

IGNORANCE OF THE LAW IS NO EXCUSE.

SHOULD THIS BE THE POSITION IN KENYA?

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TABLE OF STATUTES:

- Criminal code of Japan of 1972 . . . . .
- Interpretation and General Provisions Act (Cap 2 laws of Kenya).
- Penal code of Austria of 1974
- Penal code of Kenya (cap 63 laws of Kenya).
- Penal code of Malawi (Cap 7:01 laws of Malawi)
- Penal code of Tanzania (cap 16 laws of Tanzania)
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- Penal code of Zambia (cap 146 laws of the Republic of Zambia).

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- Brett V. Rigden II c. 46
- Cooper V. Simmons [1862] 7H and N, 707
- Karuria V. R. [1969] E.A 16
- Kasau wa Muiga and others V. Rex [1912] 4 E.A. L. R. 103
- King V. Lord Vaux I plowd 342, 1568
- Kotak V. A. Ali Abdulla [1957] E.A, 321
- Lim Chin Aik V. R. [1983] A.C. 160
- Martindale V. Falkner [1846] 135 E.R. 1130
- Montrioff V. Jeffreys [1825] 172 E.R. 53
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- Oakland V. Carpentier 21 cal 642
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- Regina V. Campbell and Mlynerechuk [1972] 10.C.C.C.  
(2nd) 26 Alberta District council
- Reg. V. Sharpe 7 Cox C.C. 214
- Richardson V. Mellish [1824] 2 Bing, 22 229
- Rex V Karoga wa Kithengi and 53 others [1913] S.E. A.L.R. 50
- Rex V. Ross [1944] 84 C.C.C 107 British columbia county court
- S.V. De Blom [1977] 35.A, 513
- Vernon's case Y.B 20 VIII for 2 Pl 4
- Zus V. Uganda [1967] E.A. 420

ABBREVIATIONS

A.C	-	Appeal cases
Bing	-	Biggins
Cal	-	Calthrop's customs and Liberties of England.
C.C.C	-	Central Criminal court
Cox C.C	-	Cox's criminal cases
E.A		East African law Reports (1968 to 1975)
E.A.L.J	-	East African Law Journal
E.R	-	English Reports
E.A.L.R.	-	East African law Reports (1957 - 1968)
N.L.R	-	Newfoundland Law Reports
Russ & Ry	-	Russel and Ryan
S.A	-	South Africa Law Reports.

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PROPOSAL:

PROBLEM

"Ignorance of the law is no excuse." Should this be the position in Kenya?.

JUSTIFICATION FOR THE STUDY

Law and Society are two sides of the same coin. We cannot have a society without law and on the other hand, we cannot have law unless there is a society, its size notwithstanding. Therefore, law is very important in any society. Unless the political, socio-economic, cultural and the religious aspects of the society are governed by law there are bound to be chaos in the society. It is therefore imperative that every member of society who is to be affected by a particular law knows what that law is. Hence one of the aims of this dissertation is to find out whether everybody in Kenya knows what the law is since Kenya is not an exception to the general rule that every society must be governed by law.

It would be shameful and an unforgivable lie to argue that nothing has been written on the subject. Much has been written by very authoritative members of the bench, legal practitioners and scholars alike. But most of their works were written several years ago. This is not to say that their works are outdated. As expected, these authors

wrote their works at a time when legal studies were not as developed as today and when not many people were as educated as there are today. Each of these authors had therefore his own speculations the most significant being that with time more people were going to learn the law and ignorance of the law was not to remain a big problem for so long. It is therefore my duty to find out the changes that have taken place since these works were written and show whether their speculations were well founded.

Everything possible should be done to ensure that everybody knows the law he is expected to comply with. Accidental compliance with the law should not be the order of the day. Different people have different conceptions of what law is and some people commit crime thinking that they are doing what is right in the eyes of the law. Law is not inbuilt in every human being. Every citizen has got his own conception of what law is depending on the way he has been brought up and due to his cultural and religious convictions. To a Muslim, for instance, one who does not accept the conversion into Islam deserves to be killed. A christian, on the other hand, believes that one has a right to choose whether to be a christian or not. Likewise, in the eyes of the law of this land everyone has a choice of deciding whether or not he should be a member of one religion or not and killing a person for refusing to be a Muslim is tantamount to murder and is punishable by death. To exemplify



the point further, to a maasai, killing a fierce animal like a lion is heroism and is rewardable by treating such a person with much respect and dignity. But in the eyes of law this is illegal and is punishable.

Many more ~~examples~~ can be cited. This being the case, I feel obliged to look for a formula of determining when one should be punished for contravening a law without having known that he was doing so.

The most important justification of this study, in my own view, is to enravel the rationale of this principle of law especially in criminal law. One would argue that this is not an important diagnosis at this stage of development of the law since if the principle were not an important tool of enforcing law and order, with a substantial amount of justice, then it could have been thrown into the dustbins of history. But it is also worth noting that some important principles of law wear out in importance while others which have never been important at all have remained in the statutes and also in law reports without anyone questioning their rationale. It is therefore my endeavour to question the rationale of the principle putting all important factors into consideration.

Closely related to the above, I wonder whether a doctrine propounded by Western scholars to properly and appropriately meet the needs of the westerners who have a background different from ours and are at a higher

stage of development in the legal field would have the same blessings in Kenya which has a different cultural background and is at a lower stage of development in legal circles. As Horsfall J. Said,

"it would be wrong to apply principles of equity which were devised to suit christian society in England during the last century in order to import a presumption whereby to gauge the intention of a Muslim husband and wife living in present day Zanzibar whose social and cultural background is very different from that of Victorian England."<sup>1</sup>

The same is also true with regard to criminal law.

This is not to say that all principles of law based on English cultural background should not find any place in our law. Each case should be decided on its own merits and hence the need to diagnose the rationale of applying this doctrine (whose cultural background is Roman) in Kenya.

"Ignorantia Juris non excusat" can best be applicable only where everybody knows all the law. But as is expected no one knows all the law. This was best explained by Abbott C.J. in Montriuou V. Jefferys<sup>2</sup> when he said that

"God forbid that it should be imagined that an attorney, or a counsel or even a judge, is bound to know all the law i.e. to make him liable in damages if he does not."

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Since an attorney is trained as a lawyer and knows a substantial amount of law and is able to know the law with ease whenever he needs it, then this statement should protect a layman even the more bearing in mind that to a layman the law is what a lawyer says it is. But this is far from the truth since it was pronounced twenty one years later by a court in the same (English) jurisdiction still highly authoritative that:

"Everybody is presumed to know the law except His Majesty's judges, who have a court of Appeal set over them to put them right."<sup>3</sup>

While it may be argued, and correctly so, that this position enhances the independence of, and the non-interference with the judiciary, an accused would feel that the law is very harsh to him if it accepts on one hand (as it does) that an attorney or a judge cannot be expected to know all the law whereas he, without much legal knowledge, is expected to know all the law lest he falls under the condemnation of the same law if he trespasses it. I therefore find it rewarding to find out why this should be the case.

Having read some recommendations which have been made in the past and having observed their implementation I have noted that the doctrine is still harsh to those who appear before the machinery of the law e.g. Professor Mutungi suggests in his article that:

"..... Kenya's innumerable chiefs, sub-chiefs etc could play an invaluable role in informing their residents of the new laws and the desired actions expected of the citizenry."<sup>4</sup>

This has been attempted in certain cases but without improving the situation since most of these officers are not well versed with the law. Due to this reason, without denying my precursors in this field the credit they deserve, I wish to plug the loopholes they left in their researches. This is not to say that I will have given perfect recommendations.

But my major task will be to show whether the law should be otherwise or whether it should remain as it is today with or without any modifications.

WORKING HYPOTHESES:

Any researcher normally has a tentative conclusion(s) otherwise he would lose the sense of direction. The conclusion(s) may be proved in the affirmative or in the negative. I am not an exception. I will be working on certain assumptions and with certain tentative conclusions and the epilogue of my dissertation will either confirm these conclusions or declare them negatory.

In the first place, I am working on the hypothesis that the law as it stands today is harsh and causes a lot of injustice to those who fall prey of the same.

Secondly, I contend that many people commit crimes without necessarily having a criminal mind.

My third hypothesis is that not all the accused (or even the subjects of the law) have the knowledge of what the law is though every subject of the law is presumed to know the law.

It is also my contention that adhering to the doctrine of "ignorantia juris" strictly would not educate the public on what the law is.

I am also of the opinion that it is not very difficult to prove when one's ignorance of the law is justifiable and therefore those whose ignorance is justifiable should be acquitted.

My sixth hypothesis is that adhering to the maxim rigidly cannot help to make the law objective since the law, in my own view, is not objective.

My final hypothesis is that the opinion of quite a number of scholars that the maxim exists and rests upon public policy alone is not well founded and therefore the law is not appropriate for Kenya.

I intend to condense my wide research into five chapters. The first chapter will entail introduction of the dissertation which will include the definition of the maxim, its origin and historical background, the exceptions to the general rule, the adoption of the doctrine in Kenya and finally its application in other jurisdictions.

The second chapter will dig into the legal archives to look for the justifications advanced by a number of scholars and practitioners of law as to the rationale of the doctrine.

The third chapter will be a detailed account of the reasons advanced against the application of the principles by different lawyers.

In chapter four, I shall analyse the merits and demerits of applying the doctrine in Kenya and give my own stand as to whether I consider it appropriate to retain it in our penal code or not.

The last chapter will deal with the findings of the research in order to show whether the tentative conclusions have been proved in the affirmative or in the negative. Recommendations will also be given as to how the position of the law should be improved if need be.

METHODOLOGY

In this research work I am privileged not to have been the first person to carry out a research in the same field. The researches carried out by previous researchers in the same field will therefore be very helpful to me.

I have also had to apply the knowledge I gained over my clinical programme where I was attached to the Principal Magistrate's court at Nakuru. My experience in court procedures and its working serves as a good source of information besides the research I carried out in the archives therein.

But primarily, the Nairobi University Library where works of such important scholars as C.K. Allen<sup>5</sup> and law reports are shelved for students' use has been very helpful to me in my research.

LITERATURE REVIEW

While I admit that it was not very difficult to get a lot of material on this topic, I must also admit the fact that the few literature I got was very resourceful to me.

I have gone through the works of Professor Mutungi in his article on "communication of the law."<sup>5</sup> I wouldn't be justified to say that his research was not elaborate. But this is not to say that I only have the views he has and no more. I have supplemented his works and, where necessary, demystified any incongruences occasioned by his research.

I have also gone through the works of Glanville Williams,<sup>7</sup> Okonkwo,<sup>8</sup> Smith and Hogan,<sup>9</sup> Keedy<sup>10</sup> just to mention a few and I would humbly submit that none of these works in solitude can be said to be handling the subject exhaustively.

