T I T L E

THE ACCUSED AND THE MACHINERY OF CRIMINAL JUSTICE: IS THERE REAL JUSTICE ?

Dissertation submitted in partial fulfillment of the Requirements for the LL.B. Degree, University of Nairobi.

B Y :

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NAIROBI APRIL, 1984

DECLARATION

I, SAMSON M. OMAE, declare that this dissertation is my original work and has not been copied from any source nor presented for any degree or award in any University.

.....
(CANDIDATE)

This dissertation has been submitted after supervision by MR. ARTHUR A. ESHIWANI as my University supervisor.

.....
(SUPERVISOR)

PREFACE AND ACKNOWLEDGEMENTS

This dissertation has been written about criminal justice at a time when the crisis of maladministration in our courts, and the unethical behaviour of those engaged in the administration of justice, particularly law enforcement, is at its peak. Public criticism has been mounting every day, for some time now. And it is about time something was done about it.

The reader may not agree with a number, or even all of the views expressed herein. That is alright. The aim is not necessarily to convert a particular point of view, but rather to stimulate thought which will result in a point of view.

I am greatly indebted to Mr. Arthur A. Eshiwani, who as my supervisor, read through everything, and made valuable comments and criticisms. He saved me from many errors, and could have saved me from many more had I the time and his patient persistence in pursuit of perfection. Any errors that may have escaped notice, are therefore wholly my responsibility.

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ABBREVIATIONS

A.C.	-	Appeal Cases
All E.R.	-	All England Reports
C.P.C.	-	Criminal Procedure Code
E.A.C.A.	-	East Africa Court of Appeal
H/O	-	Handout
H&C	-	
Mimeo	-	Mimeograph
P.C.	-	Penal Code

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I N T R O D U C T I O N

The criminal process is not working as well as it should. This is evident from the magnitude of the criticism levelled against the Police, the judiciary and the prison authorities. The police in the way they treat suspects, and investigate cases. The courts in the manner in which they execute their business. The prison authorities in the way they treat people in remand, whose cases are pending before the courts. This has the cumulative result that dangerous criminals escape liability for their actions, and innocent people get punished for acts they have not committed.

A breakdown and analysis of the machinery of criminal justice exposes intrinsic defects, which naturally call for an overhaul of the system. Nothing short of an overhaul can bring it to the level that can restore public confidence in it.

In the past, reforms of various kinds have been attempted (by the Law Reform Commission, presently, among others) but that proceeded on the false assumption that the system was alright in the basics. The reforms attempted were therefore superficial, and so were the results attained.

It is important to restructure the machinery of criminal justice. People do not have, and cannot be expected to have confidence in a system which produces results that do not reflect the vox populi and the social reality of the present generation. The machinery was inherited from the colonial governments, and in the colonial era, it was used to acculturate and process the African towards "civilisation."

It is therefore curious that whole codes of colonial legislation - the Penal Code, Criminal Procedure Code, Evidence Act - the list is long, have been retained, without any serious efforts to adapt them to the needs of an independent, developing country. The colonial legal system has remained more or less what it was in attitude if not in essence. The colonial legal system saw law as the means of maintaining order to allow the colonists to live in peace in their settlements. Even the new post-independence governments and their institutions (Judiciary, Administration, Parliament) are premised on a law and order orientation, rather than on a developmental one.

This approach to planning and administration has produced the unenviable result that the administration finds difficulty in respecting some of the fundamental rights guaranteed in Chapter Five of the Constitution. On the other hand, the factual inequality existing between the rich and the poor in terms of access to resources, whether natural or industrial/commercial, has had the unpleasant consequence that there are a few rich people, and millions of poor people.

Whereas the poor are perpectually struggling to wrest some of that property and wealth from the hands of the few, within the law, the law itself has not made it possible. Those who are desperate, or simply impatient have resorted to extra-legal means to acquire wealth. This is reflected in the high rate of crime - crime with an economic element. Examples are fraud, robbery, theft, burglary, impersonation.

Justice has been defined as treating equals equally. Injustice as treating unequals equally. The Constitution says that anybody charged with an offence can be legally represented. And that anybody charged with an offence other than murder and treason may be admitted to bail. But poor people cannot benefit from these guarantees. The results attained by the criminal process are that poor people fair very badly, whereas the rich come out unscathed.

Although the immediate solution would be to evolve a varying criteria for determining issues of bail and fines, a lasting solution would be to bridge the gap between the rich and the poor. Only then will these rights mean anything to most people, since they would then be in a position to invoke them.

The commission of an offence makes a convenient starting point of the analysis, because the commission of an offence entails the violation of a rule of law. Chapter One examines the nature of legal rules, what they are and what they seek to achieve. The approach taken is that law is an instrument of social control, It is held by the most politically and economically dominant group of the society, who use it in ordering the social, economic and political life of that society.

Chapter Two deals with the investigation of crimes and the arrest of suspects by the police. The constitution demands that suspects be treated as innocent, and should not be subjected to any punishment normally reserved for convicts. In this Chapter, it is concluded that police and prison authorities do not respect this principle, since they presume the guilt of

remanded people and treat them accordingly.

In Chapter Three the concepts of fair trail, independence and impartiality of the courts are examined. The argument made here is that a trial cannot be absolutely fair due to the negative operation of certain social phenomena. They are, inter alia, dependence of the courts on the government, due to the leverage exercised by the State on the judiciary; the "class" bias of judges, stemming from the fact that judges are appointed from a certain "class" which thinks in a particular way. There are also other issues such as inability of remanded people to prepare and put up vigorous defences, even where such defences exist. The effect of delay of the process is seen as a prime cause of injustice and unfair trial, among others.

In Chapter Four the issue of wrongful imprisonment is discussed. It is argued that wrongful imprisonment is evidence of the inadequecies and imperfections inherent in bourgeois legal systems all over the world, Kenya included. Evidence is discussed, including examples as far afield as Japan and Britain, to show the premises herein taken by the writer. The evidence hinges on wrong conviction and imprisonment.

The conclusion presents a summary of what are considered as important points that crystallize from the discussions in the dissertation. The conclusion forms the basis of the recommendations attempted, which it is hoped, will be taken note of by the authorities, in their effort to build Kenya into a more stable nation.

CHAPTER ONE

The Role of Law in Kenyan Society :

The role law plays cannot be articulated before a definition of law itself is attempted. Many conflicting theories have been offered by scholars to explain the phenomenon called law. For instance it has been defined in Marxist-Leninist terms as " a system of juridical standards and prescriptions expressing the will of the ruling class and protected by the coercive power of the state." According to this school of thought, law is not just a system of "standards and prescriptions," it is the tool by which the social and economic status quo is maintained in order that the dominant (ruling) class may continue to exploit the workers and peasants.

This exploitation, it is argued, takes place when the purchasers of labour power are the group of people who own all the means of production in society, and Marx calls these people the "bourgeoisie" or the"capitalist class". He calls those who have only their own labour power to sell the "proletariat" or the "working class."

The concept of exploitation facilitated by the law, describes the situation where one class, by owning the means of production, can determine both the conditions under which another class can produce and the level of that class's subsistence. By the economic power conferred by ownership of property to manage the economy, the propertied class dictates how well or ill the main body of citizens shall live. Under capitalism, the capitalist class has precisely this form of control over the proletariat. That control takes the form of the ability of the capitalist class to determine

the value of the labour power which the working class sells.[2]

Jurists of the "free world" define law in differing terms. Basically, seven different definitions, belonging to seven schools of thought are proffered. The essence of the natural law theory of the Natural Law School is that in society there are two systems or classes of legal norms: positive law and natural law. Positive law is the law expressed in legislation or customs, applied in courts and administered by the authority of the state.

Natural law on the other hand is divine law arising out of human reason and the eternal principles of justice. It is inherent in all mankind and is the same for all peoples, as opposed to positive law which is national in character. Natural law emphasizes individual inherent rights which are immutable, inalienable. They are given to man by nature and are incapable of being taken from him by the state.[5]

On this premise, capitalist relationships and private property are built. The Bills of Rights or the Fundamental Rights and freedoms have their foundation on this theory. It is difficult, however, to define the content of this natural law and establish exactly what norms are natural law norms which are changeless.[3]

The School of Emmanuel Kant asserts that law is derived from morality; a morality which is supreme and is not based on the experience of human society or on historical or social conditions and relationships. This law, expressed in the form of the "categorical imperative," enjoins people to obey it

without reference to any considerations of advantage, interest or expediency and regardless of their own propensities and sympathies. Such fulfillment of the law must be motivated solely by respect for it. The leading principle of the law is the freedom of each personality, and the essence of law is that freedom of one be compatible with the freedom of each and every one.

This doctrine reflects the class demand of the bourgeoisie that every capitalist be granted freedom of economic activities, among other freedoms. Like the theory of the Natural Law School, Kant's theory reflects the class demands of the bourgeoisie: freedom of private property, capitalist enterprise and freedom of competition.

The Historical School of law asserts that law is the result of the historical process of legal development of what they call the Volkgeist[4] or a "national spirit" or simply, spirit of the people. Notwithstanding its name, there is absolutely nothing "historical" about it. It is a reactionary movement. To Marx, it is a school which legalizes the abomination of today because it was yesterday's abomination. "The school which proclaims that the outcry of the serfs against the lash is arebellion if only the lash is sanctified by long usage and a local product as a matter of history. .."[5]

The theory of Hegel emphasises the free will of the individual which he calls the "subjective spirit" which manifests in law through man's free actions, and the "objective free will" manifests in the state which merges in legislation, expressing the general will and at the same time defends the freedom of individual will.

The result attained by Hegel is that the spirit - the idea

embodied in law - forms the relationships between people. For example workers must work for capitalists not because the capitalists have appropriated for themselves all the means of production, but because such is the free will of the workers themselves expressed in the contract of hiring.

This theory of law lends philosophical support to the class interests of the bourgeoisie in that doctrines such as private property and freedom of contract are depicted as the realization of freedom. Even Criminal Punishments which are all else a means employed by the dominant class to deal summarily with its class foes appear in Hegel's theory as a manifestation of the free will of those subjected thereto.

Hegel is of course correct in his insistence that law is a manifestation of will but not the general will, but the will only of a single dominant class. Such class will, expressed in legal norms guarantees expression of the individual will only on behalf of members of the dominant class. For instance, freedom of disposition of property is enjoyed by property owners, whereas for those owning no property, such a norm merely forbids touching another's property and therefore fetters the freedom of will of the "have-nots" clearly, the law emanates from economic relationships and it is not economic relationsships which emanate from law.[6]

The Realist School of law exhorts jurists to come down to earth from a "heaven of ideas" and study the real, living phenomena as the foundation of juridic concepts.

This school sees the foundation of law as the interests defended by the state, it sees law as nothing but an interest defended by the state and which is inseparable from force.

These views are correct, but they fail to include the fact that the "interests" are first and foremost class interests, to which individual interests are subordinated. To the extent that this school sees social interests as the interests of all society, it is wrong, which undermines the value of this theory.

The Psychological School of law sees law merely as a psychic phenomenon existing only in so far as it is experienced by people as law by creating obligations to act in accordance with emotion. Legal norms as expressed in statutes are said to have no real existence, being mere figments of imagination, fantastic notions described as "phantasmata."[7] This school proposes that everything people experience as law is law because of that fact.

The major criticism of this theory is that law loses all the features of a social phenomenon and varnishes from the domain of social relationships. It loses all semblance of definiteness and dissolves in psychic experiences. This theory must be dismissed as a manifestation of extreme idealism, illusion or phantasmata, to use their term.

The last school of the Normative theory of law school which comprises heterogeneous tendencies of juridic theories of the bourgeois, all of which derive law from some "higher" norm of some sort which possesses its own independent force. This higher norm is described by some as the "categorical

imperative," "social solidarity" (the accord or unitedness of all persons irrespective of class or social position to perform their obligations which are everyone's mission) or the "grund-norm" from which all norms derive their validity. This school emphasizes the law that "ought to be" as opposed to the law that "is" (natural law).

The major criticism of this approach is that it is idealistic in character, since it is isolated from real life. This theory does not explain the origin of the higher norm, neither does it explain what causes the law to be what it is. It merely concentrates on the question of validity.

All these attempts at a definition of what law is can be dismissed as failing to answer pertinent questions such as why people set about to create legal norms, and why these norms have one content and not another.

The Marx-Lenin Theory however answers these questions in a scientific and most satisfactory manner. And it is the one used to analyse Kenyan Society vis-a-vis the law. It says that a legal norm is an obligatory rule of human conduct as one of the manifestations of the social life of human beings which is a phenomenon of the real world, subordinate to the law of causation. This theory regards legal norms as instruments of the class struggle in the hands of the dominant class; as a means of compelling people to carry out the will of such dominant class. It explains that law is created to safeguard capitalist property because capitalists constitute the dominant class having the authority of the state at their

disposal. It is to their advantage to make secure in their hands the riches they have seized. They do this by instigating the enactment by parliament (a bourgeois institution) of laws whose measures or effects, which are binding, not due to any mysterious force that is inherent in them, but because behind themstands the exceedingly real authority of the state with its police force, army, courts, prisons.

A qualification is necessary though, lest the picture of how law is framed be presented as a simple and stark affair of incessant class struggle; that by no means is the case. Not all legislation is designed to further class interests directly by imposing the will of the ruling class on the population en masse. Much law is "neutral" in the sense of being designed to govern the relations of people in fields with no strong element of class conflict, where indeed the actual provisions of the law would be just as useful, and no more significant, if they were the opposite of what they are, For example the traffic law directs wheeled traffic to keep to the left while on the roads; but there is no class interest directing traffic to the left. What is true, however, is that the rules were developed in accordance with the ruling-class view of what is best for the society - in this particular case, motoring.

It logically follows that to view all law as a tool of exploitation and domination en block by the ruling class would be a mistake. But what is of interest here is that body of law that is designed, and/or tends to have the effect of aiding class struggle. And much of the criminal law which is directly

the concern of this dissertation, is not neutral in the sense outlined above.

It was stated earlier that the law emanates from, and therefore is a product of economic relationships. The economic base of any society determines the character of the superstructure. The superstructure is made up of ideas, institutions and relations. The ideas of a society may be legal, political, religions and others. Law is one of the superstructural features. Hence a feudal economy has a feudal system of law supporting it, a capitalist economy has a capitalistic legal system. If it is therefore proved that Kenya has a capitalist economy, then its legal system can be said to be a capitalist, bourgeois legal system and Marx's analysis of what role law plays in a capitalist society will apply to it.

Going back to the superstructure, it has been shown that law is one of the superstructural features. Like the state, it had its birth in the origin of private property. Engels has said :

> "Because the state arose from the need to hold class antagonisms in check, but because it arose, at the same time, in the midst of the conflict of these classes, it is, as a rule, the state of the most powerful, economically dominant class, which, through the medium of the state, becomes also the politically dominant class, and thus acquires new means of holding down and exploiting the oppressed class ... the modern representative state isan instrument of exploitation of wage labour by capital."[8]

The state Engels is refering to is of course a bourgeois state; a capitalist state. And the law he is talking about is bourgeois law. And he says that the economically dominant class uses its economic power to transcend the realm of commerce and enter and dominate politics as well. That enables them to manipulate parliament, the courts, the police - which

become tools at their beck.

Is Kenya a bourgeois state then? Is it a capitalist state? Are its laws bourgeoisie laws? Does power and wealth reside in the same hands in Kenya? The answer to all these questions is in the affirmative.

