

ADMINISTRATION OF CRIMINAL JUSTICE IN

MACHAKOS LAW COURTS

Dissertation submitted in partial fulfilment  
of the requirements for the LL.B. Degree,  
University of Nairobi.

BY

MUNUVE, D. M.

NAIROBI

JUNE, 1986

### ACKNOWLEDGEMENT:

I am deeply indebted to Mr. Okechi Owiti (my supervisor) for his tireless efforts in assisting me in this work. His guidance, co-operation and criticism. I must say, helped me alot in having a fair picture of what I discussed.

In a similar vein, I am deeply indebted to Esther Mwanza and Valentine Mutua. To the former, for providing me with all the necessary materials used in dissertertion and above all for her great concern over my success and moral support: all of which provided a very lovely atmosphere for the success of my work. To the later for offering herself wholly to type for me in the very most friendly manner. To all I am sincerely grateful.

Entirely dedicated to my dear parents and  
family.

TABLE OF CONTENTS:

	PAGE
1) TABLE OF CASES.....	(i)
TABLE OF STATUTS .....	(ii)
ABBREVIATIONS .....	(iii)
INTRODUCTION .....	1 & 2
11) <u>CHAPTER (1)</u>	
A. <u>PRE-COURT PROCEDURE</u>	
1. THE POLICE .....	3
2. CHIEFS AND ADMINISTRATION POLICE ..	8
3. KANU YOUTHWINGERS.....	12
4. THE CHARGE.....	14
B. <u>IN-COURT PROCEDURE</u>	
1. MAGISTRATES.....	21
2. PROSECUTORS.....	29
3. INTERPRETERS (Court Clerks).....	31
4. PROBATION OFFICERS.....	32
111) <u>CHAPTER 11</u>	
1. THE POLICE.....	35
2. THE CHARGE.....	50
3. CHIEFS AND ADMINISTRATIVE POLICE...	57
4. KANU YOUTHWINGERS.....	64
5. MAGISTRATES.....	67
6. PROSECUTORS.....	71
7. INTERPRETERS.....	73
8. PROBATION OFFICERS.....	76
1V) CONCLUSION .....	77

(i)

TABLE OF CASES:

(a)

1. Connley V.D.P.P.
2. Odundos/o Anyangu and another V.R.
3. Ramanlal T. Bhatt V.R.
4. R.V. Elijah Kathoka and others.
5. R.V. Elijah Kavulu.
6. R.V. John Mwaniki and another.
7. R.V. John Mwilu.
8. R.V. Joseph Mutie.
9. R.V. Kalulu.
10. R.V. Kaperere.
11. R.V. Kaviti.
12. R.V. King'oo Kaviti.
13. R.V. Mathew Musau.
14. R. V. Mashake Yusufu Ramadhani.
15. R.V. Mohammed Luta and another.
16. R.V. Munyao.
17. R.V. Murimi and others.
18. R.V. Musyoki.
19. R.V. Mutie Munyao.
20. R.V. Mutolu (John).
21. R.V. Mutilu.
22. R.V. Mutua.
23. R.V. Nicodemus Kingoo.
24. R.V. Ngami Peter.
25. R.V. Omolo and others.

(b). TABLE OF STATUTES:

1. Administrative Police Act.
2. Chiefs Authority Act.
3. Criminal Procedure Code.
4. Evidence Act.
5. Magistrate's Court Act.
6. Penal Code.
7. Police Act.
8. Probation of Offenders Act.

(iii)

ABBREVIATIONS:

1. Cap - Chapter.
2. Cr. case No. - Criminal case Number.
3. Kanu - Kenya African National Union.

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

Between 8th July and 30th September, 1985 I underwent my clinical programme at Machakos Law Courts. While there and sitting with the Magistrates on the bench, I witnessed many weaknesses which I felt made the proper administration of criminal justice difficult. That in turn prompted me to investigate further on the administration of criminal justice.

My main or primary aim in writing this work was to expose some, if not all, of the weaknesses that hinder criminal justice in Law Courts. The Secondary aim, however, was and still is to assist those other Lawyers who may be wishing to join the bench to have a picture of what they are likely to encounter and devise their own methods of discovering some of the weaknesses or failure that may have occurred before trials commence or at the trials.

To that end, I should emphatically stress that even though my work relates to Machakos Law Courts, this should not be taken to mean that these problems of justice are peculiar to Machakos Law Courts.

Owing to the specific circumstances of the programme, I could not make a well detailed or close examination of certain aspects of the problems facing administration of criminal justice.



This was largely due to confinement to the Law Courts for clinical programme and lack of access to the best information on the subject covered.

Again due to distance and financial expenses involved, it became practically difficult to travel to Machakos for more than two times to research. As a result, it became necessary to confine myself mainly to the data obtained during the period of the programme.

It further explains why this work is limited to matters of administration of criminal justice between the commission of an offence and the time when an accused person is sentenced.

Chapter one embraces the administration of criminal justice generally. Here, there are two-topics all of which show how different organs are involved in the administration of criminal justice. So much so that at the end of the chapter, anyone who has anything to do with the Law can say that justice would be done if all this is done in respect of an accused person.

Chapter two however, tries to show how administration of criminal justice has failed in Machakos Law Courts owing to some identified weaknesses in those involved in the administration of criminal justice in the said courts.

ADMINISTRATION OF CRIMINAL JUSTICE:

CHAPTER 1

PRE-TRIAL PROCEDURE.

This chapter attempts to outline how criminal justice is administered in Magistrate's Courts and how different organs play important roles thereof. Those organs for the purpose of this work are: The Police, Chiefs and Sub-chiefs, Administration Police, Kanu Youthwingers, Prosecutors, Magistrates and Probation Officers.

1. POLICE:

Administration of criminal justice commences when an offence (called crime) is committed or suspected to have been committed. Things may be set in motion by a complainant reporting the commission of the offence to the Police or by Police Officer who may have been at the scene of crime. It may also start if a Police Officer reasonably suspects one to have committed or to be about to commit a crime.

Thus the Police Force becomes very crucial in the whole process of administration of criminal justice. Cap. 84<sup>1</sup> establishes the Police Force and sets out its fundamental functions. Section 14(1) of the Act provides inter alia that:-

"The force shall be employed in Kenya for the maintenance of Law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the enforcement of all laws and

regulations with which it is charged".

Section 15(2) of the Act. goes further to confer upon the Police Force more powers and duties than the preceding section. By virtue of this section:-

"Every Police Officer shall promptly obey and execute all orders and warrants lawfully issued to him, collect and communicate intelligence affecting law and order and take all steps necessary to prevent the commission of offences and public nuisance, to detect offenders and bring them to justice and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist"

Normally, the apprehension or arrest of suspects is accompanied by investigation of the offence alleged to have been committed. It is the duty of the Police Officers to carry out these investigations. Investigations into any alleged offence is necessary for the purpose of determining whether the suspect should be charged with that offence.

It is even more important for the Prosecution during the trial of an accused person in determining his guilt. At this point, it is important to stress that the success or failure of the prosecution case depends very much, if not solely, on the evidence available, which evidence is gathered by means of investigations by the Police Officers.

The investigating officer is required by law to perform his duties diligently and honestly and to take

all necessary measures to ensure that proper evidence is obtained. On the day Police Officers graduate from College, they take an oath to the effect that they will be obedient, owe allegiance to President and do their utmost to preserve the peace and that would subject themselves to all Acts, orders and regulations now or in the future in force.

This is contained in the Police (Amendment) Act<sup>3</sup> which provides as follows:-

"I ... do hereby swear by almighty God  
solemnly and sincerely affirm  
that I will be faithful and bear true allegiance to the President and the Republic of Kenya during my service in the Kenya Police Force that I will at all times as a special Police Officer do my utmost to preserve the peace and prevent offences against the peace; that I will subject myself to an Acts, orders and regulations now in or in future in force relating to my service duties of a Police Officer according to Law without fear, favour, affection or ill-will".

Thus a Police Officer carrying out any investigations is subjected by the oath to the Police Regulations<sup>4</sup> by virtue of the Police (Amendment) Act, which regulations are branded "offences against discipline," Regulation Number 23 requires all Police Officers not to be negligent or idle in the performance of their duties.

It follows that whenever any Police Officer takes up, or is directed by his superiors, to carry out any investigations in respect of any alleged offence, he has to do so with the utmost exercise of care. He has to make sure

that every relevant evidence that may be useful to the prosecutor during the trial of the accused or to the Police Officer in the Police Station for the purpose of charging the suspect, is carefully taken.

As per Regulations numbers 36 and 37, <sup>5</sup> no Police inspector or subordinate, should, unknowingly make any false accusation against any other person or unknowingly make any false statement affecting the character of such person or wilfully suppress any material false, Although it is expressly stated in these regulations, it is implicit ~~that~~ <sup>it that</sup> in any investigation into any alleged offence, they are not at any time supposed to suppress any material facts which would render impossible the administration of criminal justice.

Material facts may take many forms e.g. any statements obtained, anything seen to have been done or omitted to have been done, anything left behind by the assailant (offender) or any other things connected with the offence under investigation.

Regulation number 41<sup>6</sup> makes it an offence to contravene any of the Regulations enumerated or contemplated by "The Police Regulations" and any person guilty of any act, conduct, disorder or neglect to the prejudice of good order and discipline, not hereinbefore specified, shall be

be guilty of an offence against discipline.

Two things are discernable from this Regulation:-

- (i) That it is a summary of the whole Part II of the Police Regulations.
- (ii) That Police Regulations as enumerated thereunder are not exhanstive.

It follows that Part II and particularly Regulations number 41 is very broad and as such not all offences or conducts against discipline are included therein. It can only be said in a terse statement that - All duties in respect of all investigations should be discharged diligently and honestly.

While all this is taking place, the accused is in Police Custody or at large. In the case of the letter if the investigations Police Officers or Officers has/have, having complied with all the above requirements, come up with concrete evidence implicating the suspect, then he (the suspect) is arrested and taken to Police Station for charge and caution.