I have therefore consolidated the ideas of each of these authors and others', cleared any heresies therein and replaced them with the correct ideas and besides aired my own views.

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FOOTNOTES

1. Raya Binti Salin Bin Khalfan et Busaidi V. Hamed Bin Sulerman el Busaidi & another (1962) E.A. 248, 255.
2. (1825) 172 E.R. 53
3. (1846) 135 E.R. 1130
4. Mutungi, O.K., "The communication of the law under conditions of development: The Kenyam case," 9 E.A. L.J. (1973), p. 42
5. Allen C.K. Law in the making (7th ed. O.V.P. 1966)
6. Mutungi O.K., Loc. cit.
7. Glanville Williams, The Criminal Law: The General part, (London: Steven and sons Ltd, 1953)
8. Okonkwo C.O., Criminal Law in Nigeria, (London: Sweet and Maxwell, 1964)
9. Smith and Hogan, Criminal Law 5th ed. (London: Butterworths, 1983)
10. Keedy, E.R. "Ignorance and mistake in the criminal law," 22 Havard law Review (1908-1909)

CHAPTER ONE

INTRODUCTION

MEANING OF THE PRINCIPLE

S.7 of the Kenyan penal code (cap 63 of the laws of Kenya) provides that:

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

This is the incorporation of the English doctrine "ignorance of the law is no excuse" put in the Latin maxim, "ignorantia Juris non excusat"

What this doctrine means is that one cannot plead one's ignorance of the law as a defence in a criminal charge hence using it as an exculpatory claim to be excused for the commission of the crime in question.

Keedy E.R.<sup>2</sup> says that under what has been termed "ignorance of law" may be grouped two situations:

(a) When a man does an act without giving any attention to the law as such, in what may be termed unconsciousness that the law governs such a case.

(b) When one considers the law but believes that it

*where's nq 13?*

This is to distinguish it with mistake of law which means that a person does an act under a misconception of the legal effect of certain facts, i.e he gets a wrong view of a situation as a result of the improper application of law to facts. An example of "ignorance of law" is where one has never heard or known and has never had access to the means of knowing that it is a criminal offence to be found in possession of stolen goods (S.322 of the penal code). An example of "mistake of law" is where one knows that marrying a second wife constitutes the offence of bigamy but marries a second wife believing that he has already divorced the first wife.

Keedy says that in ignorance of the law a man does an act in ignorance that the law makes such act criminal. The misconception is due to lack of knowledge, and may be termed ignorance of law e.g. when a man already married marries again in ignorance that a second marriage is unlawful.<sup>7</sup>

The distinction between ignorance of law and mistake of law is based upon the ground that ignorance of law does not negative the criminal mind, whereas mistake of law does. But the study of mistake of law is beyond the scope of this dissertation. The author endeavours to confine himself to the issue of "ignorance of law" unless it is inevitable to do otherwise e.g. as

he has done there in order to bring out a clear picture of what ignorance of the law is and what it is not

THE ORIGIN AND HISTORICAL DEVELOPMENT OF THE DOCTRINE

Blackstone says that "ignorantia <sup>juris</sup> quod quisque tenetur seire, neminem excusat" (as the maxim is sometimes called) is as well the maxim of our own law (English) as it was of the Roman - For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence <sup>8</sup>

It is universally accepted that the doctrine is of Roman origin<sup>9</sup> and the author could not trace any evidence to controvert this universal orthodoxy. Initially it was applied solely to civil actions and had no application in the law of crimes.<sup>10</sup>

In Keedy's article, he says that in the English law the earliest case found, in which the doctrine of 'ignorantia' is considered was decided in 1231, Hilary Term, 1231.<sup>11</sup> In this case Robert Wagge **hastr** was summoned to answer one Wakelinus for breach of a fine committed by entering upon the land in question, which was in the possession of the mother of Wakelinus.

Robert pleaded as a defence that he entered upon the land under the belief that the estate belonged to him, which belief, was founded upon the advice of counsel. The court held that this was no defence, and ordered Robert to be imprisoned for breach of the fine.

About 3 centuries later, in 1505, another case of trespass was decided. This was the case generally referred to as Vernon's case.<sup>12</sup> In this case the defendants, as they were charged and they admitted, carried off the plaintiff's wife. They justified themselves on the ground that they were accompanying the woman to Westminster to sue for a divorce to ease her conscience. Objection was made to the plea on the ground that Westminster was not the proper place to take the woman for a divorce. Though it was said that the plea was good since "perhaps they did not have knowledge of the law as to where the divorce should be sued" it was nevertheless not an excuse to the commission of the offence of trespass .

Keedy quotes "The Doctor and student Dialogues" which stated the following rule<sup>13</sup>;

"Ignorance of the law though it be invisible doth not excuse as to the law for every man is bound at peril to take knowledge what the law of the realm is, as well as the law made by statute as the common law".

This principle was so much respected by common law courts that no member of the Bench found it worthy to depart from it. Instead, they pronounced it even more authoritatively. In Brett V. Rigden<sup>14</sup> Manwood J. could not see the rationale in stating the law otherwise. He therefore said:

"it is to be presumed that no subject of this realm is miscognisant of the law whereby he is governed. Ignorance of the law excuses no man".

In the case of King V. Lord Vaux<sup>15</sup> an indictment was brought against the accused for refusing to take the oath of allegiance. The accused desired to have counsel speak for him "he being ignorant of the proceedings of the laws of this land". The Attorney General, Hubbert, said that:

"there was no need of counsel to be assigned to him in this case, for though he do pretend ignorance in himself in the laws of the land (of which no subject of the land ought to be ignorant), for that his ignorance of the law will not excuse him, if so be that he do offend against the law".

The court upheld this view.

Though the principle was initially applied solely to civil actions and had no application in the law of crimes it later found its way into the criminal jurisprudence. In Hilary Term<sup>16</sup> the court held that ignorance of the law was not a defence in criminal cases.

Blackstone<sup>17</sup> says that "ignorance of law is in criminal cases no sort of defence."

This doctrine was adhered to quite strictly. It mattered not why the accused had been ignorant of the law. Once he pleaded ignorance of the law the court would not go behind his ignorance and consider the circumstances occasioning the ignorance. In the case of R.V. Bailey<sup>18</sup> the accused was indicted for maliciously shooting another. The offence was within a few weeks after the statute that made that act an offence had been passed. This was before notice of the statute could have reached the place where the offence was committed - in the sea. There was enough evidence that notice of this new statute had not reached the accused and that he could not have known the new law before he was back at the coast. But nevertheless, it was held that he was guilty since the law had already been published. The best that the court could have done to him was to mitigate the punishment and the literal rule of the construction of the doctrine could have led to no acquittal of the accused. This was a situation of total want of knowledge in reference to the subject matter. But be that as it may that is the law and no judge would be expected to fall short of giving it the effect it deserves without causing injustice in the eyes of the law and also without rendering the work of his precursors who propounded the doctrine futile.

EXCEPTIONS TO THE GENERAL RULE

In the course of the development of the doctrine, a number of classes of people were excused due to their ignorance of the law both under Roman and common laws.

Under the Roman law the rule did not apply to certain classes of individuals because it was considered that these individuals, by reason of their status or condition, would not have a knowledge of the law. Those exempted were persons of upto 25 years of age, women, soldiers and peasants and other persons of small intelligence.<sup>19</sup>

At common law an exception to the application of the doctrine was introduced. Keedy says that:<sup>20</sup>

"when a specific criminal intent, as distinguished from the criminal mind, is a requisite element of the offence, and such intent is negatived by ignorance or mistake it is held that the accused shall not be convicted, notwithstanding the maxim e.g. if A thinking he have tittle to the horse of B seiseth it as his own this makes it no felony but a trespass because there is a pretence of title".

Another exception to the application of the doctrine is where it is not possible at all to know the law. But this does not mean mere difficulty as for example where one lives in a very remote area. This is due to the fact that the law has not been published. In Lim Chin Aik V.R.<sup>21</sup> Evershed L., in his wisdom of construing the



law, held that:

"the principle cannot apply if there is no provision for the publication of a certain type of law or regulation, nor any other provision designed to enable a man by appropriate enquiry to find out what the law is"

The rationale for this exception is that one cannot know what the law is, before the law is mature and a law matures only after it has been published. Before then it is not law and even when it becomes law, it cannot be applied retrospectively. A strong case would be where an individual takes the trouble to ascertain the law on a certain point, forms the correct view of the law and then acts in reliance on it. If he is then prosecuted and the courts depart from the previous law in convicting him, strong feelings of injustice would be aroused. Whenever there is reliance on a view of the law which is correct at the time of acting, sound reasons exist for allowing a complete defence to liability. How the accused formed his correct view of the law should be irrelevant. This is hardly a case of mistake or ignorance on the accused's part: it is really a mistake of law by the court and surely no individual should be convicted for that.<sup>22</sup> This is a case in which the court changes the law and the principle of "nulla poena sine lege" demands that no one should be convicted for an offence which he committed before it was declared an offence.

At common law the principle does not apply to the prejudice of the court. It only applies to the parties before the court. If the court reaches a wrong decision due to ignorance of the law this is excusable. It is said that judges and magistrates should be excused for their ignorance of the law so that they can discharge their duties freely and independently without fear, in conformity with the doctrine of the independence of the judiciary.

#### THE ADOPTION OF THE DOCTRINE IN KENYA

The first statute that gave the English laws "validity" in Kenya was passed long before Kenya became a protectorate. This was meant to apply to all the English territories in Africa, future and those that were already in existence. This was the Gold Coast Ordinance of 1876<sup>23</sup> which stated that:

"the substantive English law to be applied in African territories was the common law, the doctrines of equity and the statutes of general application in force on the relevant date of reception"

This ordinance was authoritative enough in as far as the application of English law in all the English territories was concerned notwithstanding the various local variations in circumstances. The English doctrine of "ignorance of the law is no excuse" was therefore to be applied in all the English territories since it is part of common law.

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In 1897, the East Africa order-in-council was passed.

This stated that:

"Her Majesty's criminal jurisdiction in the protectorate shall so far as the circumstances admit, be exercised on the principles of and in conformity with the enactments of the governor of India and where inapplicable shall be exercised in accordance with common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897".

In 1902 the application of the Indian penal code in East Africa was expressly and specifically provided for in the 1902 East Africa order-in-council which stated that:

"such criminal jurisdiction shall so far as the circumstances admit be exercised in conformity with the Indian Penal Code"<sup>24</sup>.

It would appear that the colonial government, by being more specific on the law to be applied in her East African territories, wanted to leave no doubt as to the application of the Indian penal code in East Africa.