Kenya claims it is a non-aligned state. That is, it claims that it is neither capitalist nor socialist (Marxist). It its Sessional Paper No 10 of 1965,[9] it says that it follows a political and economic system it calls African Socialism. Describing Marxian Socialism and laissez-faire capitalism as systems that have failed, it dismisses them as irrelevant and inapplicable in the Kenyan or even African Context. It says :

> " Thus African Socialism differs politically from Communism because it ensures every mature citizen equal political rights and [it differs] from capitalism because it prevents the exercise of disproportionate political influence by economic power groups."[10]

While it does not deny the existence of economic power groups in Kenya (and naturally , also, the political groups as well) it does not say how African Socialism or by what mechanism it prevents or can prevent the "exercise of disproportionate political influence" by the ruling class or group in this country. It is hard to see that such mechanisms exist at all. This means that whereas Marxism or Socialism or Communism is distinguished and out-lawed, capitalism is not, since the attempt to distinguish it from African Socialism fails ab initio. The attempt to distinguish capitalism from Africam Socialism can be said to have been an inspiration which to date has not been achieved. And under the present economic and political system, it is not capable of achievement.

In actual fact, the dominant economic class in Kenya is also the most dominant political class. And according to Hon. Martin Shikuku, 99% of the present parliament was elected due to the economic as well as political muscle of this class. He has said, "I asked Wananchi to vote these rich people out of parliament in the last elections. But they were bought, some of them with five shillings and they voted them back."[11] And what kind of law can be passed by such a group if not law that favours that class? To the extent that African Socialism has failed to prevent such things as Shikuku is talking about, it is not better than, or different from capitalism.

The paper further asserts that the economic system adopted in Kenya is "an African Political and economic system that is ... African, not being imported from any country or being a blueprint of any foreign ideology ..."[12]

It is submitted that Kenya has no economy it can call its own, it being part of the larger world capitalist economic order. Kitching, confirming this view, and who has no doubt whatsoever about it, says :

> " One thing is certain. Kenya is an integral part of the world capitalist system and the implications of this are that its development prospects are strongly over-determined by those of the system as a whole, and that autonomous development (even of a capitalist sort) in even partial opposition to international capital would be bought at a high price for the bulk of Kenya's people."13(b)

If one can believe Kitching, and one is infact inclined to do so, then it appears unrealistic to talk of Kenya being absolutely sovereign, having and enjoying full and unmitigated autonomy in its internal affairs, if some decisions come from the metropolitan-Bonn, London, New York.

One example will suffice to illustrate this particular point. Sometime in 1983, manufactures of detergents and toilet soaps, particularly the East African Industries Limited, unilaterally decided to hike the prices of their products, arguing they were not making profits. There was a hue and cry from the ordinary population hardest hit by such price increases. The Government ordered a restoration of the old prices, but almost immediately the commodities disappeared from the market, the manufacturers threatening to suspend production altogether unless they were allowed to make "reasonable" profits.[13(b)] The government had to bow to the demands of the manufacturers by allowing a certain increase in the prices but not to the level attempted by the manufacturers. After a short time, the prices were raised to the original mark proposed by the manufacturers where they have remained ever since.

It needs no emphasis that most of the capital that has been used in financing governmental activities, and even the private sector, comes from the international capital houses of the metropolitan. And as Bitonye says, both rightists and leftists have now agreed that foreign investment as foreign aid has "strings attached," that no company however benevolent its designs may be, can hazard its capital in a foreign country unless it stands to benefit overall by such action.[14] These companies come here to trade and make profits. As the manifesto of the Communist Party clearly states :

> " The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere."15

They have come here to exploit, make profits and if these profits are to be realised, they must be repatriated out of Kenya to the metropolitan. The right climate, a "hospitable climate" for investment must be created by the Kenyan authorities. This has resulted in a state of reliance and dependence on foreign capital. Eshiwani makes this same point when he says :

> "The reliance has actually crystallised in a conscious effort on our part to integrate, our country, by all means including law into what political scientists term neo-colonialism, or international capitalist system, as per politico-economic scholars. (Emphasis in the original). Of late, we have passed laws (or made regulations based thereon) that have helped this process of integration with the so-called metropolitan countries. Tax laws have expanded incentives with special attractions to foreign investors. Commercial laws on their part have made provisions to them ... for repatriation of profits ..."[16] (Ephasis added)

It is therefore surprising that in the face of these realities, the sessional paper without any attempts at disguise claims that an African Political and Economic System, that is, African Socialism must not rest for its success on a satellite relationship with any other country or group of countries.[17] It seems that the paper has sounded its own death knell.

One other conspicuous failure of African Socialism is its failure to eradicate anti-social behaviour which it defines as the sending of needed capital abroad, allowing land, the basic means of production, to lie idle and undeveloped, misusing the nations limited resources and conspicuous consumption when the nation needs savings "are examples of anti-social behaviour that African Socialism will not countenance."

It is difficult to see that conspicuous consumption for example, can be eradicated within the present framework of the law. Ministers and top government employees, and others, are given lavish residences, loans to enable them to buy cars and then paid motor car basic allowances to enable them to run and maintain the cars. The ministers emphasize their importance by living in mansions and riding everywhere in motor-cades 'which outdo in size and magnificience those of their former colonial masters.'

Cars are a great status symbol. Conspicuous expenditure and ostentations living by the elites has gone too far - it widens the rift between the elite and the man in the street.[18] In other words, it emphasizes class differences.

Another factor that proves that Kenya is a capitalist state is its policy on the ownership of property. It recognises that ownership of property is the critical factor in economic organization but it rejects the Marxist doctrine of state ownership saying owner-ship is not an absolute indivisible right subject only to complete control or none. It opts for a system where, first, wages and income policy recognises the need for different incentives as well as an equitable distribution of income, second, techniques of production combine efficiencies of scale and are coupled with diffused ownership, and lastly, it recognizes various forms of ownership - state, co-operative, corporate and individual - that are efficient for different sectors or that compete with each other provided only that the form promotes the objectives of government 19

State ownership of certain means of production was a revolutionary step in the right direction, but there apparently is a tendency to abandon it and hand over all ownership to individuals. This can only be seen in terms of capitalism versus socialism. State ownership is a device used by socialist states to divest individual property owners of their property rights. The fact that in Kenya the process seems to be reactionary, that is, vesting property in individuals indicates that capitalism (private property) has integrated itself fully in Kenya.

Socialism, it should be noted, arose as a critique of capitalist society's tripartite evils : exploitation, injustice and oppression. Socialism is also a protest against capital's two most important features - its coercive hierarchy of authority and its distribution (or non-distribution) of property. These two features appear to be based upon and are safeguarded by law. People have tended to emphasize their inevitable hostility to these two features by attacking law, which they see together with private property as either the cause or the symbol of human misery.

This point has been advanced very succinctly by The Saint Simonian-Bazard. :

> "If, as we proclaim, mankind is moving toward a state in which all individuals will be classed according to their capacities and renumerated according to their work, it is evident that the right of property as it exists, must be abolished, because by giving to a certain class of men the chance to live on the labour of others and in complete idleness, it preserves the exploitation of one part of the population, the most useful one, that which works and produces, in favour of those who only destroy..."[20]

The ordinary people of Kenya do not know that these ideas are

"Marxist," "socialist" or Communist," They probably would not care if they were. What they want is justice and equity in the distribution of what they call " the fruits of independence" or the "national cake". But as long as goods are not distributed in equal shares, there is no way to distribute equal shares of justice. The rich can always hire the best lawyers as long as there are lawyers for hire. The rich are able to avoid the harsh treatment of the law far better than the ordinary citizen.

The non-availability of those "fruits" has led to emergence of a mentality, especially amongst the poor that to steal is not criminal; it is a liberation of property. People cannot steal what is theirs. That stealing is criminal and also immoral is not in question. It is however immoral to punish people who steal because they have to survive somehow. It is especially immoral if the group that metes out the punishment is the very group that has deprived the "thief" of his means of survival in an honest manner.

It is becoming increasingly clear that economic crimes, that is, crimes against property, are more prevalent amongst the poor than the rich. It is also true that these crimes carry the highest penalties. The law, especially the criminal law seeks to curb these activities. It is not surprising then that most people that get arrested for contravening provisions of the criminal law are poor people. In other words the law is used to regulate conflict or class - struggle to make sure it does not exceed certain limits which might threaten the very existence of the state.

Engels, commenting on a similar situation has said :

> "The state is therefore, by no means a power forced on society from without; ... . Rather, it is a product of society at a certain stage of development; it is the

> admission that this society has become entangled in an absolute contradiction with itself, that it has split into irreconciliable antagonisms which it is powerless to dispel. But in order that these antagonisms, classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have a power seemingly standing above society that would alleviate the conflict and keep it within the bounds of "order," and this power, arisen out of society but placing itself above it, and alienating itself more and more from it, is the state."21

The state uses the law to regulate class conflict.

The ruling class recognising that capitalism is both harsh and repulsive has attempted to humanize and socialize it in order to legitimate it to the Kenyan masses by using what has been described as quasi-individualistic, quasi-social ideology of Bentamite Utilitarianism and piecemeal social engineering.[22] (The sessional paper No 10 of 1965 obviously falls into this category). The increasing social visibility of public law somehow revolutionizes private law and its ideology of free-enterprise and freedom of contract of middle class culture. This has resulted in a concern for the interests, the rights and the dignity of the poor and underprivileged. It explains the appearance of such institutions as Labour Unions, Workmen's Compensation Schemes, and Hospital Insurance Funds to name a few. The Government has rationalized this, albeit in crude terms, as follows:

> "The economic systems in actual use throughout the world today bear little resemblance to either model [Marxian Socialism or laissez-faire capitalism] . The Industrial Revolution quickly led to the social protest of which Marx was a part and this in turn resulted in sweeping political and economic changes as the systems of the world adopted to the new state of technological change. Political democracy was achieved, private property rights were diluted; ...

> the state accepted increasing responsibility for social services, planning, guidance and control, taxes were made progressive to distribute benefits more widely. Capitalism did not evolve into Marxian Socialism as Marx had predicted, but was indeed modified in directions that Marx might well have approved."23

The conceit displayed in this passage is unbeliavable. To claim that private property rights have been "diluted" or "diffused" to an extent "Marx might have approved" is a reductio ad absurdum of the facts. This conclusion is not only absurd, it is totally false.

Kenya is a capitalist state as has been shown above, and the law plays the role it plays in all capitalist states, that of effecting social control by the rulers, resolving disputes, arising out of the class struggles going on in the society for the control of instruments of production and for maintaining the social and economic status quo.

Some people say there are no well defined classes in Kenya, at least in the Marxist sense. These people forget that Marx emphasized the importance of the relationships of the classes and not the classes themselves. And he said that basically there are two classes in any capitalist society : the class that exploits, which owns all the means of production which he called the "bourgeoisie", and the class that is exploited - the working class which is called the "proletariat."

In Kenya there are those who rule and those who are ruled. The rulers by no means use their power impartially for the benefit and protection equally of all groups that make up Kenyan Society. Nor are their servants, including the legislators, judges and lawyers, in any sense neutral. They govern in their own interests, which they profess to believe, and perhaps sometimes do believe to be identical with the interests of the whole communinity.

The next chapter attempts to show that due to mainly economic factors, legal process oppresses those that it handles instead of ensuring justice and fairness. It shows that when the suspected person is sent to jail awaiting trial, he is oppressed, and his constitutional rights are violated but because he has no power, he cannot vindicate those rights. This makes the constitutional guarantee that persons arrested are presumed innocent until proved or until they plead guilty, largely illusory.

FOOTNOTES

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10. Supra, Paragraph 1 P.4
11. See The Anvil, February 15, 1984 P.1 Also, The Standard February 18, 1984 P.10
12. Para. 7 P.3
13(a) Kitching, Supra P. 19 For 13(b) see below footnote No. 23, Infra.
14. Kulundu - Bitonye, Insurance and National Development in Kenya, Nairobi, P. 15 (Mimeo).
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17. Para. 7(iii) P.3.

18. Gower L.C.B., Independent Africa : The Challenge to the Legal Profession, Harvad University Press, 1967 P. 37. At P. 45, Gower writes : ".. The great day for Nigeria would be when one of the Ministers went to his office on a bicycle rather than on a chauffer-driven limousine."
19. Sessional Paper, Supra Para. 24 P.8.
20. Kamenka E., et.al. (eds.), Law and Society : The Crisis in Legal Ideas, Edward Arnold (Publ.) Ltd., London, (1978) P. 59. Emphasis added.
21. Cain & Hunt, Supra. P 156.
22. Kamenka, et.al. Supra. P.49
23. Sessional Paper Supra Para. 21 P. 7. Emphasis added.

13(b) See for example the view carried by the Weekly Review, April 27, 1984 p. 26 of the recent price hikes of cooking oils. It says in column two:

> "Other reports had it that E.A.I.'s mother company, the multinational Unilever, had instructed E.A.I. to cease production if an economical increase in prices was not obtained from the government. The desired increase,however, was reportedly so high that the government was reluctant to oblige, leading to lengthy negotiations".

C H A P T E R T W O

PRESUMPTION OF INNOCENCE :

The concept of presumption of innocence of accused as well as detained persons is based on the rather obvious fact that, it is the courts that have been empowered to settle disputes among citizens and disputes between the state and the citizens. Until a court of law finds any person guilty or unless, and until any person pleads guilty before such court, that person shall be presumed innocent and is entitled to be treated as such.

It is the view of the writer that in practice, this is not always the case. The first people to violate this principle are the police. It is therefore appropriate at this stage to examine the police as a social institution, their duties and objectives with a view to establishing whether what they do to suspects and accused persons, which in actual fact negates the presumption is inevitable or a matter of choice on their part. This chapter falls into two parts. Part one deals with the activity of the police vis-a-vis the public and part two with custody before trial, or pre-trial incarceration.

P A R T O N E

POLICE PRACTICES :

A majority of citizens of this country are averse to police operations and policemen generally. They cannot talk good of them. They hardly ever invite them to social functions. The police, on their part restrict their social contacts to other members of the police force and their families. One could say that police society and the general community are mutually

exclusive in relation to each other. As any human institution, police do make mistakes in their dealings with the community, and one would expect that the community would be free to criticize them, but this is not the case at all. They enforce a policy of refusing to discuss police business with civilians. They do not entertain criticism.

The effect of this isolation is that people do not trust them enough to tell them their peoblems unless they must. They do not assist the police by reporting cases to them. And they even hide or destroy evidence which would otherwise be useful in a case being investigated. For instance the writer remembers a case where a thug beat up a policeman who was trying to arrest him and ran away with his gun. The community, from where the thug came from, was told to produce the thug and the gun or at least the gun, but nothing happended. The police embarked on a "swoop" which lasted several days. The thug dropped the gun by the roadside where it was found by an old man who, being the good citizen he was, carried it to the police station. He was instantly locked up and beaten, this time being asked to produce the thug!.

It is regretted that instead of regarding themselves as friends of the community, law enforcement officers usually perceive themselves as being in conflict with political and other community influences, and they "protect" themselves from these "hostile" forces by developing and encouraging a form of solidarity or brotherhood that encompasses all members of the force. This solidarity has operated, probably more than any other factor, to thwart reform of police machinery which would result in a more efficient and positive social institution. This

solidarity impedes the ability of their supervisors or superiors to discipline the activities of subordinates within the force.

Another factor that prevents or frustates efforts by superiors to improve police machinery is what has been termed as fraternity. Most senior police officers have risen to their positions due to promotions within the police force. Naturally, they cannot be expected to divest themselves completely of those fraternal loyalties that exist within police ranks. This disability on their part weakens their authority or even desire to insist that rules and procedures be followed regardless of the situation. In practice, what happens is that they fit the rules and procedures to the situation.

In situations where a citizen complains of police misconduct, fellow policemen would try to cover-up evidence, to protect the criminal, and senior officers try to "understand". So the matter ends there. The citizen is earmarked as a troublesome person and he will be a wanted man even for minor transgressions.

Ruth Brandon, while considering this matter has asked,

> " Is the first responsibility of the officer in charge of a police station towards his own men, or towards the public ? How can he expect his men to retain any enthusiasm for their work, if he keeps rejecting potential prosecutions just because some rule or procedure was not observed to the letter by his officers ?".