If the suspect is already under arrest, he is there-upon charged. It should be borne in mind that on either case the suspect should be charged with the right offence; that is to say, the charge should be compatible with the evidence gathered during the investigation.

It is however less important here to say that if no reasonable grounds are established as to why a suspect should be charged then he should be set at liberty.

2. CHIEFS AND ADMINISTRATIVE POLICE:

Closely related to the institution of Police are the Chiefs and Administrative Police. Differences however do exist between the former and the later two. The former is more detailed and elaborate when compared with the later (Administrative Police).

It is also wise to treat them differently here as administrative police work hand-in-hand with chiefs and can be called Chief's Agents.

In terms of duties, however, administrative Police Officers can be said to constitute the lower echelon of the Police Force generally. This is because the Law does not require them to perform the very detailed tasks such as charging suspects. If anything all they do in practice is to arrest suspects, then hand them over to the Police properly so called.

Cap. 128<sup>7</sup> establishes the institution of Chiefs in this country and section 2 of the Act. provides:-

"In this Act, except where the Act otherwise requires 'Chiefs' and 'Sub-Chiefs' respectively mean the persons appointed for any area to the Offices of

Chief and Sub-Chief respectively in the public service."

Cap. 85<sup>8</sup> establishes the institution of the Administrative Police and section 8 of the Act. links them with chiefs when it comes to the exercise of duties. As per this section,

Every Officer shall:-

- (a) when called upon by any Chief or Sub-chief, assist him in the exercise of his lawful duties,
- (b) obey and execute promptly all orders and warrants lawfully issued to him by any competent authority,
- (c) preserve the public peace, prevent the commission of offences and apprehend all persons in respect of whom he holds a valid warrant of arrest."

It is clear from this section that apart from the statutory connection that exist between administrative Police and Chiefs with Sub-Chiefs inclusive, the duties they are required by the Law to perform are generally similar to those conferred upon the Police Officers properly so called. It follows that everything said with regard to the exercise of duties by the Police Officers apply equally to the Administrative Police Officers. The only two reasons why they should be treated differently here are:-

- (i) as already said they constitute the lower echelon of the Police Force,
- (ii) as per S.8 of Cap. 85<sup>9</sup>, they work hand-in-hand with Chiefs and Sub-Chiefs.

It can be argued that, since chiefs and sub-chiefs represent the executive at a very local level, the Administrative Police work at such areas.



Section 6 of Cap. 128<sup>10</sup> confers powers and duties contained in the Act upon chiefs and sub-chiefs. The section provides as follows:-

"It shall be the duty of every chief or sub-chief to maintain order in the area in respect of which he is appointed, and for such purpose he shall have and exercise the jurisdiction and powers conferred upon over persons residing or being within such area."

The Act in fact confers upon the chiefs and sub-chiefs a wide range of powers. They work as administrators in the areas to which they are appointed and can make orders to be obeyed by the persons residing or being within the local limits of their jurisdiction. Contravention of any chief-made-orders attracts criminal penalties.

As for maintenance of order, they are required to work within their jurisdiction. Here, a chief has powers to arrest or issue warrants of arrest in respect of anybody who disturbs the good order or in breach of peace. All this he does with the said administrative police acting as agents.

Since S.8 of Cap. 85 requires the administrative police officers to obey and assist chiefs and sub-chiefs respectively in the exercise of their duties, it means that once a chief or sub-chief receives any information that one has committed an offence, he can direct any administrative officer to arrest that person. Sub-section (b) of the same section mitigate the injustices that sub-section (a) may

Cause by requiring these administrative police officers to obey and execute promptly those warrants lawfully issued to them by any competent authority.

In practise, " any competent" authority means the chiefs and the sub-chiefs.

But the question remains, when can we say that a warrant is lawfully issued?

would it suffice that a warrant emanates from a superior officer regardless whether it is made mala fide or not?. For the Law to achieve its goals it should be said that the requirement is that only those warrants executed bone fide should be obeyed.

In practice, when a suspect is arrested pursuant to the powers conferred by the chiefs authority Act<sup>11</sup>, he is taken to the chiefs offices and subsequently handed over to the police officers for charge and caution. So the evidence gathered by the chief and his administrative police officers becomes very vital in the preparation of the charge and even during the trial of the accused. That way, chiefs, sub-chiefs and even administrative police become very vital in the administration of criminal justice.

It follows that any negligence, misconduct or bad faith in the performance of their respective duties can

can easily occasion miscarriage of justice.

3. KANU YOUTHWINGERS:

Today a body known as Kanu Youthwingers does exist. This body is directly involved in the administration of criminal justice and therefore an integral part of the system and worthy of some consideration..

It is not clear how this body is supposed to go about its duties, but guidance can be perhaps sought from the Kanu Constitution itself. However, there are conflicts among the local leaders as to whether the Kanu Constitution provides for the existence of such a body. The most dominant camp led by Honourable Kariuki Chotara holds that the Kanu Constitution is explicit on this issue and that the same group cannot be disbanded unless the Constitution is changed.<sup>12</sup> This disparity is of little importance here as the constitution seems to support the view expressed by Mr. Kariuki and his lot. By virtue of S. 12(a) of the Constitution:-

"The group shall consist of union members who have attained the age of 18 years but who have not attained the age of 35 years. Application for membership shall be made verbally or in writing to the sub-branch secretary or to the District Secretary. On enrolment each member shall be supplied with a youth group card and badge"<sup>13</sup>.

Subsection (b) of the same section goes on to say that every member of the youth group shall pay a fee of sh.2/- and a monthly subscription of cents -/50.

Since the constitution (KANU Constitution) talks of a body called Kanu Youth which is organised on both District and Locational basis,<sup>14</sup> it can be wisely inferred that the so called Kanu Youthwingers is build on that. If that is the case, then Hon. Chotara cannot be said to have blundered in suggesting that Kanu Youthwingers is a creature of the Kanu Constitution.

What are the duties of the body? Here, it should be stressed that the duties of this body are contained in the Party's Constitution. The view contemplated by the constitution is however at variance with the view cherished by a good number of politicians in Kenya. Hon. Chotara, once again has been in the forefront to express their views and has been quoted by the daily to have said that:-

"The sole of the party's youthwingers was to assist the police and the administration in fighting against crime and other social evils. They are not bodyguards of individuals, but on the contrary their duty is to assist in promoting Nyayoism."

Compared to the provisions of the constitution itself, it is clear that the above view is not free from criticism but rather a serious blunder. 8.12 (c) of the said constitution makes it clear that the whole group retains a measure of self-identity, that it shall be an integral part of the party and amenable to the unions control and discipline at sub-location, area, sub-branch/ward and District level. Section 12(i) which charges them with duties provides as

follows:-

- "(i) to work in closest co-operation with branch, location/ward, sub-location/area committees to ensure the success of the policy and programme of the union,
- (ii) they shall have no original power of expenditure but shall be given funds by the branches in order to enable them to fulfil their duties,
- (iii) they shall organise self-help, voluntary work, youth rallies, sports, and organise meetings aimed at increasing the party's consciousness among youth in the District." 16

In practice, however, the view held by those in Hon. Chotara's Camp seems to hold water. It is now a common practice that the Kanu Youthwinger's major task is to assist the police and the administration in fighting against crime and other social evils.

Actually, in that capacity the said group has powers almost similar to those exercised by the police and can therefore arrest any person if directed to do so. Normally it is their leaders who direct them to act. Most of the time they arrest "offenders" and tie them up in ropes then hand them over to the police for charge and caution.

#### 4. CHARGE:

Once a suspect is taken to the police station and the police officer in charge has evaluated all the material evidence gathered against him, the latter shall proceed to prepare a charge against the suspect. The process is long and may take many forms e.g. the complainant or any other

person with relevant information in respect of the offence in question may be required to come forward and make statements, which statements are recorded and signed by the person making them. It is an offence for any person to fail to comply with this requirement without reasonable excuse<sup>17</sup>.

Before the suspect is charged, it is the requirement of the Law that he should be cautioned. This applies where the accused wishes to make a statement or answer a statement put to him by the police. In practice and even from the way the statutes are constructed, it appears that cautioning and making of statements by an accused person may come after he has already been charged.

The relevant section governing this matter is S.22 (3) of the police Act which provides as follows:-

"Any police officer may record any statement made to him by any such person if suspected of having committed an offence or not, but, before recording any statement from a person whom such police officer has decided to charge or who has been charged with committing an offence, the police shall warn such person that any statements which may be recorded may be used in evidence".

There is also a proviso to that section which provides as follows:-

"provided that any such statements shall, whenever possible, be recorded in writing and signed by the person making it after it has been read to him in a language which he understands and he has been invited to make corrections he may wish."

An accused person may also wish to make a confession, if this happens, then section 28 of the evidence Act<sup>18</sup>

becomes operational and by virtue of this section no confession made by any person while he is in the custody of police officer shall be proved as against such person unless it be made in the immediate presence of a Magistrate or a police officer of or above the rank of, or a rank equivalent to assistant inspector.

The initial problem which arises in application of the section is that of who is a police officer under the section, in regard to section 25 of the Indian Evidence Act - confessions to police officers not admissible MAC-KENZIE J. in a concurring opinion in R. V. ASMANI MWAKE WAMBA<sup>19</sup> noted that:-

"the authorities quoted to us all tend to establish the principle that S 25 .... is not to be applied in a strict technical sense but that persons who are in popular sense policemen are to be regarded as coming within the section!"

In the light of the foregoing learned speech and practice in Kenya Courts, it appears that a police officer under S. 22 (3) of the police Act and S.28 of the Evidence Act, is anybody who is by law assigned the duties of a Police Officer.

From practice, it also appears that the requirements of S.28 of the Evidence Act can be dispensed with.