The Indian Penal Code was introduced because of three reasons:

- .1. it was codified and could therefore be more easily applied by lay magistrates and most magistrates in Kenya were lay.

2. it was thought that Indian criminal law was better suited to the Africans because it contained some offences that were recognized under African customary law but which were lacking in English law such as adultery, enticement and insult.
  
3. it was argued that since the Indian criminal law, which had in fact been a codification of English law with minor modifications, had succeeded in India, it would be equally successful in East Africa.

The white settlers were opposed to the Indian penal code claiming that common law was their birth-right regardless of where they were. The colonial administration acceded to this demand. A new code based on the Nigerian Penal Code was enacted. This had been based on the Queensland code of 1899 the latter having been based on the provisions of an 1880 English bill whose aim was to codify the common law crimes. This was passed in 1929 and came to effect on 1st August 1930.

The penal code we have today, save some minor changes, is basically the 1929 enactment that commenced on 1st August, 1930 and it is its section 7 which gives expression to the maxim under consideration in this dissertation.

Among the earliest cases in Kenya was the case of Rex V. Karoga wa Kithengi and 53 others<sup>25</sup>. Here, it was reported that there had been much sickness and death in Kikuyu land and that as a consequence, the Kikuyu suspected two men of witchcraft. Pursuant to Kikuyu customary norms, the "kiama" (Native Council of Elders) undertook to try the issue of witchcraft, a capital offence according to the kikuyu customary law. Unaware that the colonial Government had withdrawn from its jurisdiction the power to try capital offences, the "Kiama" proceeded and carried out the death sentence by burning. The entire council, who thought they were acting to preserve their people in the face of destructive supernatural powers and doing a meritorious act, were found guilty of culpable homicide. They were convicted. This is a clear indication that the colonial courts in Kenya adhered strictly to the principle of "ignorantia juris non excusat". Here is a case where the accused were ignorant of the law but nevertheless they were not acquitted on that ground.

The same principle was followed in the similar case of Kasau wa Muiga and others V Rex.<sup>26</sup> In this case all the eight members of the kikuyu "Kiama" were sentenced to death for the murder of one Kachau, whom the council had sentenced to death for alleged witchcraft practices, in ignorance of the fact that the "Kiama" had been deprived of all jurisdiction except the most petty criminal matters by the rules issued by the Governor on 4th April, 1911, under S.10 of the courts

ordinance, 1907. In their defence, the eight accused claimed immunity on the ground that they were obeying the orders of the Native Council in their exercise of "powers which they, the "Kiama", had from the beginning of things. "They contended that the council was exercising its original powers of life and death appertaining to it by native custom. It was held that even if it were assured that the council has duly authorized and sat judicially when it decided on the death of Kachou, it could not be said to have in good faith believed that they had such jurisdiction.

This judgement presumed that the "Kiama" knew their jurisdiction as per the Governor's Rules of 4th April, 1911. And that is exactly what the "Kiama" had never heard of. Indeed, such conclusion is inevitable from both the facts of the case and the defence raised. The "Kiama" never claimed jurisdiction or immunity by virtue of the Governor's Rule, but based their claim on jurisdiction and powers appertaining to the council by virtue of native custom from the beginning of things. But, of course, their argument was based on ignorance of the law. They were presumed to know of the rules and, therefore, their jurisdiction and powers, irrespective of whether they actually knew of their powers or not.

Even after independence the position in Kenya and in East Africa has not changed. The leading case to illustrate this point is Musa and others V.R.<sup>27</sup> In this case it was said "inter alia":

" ..... what the appellants were mistaken about was law and not fact. That is, they did not know that the consequences of their action (murder). And a mistake as to what the law is cannot entitle a person to claim the benefit of mistake of fact and thereby absolve himself from responsibility for a criminal act merely because he thought that in law it was not a criminal act or that he was legally justified. In effect, what the appellants' defence amounted to was confession of their ignorance of the law. And this is no defence".

THE APPLICATION OF THE DOCTRINE IN OTHER JURISDICTIONS:

This doctrine is applied in most commonwealth countries as rigidly as it is in England. For example, a number of African commonwealth countries have their penal codes codifying the doctrine in the same way it is worded in S.7 of the Kenyan Penal Code. S.8 of the Tanzanian Penal Code, for instance, provides that:

"ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an act of the offence"<sup>28</sup>

The same wordings are found in S.7 of the Malawi Penal Code<sup>29</sup> and also S.7 of the Penal Code of Zambia.<sup>30</sup>

In the Nigerian case of Ogbu V.R.<sup>31</sup> an accused said at his trial that he did not know that it was contrary to law to pay a bribe in order to induce the other accused to appoint him as village headman and therefore tax-collector (the mental element of the offence being that he should have paid the bribe "corruptly"). On appeal by the other accused, although the Federal supreme court had no power to convict the first accused, it was remarked ("Obiter"):

" ..... we are not at present satisfied that the learned judge was right in law in acquitting Utachia Okobi on those findings, and that if the matter ever fell to be decided by this court we should require cogent arguments to convince that on a charge involving doing some act "corruptly", ignorance of the law is a defence to a person who had an intent of a kind which the law regards as corrupt".

But the common law rule is not universally followed and the arguments by which it is supported have not been very convincing to those in other systems.

#### IGNORANCE OF THE LAW IN SOUTH AFRICA

The position in South Africa is slightly different from the English one. In S.V. De Blom<sup>32</sup> it was said that:



"the fact is that there is not and never has been a presumption that everyone knows the law. There is a rule that ignorance of the law does not excuse, a maxim of very different scope and application,..... if the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful".

Unlike at common law, in South Africa ignorance of the law can excuse an accused provided he satisfies the court that he did not know that his act was unlawful.

THE SCANDINAVIAN POSITION:

Smith and Hogan while discussing the doctrine of "ignorantia juris non excusat" and its application in different jurisdictions have ventured into the application of the principle in the Scandinavian countries. They have the following to say on the subject:

"in Scandinavian criminal law, ignorance of the law is, in varying degrees a defence. Thus, in Norway, a man will not be excused for ignorance of the general rules of society which apply to everybody or the special rules governing the business or activity in which the individual

" is engaged. But a fisherman need not study the legislation on industry; a servant may be excused for "bona fide" and reasonable obedience to illegal orders of his master; or a stranger for breaking a rule which he could not be expected to know about; or liability may be negatived because the legislation is very new, or its interpretation doubtful."<sup>33</sup>

The Scandinavian position therefore relates guilt to moral culpability in a way in which the English law does not.

In Austria S. 9 (i) of the 1974 Austrian Penal code provides that:

" A person who because of a legal error does not realise the wrongfulness of his act, does not act culpably provided that he is not consurable for his error."<sup>34</sup>

The legal error is **Consurable** especially where the wrongfulness was easily perceivable by every man. Thus, the test of a reasonable man is used.

In Venezuela the Penal Code provides for mitigation on ground of ignorance of law. Article 25 reads:

"The judge may mitigate the punishment, and even exempt from it, if it be proven that the actor acted believing in the lawfulness of his act or omission".<sup>35</sup>

Asian countries such as Korea, China and Japan are not left behind. For example Art. 21 (ii) of the Japanese criminal code of 1972 provides that a person who commits a crime without knowing that his conduct is not permitted by law shall not be punishable if his understanding is based on reasonable grounds.<sup>36</sup>

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FOOTNOTES

1. Keedy, E.R, 'ignorance and mistake in the criminal law,  
22 Havard law Review (1908-9) p. 90.
2. ibid.
3. 21 cal 642,665.
4. supra fn. 3.
5. 7 cox c.c., 214.
6. Keedy, loc.cit p. 76.
7. ibid, p. 90.
8. Blackstone, 4 commentaries on the English law, (London,  
Dawson of Pall Mall, 1966), p. 27.
9. 3 Greenleaf Ev. 16 ed. S.20 quoted by Blackstone  
4 commentaries on the English law, (London, Dawson of Pall  
Mall, 1966) p. 27.
10. Keedy, loc. cit. pp 77-78.
11. Bracton's Note Book, Maitland's ed. p. 496 and quoted in  
Keedy, loc. cit. p. 78.
12. Y.B. 20 Hen. Vii f 2 pl.4 .
13. supra fn.12.
14. Dial II C. 46, (1518).
15. I Plowd 342, (1568).
16. Keedy, loc. cit. p. 79.
17. Blackstone, op. cit. p.27.
18. Russ & Ry I 168 E.R. p. 651.
19. Keedy, loc. cit. p.80.
20. Keedy, loc. cit. p.80.

21. 1983 A.C. 160
22. Ashworth, 'Excusable mistake of law', *The criminal law Review* (1974) p. 658.
23. Gold coast supreme court Ordinance S. 14 quoted in Allot, A's New Essays in African law (London, Butterworths, 1970) p. 16.
24. East Africa Order-in-council, 1902, Article 15 (2).
25. (1913) 5 E.A. L.R, 50.
26. (1912) 4 E.A.L.R, 103.
27. (1970) E.A. 42, p. 43.
28. cap. 16 of the laws of Tanzania.
29. Cap. 7:01 of the laws of Malawi.
30. Cap. 146 of the laws of the Republic of Zambia.
31. (1959) N.R.N.L.R., 22 at 24,25
32. (1977) 3.S.A., 513
33. Smith and Hogan, criminal law 5th ed. (London: Butterworths, 1983) p.70
34. Ryce. Paul K. and Hellen Silving, 'comment on Erro Juris" A.J.C.L. Vol 24, 1976 689-690
35. *ibid* p. 692.
36. *ibid*.

CHAPTER TWO:

THE CASE FOR THE MAXIM:

Various scholars have advanced their reasons for defending the maxim "ignorantia juris non excusat". Some of these scholars such as Holmes, Austin and Granville Williams are highly respected jurists who venture into almost all the spheres of legal thought, propounding their arguments as to why the law should be what it is in some instances and why it ought not to be in others. The author therefore wishes to point out some of their arguments in favour of the application of the maxim.

The first rationale of the maxim is that in spite of the accused's ignorance of the law more often than not he has a guilty mind. Hall, in support of the maxim, said that the penal law is asserted to be no more than a compilation of the prevailing morality of the community.<sup>1</sup>

This thesis is also subscribed to by Seidman when he says that:

"if laws represent no more than the norms generated by society itself, every properly socialized individual will know the law. The criminal law particularly is said merely to codify an objective ethic, the established judgements of the community."<sup>2</sup>

On this thesis, when the accused starts doing the act or omitting to do what he ought to do, he is aware in his mind that his act or omission is unacceptable to his community. For example, when a person breaks into another's house with an intention to steal therefrom and in fact does so, he need not have seen the penal code to know that he is committing a crime. Even if he may not be aware that his action constitutes the offence called "Housebreaking" in law, nevertheless he is aware that his conduct is not in line with the norms of his society and most offences are based on the morality of the large community known as the state.