Police need very little provocation[2] to demonstrate their power in the use of physical force or violence, in cases where some disrespect from members of the public is indicated. But as Weistart[3] observes, disrespect for the police has never been recognised by the law as a legitimate justification for the use of force or violence. Yet many policemen display the

attitude that force can be, and in fact they do apply, it, to gain deference, to impose punishment and for other reasons that exceed the bounds of legality.

The instruments of force, as symbolized by the gun, truncheon (baton) and the riot gear (helmets, shields,sticks and of course the teargas canisters) which are provided by the state itself are frequently used by them to enhance their own authority. The legality of some of their activities is questionable.

And there is very little protection left to the citizen because even basic laws like the constitution that :

> "protect basic liberties are freighted with epicycles that may fascinate analysts of a scholarstic bent but no one else ... the police, to whom the rules are supposed to speak ... after all have a job to do. They do their job as they see it, with an eye cocked at the law but their minds - and their hearts - elsewhere. For all the rule making and remaking, the behavior of the police in a criminal situation has not changed very much in its essentials."4

No justice can be expected then, in a criminal situation inspite of what the consitution says. Policemen are a conservative entity who like to keep to the beaten track. Any deviation from the pattern that has been charted by practice backed with experience is a radicalism they can do without. Weinreb is of the view that courts have not done much either by their rules or decisions to change police behaviour and attitude. He says :

> "We have grown uncomfortably familiar with the discontinuity between the rhetoric of the law and the practical realities of law enforcement. Purporting to effect what the police do, courts render their decisions confident that the police will manage. The police for their part listen respectifully ... and then go to work ... in the same old fashion."5

The courts in England in the last century, concerned about the large number of allegations against police promulgated the Judges' Rules to guide them when questioning suspects and taking statements from them. Though the rules are not "law"

they have acquired respect and judicial notice even in this country. But the police hardly ever comply with them. Harry Street has reproduced a letter written by an English policeman, which summarises the mentality of not only English policeman but even their Kenyan counterparts.

> "Though the judges fondly imagine that their rules are carried out to the letter, they in fact very rarely are. All sorts of avoiding action are taken or otherwise the percentage of detections would be more than halved ... (T)he said avoidance causes policemen to commit no little perjury in the box... . The ignorance of the ... public neutralizes the Judges' Rules . When we deal with an educated man who knows his rights we have had it : unless we have outside evidence enough."6

The police are obsessed with detection. In fact they see as their model officer one who is actively engaged in upholding substantive as opposed to procedural law by apprehending those who violate it and disdain authority.

Assuming that Kenyan police do their very best and can do no more, then inevitably certain duties of the police must be taken away from them and be vested in another organ. As things are at present, society has to chose between law and order and rule of law.

> "The police in a democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than desciplined adherence to rules and regulations. By contrast the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal officers. This tension between the operational consequences of ideas of order, efficiency and initiative, on the one hand and legality on the other hand constitutes the principal problem of police as a democratic legal organization."7

A discussion of the criminal process characteristically and inevitably takes the form of a conflict between law and order as shown above and individual human rights. Too often the

public is heard demanding tough measures against criminals and crime, and at the same time protest against what they regard as encroachments by the excutive on their fundamental rights andfreedoms as set out in the constitution.

The state in dealing with this problem has reiterated th e argument that freedom is a fundamental right, but that freedom cannot be enjoyed in a "lawless", "fetterless" society. That freedom without law degenerates into anarchy. Hence the inclusion of the Public Security Act within the constitution. By that the government has chosen public order as more important and worth preserving at any cost. In the words of Professor Ghai and his colleague McAuslan,

> " It is hard to escape the conclusion that the Bill of Rights has had little impact on government and administration in Kenya. Public order rather than human rights remain the dominant theme of the government."8

To maintain law and order, police have been vested with astronomical powers of search and entry[9] and arrest on mere suspicion. They can detain a person for questioning[10] and they can use force, even if it results in death, to effect an arrest![11]

To say that these powers seek to maintain law and order is not enough. Law and order for whom ? In chapter one, it was said that law seeks to maintain the status quo. That is exactly the order that is sought to be maintained. Any activity that might endanger or change the order (status quo) established by the ruling class for its own continued dominance and safety would be met with the power of the police. That explains why law and order takes precedence over human rights.

That also explains why, though the police violate fundamental human rights, apparently no serious action is ever taken against them by those who have the power to so so. Of course Kenyans have not taken all that lying down. They have protested. The police have been labelled by the courts[12] and also in parliament as "trigger-happy" and they"shoot-to-kill"[13] suspects "on sight"[14] As it is, the police force has grown into an institution of fear, feared by many people, including members of parliament who supposedly have given the police their authority in their enactments.

The class role of the police is perhaps best seen when they are investigating crime, and not just enforcing the law. They are engaged in as it were, a constant "war" against crime. Guided by that premise, the rules of law and public discussion about the law are concerned above all with the behaviour of the police. What they can and cannot do in an encounter with someone who may be involved somehow in a crime.

Such an encounter crystallizes into a contest between the authority of the police representing the state and the autonomy of the private person. Resolution of this conflict by the court, supposedly an impartial agent, takes the form of a balance between those contending forces which in effect comes down in favour of one or the other of the parties. There is presumed to be legal equality between the parties and winning or losing entirely depends on facts and merits of the case. It must be emphasized, however, that in practice, such equality does not exist, that the state by virtue of its resources and leverage on the police and the courts has the upper hand, as Brandon suggets :

> "It must be remembered that when the police prosecute, the whole might of the state's resources is on their side(15) and they almost always win."16

It has already been said that police seem to over-emphasize the importance of detections and convictions. Perhaps that is the only way their superiors can determine how hard-working they are. And they reward them with promotion. Brandon wonders

> "Whether or not promotion goes by convictions in the police force - and this is always indignantly denied - nobody can tell me that a good record of convictions ever did a policeman any harm."17

Probably fuelled by the incentive of promotion policemen have demonstrated that they can go to any lengths to obtain convictions, like piercing a prisoner's genitals[18] to make him "talk". This behaviour was commented upon in R V Kaperere s/o Mwaya[19] as follows :

> "... the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt and the strong disposition which is often displayed by persons in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof ..."

may be the basis of a good record of convictions, but at the expense of the liberty of innocent men and women, which is highly immoral, if not criminal.

Lastly, police have adopted their own standards of legality that are different from the courts, perhaps to justify what they do. They see law as unrealistic and their own view of social reality as more appealing, more practical. That may very well be true. There are in fact many contradictions and even gaps in the law. Some laws are simply obsolete. But the fact remains that the police are not adequately trained to update the law. Even for trained people like lawyers, magistrates, judges, the growing complexity of legal rules and regulations makes it almost impossible to become familiar with all forms of conduct that have been declared criminal or offensive.

The activity of clever policemen who attempt to plug "loopholes" in evidence must cease. It has been said:

> " There are some damm good cops .... It just happens that Holcomb doesn't come within that classification. Lientenant Tragg of Homicide [Department] is a square shooter and a smart man. Holcomb is a moron who will frame a prisoner if he thinks the man is guilty. He actually doesn't think he's doing anything wrong. He simply thinks he's aiding the cause of justice, that there is a loophole in the evidence and it's up to him as a good, clever cop, to plug that loophole."20

From the foregoing discussion of police activity, several points and conclusions emerge. They are listed below :

It is clear that the police, by the very nature of their training, academic abilities,[21] disposition and experience are better at maintaing law and order, at emergency operations-traffic, accidents, than the investigation of crimes, gathering evidence and the actual prosecution of offenders.

They should not prosecute people they have arrested because, obviously, they are interested parties. This is against the rule of natural justice that no man shall be a judge in his own cause, sometimes expressed as nemo judex in causa sua. For instance they gather evidence. They decide whether to prosecute or not. In most cases, they are the prosecutors. The police are only human. They would find it difficult to resist the temptation to try for a conviction at all costs. After all " a good record of convictions (n)ever did a policeman any harm!"

Police cannot treat with dignity and respect, persons who they sometimes must subdue by force and who pose a lot of danger to them. Of course it should be a matter of pride on the part of all police officers not to be provoked by misbehaviour on the part of others, and to maintain the highest possible

standards in the treatment of those in their charge. But there is a big difference between what "is" and what "ought" to happen.

Precisely because they are not judges, police cannot behave as if they were; that is, judiciously, with discretion, self-restraint and consideration when dealing with suspects and accused persons. To them oppression of suspects seems inevitable. Society should therefore not impose on the police standards of judicial behaviour which they must ignore in practice if they are to do the job society wants them to do. In the alternative, they should not be asked or allowed to do work to which society wants judicial standards applied.

Police cannot help concluding that a man is guilty if the evidence they have seems enormous to <u>them.</u> Of course by so doing, they violate the rule that a person is presumed innocent until proved guilty.

P A R T T W O

PRE-TRAIL INCARCERATION :

The constitution, in S.72 safeguards personal liberty. It states that no person shall be deprived of his personal liberty except in instances where the law authorises such deprivation. Whenever a person is arrested or detained under the exceptions stated in S.72, he is entitled to be informed as soon as is reasonably practicable, in a language that he understands the reasons for his arrest or detention. Where a person is arrested or detained and he is not released, then he must be brought before a court within twenty four hours and where this isnot possible, as soon as is reasonably practicable. Once the person has been brought before a court, he cannot be further detained except by order of that court.

It is clear from the many exceptions attached to S.72 that freedom or liberty is not an absolute right. But there is a certain minimum content of liberty, the irreducible minima, which no law may take away. It is proposed to examine the presumption of innocence in the perspective of liberty, because innocence and liberty complement one another. If a person is guilty then he may be jailed (that is, his right to liberty is cancelled). If he is innocent he should be unmolested.

Section 77(2) of the constitution provides :

> "Every person who is charged with a criminal charge (a) shall be presumed to be innocent until he is proved or has pleaded guilty."

The process of criminal trial <u>should</u> have as its sole purpose to inquire into the guilt or innocence of the accused with a view to releasing and exonerating him if innocent or to convict

and purnish him if guilty. But certain acts committed by the state through its servants have the effect of punishing innocent or supposedly innocent people awaiting trial. One such act is detention or custody of accused persons in jail- whether police custody or remand prison. The horrors of jail have been summarised thus :

> " Jail. The very name is used to strike fear in the minds of children. And the reality is at least as bad as the thought. Not just for murderers and robbers, but for thousands of others who have done nothing more serious than argue or fight a little too vigorously with their wives or friends or succumb to a moment's temptation to take something that did not belong to them. Or may be they have done nothing at all. One does not have to be guilty of anything to land in jail. Only to be accused ... . You stepout of the patrol car ... . You are ordered here, then there. Your clothes may be taken and the innermost parts of your body subjected to seaching hands."22 (a)

A visit to a remand home or prison, even an interview with a defendant in custody would not leave any doubts whatsoever that remand prisons and police cells are terrible places where no human beings ought to be confined. One may not be going too far if he invoked section 74 of the constitution which provides that no person shall be subject to torture or to inhuman or degrading punishment or other treatment. The term "other treatment" appears to indicate that the categories of punishment or treatment that is prohibited are not closed, that is, the list is not exhaustive. This means that the courts can in appropriate and suitable circumstances extend the list. It possibly could not have been the intention of the legislature to draw a conclusive and exhausive list of degrading or inhuman treatment. Had it been so, then the terms "other treament" could not have been included.

If that is so, then the courts are entitled to apply the ejusdem generis rule of interpretation to include confinement in an overcrowded cell with an evil-smelling toilet bucket at one corner in the category of punishment or treatment that is clearly inhuman and degrading.

Detaines are housed in over-crowded cells. Police never stop arresting people because their cells are full. This is contrary to sections 72(5) and 77(1) and (2) of the constitution which by implication means that accused persons should not be subjected to any form of punishment or treatment that is reserved for convicts. This is because they have not been adjudged guilty.

It is submitted that pre-trial incarceration is a form of punishment which an accused person suffers even before his case is heard. As has been stated, the police feel

> "It is their job to keep [the accused] in custody before trial if this helps to protect the community from the risk of further crimes ...."22 (b)

It should be appreciated that in purporting to "protect" society from anticipated future criminal conduct of dangerous defendants, by keeping them in jail and off the streets, the police presume the guilt of the accused. Surprisingly, the presumption of innocence is thereby reversed to mean one is presumed to be guilty and is treated as such.

Wegg - Prosser Charles commenting on the plight of detainees has said:

> "In some countries, the rights of people who have been arrested receive very little recognition either in theory or in practice. Unconvicted prisoners can be left in custody for long periods and may be cut off from all contact with the outside world, and denied access to family and friends, or legal advisers. They may be subjected to serious neglect and ill-treatment, or forced to physical or psychological pressures to confess to offences of which they are innocent or to provide information to incriminate others..."23

It is the view of the writer that Kenya is one such country where all these things happen. It is a fact that cannot be disputed that in Kenya, police detain people for any length of time [24] and their families and friends, and even their lawyers are denied access to them.[25] They are sometimes tortured[26] to provide information to incriminate others.[27]

> " If adequate guarantees against abuse are or can be made available in a practical sense, much might be said in defence of detention pending investigation [and trial]. It is a necessary evil. But as things stand, detention conflicts with the constitutional provisions to the effect that individuals who have committed no wrong shall be absolutely unmolested."[28]

Most unfortunately, these guarantees are not "available", at least not in a "practical sense." They exist only in the constitution under sections 70-85. They are not available, because were they available, the police would not violate them with impunity as they do, since their actions would be challenged in the courts. As it is, they very rarely are challenged and even on the few occasions that they have been, the action invariably fails. What can one expect anyway since one must report police misconduct to the police?

Even if it were to be assumed that these guarantees are available in a practical sense, the majority of citizens, except for the relatively small class of elites are so ignorant of the law and their rights that they do not know that they can challenge the legality of police action. As far as they are concerned, the police are the law and one may not argue with the law !

Harry Street has blamed written constitutions for this saying that Professor Dicey, successive British Goverbments and judges speak disparagingly of written constitutions. (It is

ironic that Britain insisted on her ex-colonies, Kenya included, having written constitutions). They say that it is useless to have documents which are merely high sounding catalogues of freedoms phrased in language so inescapably vague that that the little man who finds himself in the hands of the police derives no benefit from them. What counts, they say, is whether judges can give a man a fair trial, whether procedures like harbeas corpus are readily available to him. [29]

The writ of harbeas corpus is provided for in the constitution in S. 84(1) and (2), and also in section 389 of the Criminal Procedure Code. The latter says :

> "The High Court may whenever it thinks fit direct -
> b) that any person illegally or improperly detained in public or private custody within such limites be set at liberty."

Lord Denning has defined harbeas Corpus as follows :

> " The writ of Harbeas Corpus enables the court to order that whoever is being detained be brought before the court to determine whether the detention is lawful, if if is not, the detainee will be set free at once, This is the source of the rule of law which states that any person arrested must be brought before a court of law within 24 hours."30

In Kenya, this important right or safeguard against arbitrary detention is not "readily" available in a"practical sense" since only the High Court is empowered to issue the order of harbeas corpus, literally, "produce the body." The High Court sits permanently at only a few places in this country.31

Another reason why the writ is not readily available to the ordinary man is that it is a prerogative order, and like the other prerogative orders (Mandamus, declaration,certiorari) it is a discretionary order that can only be issued if the court or judge feels like issuing it. But in England, unlike in Kenya, the idea of liberty is considered so important that any person can stop a judge inthe street, call at his private residence at midnight or interrupt other court business to make an application for harbeas corpus and the judge would

entertain the application.

There is no evidence that this is the case in Kenya. In fact one can imagine what would happen if a citizen attempted to intercept a judge in the streets, or if he burst into the chambers and pleaded that so and so was being illegally detained ! The relatively few applications that are made are subjected to long and drawn-out arguments for or against their issuance.