In spite of the importance of confessions, it should be noted that there are great dangers in courts relying on

oral confessions of guilt, therefore the rules and cases all emphasize the transcription of statements, for as was said in R. V. Kapere s/o Mwaye,<sup>20</sup> quoting Taylor on Evidence (11th Evidence) P. 582:-

"...the evidence of oral confession of guilt ought to be received with great caution. For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory; but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof-together with the character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime all tend to impair the value of this kind of evidence and sometimes lead to its rejection, where, in civil actions, it would have been received."

Once a statement or confession is recorded pursuant to s. 22 (3) of the Police Act, the proviso to that section requires the accused person to sign it after it has been read to him in a language which he understands.

Apart from the statutory provisions governing preparation of charges and recording of statements, there are rules of practice providing administrative directions for the guidance of Police Officer in the taking of statements and confessions from suspects. These are called Judge's Rules, and, being rules of practice they are declared by a court of competent Jurisdiction and are followed until that court or a higher court declares them absolute, or they are changed by a legislature.<sup>21</sup>



The initial rules were adopted in East Africa, and when "new" Rules were adopted in England in 1964, the question arose as to whether the "old" or the "new" Rules then applied in East Africa. The court of appeal in Ondundo s/o Anyangu and others V. R.<sup>22</sup> settled the matter by ruling that "old" Rules represent the practice to be followed in the criminal courts in Kenya."

The rules, nine in number state as follows:-

1. When a Police Officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not from whom he thinks that useful information can be obtained.

2. Whenever a Police Officer has made up his mind to charge a person with a crime, he should first caution that person, before asking him any questions or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being administered.

4. If the Prisoner volunteers any statement, the usual caution should be administered. It is desirable that the last two words of such caution should end with the words "be given in evidence".

5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words:-

"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence". Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely because no caution has been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and their statements are taken separately, the Police should not read these statements to the other persons charged, but each of such person should be given by the Police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should whenever possible be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

Although police officers are by law empowered to record statements and confessions given by accused persons, there are other statutory provisions prohibiting the taking of confessions in certain methods. They include among others confessions obtained by inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.<sup>23</sup> If the confession is obtained by any unlawful means it is held to be inadmissible in evidence so is the case where the confession is qualified or retracted by the accused person during the trial - in which case the court is entitled to call a trial - within-a-trial to ascertain whether the confession has been voluntary or not.

B. IN COURT PROCEDURE:

Once charged the accused person is taken to court to answer the charge - to plead. In the court we have a number of personalities who are directly involved in the administration of criminal justice of particular importance here

are Magistrates, Prosecutors, interpreters with probation officers inclusive.

1. MAGISTRATES:

S. 7(1) of Cap. 10 (of Laws of Kenya) establishes Magistrate's Court in every district. The sub-section reads as follows:-

"There is hereby established for each District a Magistrate Court, each of which shall be a court subordinate to the High Court and shall be constituted when held by a District Magistrate who has been assigned to the district in question by the judicial service commission."<sup>24</sup>

S. 6 whose heading reads "powers of district magistrate" is somehow vague and does not tell us a lot about what these powers are. All it says is that a District Magistrate shall have power to hold a Magistrates' Court of such class as is designated by the judicial service commission,<sup>25</sup> S.15 of the same Act is however of great assistance for it gives guidelines as to the procedure proceedings. It is this section that directs Magistrates to the criminal procedure to be followed:

It provides inter alia that:-

"subject to this Act and rules of court, all Magistrates' courts shall follow the principles of procedure and practice laid down by or under:-

(a) the criminal procedure code, as regards proceedings of a criminal nature."<sup>26</sup>

Under the criminal code and also in practice once an accused person is taken to court for the first time, the substance of the charge is stated to him by the Magistrate and he is called upon to plead. Here, he can admit or deny the truth of the charge.

If the accused person admits the truth of the charge his admission is recorded as nearly as possible in the words used by him and the Magistrate shall convict him and pass sentence upon or make orders against him, unless there appears to him sufficient cause to act to the contrary.<sup>27</sup>

In practice, after conviction but before passing of the sentence, the Magistrate may require the prosecutor to outline any special facts in which the offence was committed. This applies mainly where the offence committed is e.g. cases of assault.

It is of course a requirement of the Law that special facts may be given upon the pleas of guilty by the accused person - but it is not a mandatory requirement and the Magistrate therefore has a discretion in the matter.

Thus minor offences such as brewing or being in possession of traditional liquor without a licence may be punished without production of special facts - except perhaps the liquor as exhibit.

In the case where the accused person does not admit the truth of the charge, the court shall proceed to hear the case.<sup>28</sup> The same would apply where the accused person refuses to plead.

In practice the hearing of a case may be fixed to commence several weeks after the "plea". As a result the accused person may be released upon the court granting a bail to the accused person or release him on his executing a bond with or without sureties for his appearance. As soon as the bond has been executed, the person for whom appearance it has been executed shall be released, and if he is in prison the court admitting him to bail shall issue an order of release to the officer in charge of the prison and the officer on receipt of the order shall release him.<sup>29</sup>

The release should be immediate save where other lawful grounds render it impossible e.g. where the accused is charged with another offence for which no bail has been granted.

Moreover, in granting bail the Magistrate has a discretion so that factors such as the possibility of the accused absconding or interfering with witnesses may influence him not to grant it.

If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any). The Magistrate ensures that after each prosecution witness has given evidence, the accused person or his advocate (if represented) is given an opportunity to cross-examine

that witness. The answer given (if the witness is cross-examined) is recorded.

Normally all evidence is given on oath save where some circumstances exist exempting a witness from making sworn statements.

If at the close of the evidence in support of the charge and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.<sup>31</sup>

If however the Magistrate in this case is satisfied that a prima facie case has been established to require the accused to make his defence, the Magistrate shall again explain the substance of the charge to the accused and inform him that he has a right to give evidence on oath or to make unsworn statement, and that in the former that he would be cross-examined by both the court and prosecution and that in the later he would not be subject to cross examination.<sup>32</sup>

In practice the Magistrate informs the accused person that he has the right to keep quiet as the burden of

proof in criminal cases is always upon the prosecution (save where the burden is by law placed upon the accused).

Now the question is, when can a Magistrate say that a prima facie case is established? or, what is a prima facie case?

The leading decision on this question is Ramanlal T. Rhatt V. R.<sup>33</sup> There the appellant, a sub-inspector of Police, had been charged with two counts of official Corruption. At the trial the Magistrate considered that a "fragment of evidence" namely "have you got sh.1,000/=?" was not sufficient to justify his calling on the defence on the count of soliciting, and though evidence on the second count was strong, he thought it did not constitute proof of the charge as laid. The Attorney-General appealed to the High Court by way of case stated and obtained an order remitting the case to the same Magistrate with a direction to put the appellant on his defence in respect of both counts and to hear and determine the case according to law. At the resumed trial the appellant was convicted, the court of appeal, discussing and disagreeing in part with 9 passage from the judgement of Wilson, J. in R. V. Jagjivan M. Patel and others,<sup>34</sup> said;-

"Remembering that the legal on us is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one 'which on full consideration



might possibly be thought sufficient to sustain a conviction: This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes that the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is 'some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence'.

A mere scintilla of evidence cannot be enough: nor can any amount of worthless discredited evidence. It is true as Wilson, J. said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively! that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence!

Certain things should be said about a prima facie case:-

1. That the fact that a prima facie case has been made out does not inevitably indicate that the accused person will be convicted even if he offers no defence.
2. That the right approach is that the accused may be convicted once a prima facie case is established whether a defence is made or not.
3. That the Magistrate does not of course have to decide whether the accused is guilty at this stage. All he needs to do is to decide whether a case is made out sufficiently to require the accused to make a defence. It may be a strong case or a weak case.

4. That even if a prima facie case is established against the accused the burden of proof will remain on the prosecution.

5. That a prima facie case may and may not be a case proved beyond reasonable doubt - if anything, the Magistrate makes a decision immediately the prosecution closes its case and that is too early to examine the weight of the prosecution evidence.

A situation may arise during the proceedings where the accused person denies or qualifies a confession taken while in police custody. In such a case, the Magistrate is required to call a trial-within-a-trial. Here the onus of proving the voluntariness of the confession lies on the prosecution.

A different problem may also arise at any stage of the trial. If it appears to the court that the charge is defective, either in substance or in form; the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet circumstances of the case. Provided that the accused is to plead afresh to the charge and call back the witness to give evidence afresh and cross-examine them.<sup>35</sup>

After the close of the defence case, the court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.<sup>36</sup>

However, between the conviction and sentencing the Magistrate is required to call the prosecutor to produce the accused's record (if any) i.e. - the accused's criminal antecedents. This is given effect by section 57 (2) of the Evidence Act which states that:-

**"Notwithstanding** the provisions of sub-section (1) of this section, evidence of previous conviction for an offence may be given in a criminal trial after conviction of the accused person, for the purpose of affecting the sentence to be awarded by the court.

After the prosecutor has addressed the court on this issue the accused person is also given a chance to mitigate. This also helps the Magistrate to determine the level (gravity) of the sentence to award. Mitigation includes other things like social background, economic position of the accused person, dependants (if any) or any other extenuating circumstances - in which the offence was committed.

Once satisfied, the Magistrate proceeds to pass sentence on the accused person. For every offence, there is always a punishment prescribed by the statute creating the offence.

In the majority of cases, the statute gives a maximum penalty or the minimum, thereby leaving to the Magistrate a wide margin of discretion.

2. THE PROSECUTOR:

Prosecutors are normally Police Officer with police training as well. This similarity however applies to those prosecutors working with Magistrates but not Public prosecutors or the Deputy Public Prosecutors. Here, we are concerned with those prosecutors in police employment. Due to the similarity all the rules and regulations affecting other police officer apply to them with equal force.

In criminal proceedings, it is the prosecutor who represents the state. In that behalf he institutes legal proceedings against the accused person.

Being the one prosecuting the accused person, he is required to produce every evidence that bears on his case otherwise he is likely to fail. This will include production of real evidence (as exhibits) and ensuring the attendance of all prosecution witnesses.

The onus of proof is upon him - to prove his case beyond reasonable doubt whether the accused person is put on defence or not.