The above two scholars therefore maintained that since law represents the norms, ethos and ethics of the society which are so common that everybody must be presumed to know then a plea of ignorance as a defence would amount to an admission that the accused was improperly socialised into the community ethics and to excuse such an accused person would be to encourage people to be improperly socialised into the community.

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The second justification for the rule is that the law presumes everybody to know it. Once a prescribed procedure to inform the public of the commencement of a new law has been complied with, that serves as a notice to all. In Kenya specifically, S.9 of Interpretation and General Provisions Act (cap.2 of the laws of Kenya) suggests

that once the law has been published in the Kenya "Gazette" that serves as a notice to all.

There is an obligation on the law-maker to ensure that the law is actually known by all the subjects. The government does this by "gazetting" the new law and from that time it presumes everybody to know the law because it is now at their disposal. The presumption of knowledge of the law was discussed in the case of Rex V. Ross<sup>33</sup> where it was observed "Obiter" that:

".... amongst other things, before a public Act can receive the Royal assent and become law it must first, in the form of a bill, be presented to and deliberated upon and conveyed or passed, through its different stages at different times and on different days, by the action of the members of the Legislative Assembly in concourse duly assembled in the proper place designated for that purpose, at which the public, including representatives of the press, are generally permitted to be present. Therefore the proceedings necessary to enact and bring into force an Act or law binding upon the public give to it a certain measure of publicity, and it is not difficult to understand why it is a general rule of law that one cannot successfully plead ignorance of such an Act or law"



Blackstone, in support of the maxim, advanced the justification of the same on the ground that everyone is presumed to know the law. His reasoning was that people are presumed to know the law even before it is formally promulgated because they are present by their representation (i.e. by their members of parliament) at the passing of the Acts and must therefore be taken to know the new Act.<sup>4</sup>

The same reasoning was echoed in the case of Regina V. Bishop of Chichester<sup>5</sup> where it was said that everyone is bound to know what is done in parliament even though it has not been proclaimed publicly for parliament represents the body of the realm.

In essence, what this means is that everybody cannot go to parliament to represent his interests. Some few people have to go on behalf of all the others. Once they make the laws, they therefore have an obligation to ensure that everybody, that is, the people they represent in making those laws, are aware of the laws they make. Parliament has in turn delegated this duty of notifying everybody what the law is to the executive arm of the government which is answerable to parliament. This is in <sup>line</sup> with the law of agency. The constituents employ their parliamentarians as their agents and whatever they do in conformity to the agency relationship, they must give their principal (the constituents) the feedback of the same. Therefore, the

law presumes the subjects as principal to know all the laws that parliament makes. In case the subjects are ignorant of the law then they only have an action against their agents (i.e. parliament) but they cannot plead ignorance of the law as an excuse for not observing the law.

The third justification that has been given for the use of the maxim is that the maxim compels people to know what the law is. This is slightly connected to the second rationale (supra). If the law were otherwise people would not feel so obliged to know the law since they would always have an excuse when they appear in court to answer certain charges. Holmes argued out this point by saying that:

"..... the true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable to put an end to robbery and murder. It is no doubt that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to individuals is rightly outweighed by the larger interests on the other side of the scale".<sup>6</sup>

What Holmes was saying is that the rule fails to consider why the accused has failed to know the law because suppressing crime is of more significance than doing justice by punishing only those who commit crimes deliberately. In other words, punishing only those who break the law after having known what the law is <sup>is</sup> <sub>^</sub> to encourage ignorance of the law, a posture which is indefensible. People should have fears that should they commit crimes they would be punished and therefore this would compel them to ask themselves whether what they are about to do is authorised by law or not. \* Should they have doubts concerning the legality of what they are about to do then they would abandon it first and find out whether it is lawful or not.

Blackstone was even more explicit that everybody should be expected to know what the law is whether he has access to it or not. He argued that the utter impossibility of notifying everyone is the best reason why ignorance of the law does not excuse and that everyone concerned must know the law at his peril. He concluded by saying that no specific notice of the passing of an Act of the legislature is required so long as there is legal notice to every individual in the nation.<sup>7</sup>

x In similar vein Granville Williams said that the rule has the effect of compelling people to learn the standard of conduct expected of them. The rule is a useful weapon where the legislature intends to change the social norms.<sup>8</sup>

Seidman shared the same views by saying that citizens retain the burden of learning the law, while the state has the responsibility to make the law available to them.<sup>9</sup>

The fourth rationale of the maxim is that whereas it is true that some people are ignorant of the law it would be very difficult to know when one's ignorance is totally inevitable or when one has contributed to one's ignorance. It is with this in mind that a Nigerian jurist, Okonkwo C.O., said that it is everyone's business to find out what the law is, and that if there was no such rule, every accused could claim that he did not know what the law was, and the prosecution would have to bear the impossible task of having to prove that he did know it.<sup>10</sup>

Austin, a lawyer of no small repute, also did not spare his ink after considering this matter. He said that:

"..... whether the accused was really ignorant of the law and was so ignorant of the law that he had no surmise of its provision, could scarcely be determined by any evidence accessible to others..... even if this was determinable, it would be impossible to determine whether the defendant had been negligent in failing to acquire the legal knowledge since it would be incumbent upon the tribunal to look at his previous history and to search his whole life for the elements of a just solution."<sup>11</sup>

Another school of thought has it that if such a plea were acceptable it would be impossible to check crime. In other words, that if the law were otherwise most accused people would escape conviction even after having committed crimes because it would be difficult to know when one is saying the truth when one raises the defence. Hence Austin said that:

"..... the only sufficient justification for the rule is that if ignorance of law were admitted as a ground of exemption the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable."<sup>12</sup>

The sixth rationale of the doctrine that scholars have advanced is that the failure to allow the defence educates the public on what the law is. Essentially, what this means is that once a person has been convicted for committing an offence then this conviction would be given some publicity and people would learn that behaving in a similar manner constitutes a criminal offence. Granville Williams, in support of this school of thought said that the rule is <sup>a</sup>useful weapon where the legislature intends to change the social norms, for the most effective way of bringing the new rule to the public notice is by convictions reported in the press.<sup>13</sup>

Smith and Hogan opined that the doctrine is rationally applied for its application helps to make the law objective. Their argument was that if the plea of ignorance of the law were valid, the consequence would be that whenever an accused in a criminal trial thought that the law was thus and so, he is to be treated as though the law were thus and so, that is, the law actually is thus and so.<sup>14</sup> What they meant is that if an accused who is charged with handling stolen goods contrary to S.322 of the penal code, for instance, alleges that he thought that it is not a crime to handle stolen goods then that court assumes that it is not a crime to handle stolen goods and therefore acquits the accused. The law would therefore be very subjective. Hence Smith and Hogan strongly felt that:

"The law represents an objective code of ethics which must prevail over individual convictions and thus, while a person who acts in accordance with his honest convictions is certainly not as culpable as one who commits a harm knowing it is wrong, it is also true that conscience sometimes leads one astray. "Mens rea" underlines the essential difference. Penal liability based on it implies the objective wrongness of the harm prescribed regardless of motive or conviction. This may fall short of justice but the ethics of a legal order must be objective."<sup>15</sup>

The two scholars were therefore of the view that it matters not that the accused had a good motive when committing the crime he is charged with so long as the law is objective and neither does it matter that the law is not perfectly "just".

The last rationale that scholars have come up with is a summary of most of the reasons given above. This is public policy. Austin says that it is a common statement that the rule concerning ignorance of law exists apart from the general principles of criminal jurisprudence and must rest upon policy alone.<sup>16</sup>

Public policy is defined as that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.<sup>17</sup>

Precisely, public policy means public interest. Jurists have argued that if the law were otherwise, then the public at large would face a lot of hardships since the administration of justice would almost be impossible. This point was explained quite clearly by Kerans D.C.J. in the case of Regina V. Campbell and Mlynarchuk. He said that:

"..... the section removing ignorance of the law as a defence in criminal matters, is not a matter of justice, but a matter of policy. .... it is not a defence, I think, because the first requirement of any system of justice, is that it works efficiently and effectively. If the state of understanding of the law of an accused person is ever to be relevant in criminal proceedings, we would have an absurd proceeding. The issue in a criminal trial would then not be what the accused did, but whether or not the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law. There would be a premium, therefore, placed upon ignorance of the law ..... our courts, following the traditions of English jurisprudence, have closed that avenue from consideration in the criminal court-room.... The defence should not be allowed as a matter of public policy. This is the case notwithstanding the sympathy evoked by the situation of an accused person..... The principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is necessary, even though it will sometimes produce an anomalous result."<sup>18</sup> y

Having looked at the various justifications given by scholars for the application of this doctrine, I shall, in the next chapter, endeavour to give the various reasons propounded by various scholars who are of the contrary view i.e. that the maxim should not be applied.



FOOTNOTES:

1. Hall, J, 'General Principles of criminal law' pp. 163-170 (2nd ed. 1960) quoted in Seidman, R. "The communication of law and the process of development", Wisconsin Law Review 3 (1972), p. 688
2. Seidman, R. loc. cit, p. 689
3. (1944) 84 c.c.c. 107 British Columbia County court.
4. Blackstone, I commentaries on the English Law (introduction) (Dawson of Pall Mall, London, 1966) p. 131.
5. (1365) Y.B, p. 39 quoted in Allen S.K. Law in the making 7th ed. (O.U.P. 1966) pp. 469-470
6. Holmes, O.W., The common law, (Boston: Little, Brown and co. 1963) p. 48
7. Blackstone, op. cit. p. 131.
8. Glanville Williams, The Criminal law: The General part, (London: Stevens and Sons Ltd, 1953) 385.
9. Seidman, R. loc. cit, p. 690.
10. Okonkwo, C.O, Criminal law in Nigeria, (London: Sweet and Maxwell, 1964), 107.
11. John Austin, Lectures on Jurisprudence, or the philosophy of positive law 5th ed, Revised and edited by R. Campbell (London Murray, 1885)
12. Austin, op.cit.
13. Glanville Williams, op.cit.
14. Smith and Hogan, Criminal law 5th ed. (London: Butterworths, 1983) p.70
15. Smith and Hogan, op.cit.
16. John Austin, op.cit
17. Black's Law Dictionary, 5th edition, p. 1041
18. (1972) 10 c.c.c. (2nd) 26 Alberta District Council.