Detention of unconvicted persons,

> "quite apart from subjecting a man who is presumed innocent to a prison regime, makes it more likely that will plead guilty, more likely that he will be convicted despite a plea of not guilty, and more likely that if convicted, he will receive a custodial sentence."32

Quite apart from subjecting a potentially innocent man to a prison regime, detention has other ill-effects. The detainee is likely to lose his job, that is, if he had one and his family would suffer, especially in the case where he is the sole breadwinner, as many Kenyan families indeed do depend on the man to provide all their needs.

In the case of adolescent defendants, (and even adult defendants) who turn out to be innocent, humiliation and injury to morale and reputation may occur. Orfield, talking about custody of minors says :

> "The paradoxical situation is that the criminal law now takes account of immaturity after conviction by providing special reformatories, but takes no account [or very little account] of immaturity before conviction. The paradox is all the more striking when it is remembered that before conviction the law is dealing with adolescents presumptively innocent, many of whom will be adjudged innocent and most of whom will not be sent to prison."33

From the above account, and also from accounts of prison inmates, life in prison is better and more regular than life in remand. In prison, one gets a place to sleep in, (with a

blanket) three meals a day, soap and water, medical care and others. In remand there are no blankets, people are crowded into small rooms, they do not wash, do not receive medical attention unless the court orders so.

It does seem that convicted prisoners get relatively better treatment than unconvicted prisoners. Yet those convicted are those whose guilt has been proved ! Why should people who are presumptively innocent be treated as if they were worse than criminals ? It does seem, at least to the writer, that the aim is to "break" the resistance of the defendants so that they do not put up a vigorous fight or defence. To "break" people morally and then purport to give them a chance to explain away their "guilt" is a mockery of justice.

This discussion has tried to show that presumption of innocence is largely theoretical, that in practice there is no such presumption. People who are unfortunate enough to be arrested in connection with crime are treated as if they were already guilty. This seems to make court process irrelevant. The next chapter attempts to show that the verdict in a case is reached irrespective of the innocence of the accused - that the process does not really base its conclusions on truth but on expedience and formality.

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11. C.P.C. S 26(1) (c); S.36.
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15. Brandon, Ibid.
16. Statistical Abstract (Republc of Kenya) 1980 P. 284-5. The abstract shows that in 1979 alone, there were arrested 50, 558 people on penal offences alone. Of these, 27,623

were awaiting trial. Of those tried, 18,042 were convicted. Only 4,020 were on the other hand, acquitted, or discharged or had their cases dismissed or withdrawn. Only 873 were disposed of by other means. This shows that a person who has been charged with an offence is likely to be convicted than to be acquitted.

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19. (1948) 15 E.A.C.A. 56 at P. 58.
20. Gardner, E.S. The Case of the Vagabond Virgin, Pan Books, London, (1968) P. 62. (Emphasis added).
21. According to Weistart, Supra P.22, mention of "policemen" brings to the minds of many "memories of elementary school classmates, more renowned for their roughness or athletic prowess than for their intellectual acumen or sensitivity who have joined the police force."
22. (a) Floyd Feeney quoted by Wayne Thomas, Bail Reform in America, Berkely (1979) P. ix (foreward). (Emphasis added).
    (b) Bottoms, A.E. Defendants in the Criminal Process London (1976) P. 193.
23. Wegg - Prosser, Charles, The Police and the Law, Oyez-Publishing Ltd., London (1978) P. 70.
24. See for example Shimechero case, infra. Also Mwithaga, infra.
25. R V Mwithaga, infra.
26. R V Ekulan Narigor, supra.
27. Kariuki and Another V Republic, infra.
28. Orfield, L. B., Criminal Procedure From Arrest to Appeals Connecticut, (1973) P. 25.

29. Street, supra P. 284. They may be right to blame written constitutions. If a person stood in a street corner in Nairobi and asked a hundred people what the constitution was, he had only get intelligent answers from about thirty. If he went to the rural areas, the figure would be reduced to about five.

30. Denning, Lord Alfred, Freedom Under the Law Stevens & Sons Ltd., London P.

31. Nairobi, Mombasa, Nakuru, Kisumu Kakamega and Nyeri. It occasionally sits in some District Courts like Eldoret, Kitale, Embu, Meru, Kisii.

32. Bottoms, supra P. 214.

33. Orfield, supra, P. 106.

C H A P T E R T H R E E

FAIR HEARING, INDEPENDENCE AND IMPARTIALITY OF THE COURTS:

In the last chapter, it was found that a person is presumed innocent until proved guilty. It was also shown that according to the law, punishment is only reserved for convicts, not defendants. The only institution empowered to decide on the guilt of any person is the court, not the police or the public. This means that whenever an allegation or imputation of guilt is levelled against any person, that person must be allowed time and facilities to defend himself.

Condemnation before trial, especially by the police (" he was caught red-handed, so he is guilty") or the public ("mob justice" or more accurately,"mob-injustice") is not just illegal, it is contrary to principles of natural justice, one of which states that no person should be condemned unheard : audi alteram partem - literary, do not decide the girl's case until you have heard the boy's, or simply, hear the other side. The maxim was discussed at length by Justice Megarry in John V Rees. He said :

> "It may be that there are some who would decry the importance which the courts attached to the observance of the rule of natural justice. 'When something is obvious', they may say 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard ? The result if obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable

> conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

A hearing is an absolute necessity. There can be no compromise to that right. Is it enough that a hearing is granted? A hearing must not only be given, it must be fair. Even the racist, oligarchical regime of South Africa can boast of granting hearings to Africans.

This chapter attempts the question whether a hearing can be fair in view of the fact that courts are manned by fallible human beings who come from a particular class and who, naturally, cannot help favouring that class and championing its interests. Matters are made much more complicated by the system used in resolution of disputes which emphasizes power, money and influence rather than truth and justice.

Kenya's system of criminal justice, and indeed the systems of all Western Countries is the adversary - accusatory system which manifests itself in a law-suit. A law-suit is a kind of war, it is "mimic warfare." A law-suit is, like a war won through "stratagems" and "tactics" resembling "skirmishes" in a battle. Going to court means submitting quarrels to a court for decision, as a substitute for private warfare.

The main business of courts then is trial and decision of specific disputes. The judge presides over this duel and ultimately pronounces his verdict which for the winning party confirms legal rights and for the loser, legal duties - unless there is a further appeal. In other words, a legal right is a law-suit won, and a legal duty a law-suit lost !

For justice to be done the trial game - indeed it is a game of skill with its peculiar rules, its methods and techniques - has to be conducted fairly. The quality of the verdict in a trial depends wholly on the degree of impartiality and disinterestedness of a judge in the case before him. There can be no fair trial before a judge lacking in impartiality and independence.

When is a judge impartial ? If "bias" and partiality be defined to mean total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy is not a blank piece of paper. People are born with predispositions, and the process of formal and informal education, the company one keeps, the attitude of the judge to religion, social, economic and political problems and issues of the day and place-in short, a judge's personal philosophy creates an attitude which affects him in judging situations, an attitude which precedes reasoning in particular instances and which by definition is a prejudice.[2] Impartiality and independence must therefore not be defined in sociological but in legal terms. The constitution[3] defines a fair hearing as one in which, first the accused person is presumed innocent until he is proved or has pleaded guilty, second he is informed of the nature of the offence he is alleged to have committed, he is allowed time and facilities to prepare his defence, he is allowed legal representation and one in which an interpreter is made available to him free of charge if he does not understand the language used at his trial. The same section outlaws, inter alia, retroactive legislation and punishments, and 'double jeopardy.'

Thinking of impartiality, one should therefore not have the tendency to

> " concentrate on minute psychological and sociological examination of the man on the bench. If he owns stock in corporations or went to a protestant - 'prep' school or grew up in a large Eastern City, can he be 'fair' to trade unionists, Roman Catholics or Western Farmers ? Do licencing administrators favour their cousins or discriminate against the husbands of their wives' enemies ? Does the surreptitious hand of graft, influence or advancement tuck lucrative gifts into the folds of the judicial robe ?"4

Although such sensational suspicions occasionally lead to prosecution of a wayward official, they do not realistically chart the main stream of problems incurred in maintaining impartiality. The fact is that on the whole, judges genuinely attempt to disregard their own personal philosophies and attitudes and to decide cases on an objective basis, but it is certainly not possible for any human being to completely detach himself from his personal philosophy or that of the class to which belongs. This was proved to be so at the end of chapter one where it was stated that the ruling class governs in its own interests which it professes to believe and perhaps sometimes does believe to be the interests of the whole community, but which of course is not.

Apart from the need for impartiality, a court also needs to be independent. By this is meant, independence of the government (executive and the legislature). A judge should not be told by anyone what verdict he should reach in any case he is hearing. In theory at least, judges are protected from any threats whatsoever, and their security of tenure is guaranteed by the Constitution[5] itself. They cannot be removed from office except for misconduct or inability to

perform functions of their office and only through very stringent formalities.

In Minister of the Interior V Harris[6], Justice Schreiner said that the independence of the judiciary can only be ensured and maintained if the courts are manned by full-time judges trained in the law, are outside party politics and have no personal interests in the cases which come before them, and judges whose tenure of office and emoluments are protected to make them feel free to decide cases without fear or favour. They should not seek to please the government or any group in the government. They should do justice even if that results in embarrassment on the part of the authorities.

In Rex V Wilkes[7], the state refused to reveal certain vital information in the trial of Wilkes the defendant, who was a member of parliament and who was charged with treason. He had been convicted by the lower court and he appealed. The state in refusing to disclose the information said it was privileged to do so. Lord Mansfield in his judgement said :

> " The constitution does not allow reasons of state to influence our judgement: God forbid it should.... We must not regard political consequences howsoever formidable they might be, if rebellion was the certain consequence, though the sky may fall (fiat justicia, ruat caelum) .... I will do my duty unawed."[8]

Nearer home, it has been said that judges "should not be influenced by onerous factors. In criminal cases, they should not convict or acquit because they believe that a particular verdict will please the government. In civil cases they should not consider the relative importance of the parties or the political consequences of their decision. Their job is to find the facts and apply them to the relevant principles of law"[9]

Fine sentiments, but to what extent do courts apply these principles ? There is evidence that they do not always apply them, and that is especially so in cases or disputes with a class content. In other words the courts respect and apply these principles in so far as, and to the extent that the disputes before them are not those in which the ruling class has interests.

A case in point is the Sundstrom case,[10] in which the High Court at Mombasa convicted a Fireman Apprentice on board the U.S.S. La Salle on a charge of manslaughter after the accused had pleaded guilty to the charge. He was released on a bond of Kshs.500 on condition that he kept the peace for the next two years while in the United States ! The court totally disregarded a long line of cases in which the defendants had almost always been sent to jail for between five and seven years on similar charge. There was a public outcry against the sentence and the then Attorney General, Mr. James Karugu admitted in parliament that even he was not satisfied that justice had been done in that case.[11]

Although it is not clear that the U.S. Government interfered with the proceedings, it is clear from the judgement that the Commanding Officer of the ship sent a letter to the court which the judge said "strongly influenced" him and for which he was very grateful. Neither the contents of the letter nor its purport are disclosed in the judgement, but what else can the letter say if not that the Officer and the entire U.S. was sorry for what Sundstrom had done, but really Sundstrom was not or had not been a bad boy previously. If the Officer was

commenting on any aspect of the case, which undoubtedly he was, then he was acting as a witness of some sort, and he should either have been called or should have availed himself for cross-examination on his evidence !

The public, especially the "Kenyans of African Origin" from whom the victim was drawn criticised the judge of having been influenced by, inter alia, racial considerations, corruption and incompetence. The government quietly retired or declined to renew his contract, probably in response to public criticism of the judgment which had tarnished the reputation and standing of the judiciary.

In the case of R V Mwithaga[12], the accused was charged with assault and malicious destruction of property. After being locked up for three days in the police station without being charged, the defendant heard for the first time the substance and the nature of the offence he was alleged to have committed, in court. The case was scheduled to be heard the same day and his counsel (fortunately, hired by his family) objected, saying he needed time to take instructions from his client and the client needed time to raise a defence. The court overruled the defence counsel and went ahead to hear the case despite an appeal to the High Court over the same issue.

It was clear, at least to the defendant and his counsel, that the Trial Magistrate was partial and was taking directions from some other person(s) , and the defendant being a politician could not help thinking that his political opponets were up against him. Since the behaviour of the Magistrate appeared to him, suspect, he requested his counsel to have the case transferred

to another court. Counsel duly made an application to that effect, but the same Magistrate rejected it, saying that was "delaying tactics".

Request for bail so that the accused could prepare his defence and also present his nomination papers in a by-election in which he was supposed to defend his seat, and which was coming up that week was also refused. The defendant was finally convicted on all charges and sentenced to serve various sentences, the highest being two years.

Although the court of appeal[13] agreed that the case left an unsavoury mote, it refused to interfere with the sentence. The court agreed that this was a minor case between a man and his wife, at most a domestic affair, that the prosecution had taken very long to come to a decision to prosecute, the offence having been committed nearly two years back, to be exact, twenty-two months and that the defendant should have been allowed more time to prepare his defence. But the court said it was satisfied that no miscarriage of justice had taken place.

This case clearly shows that the criminal process was being used by a section of the ruling class to supplant another section of the same class, probably because the defendant had betrayed his class. Dr. Ooko-Ombaka has dealt exhaustively with this phenomenon.[14] It is therefore unfortunate that the court supposedly impartial and independant failed to exercise its independence by refusing to be used in the manner that it was.

In R V Mutai,[15] bias was displayed by the admission of evidence of character intended to show that the accused was

a person who disdained authority, was a leftist - oriented radical who had been sent away from the University for her "radical activities." This admission was contrary to the provisions of the Evidence Act. Although the magistrate claimed that he was not influenced by the defendant's background, it is difficult to explain why he admitted the evidence in the first place. He said :

> "In passing however, I must make it absolutely clear that in coming to all the aforesaid findings, this court has ignored and excluded and has not taken into account at all, the deceased's past background and her behaviour at the school, the college or at the University of Nairobi."

The High Court agreed that the evidence of her past character was of a prejudicial nature and should not have been admitted in the first place, but it went on to say :

> " ... after due consideration, we agree with counsel for the Republic that the admission of evidence in question while improper, did not in fact prejudice or influence the mind of the magistrate, since he was at pains to correct the matter in this judgement. We are satisfied again that the admission of this evidence did not occasion failure of natural justice."

With respect, this reasoning is erroneous since it only found that there had not been a miscarriage of justice proceeding from the presence of actual bias. The principles of natural justice, which fortunately the court bound itself to respect, demand that there should not only not be actual bias, but even an appearance or likelihood of bias.

> "The apprearance of bias is regarded as seriously by the supervising court as is actual bias, the judge who appears to have or who has a bias may have most excellent and upright motives and may not in fact allow his judicial discretion to be impartial in any way by the vitiating "interest", but the courts will still find there has been a breach of natural justice. It is of fundamental importance that justice should not only be done but should manisfestly and undoubtedly be seen to be done."16

Perhaps it is not a coincidence that the trial magistrate in Mutai's case was the same one who tried Mwithaga.

From the foregoing, it may be concluded that justice and fairness are concepts that are so much related that they are sometimes used interchangeably. But what is Justice ?

Lord Denning has said that the nearest one can get to defining justice is to say that it is what the right-minded members of the community - those who have the right spirit within them - believe to be fair.[17] But who decides that a person is right-minded or is not ? Justice is an abstract concept, it is dynamic - neither static nor well - defined. In other words it is subjective since it only exists in the minds of the people. Men's views of what is right and what is wrong, what is fair and what is not, what conduct is healthy and what is harmful, have always been subject to change.