S. 108 of the Evidence Act provides that:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"

From this provision it is clear that the prosecution has to adduce evidence sufficient to prove its case beyond reasonable doubt. Thus in Woolmington V.D.P.<sup>36</sup> Lord Sankey had the following to say in respect of this matter:-

"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common Law of England and no attempt to whittle it down can be entertained."

Since the burden of proof is upon the prosecutor generally, it is upon him to re-examine his witnesses where the circumstances render it possible.

He has to ensure further that the charge against the accused person is not defective. This he does by reading all the statements recorded at police station.

When the accused is called to plead for the first time, it is upon the prosecutor to make sure that all the relevant facts surrounding the commission of the offence

in question are available. This enables the court to convict promptly, if need be.

It is upon him to produce to the court the accused's criminal antecedents before sentencing. This requires him to have searched for the accused's criminal record. At the same time he ought to address the court as to the nature and gravity of sentence necessary. The above discussion however should not be taken to mean that the duty of a prosecutor is to secure a conviction. Instead it should be taken to mean that his duty as a court officer is to produce the best evidence and to assist the court in reaching a just decision.

### 3. INTERPRETER (Court Clerk).

Court interpreters are very important persons as far as administration of criminal justice is concerned.

Besides the role of interpretation they also work as in the courts. They communicate any information between Magistrates and the accused person. This duty includes passing over of files to the Magistrates for signatures where the accused have executed bonds.

As interpreters they are required to be fluent in both, the language of the accused as well as that of the court (English).

Thus when we say that the substance of the charge has to be read and explained to the accused, it means that the interpreter has to be accurate in his interpretation, and that every thing said by the court is conveyed.

Even if it is at the end of the proceedings but slightly before the sentencing i.e. when the accused is called upon to mitigate, the interpreter has to explain to him the meaning and the effect (purpose) of mitigation. Whatever the accused says in mitigation has to be communicated to the Magistrate accurately.

He has to interpret everything said by the prosecutor and witnesses in respect of the charge or trial so that the accused may know exactly what is going on and to be in a better "position to cross-examine those witnesses.

#### 4. PROBATION OFFICERS:

Probation officers play a vital role in the administration of criminal justice in Magistrate's courts. They are mainly social workers. By virtue of S. 4(1) of Cap. 64<sup>38</sup> where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that; having regard to youth, character, antecedents, home surroundings, health or mental conditions of the offender, or to any extenuating circumstances in which the offence was committed,

it is expedient to release, it shall:-

- (a) Convict the offender and make a probation order or
- (b) Without proceeding to conviction make a probation order.

When this section comes into operation the probation officers are required to undertake the supervision of such probationers as may be assigned to their charge.

We are here however concerned about the probation officer's role in the administration of criminal justice before sentencing.

This is the time when the Magistrate may require some special report about the accused person to assist him in the making of a just sentence.

One of the Rules under S. 17 of Cap. 64<sup>39</sup> states that, it shall be the duty of a probation officer to make such probationary inquiries as the court may direct into the antecedents, home surroundings and other circumstances of an accused person.

This may be necessitated by a variety of circumstances such as the accused being of an apparently tender age (in which case the court would decide whether to send the accused to an approved school), or where the accused person appears to have committed the offence but the court feels



that some other circumstances surrounding the commission of the offence tend to portray the accused as a less dangerous person (in which case the court may order a non-custodial sentence or a light custodial one).

Thus it is the duty of the probation officers to investigate into the antecedents of the accused. This is achieved by interviewing the accused's relations, neighbours, local administrators and even the accused person themselves.

ADMINISTRATION OF CRIMINAL  
JUSTICE IN MACHAKOS LAW  
COURTS

---

CHAPTER II

We have seen in chapter one how criminal justice is administered in Magistrate's courts. We have also seen how different institutions play different vital roles in the administration of that Justice. This chapter attempts to show how failure to observe the statutory rules or otherwise by those concerned can occasion injustice and how such injustice has been occasioned in Machakos Law Courts.

1. THE POLICE:

In spite of the rules and regulations governing the conduct and exercise of police powers, situations may arise where such powers are abused. Other situations may also arise where, due to justice is miscarried.

It is the police who, when an offence is committed, carry out investigations and eventually bring the suspect to book. In the process of investigations, the police officer responsible stands a chance of being bribed by the suspect and thereby tamper with the investigation or abandon the whole business altogether.

A police officer may be also negligent in the performance of his duties, in which case no just results will be achieved. If after he has taken up the investigations he fails to do everything necessary and reasonably possible for the purpose of achieving a just trial then he will be deemed negligent. In that case, the accused will be prejudiced or go scot-free even if he has been guilty. It has been shown in chapter one that there are certain police officers who are charged with some special powers. These powers go with ranks in police force; some police officers are superior to others by virtue of their offices and therefore command respect and obedience from the other ones. This kind of power may be abused in a number of ways. Firstly, since a junior police officer is required to show respect to his senior officers, it follows that those in senior ranks play an important role in the promotion or demotion of those under them. Thus if for any reason the Senior officer is not obeyed he can readily work for the downfall of his junior. This kind of atmosphere raises the possibility of the junior police officer being misused by those in high ranks. This misuse may take a number of forms. One, due to fear of being intimidated or losing his job or promotion the junior police officer may find himself in situation where, notwithstanding the fact no investigation has been carried out, or the investigation carried out does not disclose adequate evidence, he is nevertheless directed to charge a suspect and thereupon comply.

Secondly, the fact that promotion is on merit (where merit means how dutious a police officer is in respect of apprehension and charge of suspect), there is a chance of a police officer misusing his power to arrest and charge innocent people with a view to pleasing his superiors for promotion.

This kind of malpractice, if it succeeds, will no doubt go to the record of the police officer and serve as a guideline when the question of his promotion comes to be determined. That way he happens to kill two birds with one stone i.e. he pleases his seniors and at the same time stands a chance of future promotion.

Examples of weakness are found in the following cases:- R.V. Joseph Mutilu 1. The accused had been charged with giving false information to a public officer causing him to wrongfully set up an investigation.

Particulars of the offence were that sometimes in April, 1985 the accused person wrote a letter to the Permanent Secretary in the Ministry of Education which purported that a certain school had not given any account on its expenditure from 1979 to the time the letter was written. It was further alleged that the same P.S. had, acting on that information, summoned the school committee. Nothing was said about the findings of the meeting.

As a result the court found the accused not guilty and he was therefore discharged.

In R.V. Kalulu 2. The accused had been also charged with giving false information to a public officer. The allegation was that the accused had reported to two police officers at Machakos Police Station that he had seen a plantation of bhang on Mua Hills which belonged to another person there. It was further alleged that two policemen had, upon receiving the information gone to visit the scene but to their surprise found nothing like a bhang plantation or any sign of it.

The court found that when the policemen were taken to Mua Hills, they had actually found three plants of bhang as the rest had been uprooted.

It was also found that the policemen had uprooted the three plants saying that they did not constitute a plantation. No drugs was established between the accused and the alleged owner of the bhang plantation. Accordingly the accused was discharged of the offence.

In another case of R.V. Muhammed Luta and another<sup>3</sup>. The defendants had been charged with offence of taking a motor-car without the consent of the owner.

Particulars of the offence were that the two had driven the said motor-car to a place called Sophia in Athi River Township, five kilometres off the Machakos-Nairobi Road. Contrary to the vehicles work-ticket which permitted the vehicle to operate between Nairobi and Katumani Research Station.

Evidence was adduced to the effect that the accused had permission to drive the said vehicle to Nairobi as the first one was attending a seminar there while the other was the driver.

Further evidence showed that the car had a mechanical defect which had forced the accused to drive to Sophia to look for a mechanic for they feared that it could break down before they got to Machakos.

Although the police officers who had arrested the accused had also arrested the vehicle, it was not produced as evidence. The explanation offered for its absence being that its battery had gone down making it technically impossible to drive it to Machakos Law Courts.

This prompted the learned Magistrate to dismiss the case under section 210 of the criminal procedure code before the close of prosecution case.

The foregoing three cases manifest negligence on the part of the police contrary to police Amendment) Act<sup>4</sup> and police regulation<sup>5</sup> which require police officer not to be negligent or idle in the performance of their duties.

In the first case the police were negligent in the sense that no investigations were carried out to ascertain whether the accused had actually written the alleged letter to the P.S. or whether the information was true.

Moreover, no attempt was made to secure the original document pursuant to statutory requirements that no secondary evidence in respect of documents is admissible as evidence save where certain requirements are met. None of those requirements was met in this case.

In the second case, apparently the police were shown three plants of bhang which showed that at least some more had been there. Even if there never existed any plantation of bhang according to their expectations, the three plants were much of an offence as a plantation. Any reasonable police officer could have used the three plants to charge the owner. Perhaps the owner was not within reach and if that was the reason why he was not charged then they were negligent as no attempt was made to arrest him.

In the third case the vehicle had been seized on

4/6/1985 and the hearing took place on 25/7/1985. This vehicle had been impounded so that it could be later produced as exhibit. The Katumani Research Officers had also applied for its release but their efforts had been frustrated since the police "intended" to produce it as evidence.

From those cases it is manifestly clear that the police officers involved were grossly negligent in the performance of their duties. As reasonable police officers they knew or ought to have known the importance of exhibit as evidence in court process. Even if the battery of the vehicle had ran down, the vehicle could have been towed down to Machakos. The prosecution could also have moved the court to view the exhibit at the police station.

Another problem relates to the abuse of police power. This has been manifested in the following cases, R.V. Ngami Peter<sup>6</sup>. The accused had been charged with assault inflicting actual bodily harm. The allegation was that the accused and the complainant (one Peter Munyao) were drinking in a bar in Athi River Township when the accused hit him with a beer bottle causing him a vertical fracture in one of his teeth.

When the accused was taken to court on the first day for plea, it appeared to the court that she too had



sustained severe injuries, and that she had been denied a P3. The court thereupon ordered that she be issued with one.