CHAPTER THREE

THE CASE AGAINST THE MAXIM:

In spite of this maxim having so many scholars advocating for it as has been shown in the proceeding chapter, it never escaped criticism. A number of jurists were of the view that it falls short of justice. Each of the scholars has got his own reason for advocating against the application of the principle. This chapter is devoted to the schools of thought that are against the application of the doctrine of "ignorantia juris non excusat".

As shown in chapter two, one of the reasons for justifying the doctrine is that in spite of the accused's ignorance of the law, more often than not he has a guilty mind. Smith and Hogan are of the opinion that this rationale is unfounded since it is not in all cases that the accused has a guilty mind. Their opinion is that unless an accused is morally guilty, he should be acquitted. They argue that in the case of the most serious crimes the problem does not arise since everyone knows it is against the law to do such acts as murder, robbery or rape. But in the case of many less serious crimes, a man may very easily and without negligence be ignorant that a particular act is a crime in which case there will usually be nothing immoral about such an act and therefore he ought to be acquitted for his ignorance.<sup>1</sup>

The two scholars continue to lament that much modern legislation is devoid of moral content apart from the moral obligation to obey the law. That being the case, they thought that it is not always easy for one to know that one is committing an offence.<sup>2</sup>

The argument of these two scholars is that it is wrong to convict a person who commits what the law considers to be a criminal offence without the court taking into account his conscience at the time he committed the offence.

The second rationale propounded by scholars in favour of retaining the doctrine in our penal jurisprudence is the presumption that everybody knows the law and therefore his ignorance of the same should not be excused. A number of scholars are of the opinion that it is a wrong presumption that everybody knows the law.

Among the scholars who were opposed to this school of thought was Blackstone who opined that the proposition that "every person of discretion" may know the law is a proposition which is manifestly untrue today.<sup>3</sup>

Morris L. in the case of Palmer V.R.<sup>4</sup> had the following to say in expressing his disapproval to the application of the doctrine:

"some of the traditional reasons for supporting the 'ignorantia juris' principle are inapplicable:

the law on justifiable force gives no specific guidance, and so it is both unfounded and unfair to maintain that individuals are presumed to know the law or that to allow the defence would encourage ignorance of the law. The English law on justifiable force is that a person may take such action as is both necessary and reasonable in order to achieve the lawful purpose (e.g. self-defence, prevention of crime etc.). The existence of an immediate necessity is a question of fact, but reasonableness is a question of law upon which the judge must give directions which the jury must apply to the facts of the case."

The fact that not everybody knows the law was also put across by Menle J. in the case of Martindale V. Falkner<sup>5</sup> where he said that there is no presumption in England that every person knows the law. He added that it would be contrary to common sense and reason if it were so.

About seven years later Glanville Williams expressed the same views when he said that the proposition that everyone is presumed to know the law is a sheer legal fiction. To explain his point he added that due to the practical difficulties and the inadequency of the existing institutions of communication it is illogical to presume everyone to know the law its technicalities notwithstanding.<sup>6</sup>

Professor O.K. Mutungi argues that it is wrong to assume that everyone knows the law in a country like Kenya where the percentage of illiteracy is a matter of national concern. He contends that it is wrong to assume that everybody gets to know the law simply because court proceedings have been reported in the public press. He also argues that English and Swahili are equally foreign to the majority of the Kenyans and since they are the languages in which the law is mainly published then it cannot be directly said that there is effective presentation of the laws to the mind of those who are governed by them in such a manner that they may have it habitually in their memories and possess every facility for consulting it, if they have any doubts in respect to what it prescribes.<sup>7</sup>

In Montrion V. Jeffreys<sup>8</sup> and Martindale V. Falkner<sup>9</sup> it was held that it should never be imagined that judges, counsel or attorneys know all the law. In the latter case it was further held that besides His Majesty's judges who have a court of Appeal set over them to put them right, everybody else is to be presumed to know the law. Mutungi wonders why the legal technicians such as judges and counsel disclaim the suggestion that they should be expected to know all the law and yet expect everybody else to know all the law. His argument is that:

" ..... there is an apparent paradox. Those whom the ordinary citizen expects to know the law not only disclaim any obligation to know all the law, but are also protected should they err in the course of their duties, while at another level, everybody, including judges and counsel in their capacity as law subjects, is bound to know all the law."<sup>10</sup>

The "Agency theory" whose propounders argue that since members of parliament are agents of their constituents and their knowledge of the law means knowledge of the same by their constituents has also been criticized. Professor Mutungi argues that this is a wrong presumption since there must be a limit as to the extent to, and the purpose for which the acts of a member of parliament and the parliament itself, can be deemed to be those of the constituents and that the agency rule of the answerability of the agent to the principal is not applicable to parliamentary representation. He continues to say that even if parliamentary representation were the reason why people are presumed to know the law (even though they have never heard of it) the argument would fall flat in cases of military regimes which seem to be sweeping most African states which military governments not only do not represent the people, but impose themselves on the nation regardless of the wishes of the masses. His contention is that in Kenya, even if a member of parliament is an agent of his constituents, it is not for the purposes of inputting knowledge of enactments of the National Assembly.<sup>11</sup>

The fourth justification of the application of the maxim is that the maxim, in its present form, compels people to know what the law is. The argument is that if the law were otherwise people would not feel so obliged to know the law since they would always have an excuse when they appear in court to answer certain charges. This reasoning too does not escape criticism. The great jurist, Jeremy Bentham, in response said that laws are not always available to the subjects of the same and even when available they are not in the languages they understand.<sup>12</sup>

Mutungi argues, in response to this rationale, that:

" ..... where there is a duty, there should be a corresponding right. If a legal system requires every subject to know the law on pain of punishment, the subjects should have a right to be reasonably and accurately informed of such law. And it seems that a subjects' rights are not sufficiently met when the law he is supposed to obey is not only foreign to his culture, but is also written and published in equally foreign languages."<sup>13</sup>

In other words, the above two scholars are of the view that a subject cannot be compelled to know what is not accessible to him. For every subject of the law to be compelled to know the law, the same has to be in the language he understands.

To those who justify the application of the maxim on the ground that it would be impossible to know when one is actually telling the truth when one says that one is ignorant of the law Professor Nutungi<sup>14</sup> says that this argument is not well founded because a plea of ignorance of the law has been rejected even where it was established beyond reasonable doubt that the accused not only did not know the law, but had no means of knowing it. That was in the case of R. V. Bailey<sup>15</sup> where it was physically impossible for the accused to know the law because it was passed while he was on the High seas and he committed the crime while still there. He advances his argument by comparing the difficulties involved in establishing one's ignorance of the law and those involved in establishing the offence of treason committed when one imagines the death of the President. His contention is that the former is more easily attainable than the latter yet the prosecution must always prove the latter for one to be convicted. He therefore argues that the fears of the proponents of this doctrine who argue that if it were otherwise then it would be difficult to know who commits an offence ignorantly and who commits it knowingly are baseless.

The sixth rationale of the maxim is that the failure to allow the defence does educate the public on what the law is, meaning that once a person has been convicted for committing an offence then this conviction would be given



some publicity and people would learn that behaving in a similar manner constitutes a criminal offence. The criticisms levelled against the reasons for the application of the maxim on the ground that it compels people to know the law (above) were double-edged in that they were also calculated to rebut the presumption that reporting of convictions educates the public on what the law is. For example, when Professor Mutungi says that people cannot be compelled to know the law when court proceedings are reported in the public press since the percentage of illiteracy in Kenya is a matter of national concern he also meant that people cannot be educated on what is crime and what is not by such reports if they are not literate.<sup>16</sup>

To those who justify the application of the doctrine on the (last) ground that if the law were otherwise then it would not be objective, Mutungi issues a rejoinder by saying that in the first place, the law is not objective. He argues that the knowledge of the law presupposes clarity and certainty of the same yet this is not the case since much of the time in the courts is taken by the interpretation of the law. He therefore wonders why courts spend a lot of time trying to establish what it is even when both parties are legally represented if it were objective. He illustrates his point by citing the case of Kotak V.A. Ali Abdullah<sup>18</sup> where the meaning of the word "native" was argued from the lowest court in the country (Tanzania) to the court of Appeal for East Africa notwithstanding the fact that it was statutorily

defined. He opines that if the law on this point were certain then what constituted "native" would have been established at the court of first instance.

A Asworth was also of the opinion that this doctrine occasions injustice especially where an accused rightly thought that he was observing the law basing his thought on an earlier interpretation of the law which interpretation is later reversed. He said that if such a thing occurred then strong feelings of injustice would be aroused.<sup>19</sup>

After looking at the various views propounded against the application of this maxim, the next chapter gives a critical analysis of the doctrine as it is practised in Kenya before stating whether I am in favour of its application or not.

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FOOTNOTES:

1. Smith and Hogan, criminal law, 5th ed. (London: Butterworths, 1983) p. 69
2. Smith and Hogan, op. cit
3. Blackstone, 4 commentaries on the English law, (London, Dawson of Pall Mall, 1966) p. 27
4. (1971) A.C. 814
5. (1846) 135 E.R. 1130.
6. Glanville Williams, The criminal law: The General part, (London, Stevens and sons Ltd, 1953) pp. 385-6.
7. Mutungi O.K. 'The communication of the law under conditions of development: The Kenyan case,' 9 E.A. L.J. (1973) p.16
8. (1825) 172 E.R. 53 quoted by Glanville Williams op.cit. p 386
9. (1846) 135 E.R, 1130, quoted at p. 385, Glanville Williams, op.cit.
10. Mutungi, O.K. loc. cit.pp.21,22
11. Mutungi, O.K. loc. cit. p.19
12. I The works of Jeremy Bentham, by Bowing, Russel and Russel inc., N.Y. (1962), 157
13. Mutungi O.K. loc. cit.
14. (1800) 168 E.R, 651
15. Mutungi O.K. loc. cit, pp. 22,23
16. Mutungi O.K. loc. cit, p.16
17. Mutungi O.K. loc. cit, p. 20
18. (1957) E.A. 321
19. Asworth, "Excusable mistake of law", The criminal law Review (1974) p. 658.

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE APPLICATION OF THE MAXIM IN KENYA:

After looking at the case for the maxim and case against the same it would be an appropriate time to weigh the merits and demerits of the application of the doctrine so that it may be clear whether the doctrine ought to continue in our penal code, discarded or altered. This can best be done by asking oneself a number of questions:

1. Does every offender have a criminal mind?
2. Should every subject of the law be presumed to know the law?
3. Should the principle be applied in order to compel people to know the law?
4. Would it be very difficult to know when one's ignorance of the law is justifiable?
5. Does the application of the maxim educate the public on what the law is?
6. Does adhering to the doctrine rigidly make the law objective?
7. Should public policy alone justify the application of the doctrine?