The law, especially the criminal law has as one of its objects the regulation of conduct of the individual so as to protect society from the ill-consequences of anti-social conduct. What is considered anti-social and therefore undesirable, must correspond with the ideas of the people as to what they consider just in any particular set of circumstances.

Sociologists have found as a fact that people will respect rules of law which are intrinsically right and just and will expect their neighbours to obey them, as well obeying the rules themselves, but they will not feel the same about rules which are unrighteous or unjust.

But good law per se does not produce fairness. It should be administered justly. It has always buffled jurists whether

law is or should be administered according to principles of justice, or justice should be administered according to law. Lord Denning and Justice Akinola Aguda (Judge of the High Court of the Western State of Nigeria, formerly Chief Justice of Botswana) say that the law should be administered according to principles of justice. For instance Denning says :

> " I ask you ..., in your progress in the law, not to rely overmuch on legality - on the technical rules of law - but ever to seek those things which are right and true; for there alone will you find the road to justice. When you set out on this road, you must remember that there are two great objects to be achieved. One is to see that laws are just : the other that they are justly administered. Both are important, but of the two, the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers."18

The reason he gives for this proposition, which has been criticized as being "cavalier", is that laws that are harsh or unjust can be tolerated so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness, but a country cannot tolerate a legal system which does not give a fair trial. Indeed what is the use of holding a trial unless it is a fair trial?

Law can only be just and its administration fair if each and every person involved in its administration does his duty conscientiously, diligently and honestly, for as the adage goes, "a chain is no stronger than its weakest link," which means that the agencies and personnel making up the system determine the amount of justice or fairness that reach an accused. And the morality of law is commensurate with that of the system itself and the agencies that constitute it.

To what extent then, are judges and other officers engaged in law enforcement concerned with the justness and morality of their actions? Most lawyers, especially judges have become mere technicians, spelling out the meaning of words. They conceive their role as not concerned with morality or justice of the law, but only with interpretation of law and also its enforcement. Yet they deny that justice can be administered by computer ! At least a computer would produce consistent results whenever facts are similar. Of course the advantage of using human beings lies in the fact that they are supposed to apply good sense and not logic - which Frank Jerome calls "mechanical jurisprudence."[19] A strict application of the law may produce a result which appears or actually is manifestly unjust.

To determine the guilt or innocence of an accused, the court has to get the facts of the case or issue. The key word here is "fact". What is a "fact"? The Pocket Oxford Dictionary defines it is a "thing that is (known to be) true." Fact is "truth or reality". Courts set to discover facts or truth in a trial. The facts can only be discovered by conducting an intelligent inquiry into all the practically available evidence in order to ascertain as near as may be, the truth about the facts of the issue. But it must be borne in mind that it is the "issue" that the court has to decide and facts are the means or tools it can use to decide the case.

One would therefore expect that the best way of doing so is by using the truth or investigatory method of inquiry. Not so. Kenyan courts use the contenticus or adversary method which is premised on the notion that if the opposing sides each strive as

hard as they can in a keenly partisan spirit to bring to the courts' attention the evidence favourable to such parties, the courts would in the process discover the facts or truth !

In the process of trying to persuade the court to favour one side, the lawyer illuminates for the court niceties of the legal rules which the judge might otherwise not perceive. But the partisanship of the opposing lawyers blocks the discovery of vital evidence or leads to a presentation of vital testimony in a way that distorts it.

There are also many other factors that lead to the distortion of the truth. They include cross-examination, coaching of witnesses, partisanship of the witnesses, perjury, "shock tactics" of lawyers.

Most lawyers seem to believe that cross-examination should be used to cajole, intimidate and embarrass a witness called by the opposing side. Frequently, truthful witnesses are misunderstood when they react nervously, which gives the impression that they are either evading or intentionally falsifying. An honest witness testifies in examination-in-chief without any problem. He answers questions put to him promptly and candidly, making a good impression. On cross-examination, his attitude changes. He suspects that traps are being set for him. He becomes hesitant in answering even the most elementary questions, often asking that questions be repeated.

Lawyers prey on such witnesses and succeed in making it appear that they are concealing significant facts. An experienced or clever lawyer uses all sorts of stratagems to

minimize the effect on the judge of the testimony disadvantageous to his client, even when he has no doubt of the accuracy and honesty of that testimony. He considers it his duty to create a false impression, if he can, of any witness who gives such testimony.

An irritable but nevertheless honest witness can successfully be prodded into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him. Frank quotes one Anthony Trollope who has said :

> " One would naturally imagine, that an undisturbed thread of clear evidence would best be obtained from a man whose position was made easy and whose mind was not harrassed; but this is not the fact; to turn a witness to good account he must be badgered this way and that till he is nearly mad; he must be made a laughing-stock for the court; his very truths must be turned into falsehoods; so that he may be falsely shamed ...; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence ..."20

Sounds a bit exaggerated but nevertheless true. Anybody who has sat for period in court would agree that lawyers terrorise witnesses in various ways. They often shout at them. They demand answer "YES" or "NO". As if all questions can be answered by a single yes or no.

Another trick lawyers use is their attempts to hide the defects of witnesses who testify favourably to their clients. Of course this is forbidden by law under professional ethics for lawyers, but they do it. They caution irritable witnesses to conceal their irritability, the cocksure witnesses to subdue their cocksureness. In that way the trial court is denied the benefit of observing the witnesses's actual normal demeanour, and thus it is prevented from sizing up the witnesses's accuracy.

Lawyers also use "shock-tactics." They reserve certain

evidence till the appropriate moments, so that when the testimony is presented, it surprises the adversary who, caught unawares has no time to seek, interview and summon witnesses who would rebut the surprise testimony. One lawyer once said, "of course, surprise elements should be hoarded. Your opponent should not be educated as to the matters concerning which you believe he is still in the dark. Obviously the trap should not be uncovered. Indeed you may cast a few more leaves over them so that your adversary will step more boldly on the ... ground believing it to be solid."

Witnesses too, contribute to this activity. They have a natural tendency to regard themselves not as aids to the courts bent on discovering the truth, but as the plaintiff's witness or the defendant's witness. Of course this is understandable since the court does not call its own witnesses. But such witnesses can be an impediment to justice rather than aids. As Ellot says "a man who is informed that he is to be called as a witness expects to see what the party who compliments him by calling him claims he will see."[21]

Less scrupulous lawyers actually coach (illegal of course) their witnesses to commit perjury. Scarcely a trial occurs in which some witness does not lie. Perjured testimony often goes undectected by courts and therefore often wins cases. At least this was the case in Queen V Kenyatta and Others[22] where the principal witness for the prosecution testified on oath after being rewarded by the government of the day. He was given a place at a British University and a job on return home.

The purpose of all these tactics is to prevent the judge from correctly evaluating the trustworthiness of witnesses and to shut out evidence the court ought to receive in order to reach a sound decision. One is sometimes left wondering in what manner advocates are officers of the court whose duty is to help save the court from error and imposition, and to aid the court to a proper determination of the law and the facts. Once again that is merely an ideal. In practice, advocates are interested in winning their cases, thereby building up a good reputation for their firms. This in turn means more business more money.

Lawyers may not be responsible for such practices. The blame lies wholly on the system which virtually compels the use of such techniques as outlined above. The system treats a law-suit as a battle of wits and wiles and not an inquiry into the truth. The stratagems outlined are therefore part of the manoeuvres which lawyers are obliged to resort to to win their cases.

Some of those manoeuvres may appear to be tricky but under the present system, it is part of a lawyer's duty to employ them because his opponent is doing the same thing, and if he refrains from doing the same, he is violating his duty to his client, even if he knows his client committed the offence with which he was charged.

Basically three principles of law demand that this be the case. First, is the principle that presumes all accused persons innocent till proved guilty in a court of law, which therefore means that the guilt or innocence of an accused is determined

by the court and not by the advocate or the police or anybody else.

Second is the principle that an accused needs or is entitled to a lawyer to defend or protect his constitutional rights.

Third, even the factually guilty might be legally or technically innocent as in the defence of insanity. The lawyer in defending the accused therefore at all times presumes the (legal) innocence of his client.

Apart from the factors outlined above which have the effect of circumventing the discovery of facts by the courts, there are also other factors which have the same effect on the court, that is those which prevent the court from reaching a decision that is based on justice and truth.

One such factor is delay of the criminal process. Prompt court appearance, and prompt trial are constitutional requirements. The constitution says that a person who is arrested and who is not released shall be brought before a court as soon as is reasonably practicable, and where he is not brought within twenty four hours of his arrest, the burden of proving that the person arrested has been brought before a court as soon as reasonably practicable shall be upon any person alleging that those provisions have been complied with.[23]

In R V Shimechero,[24] the defendant was arrested in connection with an allegation of corruption. He was detained at the C.I.D. headquarters for five weeks before being taken before a court. During that time, he made several statements to the police which were admitted in evidence at his trial. He was subsequently convicted. He appealed to the High Court which

dismissed his appeal, and he appealed to the court of Appeal of East Africa. On the ground of illegal detention, the court said it was an error of omission on the High Court not to have dealt with it. It went on to say :

> " We must state that the practice of illegally detaining a person for a long period in order to question him or obtain evidence is repugnant to the principles of law of the Republic and we reassuredly condemn it .... (A)lthough we strongly deprecate the practice which appears to be growing of rounding up all and sundry who may be connected however remotely, with subject of criminal investigation, and detaining them unlawfully in police custody whether or not reasonable grounds for suspicion exist ..."25

The constitution is said to be the supreme law and the police must respect it. They must respect and uphold the rights it gives the citizens. But the court in its susequent holding went back on what it had said and justified police behaviour. It went on to say that it was unable to accept counsel's submission (defence) that any statement obtained from a person illegally detained be rejected by the court. It said :

> " The fact that an innocent person has been unlawfully detained for a period, during which he has provided the police with a statement of facts to the matter under inquiry as known to him does not in itself raise a doubt as to the reliability of evidence consistent with the statement."

The court failed to appreciate the fact that people deprecate the use of such evidence not because it is unreliable(although even that could very well be a valid argument as will be shown subsequently) but because to admit it would be to encourage the police to go on with the practice. If such statements are rejected, the police would desist from detaining people for longer than is allowed, because such detention would serve no purpose as evidence resulting from it would be inadmissible, though relevant.

The court in dismissing the appeal said that inspite of minor misdirections at the trial, no prejudice or substantive miscarriage of justice had accured. On the ground that the statement ought not to have been received in evidence because of the possibility that it may have been extracted, the court in particulary strong language said it was

> "Surprised that counsel thought fit to levy such a serious charge against the Republic in such a manner ..."

One wonders what the purpose of detention of the accused was if not to extract the statement. If the Republic was guilty of illegally detaining a person for five weeks, one sees no reason why it could not extract an admission from the same person. The court seems to have been unwilling to interfere with the judgment of the trial court just as the High Court had done. One is left wondering why, yet the court had conceded that there was some miscarriage of justice, though such miscarriage was not, according to the court "substantive."

Once a person has made a court appearance, he cannot be further detained except by order of that court. Such people are allowed to be released on bail as per section 75(5), constitution and also S. 123 of the Penal Code which states that when any person other than a person accused of murder or treason is arrested or detained, that person may be admitted to bail.

Bail has been defined as the mechanism by which the defendant's right to freedom prior to trial is squared with society's interest in the smooth administration of criminal justice. The practice of re-conditioning pre-trial release upon bail rests on the assumption that this money, subject to forfeiture if the defendant absconds will serve to ensure his

appearance in court. In other words it is assured that threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

The court has discretion to refuse bail where it appears that the defendant will not appear in court at the next session, or will commit further crimes, or will interfere with the administration of justice. Where these circumstances are absent, the accused is entitled to bail.

In Kenya, bail is granted as an exception rather than the rule. Almost always bail is struggled for, and where it is unreasonably refused, appeals have to be made to the High Court. The prosecution invariably objects to granting of bail saying what have now become meaningless slogans or cliches, "investigations not yet completed," "accused likely to interfere with witnesses" or "accused likely to abscond." Common sense demands that the prosecution should establish a prima facie case that the accused, if granted bail is likely to misbehave. Normally they are not asked to substantiate their objections, which in most cases are simply untenable.

When for example one says that investigations not yet completed, or accused is likely to interfere with witnesses, what one is actually doing is he is presuming the guilt of the accused. He is saying the accused is guilty, and if set free, he is likely to bribe or intimidate witnesses for the prosecution. That also presumes that those same witnesses are vulnerable or susceptible to corruption if not protected. This is typical colonial mentality as epitomised in Mr. Green's statement in "No Longer at Ease" that "the African is corrupt through and through."[26]

The other reason that accussed would abscond must be rejected, at least in the majority of cases. As argued in chapter one and also chapter four, most of the people who get themselves arrested are the poor or relatively poor drawn from the lower echelons of society. For a person to flee abroad, one has to have international connections which these people clearly have not. He would have to have money. It can therefore be seen that some of the excuses given for objecting to release on bail are to say the least, untrue. In fact it is the affluent who abscond: Kihika Kimani (Tanzania), J. Mungai (Switzerland), Orengo (Tanzania), Mutai (Tanzania). Poor helpless people do not flee; where would they go ?

People who are released on bail normally turn up in court, because they know they would probably be caught if they flee, their chances of being acquitted are substantially diminished if they flee and evidence of their flight is admissible at their trial.

Bail is sparingly used in Kenya's system. Figures for 1979 on prison population [27] support this view. In that year, out of a total of 130,731 persons committed to prisons all over the Republic, 62,792 were committed for mere safe custody which constituted almost half the prison population. In 1978, 60,326 out of 133,766 were committed for safe custody alone, In 1977 82,250 out of 170,155 people were in prison awaiting trial. Similarly in 1976, 82,250 out of 170,155 were in prison awaiting trial. In all these figures, the percentage of those awaiting trial was about 50% of the prison population. Though the figures for the eighties are not available to the writer, it can be seen that the

50% standard is likely to have been maintained, since no efforts have been made to reduce it.

These thousands of people were sent to prison because they had no influence, no property. The whole idea of bail, so long as it is based on property is wrong because it is only available to those who have property and those are few compared to those who do not have it. Although the idea of "sureties" tries to mitigate the obvious disadvantages of bail, it is equally abhorrent since one has to get people of "good social standing", with property to stand surety for him. It should be borne in mind that those who have distrust those who do not have and those who do not have blame those who have for taking everthing. So they are not friends. This two institutions illustrate most dramatically that the rich receive preferential treatment over the poor. Bail practices are the clearest examples of economic discrimination.

The poor languish in jail and its often cruel environment for weeks, months or even years[28] awaiting trial, and unable to purchase their freedom. But the more affluent defendants after "buying" their freedom remain free from the constraints of jail and are permitted to carry on most of the activities of other citizens. Yet an affluent defendant is not presumed more innocent than the poor defendant.

Bail as practiced is in essence a type of legal ransom. The law insists that the purpose of bail is to ensure the presence of the accused at the trial. If then it is clear that the accused would be present at the trial, he should not be denied his freedom merely because he cannot raise money

for his release.

Remanding people generally must be condemned because it is inconsistent with the constitutional right to put up an adequate defence. What is clear is that

> "... imprisoned, a man may not have opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal."

These words were spoken by no less a person than a judge of the Supreme Court of America[29] in 1960. What the judge says is that it is not possible to conduct a good defence while in jail, as was shown in the case of R V Mwithaga.

In that case, the court displaying unusual zeal to dispose of the case sat from morning till 1.15 p.m. when it adjourned for lunch and then sat in the afternoon till 5.15 p.m. in the evening during the days the trial lasted, and everytime the case was adjourned, the accused was whisked away to prison (bail having been refused) in a special police van, making it practically impossible for counsel and client to have any consultations whatsoever. Counsel, a Mr. Mido, objected in court but to no avail. Similarly, in the Kapenguria trial, the defence team headed by Mr. Pritt D.N. complained of failure of the prosecution to make the accused available for consultations with their lawyers. Obviously then, remand can, and has been used to diminish the accused's right to consult a lawyer, in an effort to prevent an effective defence.