At the trial, the court established that:-

- (i) both the accused and the complainant were fighting and that the accused had been struck first.
- (ii) while all this happened, the police officers who had arrested her were present.
- (iii) the complainant had asked the accused "for good time" but resorted to violence when she turned him down.
- (iv) the accused did not intend to inflict the injury on the complainant; in lieu she did it in self-defence.
- (v) the situation provided an opportunity to the police officers to arrest her as she had, on several occasions turned them down whenever they asked her to favour them with her love. Accordingly the accused was discharged.

In R.V. Munyao<sup>7</sup>, the accused had been charged with creating disturbance in a manner likely to cause a breach of the peace.

The facts of the alleged offence were that the accused had gone to the complainant's shamba with a panga in his hand and threatened to shoot him with an arrow and cut down his vegetables. It was further alleged that the accused had used very strong words to the complainant by calling him "Ngombe".

At the trial, it was established that even though the accused had a panga in his hand, he talked from his own shamba which bordered the complainant's and therefore the

later could not apprehend any fear.

At any rate, it is the complainant who came first with a gun on his shoulders and started abusing the accused, the reason being that there existed a Land dispute between the two.

The accused had retaliated with abusive words whereupon the complainant rushed to the police station, had a talk with the police chief and took the two policemen to arrest the accused. When the accused saw the policemen coming, he ran away and hid himself in a nearby bush. The complainant then directed the two policemen to arrest the accused's wife and take her to police station until the accused came for her. He also "ordered" them to take oneepanga from the accused's kitchen and an arrow from the accused's father and use the same as evidence against him. The wife was subsequently detained for three days in police custody until the accused came to substitute her. N.B: (the complainant in this case had been a retired police Inspector). The accused was found not guilty and was therefore discharged.

In R.V. John Mwaniki and Paul Mutuku Maingi<sup>8</sup>, the two accused who were secondary school boys had been charged with indecent assault of a woman.

The particulars of the offence were that the second accused had stopped the complainant and then started were touching her private parts and breasts and demanding sexual intercourse from her.

It was then that the first accused joined him and then shouted at her but did nothing more.

The second accused had also made a confession implicating himself alone at the police station. The first accused also recorded a statement implicating the second accused, which statement was read to the second accused and admitted by the same to be true.

The trial court found as a fact that it was the first and not the second accused who had actually stopped the complainant.

It was further established that the second accused did nothing more than telling the complainant to go and give herself to "cops" if that is what she preferred. In any event no evidence was adduced to show that the complainant's private parts had been tampered with.

Upon the facts, the court was not satisfied beyond reasonable doubt that the offence called indecent assault had been committed. Consequently the accused became

beneficiaries of the doubt.

In R.V. Murimi and others,<sup>9</sup> the defendants who were six in number had been indicted on two counts. The first count stated that the accused persons had, on a certain day, broken into the complainants house and committed a felony therein. The second count related to handling or being found in possession of stolen property.

The six accused persons were businessmen carrying on business for gain in the same place with the complainant.

It was alleged that the alleged offence had been committed while the complainant was away. It was further stated that the broken house a business one and that when the offence was being committed, one of the complainant's servants was sleeping there. The said servant however heard nothing and it was not until the following morning that he came to discover that the offence had been committed.

The court dismissed the case before the accused were put on defence as the complainant could not identify the property as his.

As indicated, these cases display abuse of police power. In the first case, there was abuse of power in

the sense that the police officers involved arrested the accused simply because she had denied them sexual relations. Again both the accused and the complainant had been involved in the fight and were therefore liable to be arrested.

At the trial, evidence was adduced which showed that soon after the arrest and while in police custody the same policeman had gone there and demanded sexual intercourse from her.

Similarly, in the case of R.V. Munyao<sup>10</sup> the police officers abused their powers in taking orders from someone who had an interest in the matter. The requirements of the Law is that only lawful orders should be obeyed and that those orders should proceed from a superior authority.

It is true that the complainant was a retired police inspector but that did not mean that he had to be obeyed.

The most unusual thing in this case was the unlawful detention of the accused's wife. The police officers allowed themselves to be misused by the complainant when he directed them to arrest her. In any event, they knew very well that she had committed no offence and that unlawful detention amounted to false imprisonment. Their action was in gross contravention of the constitution.

This type of conduct was also displayed in R.V. Kalulu<sup>11</sup>. In that case it was made clear that the police officers found three plants of bhang at the place where the accused had taken them. Even if they found no plantation of bhang as they expected the, three plants were enough to use as evidence against the owner of them.

Whatever reason(s) persuaded the policemen to charge the accused, one thing is clear, the accused person should not have been charged at all. Arresting and putting him in police custody for two weeks until he lost his job, occasioned gross miscarriage of justice and abuse of police powers.

As indicated earlier on, the police force is created to maintain peace and order and apprehend offenders and bring them to justice.<sup>12</sup>

There is no where policemen are authorised to arrest innocent persons and cause them unnecessary inconvenience.

It is when and only when a person has committed, or suspected to have committed an offence that a police officer should arrest or cause the suspect to be arrested. Anything beyond that, whether motivated by malice or any other emotional sentiments amounts to abuse of power.

In the already mentioned case of R.V. John Mwaniki and Paul Maingi,<sup>13</sup> evidence showed that there was a foul play on the part of the police officers in that they reversed the statements recorded by the accused persons thereby implicating the one who, for all practical purposes, was innocent. The reason for this was that the police Inspector who recorded the statements lived with the first accused's father. They also hailed from the same District.

That being the position, what is likely to have happened is that, the recorder of the statements might have been later approached by the first accused's father and possibly persuaded him to exonerate his son. He thereupon changed the statements and coached the boy on what to say in court with a view of assisting him to evade justice. It goes without saying that the confession alleged to have been made by the second accused was overly retracted and although no trial within-trial was conducted, nevertheless, there was reasonable doubt to justify the accused's acquittal.

Closely related to the case of R.V. Munyao<sup>14</sup> is that of R.V. Murimi and others, (facts already given). In that case, the complainant appeared to be a man of great influence over the police officers involved in the investigations of the case. Although there was a police station near the place where the offence is alleged to have been committed, the complainant went all the way to Machakos to report the

matter to a police boss who happened to be a close friend, of his. He even carried the officers in his own car to arrest the accused person. It also appeared that there was a rift between the complainant and the accused which emanated from business competition (as all were businessmen). Surprisingly, the complainant was the one who took the police officers to the accused's houses and collected some bottles from one of the accused's shop-claiming them to be his. He also took a bed from another accused's bedroom and claimed it to be his bed.

That being the case it is very possible that the complainant did this in order to eliminate his enemies in the world of business. Thus the police officers abused their powers in allowing themselves to be used by a person who had ill-motives to achieve his selfish ends.

Closely related to the question of power abuse is corruption. Although not expressly stated, in the great majority of these cases one cannot help the feeling that some sort of corruption had been practiced. Here, corruption is used to connote any form of bribery.

Thus in a case like R.V. Murimi and others<sup>15</sup> besides the well established personal friendship between the complainant and the police chief, the possibility is that some form of corruption was done so as to effect the



desired purpose. Like wise in R.V. John Mwaniki and Paul<sup>16</sup> and R.V. Mutilu, where the arrests have been shown to have been unjustified or vitiated by later malpractices, any reasonable man cannot help the feeling that those in charge had been "tuned" by means of bribery.

## 2. THE CHARGE:

This topic has been deemed fit to be severed from the foregoing one because it deals with an entirely different stage of the administration of criminal justice. Nevertheless, it falls under the function and duties of the police force.

As in the other area, it has also witnessed a number of failures on part of those concerned. It thus serves as another example of how administration of criminal justice has been beset with pitfalls in Machakos Law Courts.

As already indicted, it is of great importance to charge a suspect with the right offence. What is meant here is that the statements recorded should be evaluated meticulously and thereafter find out the offence disclosed. Failure to do so may occasion miscarriage of justice - miscarriage in the sense that if for any reason the charge is defective, chances are that the whole prosecution case

will fail (notwithstanding the court's power to order for an amendment of the charge).

If that happens, the suspect stands a high chance of escaping justice. So is the case where due to negligence or recklessness the charge leaves out some necessary details.

In R.V. Elijah Kathoka and others<sup>17</sup>, the accused persons had been charged with stealing produce - to wit one carton of tomatoes, the property of one Musengy'a.

The police officers preparing the charge committed one vital element of the charge i.e. the value of the tomatoes. As a result, the whole case was dismissed.

Similarly, in R.V. John Mwilu<sup>18</sup>, the accused faced a charge of burglary and stealing. As per the charge, the complainant had been woken up by his maid and told that their house had been broken into and their only colour-television stolen. He subsequently reported the matter to the police.

A week after, a police informer reported that a certain colour T.V. was being sold somewhere. The police officers advised the complainant to go to the place and pose as a buyer so that he might identify whether it was

his T.V.

The complainant however sent someone else to go and pose as a buyer. This person was accompanied by plain-clothes policemen who arrested the accused. The T.V. was later identified as the stolen one and legal proceedings instituted.

At the trial, the prosecution evidence centred on how the accused was found selling the said television. This disclosed an entirely different ~~type of offence of handling~~ or being found in possession of stolen property. Owing to the nature of the item stolen and lapse of time, the doctrine of "recent possession" could not apply.

Since this case had been taken before a district Magistrate of second class, it had to be transferred to a Resident Magistrate due to lack of jurisdiction.

In the foregoing two cases, alot of court's time got wasted owing to the recklessness of the charging officers. This sort of recklessness adversely affect administration of criminal justice particularly in situations where many cases are pending waiting for hearing.

Another aspect of failure in the administration of criminal justice on the part of the police relates to taking of confessions from accused persons. In R.V. Paul Mutuku and another,<sup>19</sup> both the accused faced a charge of

stock theft. They had allegedly stolen three bulls and sold them. They were later arrested and taken to police station where they got beaten up seriously and forced to make confessions. Both made self-implicatory confessions.