The author wishes to tackle each of these questions separately after which he will make his own conclusion as to whether the doctrine should be applied in Kenya or not.

THE OFFENDER'S MIND:

A crime is an unlawful act or omission which is an offence against the state. Arguments have been raised

that in spite of the accused's ignorance of the law more often than not he has a guilty mind. Whereas this may be very true about such crimes as murder, theft, incest and other crimes where common sense dictates that one should not commit them, it may be very hard for one who is not conversant with the criminal law to know that he is committing a crime when for example he goes through a ceremony of marriage which is void by reason of its taking place during the life of his wife contrary to S.170 of the penal code. The man may not be having a guilty mind. For instance, he may have agreed with his first wife that he should get married to a second wife and he therefore feels justified to marry the second one and to go through a ceremony of the marriage. His motive may even be to easen the work of the first wife which is purely a good motive. But the law regards him as a criminal.

Seidman says that laws represent no more than the norms of the society and therefore every properly socialized individual will know the law because the criminal law is a codification of an objective ethic.<sup>1</sup> This is very true in England. Common law was deeply rooted in ordinary day to day life and it was a part of the English people and hence no properly accultured person could convincingly plead ignorance of the law.

This is the very basis of ~~the~~ justification for the Latin maxim. As a result of receiving English common law then, we received therefore the English traditions, outlook and techniques in establishing, maintaining and developing the judicial system. Due to the conditions and circumstances surrounding the reception of law in Kenya, and given the fact that at the advent of colonialism, adoption wholesale of the same was necessarily tinged with imperial objective, we have incorporated a totally alien law to us. Kenyan penal code is not based on our customary law which dictated what constituted a crime and what did not. In such conditions a person may do what he believes to be right in which case he will not have a criminal mind. He may base his justification for doing so on customary law for instance by going through a marriage ceremony with a second wife a man is justified in most customary laws in which case he will not have a guilty mind.

Smith and Hogan argued on this point of a guilty mind and said that if we were to justify the application of the maxim on the ground that law represents morality we would be wrong because much modern legislation today is devoid of moral content.<sup>2</sup> This is quite clear on perusing through our penal code (Kenya). For instance, there is nothing immoral in being susceptible to the suspicion of being a reputed thief who has no visible means of subsistence and who cannot give a good account of himself or in bigamy

both of which are criminal offences contrary to sections 183(c) and 171 of the penal code respectively.

On the other hand, certain acts seem and are in fact immoral yet they are not criminal offences. To illustrate this point, in the case of Karuria V.R.<sup>3</sup> the appellant was living on her own earnings of prostitution and was convicted on a charge of knowingly living on the earnings of a prostitute contrary to S.154 of the penal code. She was convicted on her own plea of guilt. On appeal against sentence it was held that the section does not intend to make every prostitute living in whole or in part of her own earnings guilty of an offence within the section. A prostitute cannot be guilty of this offence unless she lives on the earnings of another prostitute (knowingly). Prostitution "per se" is not an offence. It is the commercial aspect which is made an offence in Kenya i.e. living on the earnings of prostitution by someone else and not by the prostitute herself. This shows that she pleaded guilty because she had a guilty mind but her guilty mind in the commission of her act did not constitute an offence since a guilty mind on its own cannot amount to a criminal offence unless it is complemented by a guilty act or omission. Other forms of guilty mind conducts which does not constitute criminal offence include adultery and omitting to save a drowning man where there is no obligation to do so.

It is also noteworthy to discuss what factors determine whether one has a guilty mind when doing something or not.

How a person is brought up really determines quite a lot what will make him have a guilty mind. A Maasai who kills a lion has no guilty mind because he has been told and learnt from his customs that is the way to separate men from boys. But after doing so he will find himself behind the bars. Religion has also a great part to play in influencing a person's conduct and conscience. A christian for example would have a guilty mind when committing adultery, fornication or even by watching a helpless person drowning without making any attempts to save his life. But he has not committed any crime. On the other hand, a Muslim who kills a person who refuses to become a muslim has got no guilty mind. But he has committed a crime by so doing.

The author's submission is therefore that the allegation that the accused should be convicted when found guilty of an offence irrespective of whether he knew the law or not since he had a guilty (criminal) mind is baseless. A strong case in support of this submission would be where a person takes the trouble to inquire from a legal expert what the law on a particular point is, but he receives the wrong advice, acts on it with a very innocent mind only to be convicted on the ground that ignorance of the law is no excuse.



PRESUMPTION OF THE KNOWLEDGE OF THE LAW: X

The second reason for justifying the doctrine of "ignorantia juris non excusat" is that everyone is presumed to know the law. The issue here is to ask oneself whether it is actually a good law to presume everyone to know the law and the criminal law specifically.

In the first place, for one to find out whether this is a good justification for the application of the maxim, one has to ask oneself what criminal law is and more importantly it is necessary to know who decides what should constitute a criminal offence and what should not. Is it the accused, the state or the court?

The duty of the court in as far as the criminal law is concerned is to interpret what the law says. In so doing the court is not the law-maker and can therefore not be expected to know all the laws. The accused is a subject of the law. The state through the machinery of parliament is the law-maker and there lies <sup>the</sup> simplest definition of a crime, that a crime is an unlawful act or omission which is an offence against the state. Now, if the accused is not the law-maker how then does he know what the law is?

Before an Act of parliament becomes law it is known as a Bill. A government Bill is drafted by a legislative draftsman in the Attorney General's Chambers.

It will then be approved by the cabinet before it starts on its parliamentary life. It must first be published in the "Official Gazette". After a lapse of at least fourteen days, it can then be considered by the National Assembly. The first stage is the First Reading, which is merely a formal reading of the title of the Bill, it gives the members of the Bill. It is then moved that the Bill be read a first time. A date is then fixed for the second reading. This is the most important stage of the Bill and the debate on the main objects of the Bill will range very widely. The members, at this stage, decide whether they approve of the Bill on principle, or not. It is then moved that the Bill be read a second time. If the motion is passed, the Bill can then be referred to a select committee stage. Alternatively, the Bill can be considered by a committee of the whole National Assembly. At this stage the Bill is considered in detail, clause by clause, and the Minister responsible for promoting the Bill will spend some considerable time with the standing committee. At the Third Reading only minor changes can be made to the Bill and the Assembly is asked to approve the Bill in its final form. A motion that the Bill be read a third time is then moved and if carried the Bill can now be presented to the President for his assent subject to which it becomes law. The date

of commencement of the Act is either the date it received the Presidential assent, or a date shortly afterwards or it can be brought into operation by order made by the appropriate Minister.

As is evident above, proposed legislation takes time before becoming an Act of parliament from the time it is published and "gazetted" in the Kenya "gazette" as a Bill. Through out this period it receives a lot of publicity through the press and the mass media. The publication of the Bill and the Act of parliament is also done through the Kenya gazette and more importantly the proceedings of the parliamentary debate are publicized in detail through the local press and mass media.

There is therefore enough time for people to read newspapers and listen to the radio and hence learn what new laws have been passed.

One may argue that all these debates may confuse a person because some MPS are against the enactment of a new law while others are for it. But this argument does not hold much water because all the points for or against the enactment of a new law become immaterial once a law has been passed in which case the law is definite and it starts operation only after getting

the President's assent. If one is not sure on what the law is one can always look for it in either the new act of parliament or buy a copy of the Kenya "gazette". But we have to ask ourselves whether there is sufficient communication of the laws once they have been passed. In the first place, the penal code was passed years ago and therefore most of us did not have the chance to listen to any debate on its enactment in order to know that a new law has been passed bearing in mind that the bulk of the criminal law in Kenya is to be found in the penal code. Whenever the mass media or the press mentions the penal code they always assume that everybody understands what that means which is not the case. It is not surprising to find that not many laymen understand the difference between civil and criminal law.

Secondly, the mass media is not a very effective device of communicating the law to the general public. When the laws are passed the radio and Television media are mainly used to communicate the new law to the general public. But they also have their own shortcomings. Taking the radio first, as observed by professor Mutungi it is only a small fraction of the population who have access to radios in Kenya and mainly the ones in urban areas<sup>4</sup>. It is also important to note that even those who own radios don't prefer to listen to educational or informative programmes but mainly they like to tune into the stations which are playing music. The major complaint they have is that Voice of Kenya programmes are boring.

Another problem with the use of the radio as a communication device is that it communicates the new laws once they are passed and explains them briefly. Thereafter, whenever they make any reference to these laws they always assume that everybody heard the explanation when they were first heard which is a very wrong assumption. For example, the Kenyan constitution was passed in

1963 and before I joined the University used to hear it being quoted over the radio quite oftenly but without any explanation as to what it is. It is only when I attended a few lectures in the University that I came to know what it is all about. This is because it is always assumed by those who prepared programmes in the voice of Kenya that everyone knows what the constitution is all about. The same case applies to the penal code.

In as far as the Television programmes are concerned very few people in Kenya own Television sets and the few who own them are mainly in the urban areas where there is electricity. The inadequacy of Televisions is also aggravated by the fact that a perusal through the Television programmes in Kenya reveals that most of the programmes are entertaining but very few are educative or informative.

It doesn't make much sense to allege that the press suffices as a communication device of the newly enacted laws. To begin with, the local dailies do not reach all the parts of this country. They mainly go to urban areas and only a small percentage gets access to them. Coupled with this is the fact that the newspapers do not always present the law accurately. It caught so many lawyers by surprise to read from a local paper that the constitution of Kenya does not allow the President to sack the Vice-President and appoint a new one<sup>5</sup>. This is just one <sup>among</sup> many cases. Mention also need to be made of the fact that there is a high rate of illiteracy in Kenya and even a good number of those who boast of being literate are only semi-literate not to mention the fact that even those who possess University degrees whether in law or in any other discipline find it hard to inter-pret the law accurately. *maybe it's only you alone who could do it* It is one thing to print laws but it is yet a different thing for these laws to be read and understood. Apart from the problem of illiteracy in the preceding paragraphs most legal books are written in English and a good percentage of those people who can read and write do not understand English hence Jeremy Bentham said:

Show me your ordinance in my language and then, if I deceive you, punish me".<sup>6</sup> Professor Mutungi also said that if a legal system requires every subject to know the law on pain of punishment, his rights are not sufficiently met when the law he is supposed to obey is written and published in foreign languages.<sup>7</sup>

Even for those who can read the law and understand it to some extent, it may not be possible for them to get access to it. The publication of legal books in Kenya has not been quite impressive. It is only in some very few bookshops that <sup>one can</sup> trace a law book or journal in Kenya. The Kenya "Gazette", the official paper that publishes new laws and the numerous statutes that govern the criminal law are all sold in one shop in Kenya—the "Government printers" whose supply of these materials does not meet the demand notwithstanding the fact that not all people are close to Nairobi and the fact that not many people know where these legal material can be bought.