One other aspect which decisively affects the quality and character of a trial is legal representation. Courts execute their business in a technical and peculiar language which only

makes sense to those trained in it. Justice Cardozo has called it the language of craftsmen which is "unintelligible to those untutored in the craft." Those who are untutored in law therefore are at a disadvantage when they are involved in the legal process. Lawyers and their law have been described as a "society of men bred up ... in the art of proving by words, multiplied for purpose" and that their language is a "jargon of their own that no mortal can understand," that to them, "white is black and black is white, according as they are paid." They have been summed up as "charlatans" who aim to mystify the public.[30]

Whereas it is not the purpose of this dissertation to determine whether these invectives are deserved or not, it should be pointed out that those not trained in law do not understand what law is and how it works. Law is a displine which, like any other discipline, has its own peculiarities. Just as it is not easy for a layman to read a medical prescription, so it is with law. Therefore one needs a lawyer to advise and defend him whenever he has a case or in dealing with the law generally.

Although the constitution allows a person charged with an offence to be defended by a lawyer, for most people this right cannot be realised. Many cannot afford to hire a good lawyer; good in the sense that a lawyer is well known, because he wins most of his cases. Most cannot afford even a bad one. Legal aid, though available generally in some countries, is only available in Kenya to people charged with capital offences. And this of course benefits only very few people, for such offences are not very frequently committed.

For instance in 1979, 735 persons were arrested in connection with murder. 648 were finally charged. Only a fraction of those who could not afford to hire a lawyer of their own stood to benefit from free legal aid. On the other hand 13,001 people were arrested in connection with assault. 11,780 of those were finally charged and 4,506 had already been convicted, while 7,274 were awaiting trial. In that year, a total of 50,558 people were arrested on penal offences. Of all those less than 2,000 people stood to benefit from legaloid services, having been arrested in connection with murder and manslaughter and also robbery.[31]

As already argued above, prompt trial is a constitutional requirement. Delay, which is a perennial problem in Kenyan Courts should be treated as a national crisis. There have only been half-hearted efforts to deal with it by appointing more judges to the bench when the problem is acute in the subordinate courts ! Perhaps it is not treated as a crisis because it does not hit at an organized segment of the public. The majority of the public have little occasion to use the courts, and when they do, it is a once-a-life-time matter. But real, concerted efforts must now be made, because needless to say, justice delayed is justice denied.

As long as cases take very long to clear, it is doubtful if th trials can be fair, and when the verdict is finally reached, its separation from the crime by time and circumstances makes it irrele as it cannot possibly reflect the society's disapproval of the crime. A prompt trial has many advantages, inter alia, availability of evidence and witnesses, witnesses would still have the facts fresh in their memories and the need to remand people would not arise, and bail would not be necessary, at least in most cases.

Lastly identification of persons or articles involved in crime though important is almost always abused and cannot be relied on entirely. Mistake in identification has cost human lives and much suffering, for even in cases involving the highest social interests, people have been deceived, and have deceived others as to the identity of persons. Mistakes of this character are made by witnesses of adequate capacity, honest purpose and undoubted veracity. As Byron Elliot observes, "courts have been vexed and neighbourhoods divided into bitter factions upon questions as to the identity of a hog, a cow or a horse : on few questions will men swear with more positiveness than on questions of identity and yet no subject is more fruithful of error."[32]

Having seen that it is impossible for trials to be fair in their present form, then what is the constitution talking about, that there shall be a fair trial ...? Fair according to whose, or simply, what standards ? The Americans have redefined their idea of fair trial to mean a trial is fair, not according to society's conception of fair trial, but fair according to law. They have said a fair trial is one that is in accordance with "due process," that is, one that meets the minimum test of fairness required by their constitution. The supreme court of America in fact has gone so far as to say that a trial is constitutionally fair if only it does not depart from the methods usually employed in the courts ![33]

A question may be asked, whether those methods, or practices can be regarded as constitutional when due to practically <u>avoidable</u> human errors, they deprive men of lives, liberty or property. The only reasonable answer is that laymen should insist that it is not enough that a trial seem fair

to lawyers, who, indurated to the techniques of their trade have become so calloused that they acquiesce in needless judicial injustices. They should insist that a trial has to be seen to be fair, just as they insist that justice has not only to be done, but it should be seen to be done.

A good illustration of this idea can be found in the Sundstrom case. Technically, of course the case was well-decided since the judge did not exceed his powers. The law says that in manslaughter, a person may be imprisoned for life. There is no minimum sentence which must be imposed. But the fact still remains that the judge did not use his discretion properly in order to do justice. So the trial was not fair by the ordinary standards of Kenyan Society.

Having seen what a fair trial should be like, it is necessary to re-examine judges to determine whether they can be impartial and independent, having seen instances where they have acted in a manner that suggests otherwise.

The answer is to be found in the now famous statement of Justice Holmes :

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."34

Judge Holmes'S views are very correct and one can only conclude that judges cannot be impartial because they are influenced by "prevalent moral and political theories" of their time and they cannot be independent because they have to give effect to the "felt necessities" of the society, a society which is by no means

homogeneous. The needs they give effect are the needs of the dominant class in that society, which claims "and perhaps sometimes does believe, to be identical with the interests of the whole people."

The law is a superstructural feature of an economic base. Kenyan economy being free,enterprise economy is part of the wider capitalist system, which uses law to exploit, subjugate and oppress the working classes of the world so that they do not rise up and take over the ownership and control of the means of production. Therefore impartiality, independence and fairness directly hamper the effective use of the law for that end, and cannot be allowed by the capitalists. Andrei Vyshinsky explains best this idea. He says :

> "Bourgeois theorists strive to depict the court as an organ above classes and apart from politics,supposedly, in the interests of all society and guided by commands of law and justice common to all mankind, instead of the interests of the dominant classes. Such a conception of the court's essence and task is of course radically false. It has always been an instrument in the hands of the dominant class, of its interests."35

A man called Montaigne who lived in the 16th century said and his advice is still good today :

> "We must shun law-suits (even at the cost of suffering very manifest injustice ...). No judge has yet, thank God ... spoken to me as a judge in any cause whatsoever, whether my own or another's, whether criminal or civil ... I... will never, if I can help it, place myself in the power of a man who can dispose of my head, <u>when my honour and life depend on the skill of a lawyer more than on my innocence</u> .... How many innocent people have we known to be punished, I mean <u>without the fault of the judges,</u> and how many there are that we have not known of !"36

Even if lawyers were impartial, the law is not.

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Criminal Case No. 3304 of 1981. The accused are charged with stealing by servant contrary to section 281 of the Penal Code. The case was fixed for hearing on 27.2.84 although it had been filed in 1981.

ii) R.V. Paul Mathu Githiako and Benson Ngugi Ndungu, criminal case No. 1089 of 1982, who are charged with kiosk breaking and stealing contrary to section 306 P.C. The case was fixed for hearing on 23.3.84.

iii) R.V. Peter Njuguna Gachie and three others, criminal case No. 2098 of 1982, who are charged with conveying suspected stolen property contrary to section 323 P.C. The case not fixed for hearing by Feb., 1984.

29. Mr. Justice Douglas in Bandy V United states 81 supreme court 197 (1960).

30. See for example Frank supra P. 90. 31. Statistical Abstract Supra

32. Elliot, supra, P.258. The problem of identification or rather mistake in identification has buffled many people. Obotunde Ijimere in the imprisonment of Obatala, African Writers Series No. 18 has satirised the problem. In one of his plays two men come to blows because they cannot agree whether the man who has passed them on the road was wearing a red or black "Kanzu". Of course the man was wearing a 'Kanzu' that was red on one side and black on the other.

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C H A P T E R F O U R

WRONGFUL IMPRISONMENT :

This chapter deals with wrongful imprisonment. The phrase wrongful imprisonment is preferable to wrong conviction because the former means that a person is wrongly convicted and imprisoned, whereas the latter only means a conviction of an innocent person. A person may be convicted without being imprisoned, for example when one is on probation. Wrongful imprisonment can be used to describe each of the two situations, where a man is implicated in a crime or is accessory to it in a minor or secondary sense but not guilty of the more serious or principal offence for which he is convicted. It can be used also to describe a situation where an appellate court, satisfied that he did not commit an offence for which he was convicted by a court of first instance quashes such conviction. This chapter deals with cases where people are convicted of, and imprisoned for, offences they did not in fact commit.

Evidence of wrongful imprisonment is seen in instances where a conviction is quashed on appeal and the accused is released, and where a retrial is ordered by the appellate court and the retrial results in an acquittal. Other cases of wrongful imprisonment are those where new evidence is discovered and the case is re-opened and during the hearing, it becomes evident that the wrong person was convicted. A few other cases point to the fact that sometimes events thought as impossible did in fact occur.

In all these cases, the accused is not guilty of the offence for which he has been convicted. What are the circumstances or factors which can be said to cause or contribute to

these errors? At the top of the list is unsatisfactory identification. There are also, confessions and admissions, evidence of guilty behaviour, cases where perjured evidence is relied on by the courts and occasionally, badly conducted defence. Identification takes many forms and can take place at different places - at an identification parade, identification by direct confrontation between the witness and the accused in the police station, in court or anywhere else, or identification from a photograph.

Research that has been conducted to establish what could be the cause of wrongful imprisonment points at misidentification as the prime cause. Brandon says:

> "Since eyewitness identification is a very common form of evidence in criminal cases, it is perhaps not surprising that a large proportion of the mistakes we have come across occur in this field . . . . Of the cases we have examined of people who have subsequently been pardoned or whose convictions have been quashed or sentences remitted, a remarkably high proportion have involved misidentification . . . . Our view that eyewitness misidentification is a major cause of wrongful conviction is reinforced by numerous studies of wrongful conviction in other countries, notably America, which show it to be a major cause of error there also" 1

The reason why identification evidence, especially the identification parade is unreliable is that even if the rules of identification are observed to the letter, and the whole operation carried out meticulously, <u>all that is proved is that the person picked out looks more like the culprit than anyone else on the parade</u>. And though this evidence is only supposed to be persuasive, courts have a natural tendency to regard such evidence as conclusive proof that the person

picked out is the perpetrator of the offence.

Brandon refers to a case where three brothers were convicted of robbery with violence in 1964 on the identification evidence of a single witness. Subsequently however, the real culprits were caught.[2] If it is true therefore that errors occur in cases where the correct procedures have been followed, how many errors are committed where it has not!

Dishonest witnesses, for whatever reason they choose to be dishonest, would not find it difficult picking out the accused even if they have not seen him before. If the accused is in remand, he sleeps in his clothes, does not wash, generally looks dirty and scruffy. When a witness is asked to pick him out, he does so automatically. To ask a witness, as is often done in fact, whether the person is in court while the accused is standing in the dock renders the whole process of identification superfluous, because it proceeds on the wrong assumption that witnesses are ignorant of the geography of the courtroom. Yet chances are that they have watched court scenes or trials on television, on cinema screens, have read books about them or have themselves been subjected to court process either as witness or defendant.

In one case, a witness pleaded total ignorance of all matters touching on court process, only to be shown later that she had not only been a witness in court many times before, but had in fact been charged with and convicted of inter alia, soliciting for prostitution, insulting behaviour, being drunk and disorderly, attempted suicide, larceny.[3]

The fact of misidentification points to the fact that all people are at risk of being picked or misidentified, but the risk is greatest with people known to the police, especially those with criminal records or with criminal associates. A man with a criminal record is often automatically picked up and put in identification parade for every offence that takes place in the neighbourhood [4] with a view to checking whether he did not commit the offence.

Even if such a person is innocent, chances are that he would be picked because witnesses who fail to make an identification would go for him. Identification parade situations make a witness fear that he has to pick someone even if he is specifically told that he need not.

Another major cause of wrongful imprisonment is admission of confessions and admissions in evidence. The law in recognising the fact that confessions and admissions can be misleading, demands that every confession and admission be admitted in evidence only if shown by the prosecution not to have been obtained from the accused by fear or prejudice, or hope of advantage exercised or held out by a person in authority.[5] The Judges' Rules too in recognition of the danger in statements obtained from accused persons attempt to guide the questioning of suspects.

The statement containing the confession or admission must be read by the suspect who must sign it "of his own free will". In attempts to extract confessions, desperate officers torture, threaten, entice or induce suspects to sign statements which may or may not represent what they have said or what they know. But once a statement has been

signed, the signature is prima facie evidence that the statement was voluntarily made and in case an accused attempts to repudiate it, the court would have to hold a trial-within-a-trial to determine whether the statement was voluntarily given. How can an accused prove to the court that he was tortured or otherwise forced into making such a statement?

The authorities keep perfecting their methods of repression and extraction and many allegations have been made of some of the methods they employ which though effective, do not leave behind any marks or evidence. In one case, an accused alleged that he had been forced to swallow ten coins in a bid to make him sign a statement. The court ordered an X-Ray examination of the accused which indeed confirmed the presence of ten "foreign bodies" in his abdomen. Other allegations have been made where the victims are made to stand naked in the cold throughout the night with a condition that they would be treated better if they "cooperate". This treatment, if repeated several times may be more effective than actual beatings.

Perhaps a good example of psychological and physical torture which does not leave any marks on the body for the court to see is that employed by Gletkin in "Darkness at Noon" by Arthur Koestler, where Gletkin used to have his victims woken up at midnight for "interviews" and extremely powerful lights were directed at the face and eyes of the suspects for as long as they did not "behave". This method proved very effective, as it invariably enabled him to obtain

signatures to things he had written himself.

It is very difficult for a person alleging that he did not voluntarily give a statement to prove that he was coerced into giving it if such methods are used. Police have realised that actual beatings result in evidence that is used against them. They therefore apply more subtle but equally, if not more effective methods.

Even in situations where no coercion is used, some people are so ignorant and simple-minded that they do not understand the significance of some of the things they say when being questioned. They may not necessarily be guilty, but they incriminate themselves. Brandon gives an example of a man called Timothy John Evans who was convicted of murder, hanged and later pardoned! He was described to the court as "an illiterate youth of 25 with an IQ of 65 and a mental age of 10½." [6]

Another source of errors is the habit of the prosecution of introducing evidence whose purport is that the accused acted in a manner that was suspicious or showed a guilt conscience. Evidence showing that a man fled when challenged to stop,[7] concealed or destroyed a weapon that was used to commit the offence, or invented false clues or that when arrested, stammered or was confused or told lies is adduced to show that such conduct showed "consciousness of guilt".

Experience, however, shows that an innocent man when placed in circumstances of suspicion or danger may resort to deception in the hope of avoiding arrest and conviction.

And once he has told a lie he has to tell another to cover the first one and the process establishes a string of lies which once proved, would leave him without defence. Even if he then chooses to confess to the truth, such confession would not be useful since a confession in law is one in which the accused inculpates himself and even others in all material particulars of the offence, not one where he exonerates himself.[8]

An English case is told of a man called Graham who was tried for the murder of his niece. "Graham at his trial attempted to deceive the court by presenting another girl as his niece. The prosecution's exposure of this deception led to Graham's conviction. He was hanged. Some seven years later, his niece turned up, alive"![9]

In some cases, the police are reluctant to disclose evidence that is favourable to the accused, since to do so would defeat their avowed aim of having as many "criminals" as possible convicted, for among others, promotional purposes. They refuse to re-open a case where a person has already been convicted and where new evidence comes to light. This is done to save the personal pride of the prosecutor and the officers who investigated the case.

Talking of obsession for convictions on the part of the prosecution, one wonders what the roles of the various parties are? Is the role of the prosecutor merely to secure the conviction of the accused by opposing and disproving whatever the defence says? Or is it that of a public officer acting with the public interest at heart, to assist the judge

dicover the truth? And what is the principal duty of a defence lawyer? To defend his client or to assist the court discover the truth, even if that hurts his client's case?