At the trial, they denied the truthfulness of the confessions and asserted that they had been obtained unlawfully, that they made them to save their necks.

Although the learned Magistrate did not find it "necessary" to call a trial-within-a-trial, it was clear that the two accused had been beaten as they sustained several injuries.

Still, in R.V. Nicodemus King'oo,<sup>20</sup> The accused had been charged with Kiosk breaking.

It was alleged that the accused had broken into a Kiosk at night but heard by the owner before he could steal. Upon hearing the accused, the owner met him with a sword in his hand and made a deep cut in his hand. On the following morning he (the accused) got arrested and made a confession to the police inspector in charge of the station. The confession appeared to have been made and recorded in Kiswahili as - "Ndiyo mimi nilivunja hicho Kiosk". During the trial, this confession was expressly denied by the accused.

We have already seen that the Law requires the making of confessions to be voluntary and in a language the accused is conversant with. In a case like this, the "confession" should have been taken in the accused's mother tongue and be translated, if need be. Although the truth of the matter was not established as no trial-within-a-trial was ordered, and the accused convicted on other evidence, the fact remains that it was unlawful to coerce one into making a confession.

To force one to make a confession is at variance with justice. It appears that the police find confession very useful tools to effect their selfish results. In most of these cases the accused stands to lose whether an internal trial is called or not. This is so because the accused is always in the losing end with witnesses - where-as the prosecution has all the witnesses on its side.

The same behaviour, moreover, amount to total disregard of the constitution and other provisions of the penal code, all of which enhance the presumption of innocence of an accused person until the contrary is proven. This is the most important protection accorded accused persons. To administer any form of corporal punishment in order to extract confession is unlawful.

Again it is the court that has the power to determine

the amount of punishment to be awarded in respect of any offence. When a police officer therefore beats up a suspect, he is not only exceeding his powers but usurping the courts power as well.

From the foregoing short discussion with regard to the role played by the police in the administration of criminal justice in Machakos, it is clear that the said justice is below par. It is more so where most of the accused persons suffer injuries of many kinds such as physical, emotional and even pecuniary.

This is the case irrespective whether one is later released by the court or not as the machinery available for recovery of damages in cases of false imprisonment or malicious prosecution is too complicated for those who face criminal charges.

A lot of time is also wasted by those called as witnesses and the court as well. Pecuniary loss is also suffered by those called as witnesses where they have to travel by buses or matatus to attend the proceedings and no one refunds them the money.

In the cases where the accused persons go free due to the negligence of the police officers, the society is left without protection. This occurs where the accused

person goes back to commit more crimes hoping to escape again. Even more crucial, the society loses confidence in the whole process of the administration of criminal Justice.

On the side of the accused, if the charge has been motivated by some other irrelevant considerations, it matters not whether he is later released or not. His name remains tainted as people hate to have anything to do with those who have had involvements with the police. It is no business of them (society) to know whether one is presumed innocent unless and until the contrary is proven. For the society it suffices that one has been involved with the police.

It is even more crucial where the accused who has been wrongfully charged is jailed. This may happen in situations where the police officers bringing him to court "clever" enough to concoct logical lies which leaves the court in to doubt as to the accused's guilt. If that happens, then criminal justice becomes nothing beyond creating circumstances which are by all standards of evidence logical and lawful to liquidate those elements who have found no favour directly or indirectly with the police.

The matter is made more insecure by the fact that courts do not use any scientific gadgets to diagnose the cause with microscopic exactness. Instead, they act on

evidence which is given verbally by those conversant with the circumstances in which an offence had been committed. That being the case therefore courts can make errors acting on such evidence. If the police force therefore fail in their duties as officers of justice then the whole process of the administration of criminal justice is bound to fail.

### 3. CHIEFS AND ADMINISTRATION POLICE:

Chiefs and Sub-chiefs are vested with powers to maintain peace and order in areas in respect of which they are appointed. It should be stressed that these two bodies represent the executive at a low level and that Chiefs Authority Act gives them immense powers over everybody within their jurisdiction.

The statutory requirements that administrative police officers obey and assist chiefs and sub-chiefs means more than that, only warrants and orders lawfully issued should be promptly obeyed. A further implication is that the same orders and warrants of arrest should emanate from competent authority.<sup>21</sup>

However, due to the nature of the powers with which chiefs are by law charged and the low level at which administrative police officers operate, chances are that the latter will obey all orders emanating from the former



irrespective of their legality.

Again it may be difficult for an administrative police officer to distinguish a lawful order or warrant from an unlawful one. This is because of two reasons:-

1. the administrative police officers unlike their counter-parts i.e. police officer in the strict sense, lack proper and adequate training in detection of crime.
2. in practice it appears that they never bother themselves with any investigation but, in lieu thereof, work as "office messengers" of chiefs and therefore exist to obey unquestionably what they are ordered to do.

That being the case then, the police officers under this rubric may work for injustice instead of justice. In any case the relationship between chiefs and these police officers is no more than that of master-servant-in practice.

With so much power in their breasts, chiefs can order an arrest of any offender or suspect. In practice, the administrative police officer can, under the chief's directions, administer corporal punishments even before a suspect is charged. This is normally done under the guise of justified use of reasonable force to effect an arrest.

Moreover, a chief is normally just another resident in the area which is by law placed under his jurisdiction,

for that reason he, like any other villager or resident may have his personal virtues and vices over his neighbours, be it in relation to property rights or personal affection. If that happens, he may be tempted to exercise his "unfettered" powers to cripple those who have not found favour with him.

A problem of this nature became a reality in R.V. Mutie Munyao,<sup>22</sup> there the accused and others faced two counts of attempted theft and assault. It had been alleged that the complainant had been attacked by the accused while on his way home from a bar where he had gone to take a few bottles at the late hours of the night.

It was further alleged that they (accused) had demanded money with menaces from the complainant who had, earlier on, presided over an harambee. After the confrontation with the accused, the chief (complainant) summoned his police to arrest the accused who were later charged.

On the hearing day however the complainant without any excuse failed to attend the proceedings and the case was subsequently dismissed.

Certain things however cast a shade of doubt as to the validity or legality of the charge:-

- (i) when the accused persons appeared in court for plea, one of them appeared emaciated as though he had severe internal pains.
- (ii) the first accused had sustained very severe injuries for which the charging police officers in collaboration with the complainant did not find fit to issue a P3.

The court upon hearing the truth ordered the accused, be issued with a P3.

This same accused confided to me later on what had taken place. This was confirmed by those who knew both accused. The accused worked as a council clerk and was on bad terms with the chief. The root-cause of the rift rested on who had powers to grant plots in that Township, for construction of kiosks.

The chief, though without authority had usurped the powers of the accused and had granted plots to his close friends and relatives.

The accused had always challenged the chief's powers in respect of plots and had issued to other people the plots which the chief had granted to his friends.

On the material night, the complainant and the accused were drinking together upto 12.00 midnight when the complainant left the bar. After sometime, the accused left the bar with a woman who he had "snatched" from the

- 61 -

complainant when they were drinking. As they passed between two buildings, they were attacked by someone who identified himself as the chief. One of the accused punched the complainant who was attacking them with a stick.

The complainant then blew a whistle and two police officers came and under the instructions of the complainant, arrested the accused, took them to the chief's office where they were beaten up severely. On the following morning, they were taken to police station where they were charged and denied permission to obtain P3.

This was a case motivated by malice as the accused threatened the complainant's power and also took away his mistress.

Although no judicial punishment was suffered, nevertheless, they were subjected to a lot of physical torture and inconvenience. Pecuniary losses were also suffered as they were to travel three times to the court - for plea, mention and hearing. The first accused had also to see a private Doctor for a special X-ray, not to mention the P3, for he had sustained chest fractures.

Similarly, in a case like R.V. Joseph Mutitu<sup>23</sup> whose facts have already been considered elsewhere, no reason

was given as to why the matter was reported to the chief instead of the police. With the irregularities already discussed and the fact that the chief was a member of the said school, it is doubtful whether something phoney" had not taken place.

In R.V. Elijah Kavulu<sup>24</sup> the accused had been charged with trespass with intent to annoy. The accused and the complainant shared a common boundary and each had a parcel of land registered under Registered Land Act<sup>25</sup>. The allegation was that the accused had cut some coffee plants on the land of the complainant without leave. The matter was reported to the area sub-chief who sent two police officer to arrest the accused.

At the trial, it was established that the land in question belonged to the accused and that it was the complainant who actually wanted to "snatch" it from the accused. It was further established that the sub-chief knew at all material times that the land belonged to the accused but chose to assist the complainant as they were close friends. Before the accused was taken to police station, the sub-chief had ordered the two administrative police officers to thrash him-which was done.

As in the other discussed cases, this one demonstrates malpractices on the part of the chiefs, sub-chiefs and

administrative police officers with regard to administration of criminal cases in Machakos.

It should be clear by now that in these cases, no justice is seen. What is manifest is a trend or irresponsible administrators oppressing innocent "wananchi" by misuse of powers vested in them.

In such situation the accused or innocent party is made to suffer and therefore left without protection of the law which is designed to ensure some degree of safety to citizens. To such persons, the phenomena called law has no logical existence beyond that of washing down their personal liberty.

In a case where the ill-motive is not discernable, then the victim is made to suffer without succour. If discerned, however, the accused may benefit and be released but how often does it happen?

Even then, in either case, the victim of these immense powers which are exercised mala fide, is always on the losing end. So much because of the financial expenses incurred by court attendance plus physical confinements.

Having in mind the fact that most of those who fall victims of such powers are the ordinary people, it proves

difficult, if not impossible, for them to recover damages. Partly because many people hate or at least fear courts and anything associated with it. A court, to many citizens is nothing more than a place of punishment.

In addition, most of such victims are either people of low incomes or ignorant of their rights. In the case of poverty, court procedure happens to be expensive and pregnant with technicalities. So much that such a person may not be in a position to afford an advocate or otherwise cope with the procedure himself.