The prices of the legal books are also very high and not every person in Kenya can afford them.

Whereas the paliamentary legislation gets thorough publication which still does not meet the standard required to communicate the law to everyone, subsidiary legislation more often than not never gets more publicity than just its publication in the Kenya "gazette" which is only available to a few people yet <sup>all</sup> are required to comply with such laws.

In as far as the "agency theory" is concerned I would concur with Mutungi that M.P.s are not necessarily agents of their constituents and neither are they meant to impute knowledge of enactments of the National Assembly to them.<sup>8</sup> This is even made worse by the fact that most members of parliament stay far from their constituents and mainly in Nairobi and rarely come into close contact with the latter. In fact even

most of those whose constituencies are in Nairobi stay in Posh estates most of which are not in their constituencies such as Muthaiga, Lavington and Kileleshwa. They, therefore cannot be said to be performing the task of inputting knowledge of the new enactments to their constituents.

*someone thinks of person the name of the Lib. Master otherwise impossible*

*some sleep in parliament and do even know the laws to communicate to the people - (deplorably comment)*

It is therefore evident from the foregoing that communication of law to the law subjects is not effective in Kenya and most people observe the law coincidentally in which case the author submits that it is wrong to argue that there is proper communication of the law to which every subject is expected to conform and therefore agrees with Glanville Williams that the proposition that everyone is presumed to know the law is sheer legal fiction<sup>9</sup>

SHOULD THE MAXIM BE USED TO COMPEL PEOPLE TO KNOW THE LAW?

If people were allowed to plead ignorance of the law as an excuse for their lack of compliance with the same it would appear to them that they should only comply to these laws they are conversant with. What they are indifferent about should not bother <sup>them</sup> at all. They would therefore not be compelled to dig into the legal material in order to know whether they are legally justified to do what they contemplate to do. But the doctrine does not give them such a chance

But on the other hand, such a justification could be valid only where the law is available to <sup>everybody</sup> in Kenya. As mentioned above (supra) legal books are very scarce in Kenya and even to those who have access to such material, still the language used in these material is very technical and not many are <sup>for about what they are talented</sup> talented or knowledgeable enough to understand the legal language notwithstanding the fact that in some situations some latin maxims are used to convey certain messages both in <sup>statutes</sup> and in other legal books.

The only alternative for most people who want to equip themselves with the law is to consult an attorney. This is also not the best way to communicate the law to every citizen. In the first place, legal consultation is expensive. Not everybody can afford the advocate's fee. Even the affluent people would still find it very expensive to consult an advocate every time they want to know the law. And even if everyone had money to consult an advocate, the number of advocates we have in Kenya cannot satisfy the demand for their services. But most importantly is the fact that one cannot plead misrepresentation of law by an advocate as an excuse for his failure to comply with the same. In my opinion, this is <sup>an</sup> area in which the maxim works most unjustly. A person who feels compelled by the doctrine of "ignorantia juris non excusat" to know the law may go to an advocate, pay an exorbitant fee but gets the wrong advice as to what the law is. Relying on that law he does an act which amounts to a crime. When he is taken to court he gets the enlightenment that it is no defence that the accused acted in reliance to an assurance by a competent official that no prosecution would be brought against him as was held in the case of Cooper v. Simmons<sup>10</sup> that it makes no difference that the accused had received competent legal advice that his conduct would be lawful because the contrary view would result in the advice of an attorney being paramount to the law". Why punish someone who goes to a competent lawyer but who is misadvised in the process and yet that was the only way he could know the law? Such a person needs an absolute acquittal because it is hard for a layman to know that the advice is wrong.

You can only compel one to know something for which he has the means of knowing. It was opined by the famous scholar, Seidman that:

Confirming to notions of Laissez - Faire, citizens retain the burden of learning the law, while the state accepts the responsibility to make the law available".



The use of the doctrine as a means of compelling people to know the law at their own Peril, according to seidman, was conditional to the state making the law available to all the citizens. Since the position in Kenya is far from this it would be wrong to accept seidman's rationale in Kenya. We can only accept it when the state conforms to this condition that it accepts the responsibility of making the law available to all. Publishing the law in the Kenya "gazette" does not meet this requirement.

CAN IT BE PROVED WHEN ONES' IGNORANCE IS JUSTIFIABLE?

One of the justifications for the application of the principle is that it would be very difficult to know when one's ignorance is totally inevitable or when one has contributed to one's ignorance. But even without saying much about the unreasonableness of such reason, it would suffice to say that if justice has to be done and seen to be done then it would be necessary to dig all the facts surrounding the accused's commission of the offence. This would show whether the accused committed the offence he is charged with ignorantly or with full knowledge. Such factors as home background, educational background and social status of the accused would help to tell whether a person of his class would have probably known the legal consequences of what he did. For example, whereas it would be expected that every law graduate knows there is a difference between murder (where there is malice aforethought) defined under s. 203 of the penal code and manslaughter under s. 202 of the penal code where malice aforethought is absent one who has never studied law may not always be expected to have the knowledge that there is such a distinction.

It is surprising to find that in certain cases the law shifts the burden of proof to the accused e.g. where the accused claims to be insane yet it does not shift the burden of proving justifiable ignorance of the law to the accused where he claims to be so ignorant.

In fact, this reasoning is baseless when it is borne in mind that an accused who was in the High seas when a law was passed was convicted after contravening

that law when it was very clear to everybody that he did not know and neither did he have the means to know that the new law had been passed<sup>12</sup> or where a foreigner comes into the country and due to the influence of the law of his country of domicile, which on a particular point is quite different from its Kenyan counterpart, with which he is not conversant at all, he commits an offence.

DOES THE APPLICATION OF THE DOCTRINE REALLY EDUCATE THE PUBLIC ON WHAT THE LAW IS?

It is true that once an accused has been convicted of an offence then this conviction would be given a lot of publicity and people would learn that behaving in a similar<sup>live</sup> manner constitutes a criminal offence. Since most people in Kenya where legal documents are not sufficiently supplied to the public, this may be a very good way of alerting people on what a crime is. One may wonder whether it is only convictions which are reported in the press. The answer is almost solely in the affirmative. More often than not the press reports convictions and not acquittals. This is what gives flavour to their papers. Most people don't enjoy reading acquittals occasioned by very minor defences and the defence of "ignorance of the law" if it were allowed would be such. If there is an acquittal, most readers would like to read only a very well argued out defence and especially so where it is quite apparent that the accused had "committed" the crime but because of the way he argues out his case he is acquitted. The defence of "Ignorantia juris" would not meet such a qualification.

But this justification also has its own shortcomings. Firstly, it would be wrong for the government to abdicate its obligation of informing the public what the law is. Sgidman says that the state retains the responsibility to make the law available.<sup>13</sup> The press has got no such obligation.

Secondly, every now <sup>and</sup> then, there are misrepresentations of the ruling of the court. This is because pressmen are not legal experts and the language used by the courts is not always a language they can fully understand.

Thirdly, some people have never differentiated between a charge on one hand and a conviction on the other hand. Many a times policemen arrest people who have not committed any crime construing their (lawful) conduct wrongly to be a criminal offence only to be acquitted or to have no charges preferred against them. An interesting episode occurred when the author was doing his clinical programme in Nakuru Principal Magistrate's court where a man who had been charged with a criminal offence disappeared from his home and the police arrested his wife, took her to court so that the husband would feel compelled to appear in court. The magistrate reprimanded policemen for their quite unethical conduct. This is only one among many instances of confusion because to so many people who followed the matter but <sup>not</sup> to the end especially upto the time the woman was taken to court but lost interest in the matter or due to certain circumstances they were not able to hear the magistrate pronounce that the woman be discharged such people may have thought that it is a criminal offence not to produce one's husband who has been charged with a criminal offence.

Fourthly, newspapers are scarce and are mainly distributed to the urban areas and even those people who have access to them may not afford a copy every day not to mention the fact that so many people in Kenya are illiterate.

The mass media also has got its own shortcomings as was explained earlier on.

#### THE OBJECTIVITY OF THE LAW QUESTIONED:

The most important question to ask here is whether the law is objective. If the answer is in the affirmative then one may ask

whether the application of the doctrine in its present form would make it possible to maintain the law's objectivity. On the other hand, if the answer is in the negative then one may ask whether this principle would change and improve the situation.

If the law were objective we would not be having a situation where the court gives a certain section of an Act of Parliament a certain meaning and later on the same court gives the same section a different meaning altogether. There are also instances where a court interprets a word or phrase in a section of a statute and gives it a particular meaning which meaning is later reversed. In the case of ZUS V. Uganda<sup>14</sup> for example, the appellant was convicted of stealing a bicycle which had been found in his possession seven months after its owner had reported its loss to the police. The trial magistrate applied the doctrine of "recent possession" in S. 322 of the penal code in the absence of a reasonable explanation from the accused of how he came by the bicycle. The appellant was convicted of receiving the bicycle. He appealed against the conviction to the High court ( of Uganda). Sir Udo Udoma, C.J. said, "..... the learned magistrate was wrong to have applied the doctrine of recent possession. A period of seven months cannot be described as "recent". One would wonder where a demarcation line between recently stolen property and property stolen too long before they are found with someone can be drawn. This question must have bothered the trial magistrate because interpreting certain facts in order to tell whether something was recently stolen or not is quite a subjective test. There is no objective test to it.

The situation would even be more draconian where an accused rightly thinks that he is observing the law basing his thought on an earlier interpretation which interpretation is later reversed between the time he does the act and the time he is charged with the offence.

It is therefore evident that the interpretation of the law may vary depending on the person on the bench who is strongly protected by law in case he misinterpretes the law. And applying the maxim of "ignorantia juris" however strictly, would not make the law any objective.

PUBLIC POLICY AND THE MAXIM:

Austin was quite sincere when he observed that the rule concerning ignorance of the law exists and must rest upon policy and policy alone<sup>15</sup>. In other words, he could not see any other genuine reason for the application of the rule. Several jurists were of the opinion that if the law were otherwise, then the public at large would face a lot of hardships since the administration of justice would almost be impossible. It would be difficult for the state to meet perfectly the objective of criminal law which is to reduce crime since most people who would appear before the court would justifiably plead ignorance of the law. If proved beyond reasonable doubt that they were actually ignorant, then they would have to be acquitted.

But it is always necessary to consider public policy with a lot of care before we can justify the application of any law on only that ground. Burrough J. observed in the case of Richardson v. Mellis<sup>16</sup> that "public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you".