In Chapter Three, it was argued that if one sets aside ideals, and examines the practical realities of trials, one sees the prosecutor and the defence lawyer as opponents who desire to fight for their sides. They seek to outdo one another in the legal "game" and to do so, resort to various modalities for that end. It was also shown that some of those modalities are in fact illegal, unprofessional and immoral.

Other cases of wrongful imprisonment can be attributed to perjury committed by the prosecution's witnesses. At least this was the case in Queen v Kenyatta and Others [10] in respect of which the principal prosecution witness, Rawson Macharia swore an affidavit several years after the trial to the effect that the evidence he had given at the trial and that of other prosecution witnesses was false, and had no truth whatsoever, having been fabricated. He said he had been induced by great rewards promised and offered by the colonial government. One such reward was a scholarship to go and study in a British University in England and a job on return.

In the affidavit, Macharia recanted his evidence at the trial. It is interesting to note that he was tried and convicted of perjury not at the Kenyatta trial, but perjury in that he swore an affidavit in which he lied

that he had lied in the trial when he had in fact said the truth! It seems that if Macharia's evidence and that of the other prosecution witnesses was false - and there is other independent evidence that it was - then Kenyatta and his colleagues were wrongly convicted and imprisoned.

Occasionally a badly conducted defence can result in wrongful imprisonment. This is especially so where the accused is not legally represented. Even where he is, mistakes can be made as was the case in Kanja's Case.[11] Dr. Ooko-Ombaka has asserted that there is strong evidence that in that case, there had been plea-bargaining whereby the prosecution promised the defence that if they dropped grounds of appeal relating to conviction, the State would not object to the grounds relating to sentence, thus rendering a custodial sentence unnecessary. The same evidence, he argues, suggests that the defence relied on that promise, but the State did not honour its part of the bargain. He says, "indeed in reducing the sentence from three to one year, the court indicated that had the appellant offered to pay a fine through his lawyers during the appeal it might have imposed only a fine."[12]

The defence should have seen that this was a case with a political flavour in which some forces within the State wanted Kanja in jail at any costs and by whatever means, including deception. It should not have trusted so easily.

This is yet another case which shows how the criminal process has been abused by political and class forces to further their aims. Kanja had betrayed that class in his

public utterances, and his political platform as a member of Parliament had to be smashed, and the most convenient means was to have him sent to prison for at least six months which would ensure that he lost his parliamentary seat.[13] It had been done in the case of Mwithaga. It could be repeated. It was repeated.

Other cases of wrongful imprisonment are those in which criminals are called as witnesses or evidence orginating from them is used. This was clearly so in Kariuki's case [14] in which the evidence of a co-accused, contained in a confession was used and which was not corrobrated by, or which did not corroborate, any other sound evidence.

Who are the people who get themselves wrongly imprisoned? Brandon says they seem to be a normal cross-section of the people who normally get sent to jail. Many had previous criminal records. Most of them did unskilled work, many were unemployed or only did casual jobs. In short, the wretched of the earth. Very few were drawn from the middle class [15] or from respectable working class and this seems to tally accurately with the claims made in the first chapter that the legal process is used by the ruling class to suppress the other classes.

A large proportion of people wrongfully imprisoned have previous criminal records, and in their defence they mainly attempt to rely on alibis. To prove an alibi, one needs to call one's associates since these are the people with whom one spends his time and therefore people best placed to substantiate their alibis. Most of them,

probably with criminal records themselves would be most unwilling to offer evidence, but even if they agree to do so, it is very easy for the prosecution to attack and discredit them. They are hardly ever believed.

An analysis of two recent cases of wrong conviction and imprisonment illustrates the fact that the causes outlined above form the basis of the errors that lead to wrongful conviction and imprisonment.

In the case of Edward Kabui Jackson Kariuki and Another v Republic [16], the facts are that between 9.30 and 10.00 A.M. on the 4th of November, 1970, armed robbers stormed into the Naivasha Branch of the Barclays Bank and escaped with K.Shs. 164,493/10 in cash in a white Cortina car which had been stolen from Nairobi the previous day and which bore false number-plates. A witness who saw the car leave assisted a Chief Inspector of Police to follow it to the Uplands area just outside Nairobi, where they found it abandoned. They followed fresh foot-prints which led to Kirenga Village in Uplands. The two appellants were arrested in the vicinity with three others.

The first appellant (Kariuki) was implicated in the reply of another accused, Anthony Mwangi (Nduma) also arrested in the area. Nduma in his statement confessed:-

> "I did not rob but I was with the robbers. I was guarding the vehicle outside waiting for the money and I was given Shs. 81/= by Edward Kabui Kariuki, then I went to Uplands." 17

The case against Kariuki was that at 12.30 P.M. on the 4th, he was walking along a road near Kirenga when a policeman challenged him to stop but he bolted, casting

off his coat which he left behind. Somewhere either in the coat or in his trousers he had K.Shs. 5,838/25 in currency notes similar to some of those stolen from the bank. He was chased by the police assisted by members of the public and was eventually arrested.

Kariuki in his defence set up an alibi, saying in an unsworn statement that he had travelled from Mombasa where he had been living and that on 4th November, between 9.00 and 10.30 A.M. was in Kirenga trying to find a school contemporary. He was suddenly "over whelmed" by about a hundred people who burst out of a maize plantation. They flung him to the ground, beat him and removed his shoes, watch, fifty envelopes and Shs. 140/= in cash. They took him towards the Police Station beating him. His nose was bleeding and he lost consciousness. He came to three days later at Tigoni Hospital.

He was arrested and charged with robbery with violence, contrary to section 296 (2) of the Penal Code. He was convicted by the Nakuru Resident Magistrate on January 6, 1971 on the strength of evidence that, first, his alibi had been proved beyond reasonable doubt to be false. Second, he had this huge sums of money on him which he did not account for in his defence. Third, Nduma's statement which implicated him was found after a trial-within-a-trial to have been made voluntarily by him. He therefore inculpated himself and it was taken into consideration against Kariuki, a co-accused.

On the strength of these findings, Kariuki was convicted and sentenced to twenty (20) years imprisonment with hard labour and also to receive eighteen (18) strokes corporal punishment. Kariuki and the others accused with him appealed to the High Court at Nakuru (Bennett, J.) and after hearing them and the State Counsel, the learned judge dismissed their appeals, thus confirming their sentences. That was on Sept. 8, 1971.

On April, 18, 1983, the two appellants gave notice of their intention to appeal to the Court of Appeal and their appeals were admitted, consolidated and heard, though they were very late. The reason why they were allowed though late was given by the Court that it was "impossible to say where the blame lay (see judgment in Criminal Appeal 33 of 1982 at Nakuru of March 21, 1983 and the same is true of this one".[18] In the case referred to, two of the three accused who had been convicted together with Kariuki were set free by the same Court. The third had since died, unfortunately.

The Court of Appeal, after considering the evidence against Kariuki, found that although Kariuki was found with a huge sum of money, it was never proved to have been part of the money stolen from the bank.

The Court also found that the confession of Nduma did not implicate Kariuki because Section 32 (2) of the Evidence Act says that a confession must have the effect of admitting in terms either an offence or substantially all the facts which constitute an offence. In Nduma's confession, all the man said was that Kariuki gave him Shs. 81/=.

In any case, that was accomplice evidence and therefore evidence of the weakest kind, especially if the confession is repudiated as it was in the present case. According to Anyima Omolo v R [19] such evidence could only be used if corroborated or supported by other sound evidence, but there was no other sound evidence against the appellant.

The Court summed up saying the appellant had succeeded in showing that there was an error of law in the judgment and the conviction was not safe. The conviction was therefore quashed and the appellant set free after serving thirteen years (13) years of his twenty-year jail term!!

When this was revealed it shocked the whole country. The Nation reported it in banner headlines, "NOT GUILTY AFTER 13 YEARS IN JAIL; Investigations Not Thorough - Judges." [20] Everywhere people were saying they no longer had faith in the judiciary. The case was rated by The Sunday Nation [21] as one of the most important events of the year.

It is submitted that this was a mistake that could have been avoided had the police done their investigations more thoroughly. The Court of Appeal put the blame squarely on the Police. [22] The two Courts too, (the Resident Magistrate's Court and the High Court) should have acquitted the accused because, as the Court of Appeal found, there was no evidence to support a conviction, bearing in mind that a judge has to be convinced beyond reasonable doubt that the accused committed the offence, and his belief has to be based on reasonable grounds. Whenever there is some doubt, the benefit of doubt always goes to the accused, not the

prosecution.

Since the accused indeed was convicted on insufficient evidence tendered by the State, this appears to be a proper case for the application of the doctrine of res ipsa loquitur, which literally means "the thing speaks for itself."

According to Osborn's Concise Law Dictionary,[23] the maxim applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant (in this case, the State, assuming that it is sued by Kariuki in tort for damages arising out of the negligence of its servants) that a court would find without further evidence that it was so caused.

In Byrne v Boadle,[24] a barrel of flour rolled out of an open doorway on the upper floor of the defendant's warehouse and fell upon the plaintiff, a passerby in the street below. It was held that this of itself was sufficient evidence of negligence. The maxim shifts the onus of proof from the plaintiff to the defendant, who has to satisfy the court that there was no negligence.

Under the Government Proceedings Act,[25] subject to certain provisions in the Act, the government is "subject to all those liabilities in tort to which, if it were a private person of full age and capacity it would be subject ... in respect of torts committed by its servants or agents."[26]

This means that the Government is generally, vicariously liable for the torts committed by its servants when acting in the course of duty. But the law protects the government against liability in torts arising out of judicial decisions.

This is provided for in Section 4(5) of the Government Proceedings Act, which states:

> "No proceedings shall lie against the government by virtue of this section in respect of anything done or ommitted to be done by any person while discharging any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

This proviso operates as an exception to S. 4(1) which provides for actions to lie against the government in respect of torts commitfed by its servants or agents.

Apparently, Kariuki cannot sue the State for the negligence of its servants which led to his spending thirteen years of his life in prison when apparently he was innocent. It is submitted here that be that as it may, the State is under a moral, if not a legal duty, to compensate him. It must make some ex gratia payment to enable him to make a fresh start in his life, which obviously must be in a shambles, due to his long stay in prison.

At least such a duty was recognized, accepted and discharged by the Japanese Government in a case in which one Shigeyoshi Taniguchi was wrongfully imprisoned.[27] Taniguchi was charged with robbery and the murder of a 63-year old black market rice dealer in 1950. The equivalent of 36 U.S. dollars were taken from the victim. Taniguchi, then nineteen, was arrested a month after the killing, tried and convicted. He was condemned to death by hanging in 1951. His initial appeals were rejected and in 1957, the Supreme Court upheld the conviction and death sentence.

"He continued to wage a legal battle"[28] for a new trial and in 1976 the Supreme Court finally granted his request, sending the case back to the Takamatsu District Court on Japan's main South Western Island of Shikoku for a retrial.

The judge ruled on Monday, March 12, 1984 that the prosecutor's evidence was inadequate to support a conviction and acquitted the appellant, who had spent thirty-four (34) years in prison awaiting to be hanged!!! He spent his entire youth and middle age in prison, and was released an old man of 53! The enormity of the injustice speaks for itself. The court in appreciation of that fact at least extended a gesture of goodwill by awarding indemnity or compensation for the years spent in prison. It awarded him the equivalent of 328,000 US. dollars.

A comparison can be made of the factors that have been considered as forming the basis of the errors that led to wrongful imprisonment as they appear to have influenced both Kariuki's and Taniguchi's cases. In both, the convictions were based on insufficient evidence, because investigations had not been thorough enough to show that the accused were really guilty. Kariuki's case especially brings out most of the factors analysed. For instance in it, an alibi was raised and rejected. He behaved "guiltily" by running when challenged to stop and in the process, cast away his coat which might have contained the money alleged to have been stolen, thereby attempting to destroy evidence. Nduma's confession, a co-accused was used in evidence against Kariuki.

Wrongful imprisonment shows that there is something wrong

with the legal system as a whole; that it is not working as well as it should. How many cases are involved is hard to tell, because that would require a major study as was done by the Americans which resulted in the publication of the book "Convicting the Innocent" and by the British which resulted in Wrongful Imprisonment by Brandon and Davies. Such a study would not only need the cooperation of the Police but of the judiciary in its entirety, the public, who after all, are the victims and other government departments.

There is suspicion that there are many cases involved, but whether there are many cases of wrongful imprisonment, or only one does not make any difference to the fact that public confidence in the judiciary is stretched to the limits when the courts convict an innocent man. People can have no confidence and they should not be expected to have confidence in a system that is more fallible than it need be. They allow their affairs to be adjudicated upon (that is, to the extent that they have a choice in the matter) by judges because they are confident that their conditioning (the judges) makes them more likely to do justice than other people.

If judges therefore make avoidable mistakes, people tend to distrust the judicial process and they tend to execute their affairs according to their own sense of justice. It is needless to say that the "rule of law" so much cherished in this country would then be in danger of being overtaken by the "rule of the jungle" or "mob justice" or injustice, as it is sometimes called. In other words,

people would take the law into their own hands to execute arbitrary justice.

Rawls, talking on justice has said that law and other institutions no matter how efficient and well-arranged, must be reformed or abolished if they are unjust, for "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many."[29]

Rawls' view is right, and a colleague's view that some injustice for a few is inevitable, and must therefore be tolerated for a greater justice for the majority must be rejected, although realistic. People condone injustice because "it is unrealistic to think of a society where there is no injustice." They say it is utopian.

Ssekandi has rightly observed that "justice is a right for all mankind and not a privilege which can be withdrawn as and when it suits the leadership."[30] Any acts that tend to qualify, compromise, or in any way diminish this right must be opposed by all peoples. They include detention pending or during trial, the delay of the trials themselves, and the use of the criminal or judicial process for the political or partisan interests of a few politically and economically powerful groups to suppress the less dominant groups.

His Excellence the President, perhaps realising these truths - that the legal process is being used in the manner outlined above - has made a scathing attack on the judiciary. He has called on the Kenyan judiciary to ensure that justice was done to all citizens irrespective of their status in life.[31] He said that some court decisions were so irrational that they left people "wondering about the integrity of our judicial system". He said, "injustice should never be seen to be done in our courts if we are to rely on them."

The President substantiated his claim by citing the case in which a farmer who had incurred a loan of Shs. 5,000/= from a bank, had his land auctioned by an auctioneer who had received instructions from a court to do so. Saying the debt was insignificant compared to the market value of the farm, (90 acres, 10 of them under coffee), he said it was hard for any reasonable citizen to be convinced justice was done.

He said such court rulings would only create strife and death, as most of the affected people could resort to violence. (The foregoing pages have attempted to show that where people have no confidence in the judiciary, they tend to administer justice arbitrarily, by taking law into their own hands).[32]

This is not the first time an attack of this nature and magnitude has been levelled against the judiciary by a member of the Government. In mid-February, Mr. Martin Shikuku said, "big people " owe the government and banks

millions of shillings and their property was never attached or auctioned. But the common man's land is auctioned if he fails to repay the loan "only for the rich people to buy it."[33]

It is the courts that issue orders to attach or auction property as a means of enforcing a debt. Mr. Shikuku was therefore accusing the courts of readily issuing such orders in respect of the poor, but hesitating to do so in respect of the rich and powerful. A kind of economic or class discrimination.

The courts have abdicated their responsibility and position of standing above party and class politics and actually become parties in the conflicts. This is very damaging to their authority and ability to see things clearly and impassionately. In the famous case of Yuill v Yuill,[34] it was said:

> "Justice is best done by a judge who holds the balance between two contending parties without himself taking part in their disputations."

If a judge should allow himself to take part in the disputations,

> "he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."