Even if he were to institute the legal proceedings he still stands at a disadvantage, for most of those who would otherwise testify on his side may choose not to. This may be the case in rural areas where people fear to be at variance with local authorities. Conversely those willing to testify against him would be many - for many would wish to please those small "gods" in the villages.

#### 4. KANU YOUTHWINGERS:

Like that of chiefs and sub-chiefs, the institution of Kanu Youthwingers operates at a very ordinary level. All of its members are selected from among the residents. For these reasons they are likely to be entangled in the controversies involving such residents and can victimise those, who for some reasons become their enemies.

The most critical problem (weakness) is lack of any form of training thereby becoming incapacitated for discharge of duties relating to crimes. When it comes to arresting of suspects, they lack knowledge on when and how to go about it. Thus it would not be appalling to find a suspect seriously injured during an arrest.

In R.V. Musyoki<sup>26</sup>, a case of stealing and assault causing actual bodily harm - the complainant had left for water when the accused sneaked into her house and stole a radio. At the critical time, it was alleged, he was seen by one of the complainants children.

The complainant later reported the matter to Kanu Youthwingers who in turn went to arrest the accused.

It was alleged further that the accused had deliberately knocked out a tooth of one of the youthwingers while trying to escape. All the witnesses except this one denied the allegation and were of the opinion that the tooth had been hit accidentally while the second complainant molested the accused.

The court found as facts that the tooth had been hit accidentally and that the accused had actually stolen the said radio. He was thereupon discharged of the second count but convicted of the first.



Besides the point of false accusation this case raised another problem. It appeared from evidence that the accused, accused, after arrest, was detained for two days before he was taken to police for charge and caution. It was also not shown how he deserved use of force to effect caution. It was also not shown how he deserved use of force to effect his arrest. Thus it is the youthwingers who in fact assaulted the accused and not the reverse.

In R.V. Mutilu,<sup>27</sup> the accused faced a charge of being in possession of poisoned arrows. The accused had been taken to Mtito Andei Police Station by the Area Kanu Youthwingers. The allegation was that he had been found with two poisoned arrows in his house.

In spite of the charge the accused was discharged as the said arrows were not produced as evidence. It was said that the arrows had been taken to Nairobi for examination. It was also established that the arrest had been motivated by malice as there existed a land dispute between the accused and the Kanu Youthwingers Chairman. The Chairman had, before threatened to get rid of the accused so he may take the land with ease.

What these two cases demonstrate is actually not in agreement with what most of the local politicians assert -

that the body's functions is to assist the police and the administration in fighting against crime and other social evils. If anything it seems that the main function of youthwingers is to create more evils and commit more crimes.

#### 5. THE MAGISTRATES:

Magistrates play an important role in the administration of criminal justice. It is them who decide and pronounce on the guilt or innocence of an accused in respect of the offence with which he is charged. Once all the other organs involved have done everything necessary, it becomes the turn of the Magistrate on the evidence provided. Just like with other organs, that of Magistrates in Machakos - law courts also call for criticism. A number of weaknesses have been seen to exist. That however will appear as we discuss the following cases.

In R.V. Mutua<sup>28</sup> the accused had been charged with being drunk and disorderly. This case was taken before a Magistrate of second class for plea. The particulars of the offence were not read to him. All that the court did was to ask him whether he had been found drunk to which he said "yes". He was accordingly convicted on "his own plea of guilty".

Everyone who has anything to do with the law knows very well that to be drunk and disorderly is a crime. He consequently knows that for a crime to be there two elements

must be established i.e. "Mens rea" and "Actus reus" (save in cases where mens rea is not a requisite element of the crime). It cannot be said that this offence falls under those covered by the exceptions.

The law is very clear on this matter and requires the substance of the charge to be read and explained to an accused in a language which he can understand. This was not the case here. It was instead made to appear as if drinking per se is an offence. If that was the case then the learned Magistrate can be taken to have erred in law.

A similar problem arose in R.V. Omolo and others<sup>29</sup>, in that case the accused persons (one of whom was the first accused's wife) were indicated for being found in possession of traditional liquor without a licence. After the charge was read to them, a question was put to them whether they had the alleged beer. They all said "yes" and the court proceeded to enter a plea of guilty for all. The first accused's wife however proceeded to qualify her admission by adding that she had just gone to visit her husband and that she did not know whether some beer had been hidden in the house. No-body seemed to care about her protests but she was instead convicted, the court acting under the impression that she had pleaded guilty.

In a case like this one what the court failed to do is

to address its mind to the charge properly. There are situations, of course, where in spite of the "actus reus" being present circumstances are such as to justify an act or exempt one from liability. The court should have read and explained the charge properly to enable her to deny it in the first place. On the other hand, even here there was a case to hear in spite of her late denial of the charge.

A further problem relates to delay of cases before hearing. This appears in the following two cases - R.V. Mathew Musau<sup>30</sup> and R.V. Kaviti<sup>31</sup>. In the former the accused had been charged with malicious damage to property. Allegedly, the offence had been committed on the first day of April, 1983. The case came for hearing on 23rd July, 1985 and the judgement delivered on 20th August, 1985.

In the later case, the accused faced an attempted rape charge alleged to have been committed sometimes in April, 1985. The case went for hearing on 24th July, 1985 and judgement delivered on 21st August, 1985. {

The law requires a case to be heard where an accused person does not admit the truth of the charge. The implication is that, the hearing should be as soon as practically possible. The reason for this is self-evident. Where a case is not heard soon, the accused may be prejudiced in a number of ways. One, where such a person is in custody

he would be unreasonably detained. Even in the instances where one is released on bond (be it cash or otherwise), still such a person is subjected to problems particularly where he has to keep on appearing for mentions - for this may cost him financial expenses and waste of time.

Two, and even more important, the accused's memory and that of his witnesses may fade in which case he would find it difficult, if not impossible to put up an effective defence. More to that, delay should be seen to be prejudicial to an accused person where he is eventually proved innocent yet he has plunged into an atmosphere of fear and uncertainty for quite a long time.

The entire of this problem cannot be heard from the Magistrates alone for there are other circumstances beyond their control which necessitate delay.

There are of course other weaknesses which are attributable to Magistrates. An example of this relates to the question of when a prima facie case is made out, and the accused put on his defence. This indicates in no way that the onus of proof has shifted to him.

Unfortunately this was not the position in R.V. Paul Mutuku and another.<sup>32</sup> In that case, once a prima facie case was made out the accused were put on their defence.

They made no defence and called no witnesses. The Magistrate proceeded to convict. I later interviewed the Magistrate who seemed to have a curious misconception of the law relating to this matter.

His view of a prima facie case was a case proved beyond reasonable doubt, save where an accused person could prove his innocence. To him therefore, once a prima facie case was established the burden of proof shifted to the accused.

This mode of approach obviously puts an accused person in a very difficult position and consequently the law ceases to protect the citizens. The fundamental legal concept that an accused person is presumed innocent until the contrary is proven ceases to hold water.

#### 6. PROSECUTORS:

The most notable weaknesses in this area include delay and incompetence. This incompetency is perhaps attributable to negligence since prosecutors have some form of legal training particularly in criminal law.

As already pointed out, the onus of proof in the vast majority of criminal cases rests upon prosecutors to prove their case beyond any shadow of doubt. So if for any reason the prosecutor fails to discharge the duty, the case may fail.

A striking contrast of this legal requirements is demonstrated by R.V. Mashaka Yusuf Ramadhani<sup>33</sup>. This was a case of theft and the accused who also had a long criminal record seemed to be a bit versed in both criminal and the law of evidence. So much that whenever a prosecution gave evidence-in-chief, the accused shattered it all by cross-examination, thus necessitating re-examination. The prosecutor however kept on telling the Magistrate that he was not going to re-examine him.

This case is first one example of a very rampant practice in Machakos Law Courts.

Delay is sometimes occasioned where an accused person pleads guilty to a charge and the Magistrate asks for the production of special facts with regard to the offence.

In the majority of such cases, the reply from the prosecutor is that the facts would be produced the following day.

In such a case, the accused has to remain in custody until that time when the prosecutor is ready to produce the facts. Yet, that day is never counted as part of the punishment than the gravity of the offence demands.

R.V. Kingoo Kaviti<sup>34</sup> serves a good example. Here, the

accused faced a charge of theft. The allegation being that he had stolen a cob of maize valued at 2/= the property of one successful businessman at Athi River. When the accused pleaded guilty to the charge and the court sought to get the facts in which the offence was committed, the prosecutor asked for leave to bring them the following day. The accused had to be remanded until then.

Although the accused ended up being discharged owing to the triviality of the offence, he had already suffered.

#### 7. INTERPRETERS:

This is one of the main areas where criminal justice has failed in Machakos Law Courts.

The main causes of failure here seems to stem from two things:-

1. Incompetence:
2. Ignorance of the Law.

Ignorance in the sense that quite a number of interpreters do not seem to understand the impact of their failing to interpret accurately what has been said.

This is clear in R.V. Musembi<sup>35</sup> where the accused had been indicted for attempted rape. In his defence, the accused made it clear that at the time of the alleged offence, he was being mentally incapitated by beer. The interpreter could not see the importance of the accused's words and in lieu thereof, he ordered him to sit down. Owing to the



failure, the court could not understand that the accused had a defence.

Ignorance of the law can be seen also in the aspect of mitigation. Here too the interpreters seldom show any knowledge of the importance of the mitigations. Thus R.V. Mutua,<sup>36</sup> the accused had been charged with assault. He was convicted on his own plea of guilty, and the court called upon him to make a mitigation. The interpreter, instead of explaining to him what mitigation meant, merely asked him whether he had anything to tell the court. The accused thereupon began to make a defence, so as to exonerate himself—and the court had to enter nothing for mitigation. This kind of practice by the interpreters makes them incompetent in the discharge of their duties.

Another aspects of incompetence relates to the manner, some if not all of them, interpret languages. Perhaps due to lack of eloquence or adequacy in English language, many interpreters have failed people. Situations have arisen where instead of an interpreter interpreting a word, has either kept quite or interpreted incorrectly. One example here is the case we have just discussed i.e. R. V. Mutua<sup>37</sup> where an interpreter asked a convict whether he had anything to tell the court.

