bar will be unable to rely on much indigenous support if it is faced with increased government pressured since few Africans have obtained any benefit direct or indirect few will defend it against any government pressure.[6]

This concentration of legal services in the urban centre does not admittedly arise by sheer

coincedence. It may be argued that the infinite complexity of modern life of business and of affairs in general breeds litigation. Thus the majority of advocates are found in the cities. The larger firms of advocates are in Nairobi. The reason may be that there are centres of commerce and industry and therefore it creates a lot of work for advocates.

It is submitted that the lawyers undemiably belong to the priviledged elite in a free enterprise economy. Like his other elitist counterparts, the multifariois allutements offered by urban life are most irresistable.

One therefore realizes that outside the large towns, there are no practising advocates. In some districts one finds one advocate in practice and in others none.

Reasons which have contributed to this state of affirs include lack of capital to start off. This is probably one of the biggest obstacle. Before one can start off, office accomodation is required electricity, secretarial assistance and rent. It is unlikely that the newly appointed advocate will have the means to start of even if he has the ability and courage, to venture into the practice on his own account.

A duty of justice demands that more advocates should be enrolled to provide legal services to the mass.

The government could play a more positive role in attracting some advocates to the smaller towns and rural centres by making loan facilities available to them for starting practice offices, and for acquiring other basic necessities. These loans could provide a financial solutions.

The situation as it stands today leaves a lot to be desired. The majority of the Kenya population does not have access to the legal services.

Poverty

The problem of meeting the legal needs of the poor is a great one.

Legal practice is by its every nature a profession that is seen in a free-market economy as a money spinner. As such lawyers and their offices are not the best dispensers of charity. By the very nature of their training, they are skilled people and their services are costly.

True to English traditions legal services were not offered for charity but rather in expectation of remunerative fees. Rates have remained largely a matter of the practitioners' choice though subject

to advocate remuneration order and occasional review by the taxing master and senior court officers.[7]

However, it is common knowledge that with all the economic leaps and bounds since independence, the majority of the Kenya citizens still live below or on the poverty margin. This means that even where lawyers are available, such people are contructively cut-off from receiving their services. It thus becomes undeniably evident that in Kenya the very principle of equality before, and equal protection of the law is nothing more than an illusion.

As one writer has put it,

> "The well being of all citizens can be prompted by timely advice of a lawyer ... A society in which legal counselling and assistance is available only to the wealthy persons and business corporations thus be contributing to the perversion of the legal system in favour of the wealthy and to the disadvantage of the poor, who cannot afford to use it.[8]

The constitution as we have seen in chapter two guarantees equality before the law and equal protection of the law. These legal rights aforementioned apply equally at least in theory to all persons irrespective of their station in life or their means of livelihood. However, inequality is clearly evident where one party is being represented by an advocate while his poorer opponent, although

technically allowed representative, goes without it because he cannot afford it. Professor Seidman has correctly stated that "

> "It is one thing to prescribe rights and it is quite another to provide ways and means of executing or enforcing those rights."9

Most of the people being poverty striken cannot afford the legal fees, even the most moderate ones. The legal services therefore exist for the elite and those who can afford to pay for them.

The only solution to this problem lies in the provision for legal aid to the less fortunate members of the society.

Legal aid is "... essentially the willingness and actual effort on the part of the bar with financial assurance of the state, to provide their professional service by representing in court those who cannot afford to pay for the services out of their own pockets."[9]

~~Obstensibly~~ ostensibly such a lawyer offers his services out of a desire to see that justice is not denied a person simply because he is too poor to pay for them.

Such need is felt more heavily in free enterprise economies where legal knowledge to the lawyer is seen as a personal asset to be employed in consideration for pecuniary advantages.

Legal aid can take two forms: Legal advice and actual representation in the courts by a qualified lawyer free of charge.

Its submitted that both forms of aid are indispensable in the quest for social justice in the bourgeoisie society.

Legal aid scheme in Kenya cannot be left to charitable benevolent institutions. More is required by way of state. To follow the law is citizens' duty of the state to make the machinery of justice work alike for both the poor and the rich. The consequence is equality before the law and equal protection of the law as guaranteed in the constitution for all citizens.

With the realization of this problem, the legal aid centre was set up in 1973. It was formed through the joint intiative of the law society of law, & University of Nairobi. However, the legal aid centre has not worked with success. It has been faced by financial problems, communication, publicly or making itself known by the majority of the people, lack of sufficient manpower because volunteers from the bar are very few and little

government participation.

The Rule "Ignoratia juris non-excusat"

It is my contention that the current legal system in Kenya works unjustly against certain classes of people in our society. To see how this has come about we have to glance, inter alia at the historical development of the present day legal system in which this injustice are inherent.

It is a fact that the current legal system in Kenya is largely a replica of the English system. In adopting the English legal order, Kenya has adopted the rules governing communication of law.

Law shouldersse an embodiment of peoples' ethos or philosophies. This is not true of law in Kenya because the law was imported and imposed on the Africans. Consequently it has worked untold justice to a large number of the people.