What is the impact of these attacks on the independence of the judiciary? As already seen, the judiciary should not take orders from the executive or from the legislature or from any other institution or person. It should not be told what to do in respect of cases that come before it.

But these attacks do not seek to tell the judiciary what its decisions should be. The attacks are simply criticisms of the judiciary where it seems to be erring. The judiciary has the service of society as its sole aim and justification. That society is therefore entitled to criticise it if it does not seem to be discharging its duties the way it should. In other words, judges in making their decisions should look beyond the courtroom and consider the social context of the dispute. That is the reason why they have discretion to decide cases without taking directions from anybody.

FOOTNOTES

1. Brandon R, and Davies C., Wrongful Imprisonment: Mistaken Convictions and their Consequences, Allen & Unwin Ltd., London (1973) p. 24.

2. P. 25.

3. P. 32.

4. Ibid.

5. S. 26 Evidence Act, Cap. 80 Laws of Kenya

6. Brandon supra p. 49.

7. This was the case in Kariuki & Another v R infra

8. S. 32(2) of the Evidence Act defines a "confession" as any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence."

9. Jerome and Barbara Frank, Not Guilty, Gollancz, (1957) p. 156.

10. Supra, Chapter three, footnote 22.

11. Republic v Waruru Kanja, unreported, Chief Magistrate's Court, Nairobi.

12. Supra, (Chapter three footnote 14) at p. 16

13. Constitution of Kenya S. 39.

14. Infra.

15. The few from this class who get sent to jail are normally those who refuse to obey the rules of their class, that is, those who have fallen from grace.

16. Criminal Appeal No. 89 of 1983, Court of Appeal sitting at Nakuru.

17. P. 6 (judgement)

18. P.2.

19. (1953) 20 E.A.C.A. 218.

20. The Daily Nation, Saturday, October 18, 1983.

21. The Sunday Nation, January 1, 1984.

22. See report of The Daily Nation, October 18, 1983 p. 1.

23. By Burke, John (sixth Edition) Sweet & Maxwell, London, 1976 p. 289.

24. (1863) 2 H & C 722.

25. Cap. 40 Laws of Kenya.

26. S. 4(1).

27. See The International Herald Tribune, Tuesday, March 13, 1984 p. 2. Also The Daily Nation Tuesday March, 13, 1984, p. 2.

28. It is interesting that the the Tribune describes Taniguchi's constant appeal for a retrial "a legal battle". These words and the attitude they express were examined in Chapter Three.

29. Rawls, J. A Theory of Justice, Clarendon Press, London, (1972), p. 3.

30. Ssekandi F.M. Whither to the Common Law Tradition in Africa? published in The Uganda Law Focus, by the Law Development Centre, Kampala, September 1974 Vol. 2 No. 2. p. 93.

31. See The Sunday Nation March 18, 1984 pp. 1 & 24.

32. Supra pP. 85-6.

33. See The Anvil February 15, 1984 pp. 1 & 8.

34. (1945) 1 All E.R. 183.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION.

This dissertation has attempted to provide an overview of the criminal process in operation: not the rules so much as who actually does what and how, and the consequences thereto. The primary purpose has been to explain and criticise the present practice and above all, to demonstrate that its failings are not isolable incidental features of an otherwise sound process, but are its characteristic and intrinsic features. Thus for example the forceful encounter between the police and an arrested person, which infects all the evidence that the police obtain from such a person, is a circumstance that rules will not eliminate, it is the method of criminal investigation.

Delays of anywhere from three months to five years (and even more!) between an arrest and final judgement are not the occasional happenings of a fallible human institution: they are routine and are dictated by the normal operation of the process.

The criminal process itself usually consists of a brief police investigation, followed long afterwards by a judgement based on a trial in which guilt or innocence is a consequence of a win or loss. The study, particularly Chapter Three, has shown that a judgement does not, although it should, reflect the guilt or innocence of an accused. It instead reflects the pyrotechnics of the manipulative ability of lawyers with the verdict as the prize. In other

words, justice and fairness are not necessarily the ideals sought by the criminal-legal process.

The Constitution of Kenya contains the guarantees for the exercise of fundamental rights and freedoms. These are basic human requirements, sometimes referred to as natural rights, which any decent society has an obligation to respect, any decent human being a duty to co-operate in achieving, and any decent state an obligation to respect and promote. The rights of life and liberty, among others, are inalienable: they are not something that government graciously confers upon men, but things no government can take away from them.

This is another way of saying that this approach to natural rights is concerned with the dignity of man. It is from this basic philosophical principle that the natural rights argument derives much of its strength. For it is becoming increasingly clear, that it is respect for the dignity of the individual that most sharply differentiates democratic from totalitarian systems.

Granted this basic principle, it follows that any conduct of the state that impairs the dignity of man is dangerous and must not be tolerated or condoned. The dignity of man must not be compromised. And any argument for conformity that finds its ultimate sanction in force rather than reason strikes at the integrity of the individual; and thus at the basic principle of democracy.

Those who have concern for the preservation of elementary freedoms must not take refuge in legalism. It is not sufficient for freedom to be vindicated by the courts. That is barren vindication. If the preservation of those freedoms depends exclusively or ultimately upon the courts, then all hope is lost. The courts merely perform a post-mortem function; they determine whether freedom was and/or is curtailed where it should and if the answer is in the affirmative, they simply endorse and legalise such curtailment. If on the other hand, there is no justification for taking away a person's liberty, they simply acquit him.

Violation of one's liberty should not take place at all unless there is justification for it. And liberty should not contradict other values such as state security or maintainance of law and order. As Muriuki has correctly observed, "If the exercise of constitutional rights will thwart the effectiveness of enforcement of law, then there is something very wrong with that system".[1]

The natural rights approach to the problem of freedom, then, establishes the principles that freedom is an absolute right and that it is an absolute good. Yet the principles intended to support this ideal are flouted, scuttled or repudiated so frequently, openly and impudently by the so-called guardians of the law that one is left wondering what is so fundamental about the Constitution anyway. This phenomenon was dealt with in Chapters Two and Four, which showed that justice is merely an incidental feature of the criminal process and not its goal.

If that is correct, then it must be conceded that either these principles are too complex to be understood, or too weak to be effective, or perhaps that men are so lacking in virtue that they are not prepared to practise those truths they accept in principle.

This study has attempted to show that most of the defects in the criminal process are avoidable. Like Judge Jerome Frank of the Supreme Court of America, the writer believes that legends and myths have grown up about the judiciary which serve to obscure the realities. Frank who calls for reform says:

> I am a reformer - I see grave defects in some of the ways in which courts operate, defects that I believe can be eradicated, but will never be intelligently dealt with unless they are publicised.... Some persons suggest that candor about courthouse ways is unwise, that it is undesirable to let the public know the imperfections, both the curable and the incurable in our judicial doings.... I am unable to conceive... that in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions. 2

Judge Frank admits that it is in the courthouse that very considerable amounts of judicial injustice occur. It is therefore proper that any reform should extend to the courtroom, where it is most needed.

Common law systems often claim that the economy of their criminal laws is based on the premise that it is better for ten guilty men to go free than for one innocent

man to be convicted.[3] Kenya forms part of the common law system, and this thinking can therefore be said to be part of its policy. If that is so, then it is argued that it has failed to live up to that very high standard of justice. As argued in Chapter Four, several people have in fact been convicted who were later found to have been innocent. This indicates that perhaps there are many more who have not been as lucky, and who have had to serve full sentences for offences they never committed.

The social cost of avoiding mistakes of that nature can of course be prohibitive, but even one mistake of conviction of an innocent man is so abhorrent that it must not be allowed to occur, at any cost. Public confidence in the criminal process which is shaky anyway, is completely shattered by such occurences.

RECOMMENDATIONS

It is therefore suggested that first of all, the role of the police should be re-defined. It has been shown that while police are fairly good at maintainance of law and order, and at emergency operations, they are ill-placed as investigators of crime and prosecutors of offenders they themselves arrest.

The primary responsibility for investigating a crime and preparing an accusation should be left to the Solicitor-General, while the duty to prosecute all cases should be taken up by the Attorney-General, as opposed to the present system in which he prosecutes only in important cases.

Both offices should be manned exclusively by professional lawyers and not laymen as is generally the case.

The obvious advantages of this division of labour is that bias and self-interest is reduced to a minimum, in contrast to the present system where the police detect offenders, arrest them, investigate their activities while detaining them and ultimately prosecute, demanding, as they always do, for custodial sentences to be imposed! The rules of natural justice, such as the rule against bias,, that is, that no man should be a judge in his own cause (nemo judex in causa sua) are flaglantly violated.

The problem of delay can be tackled most effectivel by empowering the High Court to extensively employ the use of the writ of mandamus to compel subordinate courts to either hear cases pending before them or otherwise show cause why prosecution should not be discontinued. This would not only have the effect of discouraging the courts from granting unnecessary adjournments to the prosecution, it would also have the effect of impressing upon the courts the fact that they no longer have the power to leave cases unattended for eternity.

Questions of delay are so frequently asked that sometimes it is suspected that they are mere allegations without foundation. But the truth is that there is indeed an acute problem of delay and of pending cases before Kenyan courts. And a lot of injustice is occasioned by these delays.

Consider for instance, the case of Charles Lamambia, who won an appeal against a seven year sentence only one day before he was due to complete the jail term! Although he had been convicted by a Nakuru Resident Magistrate in May 1978, and was jailed for stock-theft, he appealed at the Nakuru sub-registry of the Court of Appeal in August of the same year. His appeal, the Attorney-General has admitted, "was not heard as soon as it should have been." [4]

This delay in hearing his appeal not only renders the right of appeal illusory, it renders the court's judgement of little practical value since the unfortunate man has already served the full sentence minus one day!!

To curb this problem, some institution of superior jurisidction, preferably the High Court, should be empowered to issue orders to subordinate courts which leave cases pending before them to dispose of them within certain time limits, otherwise the institution should have power to terminate proceedings which violate the constitutional guarantees of a speedy trial.

This approach has been tried in the United States and it is working fairly well as the case of Klopfer v. North Karolina [5] shows. Any defendant whose case has taken too long is allowed to petition the Supreme Court which orders a speedy trial or terminates the trial and acquits the accused.

Lawyers too, contribute to the problem of delay by always asking for adjournments so that they could appear in

other courts. The conflicting trial commitments of busy counsel produces gaps in the scheduling of trials and this leads to loss of court time. Lawyers forget that the criminal process exists, and they too exist primarily to assist the accused obtain fair trials. The interests of their clients, the accused, should therefore come first before all else. These and similar criticisms were levelled against lawyers at a Law Seminar recently and it is worth noting that they did not even defend themselves.[6] Perhaps they had no defence.

The right of legal representation is largely rendered illusory to the majority of litigants due to the exorbitant fees charged by lawyers. Free legal aid is only available to very few people. It would be good if this facility would be extended to as many litigants as possible, but financial constraints would definitely not make such a project feasible.

The problem seems to lie in the system which makes it difficult, if not impossible, for an accused who is not represented to defend himself effectively. F.M. Ssekandi has discussed legal representation and he has said:

> . . . it would appear to be necessary for the system /the adversary system/ to operate efficiently for the parties in a case to be represented by counsel. In the majority of African countries, there is such a scarcity of lawyers that several parties are not in a position to find counsel to represent them. Also because of the short supply of lawyers, those available charge fees beyond the means of the majority of litigants. These factors *tend to point to the weaknesses in the system* especially in the absence of legal aid to indigent litigants.

What needs to be done is for the government to revise all written laws and cause them to be re-written in simple and straightforward language, and whenever possible, to offer illustrations of what is meant. This suggestion is not entirely novel, since it in fact was used in the drafting of the Indian Transfer of Property Act, 1882 (an Applied Act). This would enable most literate people to read and understand the law. There is absolutely no good reason why the law should be expressed in technical semantics which are hard to understand, even by the lawyers!

As to the "short supply" of lawyers, that might have been the case a few years ago, but it is felt that government efforts to train more lawyers are being realised. The government has now recognised the need to train more lawyers as opposed to the situation prevailing a few years ago when it was felt that the market was becoming "saturated." This view was largely associated with a former attorney-general who did not believe in the ability or competence of African lawyers, and being in charge of legal education, successfully muzzled efforts to train more African lawyers.

It is further suggested that bail practices as they are at present favour the rich and oppress the poor, and bail should be abolished. A new system should be evolved which does not depend on money and property for its effectiveness. This is because there are now more genuinely poor people in Kenya than in the past.

It should be the aim of government to raise the standards of living of all Kenyans. And by this is meant the ability to afford basic goods and services. Since these goods and services have to be bought, the government should take measures to bridge the gaps between the rich and poor, so that the resources of this nation can be shared equitably. It is only then that fundamental rights and freedoms can have any meaning to most people.

Lastly, the Evidence Act needs to be ammended. As it is at present, the state is accorded privileges which enable it to introduce hearsay evidence, which is poor wisdom. Under S.132 of the Act, the state can adduce evidence of secret informers whose identity is protected and who may not be called so that they can be cross-examined by the accused. In Shah v. R.,[8] the High Court took a step in the right direction when it ruled that a secret informer must be called or his name be disclosed. Similarly in Raichura v. Sondhi,[9] it was held that a police officer must state the factual basis of an opinion and was not entitled to plead that he was privileged under S.132.

The state, however, determined to see that that privilege was maintained, swiftly enacted the Statute Law (Miscellaneous Ammendments) Act,[10] which in effect abrogated the two decisions. The law now is that communications not only between public officers but also with private individuals, in the course of duty, are admissible and are privileged.

Under S.131, in a civil matter between the state and an individual, or corporation, nothing stops a public official

directly concerned from withholding documents which might be crucial to the outcome of the case, if he thinks the disclosure of such documents prejudicial to the public interest. Under S.132, communications to a public officer by a private person are protected, and under S.147, no person who is entitled to refuse to produce a document can be compelled to give oral evidence of its contents.

Under S.133, a ministerial affidavit is sufficient to support the objection to the production of public documents This position was well illustrated in Duncan v. Carmell Laird Co. Ltd.[11] which makes the minister the custodian of the public interest and which has been held to be applicable in Kenya. This case has however been overruled in England by the case of Conway v. Rimmer [12] in which the court stated that it had a right to scrutinize the documents in order to determine the genuineness of the privilege claimed. Kenya continues to apply Duncan v. Carmell Laird, a case that has been discredited and overruled.

The writer believes that these ideas can help improve and streamline the administration of criminal justice, which as presently administered is far from satisfactory.

FOOTNOTES

1. Muriuki M.S. Where Lies the Balance : The Relative Strengths and Weaknesses of the State and the Individual in the Process of Litigation. Nairobi, 1982 (Dissertation).

2. Frank supra p. 86 footnote 30. (emphasis added).

3. The Romans put the ratio at one to one, Fortescue at twenty to one, Sir Edward Seymour at ten to one. Lord Hale reduced this to five to one, but Blackstone reverted to the ratio of ten to one, and so it became established.

4. See report in The Daily Nation (Nairobi), March 8, 1984 and comment in The Daily Nation, (Nairobi, April 3, 1984 at p. 3.

5. 386 United States 213 (1967) per C.J. Warren.

6. See The Daily Nation (Nairobi), Saturday April 14, 1984 p. 3. Advocates were accused of, inter alia, causing cases to be adjourned on "flimsy grounds" to go and "play darts" or because of death of a relative, and with colluding with registry clerks and defendants who steal court files. Justice Kneller blamed advocates, saying they make long submissions.

7. Ssekandi supra p. 51 footnote 19. (emphasis added).

8. (1970) E.A. 39 (Mwendwa C.J. and Farrel J.).

9. (1967) E.A. 624 (Sir C. Newbold, Duffus and Spry JJ.A).

10. No. 13 of 1972 sch.

11. (1942) Appeal Cases 624.

12. (1968) A.C. 910.

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