Likewise in R.V. Paul Mwaniki<sup>38</sup> and Mutuku where the accused person faced a charge of indecent assault, the

interpreter interpreted the words "touching her genitals" to mean hidden parts of the body. Clearly there are of course, many parts of the body which are hidden under clothes.

Notable shortcomings have also manifested in respect of bails. This takes the form of interpreters (who are also clerks) demanding "chai" from accused persons in order to have their bonds signed. Majority of these cases take place in Registries or outside the court. I personally have witnessed two instances where accused persons were denied justice by interpreters, either because they did not understand the "procedure" or they did not have anything to offer for "chai".

In one instance the accused had to remain in custody for a week because his file "could not be found". At the end of the week a relative of his who was also to stand surety for him had to produce "chai" after which the file was "discovered".

In the other instance the interpreters were "too busy" to assist a woman who wanted to sign a bond for her step-brother who was still in custody. The bail had been granted in the morning and it was not until 5.00 p.m. after she had complained to a Magistrate that the interpreter involved produced the file. From her mouth, she had been told to produce something for the file to be delivered. Because she had no enough money to spare, she just waited and any

other time she asked for assistance from the interpreter, he claimed to be too busy.

#### 8. PROBATION OFFICERS:

The role of the probation officers for the purpose of this work is to get information about the accused person if the court so directs.

The main problem here stems from the accused themselves, their relatives and those persons who happen to know them, whom a probation officer may desire to interview. Due to fear and mistrust, they show reluctance in supplying information about an accused person to the probation officers. To them it seems probation officers are dangerous people who get information about someone so that he may land him in more problems. Moreover, most of the rural dwellers hate to have anything to do with government officers.

The net effect of this trend of lack of co-operation is delay of judgements. Many decided cases have to wait, without sentence being passed for the probation officers to obtain satisfactory information.

This was the situation in the already mentioned case of R.V. Musembi<sup>39</sup> where the accused had a charge of attempted rape. Owing to the conduct of the accused at the trial, the court felt<sup>†</sup> that something had to be known about the

accused - home surrounding and his behaviour while there. The accused had to remain in custody for quite a period as his relations were not willing to co-operate with the probation officer involved.

Similarly in R.V. Joseph Mutie,<sup>40</sup> the accused faced a charge of factory breaking and committing an offence therein. Although the case had been proved beyond reasonable doubt, the court needed a special report on the accused's past and home surrounding. Owing to lack of co-operation on the side of the accused and his people, he had to remain in custody for seven weeks awaiting the report.

#### C O N C L U S I O N :

This work dealt entirely with the administration of criminal justice in Machakos Law Courts. In it we have seen how the different organs which are part and parcel of that administration adversely affect it.

On the part of the police who are by Law charged with duties to arrest suspects and investigate alleged offences, it is clear that there are some arrests which are not genuine (Lawful).

Problems have been manifested in area of investigations and quite a number of cases have shown gross negligence on the part of the police.

Similarly injustices, has been exposed in relation to the manner charges are drafted and even the way confessions are obtained from accused persons. Here, it has been shown that in a number of cases, charges are dropped as a result of negligence and that majority of confessions, are obtained by the use of force.

Although no direct evidence has been, given, indications have been made where corruption can be inferred from the conduct of the police.

Failure of administration of justice is also seen with respect to persons called Kanu Youthwingers who have no training on how to arrest accused offenders and investigate offences. This group of person is drawn from the people to whom it is assigned duties almost similar to those of the police force. For that reason, they may and have actually manifested bias in the execution of their duties - the net effect of the weakness being that people who are otherwise innocent are arrested and charged with concocted offences. In the similar vein the mode of arrest has shown itself to be unlawful.

With regard to chiefs, sub-chiefs and administrative police officers, it is clear that there are instances where the former two misuse the latter to achieve personal selfish ends - the root cause of everything here emanating

from the very wide powers conferred upon chiefs and the fact that they, like Kanu Youthwingers perform their duties in the areas where they have personal interests. In the threshold, many a people are prosecuted maliciously. There is of course, a great weakness here since no adequate trainings seems to be extended to chiefs, sub-chiefs and the administration police officers. The effect of the failure being seen in excessive use of force (violence) on suspects.

As for prosecutors, the main weaknesses are negligence and incompetence in the Law. The two here seem to be intertwined. Whereas one can argue that a prosecutor has been negligent in not re-examining a witness or for failure to produce in time any information necessary for proper administration of criminal justice, another person may see it as incompetence in prosecution.

The main concern of this work however, is not to draw distinctions between different aspects of malpractices and how to define them. Its chief concern rather, is basically to show cause and effects of non-compliance with the law on the part of accused persons and the society generally.

That being the case therefore, the net effect of prosecutors failure is reflected in delays and incompetent decisions. The former is seen where non-production of

also occasion delay.

However, it cannot be said that they are even perfect in the discharge of their duties, as there are weaknesses attributable to them - for example where a Magistrate has a wrong notion with regard to a prima facie case.

The weaknesses already indicated call for rectification. But when we say that something ought to be rectified it is also good to provide means by which a change can be achieved, for that reason a number of suggestions are hereinunder made:-

1. With regard to interpreters, it would be more effective to employ persons with better formal education particularly those with good passes in both English and Kiswahili languages. They would be better than most of the interpreters who seem to be less educated and who were employed at the colonial period when a few number of Africans had achieved good education.

Besides academic qualifications, some form of legal training should be extended to court clerks. This can be effected through seminars where clerks be enlightened on certain areas of the law for example the importance of mitigation and defences such as intoxication negating "mens rea" which to many appears as nothing.

- 82 -

2. As far as the bench itself is concerned, solution to delay seems to lie in employment of more Magistrates. The number of Magistrate already working appears very small compared to the population and the number of crimes committed everyday.

But even then, it seems that majority of the young lawyers graduating from the University of Nairobi. (The only main source of lawyers in the country) are not interested in joining the bench. The main cause being that private sectors seem to be more paying than the civil service itself. That being the case, remunerations of Magistrates and other members of the bench (judges) should be increased. Magistrate like judges should be provided with cars.

These reforms would attract many more lawyers to join the bench.

Moreover, Magistrates and all other lawyers should keep in touch with law books and any other source of law so that they may be always up-to-date.

3. The body called Kanu Youthwingers should be done away with or confine it to its constitutional duties - (Kanun Constitution) i.e. to organise sports etc.

It however seems that many weaknesses stem from



corruption and other related weaknesses. That being the case, any attempt to suggest a solution, say, supervision, appear ineffective. This is so because even now there is enough supervision especially on the part of the police. But however much they are supervised or punished, problems seem to increase.

The main problem here and even in all other areas seems to stem not merely from the way people are trained or disobedience, but rather from the kind of economy the country has. Being a free market economy where success is measured in terms of the much one has accumulated, it appears futile to suggest solutions. These solution would be still violated for those who are supposed to carry out supervision may be victims of the disease themselves.

FOOT NOTES CHAPTER I

1. The Police Act (cap.84) S.14(I).
2. Ibid S. 15(2).
3. Police (Amendment) Act (No. 29 of 1968) second schedule.
4. The Police Regulations Part II
5. Ibid (Numbers 36 and 37)
6. Ibid (No.41)
7. The Chief's Authority Act (cap.128)
8. Administration Police Act (cap.85)
9. Ibid.
10. Chief's Authority Act (supra) S.6
11. Supra
12. Sunday Nation - January, 5, 1986 at page 28
13. The KANU Constitution S. 12.
14. Ibid (Ss.8 and 9).
15. Sunday Nation - January 5, 1986 page 28.
16. The KANU Constitution S.12(1).
17. Police Act (supra) S. 22(I) and (2).
18. Evidence Act (supra) S.28
19. R.V. Asmani Mwake Wamba (1927) I.T.L.R. 119.
20. R.V. Kaperere (1948) E.A.C.A. S6 at PP. 57-58.
21. Connley V.D.P.P. (1964) All. E.R. at P. 446.
22. Ondundo s/o Anyangu and others V.R. CR. APP. NO. 232/1965.
23. Evidence Act (Supra) S.26.
24. Magistrate's Court Act (cap. 10) S.7(I).
25. Ibid S. 6.
26. Ibid S. 15.
27. Criminal Procedure Code (cap.75) S. 207.
28. Ibid S. 207 (3).
29. Ibid S. (125(I)).
30. Ibid S. (208).
31. Ibid S. 210.
32. Ibid S. 211.
33. (1957) E.A. 332 (C.A).

34. (1948) I.T.L.R. 85.
35. Criminal Procedure Code (supra) S.214(I).
36. Ibid S. 215.
37. Woolnington V.D.P.P. (1935) A.C. 462.
38. The Probation Offenders Act S.4(I).
39. Ibid S.17.

FOOT NOTES CHAPTER II

Cr

1. Cr. case No. 1131/85.
2. Cr. case No. 3751/85.
3. Cr. case No. 4811/85.
4. Police (Amendment) Act (No. 29 for 1968).
5. The Police Regulations Part II
6. Cr. case No. 2241/85.
7. Cr. case No. 3941/85.
8. Cr. case No. 2349/85.
9. Cr. case No. 4622/85.
10. Supra.
11. Supra.
12. POLICE ACT (cap.35) S. 15(2).
13. Supra.
14. Supra.
15. Supra.
16. Supra.
17. Cr. case No. 2225/85.
18. Cr. case No. 1012/84.
19. Cr. case No. 1347/85.
20. Cr. case No. 1215/85.
21. Supra.
22. Cr. case No. 2120/85.
23. Supra.
24. Cr. case No. 1765/85.
25. Registered LAND ACT (cap.300).
26. Cr. case No. 1101/85.

27. Cr. case No. 1115/85.

28. Cr. case No. 3133/85.

29. Cr. case No. 3251/85.

30. Cr. case No. 1713/85.