The question that one must ask oneself is, should the government impose an obligation to each citizen to observe the law with the threat of punishment even where those laws are not known by the citizen and worse still, even where they don't have the means to know those laws so that it may be easy for the government to control crime. And should this be answered in the affirmative, would the results be positive at all?

If people do not have the means to know the law then their obedience to the same would only be accidental. And imposing punishment for failure to observe the law where the law cannot be easily determined is quite unjust.

In Regina v. Campbell and Mlynarchuk<sup>17</sup> Kerans D.C.J. Summarised

the injustice of the principle by saying that.

"..... the section removing ignorance of the law as a defence, in criminal matters, is not a matter of justice, but a matter of policy. It is not a defence, I think, because the the first requirement of any system of justice, is that it work efficiently and effectively..... The defence should not be allowed as a matter of public policy..... indeed it cannot be allowed because of public policy. This is the case notwithstanding the sympathy evoked by the situation of an accused person. The irony is that people in society are expected to have a more profound knowledge of the law than are the judges....."

Keedy observes that policy should be invoked to support propositions of law only when these cannot be explained by general principles and that at best policy is vague, and courts may well differ as to what it is. <sup>16</sup>

It is therefore evident that all the other justifications given by other scholars apart from the public policy rationale are unfounded. But the best way to check crime is not to apply such a harsh law but to educate the citizens on what the law is. And in any case it would be better for many "innocent" persons to be set free than to insist on applying the law rigidly as a matter of public policy at the expense of a justifiably

"innocent" person. His interest cannot be ignored because of public interest.

At this juncture the author's submission is that this principle has got no justification and should not be found in our Penal code. It is interesting to find that South Africa with its policy of apartheid gives room for the excuse that one was ignorant of the law<sup>19</sup> whilst our law does not show any lenience to those that are ignorant of the same.

I would sum up by stating that this law is not appropriate for Kenya. In the next chapter, I will give recommendations as to what should be the position.

FOOTNOTES:

1. Hall, J, 'General Principles of Criminal' PP 163-170 (2nd ed. 1960), quoted in Seidman, R, "The communication of law and the process of development", Wisconsin Law Review 3 (1972) P. 689.
2. Smith and Hogan, Criminal law 5th ed. (London Butter - worths, 1983) P. 69.
3. (1969) E.A. 16.
4. Mutungi C.K, The Communication of the law under conditions of development. The Kenyan case" 9 E.A L.J.(1973).
5. Financial Review, March 26, 1988.
6. I the works of Jeremy Bentham, by Bowing, Russel and inc., C. N.Y, (1962), 157.
7. Mutungi, C.K Loc cit P.16
8. Mutungi, C.K Loc. cit P. 19
9. Glanville Williams, The Criminal law , The General part, (London, Stevens and sons ltd, 1953) pp 385 - 6.
- 10 (1862) 7 H. and N, 707.
- 11 Seidman R, loc, cit P. 690
- 12 R.V. Bailey (1800) 168 E.A., 651.
- 13 Seidman R, loc cit P 690.
- 14 (1967) EA 420.
- 15 Austin, John, Lectures on Jurisprudence, or the philosophy of positive law, 5th ed, Revised and edited by R Campbell (London Murray, 1885).
- 16.(1824) 2 Bing 229.
- 17 (1972) 10 C.C.C.(2nd) 26 Alberta District Concil.
- 18 Keedy, E R. "Ignorance and Mistake in the Criminal law" 22 Harvard Law Review (1908 - 9) p. 91
- 19 1977 (3) S.A. 514.



CHAPTER FIVE

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RECOMMENDATIONS AND CONCLUSION

In chapter four I made a number of observations in relation to the rationale of the application of the principle of "ignorantia juris" in Kenya based on my research.

In the first place I made the observation that the allegation that the accused should be convicted when found guilty of an offence irrespective of whether he knew the law or not since he had a guilty (or criminal mind) is baseless. An accused or an offender does not always have a criminal mind.

The second major finding I made is that the proposition that everyone is presumed to know the law is a sheer legal fiction.

Thirdly, I observed that it is not impossible to find out whether the accused person committed the offence he is charged with ignorantly or with full knowledge.

Given that the socio-economic conditions may not make it easy to communicate the law to all its subjects, I also observed in chapter four that the adherence of the application of the doctrine strictly would not educate the people on what the law is.

The fifth observation was that since the law is not objective applying the maxim of "ignorantia juris haud excusat" would not make it any objective.

I also observed that the opinion of the scholars who argue that the maxim rests upon public policy alone is not well founded and therefore the law is not appropriate for Kenya.

In conclusion I found out that this principle has got no jurisprudential justification. Neither can public policy which at best is vague and courts may well differ as to what it is and my contention is that S.7 of the penal of Kenya is harsh, oppressive and unjust to the subjects of the law.

To remedy the situation, the law should be amended<sup>so</sup> that we may have a law that is responsive to the needs of society. In particular in as far as the state of mind of the accused is concerned, the court should look at the circumstances surrounding the commission of an offence by the accused to ascertain whether he had a guilty mind when committing the offence and treat those who did not have a guilty mind more leniently.

Secondly, it should not be presumed that everybody is cognisant of the laws of the realm. There should be a total and unconditional<sup>accusatorial</sup> of all people who after being charged and tried for an offence are proved to be ignorant of the law they have contravened. This is the position in South Africa as was clearly shown in the case of S.V. De Blom<sup>1</sup> where it was said that if the accused wishes to rely on a defence that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful.

An alternative to the above suggestion would be to categorize those who are ignorant of the law into two classes:

1. those who have access to the means of knowing the law but who don't care to know what the law is; and
2. those who can't be expected to have known the law they have contravened because of the inaccessibility of the law to them.

The law, in its present form, treats these two classes of people as if they are at par. It beats common sense (though the law is not always synonymous with common sense) to read that where the accused could not have had access to any means of alerting him that a new law had been passed as was the case in Bailey's,<sup>2</sup> he was convicted just as a lawyer would be when he contravenes a law he is very familiar with. I therefore contend that those accused who could not have possibly known the law due to the law being inaccessible to them should be acquitted.

This is the position in the Scandinavian criminal law where a stranger is not convicted for breaking a rule which he could not be expected to know about and no one <sup>is</sup> held liable for contravening a very new legislation or one whose interpretation is doubtful. An accused's background and the circumstances surrounding his commission of a crime should be thoroughly scrutinised by the prosecution to find out whether he deliberately refused to find out what the law is or he had no means of finding out what it is. Alternatively, the law can shift to the accused the burden of proving to the court that he did not have the means of knowing that his conduct constituted a crime.

The law should also be amended to provide that where a person takes the trouble to find out what the law on a particular point is but he is unfortunatly misadvised by a lawyer either deliberately or innocently and shows the court that he relied upon such advice he should be acquitted.

All the above recommendations are in line with the Japanese position which is to the effect that:

"a person who commits a crime without knowing that his conduct is not permitted by law shall not be punishable if his understanding is based on reasonable grounds" <sup>4</sup>

Although there are people who commit crimes deliberately, there are several people in Kenya who commit offences not because they are masochists but because they do not know what the law requires of them. To such people, the state has an obligation to teach them and everybody else what the law is. To do this the government has numerous avenues. Firstly, the teaching of basic law should be incorporated in the school curriculum from primary schools to University level where students should be taught what constitutes an offence and the penalties prescribed for such offences.

Secondly, the penal code should be abridged and enough copies thereof published and sold in bookshops at a fair price which most people can afford. The abridgement would ensure that they are easily digestible by those who may not be in a position to understand the legal jargon used in the current penal code.

Since there are a number of people who do not understand English in Kenya, the above recommendation may not meet the legal needs of all citizens. Therefore, resort should be had to Jeremy Bentham's advice: "show me your ordinance in my own language and then, if I deceive you, punish me"<sup>5</sup>. This would call for the translation of the penal statutes in Kiswahili and in as many local languages as possible since most people who attend adult classes are able to read and write their mother tongues only and the most that most of them can read is Kiswahili. These translations should also be sold at a fair price.

To make sure even those who did not have a chance to go to school are also well versed with the law, the government should organize many in-service courses for chiefs, sub-chiefs, information officers, etc. to teach them the law and then make them duty-bound to organize meetings in the rural areas and teach the masses what the criminal law requires of them. This would be highly rewarding. To enhance this, law students from the university can be attached to their local chiefs' camps during their vacations with a view to educate the masses on what the law requires.

To enhance the chances of communicating the law to all, the government should make use of the mass media and introduce legal programmes to educate the public on what the law is and in a simple language which can be understood by all. This should be done through not only the general service (English) but also through the national service (Kiswahili) and other services whose transmissions are in local languages understood by both the literate and the illiterate alike.

The press can also be very useful in this area. If legal education columns can be introduced in the dailies and most especially the rural based magazines, legal education in Kenya would receive a big boost.

It would also be necessary that the law, once published, should

not be applied until after a reasonable period of time within which it would be intensively brought to the attention of all the citizens for public awareness so that it becomes a matter of general notoriety.

In conclusion therefore, it is my contention that by applying the doctrine of "ignorantia juris" as rigidly as it is applied today given the background of mass ignorance of the law it would appear that people are punished for not having known the law. People should only be punished for not observing a law which they know about. In fact most citizens are not only ignorant of the law but they are also ignorant of the fact that ignorance of the law is no excuse. And the rigid application of the doctrine can not help them know what the law is unless they are taught what it is. There is therefore an urgent need to amend the law and to embark on a very serious campaign of legal education in Kenya.

FOOTNOTES:

1. 1977 (3) S.A, 513.
2. Russ & Ry l Reported in English Reports, Vol. 168; 1925 at 651.
3. Smith and Hogan, Criminal law 5th ed. (London: Butter - worths, 1983) P. 70.
4. Article 21 (ii) of the Japanese Criminal code of 1972, Reported by Paul K. Ryce and Hellen Silving, "Comment on Erro Juris" A.J.C.L., Vol 24 1976 p. 692.
5. I. The works of Jeremy Bentham, by Bowing, Russel and Russel inc., N.Y. (1962), 157.

GLOSSARY:

- "Bona Fide" - in good faith
- "Gazette" - the official publication of the government
- "ignorantia juris non excusat" - Ignorance of the law is no excuse
- "Ignorantia quod quisque  
tender scire, meminem excusat" - Ignorance of the law, which everyone  
is bound to know, excuse no man.
- "Laissez faire" - This is a political - economic  
philosophy expression of the government  
of allowing the marketplaces to  
operate relatively free of restriction  
and intervention.
- "Nulla poena sine lege" - A legal maxim which states that Laws  
should not be passed retroactively and  
neither should a person be convicted  
offence he committed before it was  
so by the law.
- "Obiter" or ("obiter dictum") - By the way; in passing.

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