Where law has been a reflection of peoples' way of life or philosophies of life, it would be an absurdity to allow a member of that society to put up his ignorance of that law as a defence. However, this is not true in Kenya. This notwithstanding the latin maxim ignorantia juris non-excusat which means that ignorance of the law affords no excuse is incorporated in Kenya's Penal Code,[9] Section 7 provides

that "ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."

In Kenya, this requirement of the law has caused great injustices. In the first place, the notion that law is nothing but at expression of the social moves of the community is inapplicable; where the law is imported. Not only is the law foreign to the people but it was also imposed on them in disregard of their values, the rule is therefore improer under conditions of change.

The issue remains as to whether one can comply with a law, the existence of which one knows nothing about.

It is common knowledge that most people in Kenya especially in the rural areas are illierate existing side by side with another class which is benefiting from foreign civilization. It is also common knowledge that builk of Kenya's law is written law. It would therefore be re-stating the all too obvious fact that the overwhelming majority of Kenya population is hopelessly ignorant of the nature and extent and content of their legal rights, to say nothing of how to enforce them, when they are unknown.

This fact has led one commentater to assert "needless to say the ignorantia juris rule has brought immeasurable injustice in innumerable cases."[10]

This change would be unduly one sided if we didn't examine the rule in the light of the media that exists for transmitting the law to the people. Basically there are statute books law reports official gazettes, articles,'by legal' writers, law books, local newspapers, radio and televisions to name but a few. It is evident that those who benefit from such media are discouragingly few.

To the foregoing, it must be added that all written laws are in English language, the knowledge of which is a priviledge enjoyed by the "blessed" minority.

The picture that emerges from the foregoing analysis is where at law unequal people are treated as equals.

The major issue which arises is what provision does the state make for a way in which a citizen may obtain knowledge of the law? The answer is, he is required to pay for it. The cheaper and in all probability, More successful way, will be to obtain advice from a professional man. That again requires money, whichever way he chooses, he has to pay money.

If one cannot afford, he remains ignorant. If the citizen is to follow the law laid down by the state, it follows that to be taught the law is his right. The legal profession having realized the injustices brought by this practice launched the legal advice centre to try and salvage some of these injustices. Like the legal aid centre, the legal advice centre was set up on a voluntary basis. It was faced with similar problems and proved to be a failure.

This advice can only be made available through government efforts. The government can set up its own advice centre financed by the state. This centre should offer the legal advice to the general population and especially in the rural areas.

The government can also work in conjuction with the private sector which would make the burden even easier. Numbers of volunteers would be on a larger scale and thus contribute more to the public. Such a centre should try and make the public conscious of their legal rights and thus eliminate ignorance. The public should also be given some formal ideas of how to solve their legal problems.

However, one should not jump to the conclusion that nothing can be done by way of a start. ~~Shou~~ Neither should it be forgotten that the need for legal services is on a scale similar to the need for other

welfare services such as health and education.

The situation as it stands today is far from being satisfactory and there is urgent need for reaction to come to the aid of the masses.

CONCLUSION

Throughout this dissertation, an attempt has been made to show the need for legal representation in courts of law. The writer has also illustrated how the right to counsel has been ineffectively exercised and concluded that, the right of the accused as stated by the law is a right only in theory but not in practice.

As indicated in chpater three, there are many features of local situations in Kenya that raise practical problems with regard to the effective exercise of the constitutional right to counsel. Those problems included the continued role of lawyers as taught them during the colonial era, small number of practising advocates in proportion to the total population coupled with their general concentration in urban areas, poverty and ignorance on the part of the public.

It is to be noted with a lot of concern that the government has no scheme of its own for providing legal aid to those who cannot afford to ~~live~~ hire lawyers, ~~This~~ except the poor people's list maintined by a the low society. This in effect means that the poor have no public institution that he can approach for legal assistance. The Kenya bar offers legal services voluntarily, but with little success. Practice of law being a trade, and the lawyer has to make his ends meet. It can be assumed that such lawyers are few indeed. The

The bench on the other hand, do not interpret the Kenya constitution strictly with the object of giving legal aid to the accused. It also does not protect fundamental rights by acquitting those whose rights to a counsel have been viotaled.[1]

What are the possible solutions?

Firstly, an ideology can be adopted which takes the view that everybody is equal and that right to counsel is a basic right which should not be violated as it would appear to be the case in Tanzania. In Tanzania there is a statutory body called the legal corporation which acts as the state law firm.[2]

The consequences would be that legal services would be available to everyone who is in need of them.

Secondly, courts can adopt the American Courts approach and argue that legal aid services is a fundamental right as it is part of the right to a fair trial. If implemented, everyone would have access to the legal services as it is a fundamental right.

Thirdly, the government can embark on providing legal aid for it is only a government effort to provide legal aid that can make legal services available to those who cannot afford them. It is common knowledge that most people are poor and lawyers do not work where people are poor for there are a few prospective

client, and there rarely pay their bills fully. This can successfully be done by adopting such a system perhaps on the model of legal Aid Act 1967 of Zambia which provides for the office of a Director of Legal Aid who administeres a system of legal aid in criminal and civil cases in surbodinate courts as well as in high courts and extending also to appellate proceedings.[3]

FOOTNOTES

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