DOMESTIC.

EAST AFR. PROT.

No. 24192

C.O.
24192
Recd
Regd 4 JUL 08

[Name of Office] or Individual.
[Mac]Millan & Mott

1908
[ ] July

Last previous Paper.
M
22725

(Subject.)

Murder of Mr London

Tr. formal petition on behalf of natives sentenced to death. Asks for intervention. Leave to appeal was refused by Privy Council on legal grounds.

(Minutes.)

Mr Lucas

We told the Govr. on 22513 not to carry sentence into effect pending further instructions.

He wd no doubt act on his list as he originally only stayed the execution of the sentence pending the application to the P.C. for leave to appeal & as the applⁿ has now been refused, we had better make sure that nothing further is done until the Petition submitted here wh. has been laid before the King with the advice of the S of S one way or the other.

Draft tel. submitted. (G.J.)

Tel to Govr [ ] July
Ans 9 July

Subsequent Paper
[ ]
24377

Mr. Read
Mr. [illegible] MC 7/7

This is not a satisfactory case, quite apart from the manner in which it was handled by Mr. Booth, who apparently compelled counsel new to the country to defend at very short notice and refused an adjournment to enable him to consult the accused.

Some of the allegations or suggestions contained in the Petition relate to matters not in evidence at all or may be put on one side (e.g. para 9), and contradictions in matters of detail (paras 10–12) inevitably occur when ignorant persons are examined & cross-examined on separate occasions in more than one court. But I think it cannot be denied that there are unsatisfactory points about the case, most of which are stated at length by Mr. Lindsay Smith and some of which are admitted by Mr. Morison.

The principal evidence against the accused was that of the [illegible] Dimo (who turned King's Evidence) and Meegoda (Mr. Rhodes's guide boy). Dimo's evidence of course required corroboration and a good deal turns on whether this is supplied by the evidence of Meegoda or whether the latter was himself an accomplice so as to necessitate his own evidence being corroborated. Even if he was an accomplice I think there was a certain amount of corroboration of his story — e.g. the blood stains on the [illegible], and the unsatisfactory [illegible] of the explanation of it by the prosecution in court — the question would then be whether the amount of corroboration is sufficient.

[Margin note:] [illegible] the accomplice was argued [illegible] by Counsel [illegible] Petitioners before P.C. their Lordships [illegible] having been [illegible] [illegible] on legal grounds [illegible] taken to have [illegible] in the view [illegible] Meegoda was not [illegible] accomplice or that [illegible] was [illegible] evidence [illegible] sufficiently corroborated. FJA.

Speaking generally, at present I incline to concur in the judgement of Mr. Morison[x] for I think the general outlines of Meegoda's story were made good, but it is impossible for the S of S to recommend any action to HM on this petition until he has seen the Judge's notes of evidence & the whole record of the proceedings.

Since writing the above I have spoken to Lord Dunedin about this case.
He thinks it is [illegible] a case for further enquiry, and regrets that the P.C. did not grant leave to appeal in order that their Lordships might have threshed the matter out judicially instead of throwing the onus upon the S of S to deal with it administratively.
I gathered that he thought that there was some corroboration and that it was quite possible that the result of a review of the evidence might be to [illegible] from the conviction of at least some of the accused, but he was emphatic that the case [should] be inquired into and consequently agreed that no action could safely be taken on this Petition until the Judge's notes of the evidence have been carefully considered.

? Send interim reply saying that Lord C. is awaiting the receipt of a desp. from the Govr forwarding the complete record of the case, that on its rect a further communication will be addressed to them & that in the meantime the Govr has been instructed by telegraph not to carry out any of the death sentences pending further instructions.

FJA

Mr. [illegible]

So proceed. I must express [illegible]

in concurrence in the view of Judge Morison that in these cases one must not expect "that accurate & comprehensive detail of evidence that one is accustomed to find in the criminal courts of England".

[illegible] 4/7

Proceed as proposed

[illegible] July 7

x Yes, act as suggested by Mr. Riley in the concluding paragraph of his minute

[illegible] 8.7

Colonel Seely

Lord Crewe

[illegible] 8.7.

I agree

C 8.VIII.

x N.B. The telegram ... for [illegible] ...

x already despatched 4th July

W. & S. Ltd.—16679—5000—10-07.
—1979—5000—4-08.

To The Kings Most Excellent Majesty

THE HUMBLE PETITION of

Mambo bin Mwynhija

Naguru bin Mwynmku

Marere bin Kombo

Baraka bin Kjamis and

Makalinge bin Babu Kombo

1. Your Petitioners the Appellants are Mohamedan natives of East Africa living until recently at a Village called M'tongue near Mombassa.

2. On 22nd February 1908 they were convicted and sentenced to death by the Sessions Court at Mombasa for the murder of one Thomas Payn London on 19th December 1907 (a copy of the Judgment of the Sessions Judge marked A accompanies this Petition.

3. They appealed from the said conviction and sentence to the Court of Appeal for Eastern Africa sitting at Zanzibar upon grounds hereinafter stated in paragraph 5

4. The said Court of Appeal by a majority of two Judges to one affirmed the conviction of all the Appellants and also affirmed the sentence of death upon all the appellants except Mambo whose sentence they commuted to one of 10 years rigorous imprisonment (a copy of this Judgment marked B accompanies this Petition)

5. The senior Judge namely the President of the said Court of Appeal was strongly in favour of quashing the conviction of your Petitioners as having been obtained by untrustworthy evidence, but he was over-ruled by the two junior Judges although one of them admitted that there were many incidents in the case ~~of~~ which had never been satisfactorily explained.

6. Your Petitioners have since applied to the Judicial Committee of the Privy Council for leave to appeal to them, but as their counsel was unable to show that in point of strict law there had been anything actually illegal in their trial, the said application was refused.

7. Your Petitioners have always asserted their complete innocence and it is contended on their behalf that the evidence on which they were convicted was unsatisfactory incredible and inconclusive

8. It has ~~been~~ never been satisfactorily proved as the President of the Court of Appeal in East Africa admitted that the deceased Mr London was murdered at all. He parted from his friend Mr Ansell at 2 o'clock in the afternoon and accompanied by the boy Myembe went into the bush where poisonous

snakes abound and where lions are occasionally met with. He had been in the bush shooting all day and might easily have been attacked by anyone who wished to murder him in some place where the attack would not have been seen. Instead of which it is suggested that you Petitioners attacked him at the Admiralty landing place a place where they were likely to be discovered at any moment, and in broad daylight. and in view of the steamer of which the deceased was an officer. The time at which they are alleged to have attacked him was the very time at which his friend Mr.Ausell had arranged to meet him there, according to Mr. Ansell's depositions it is almost certain that hewas actually at the spot waiting at London at the very time the murder is alleged to have taken place. The said Mr. Ansell was not called as a witness at the trial, but his deposition was read, where, if he had been called the time at which he was at the spot could have been more definitely ascertained. As your Petitioners were unrepresented before the Magistrate they had no opportunity of questioning Mr. Ansell on this point and bringing out evidence which would have been conclusive as to your Petitioner's innocense. The place at which the murder is supposed to have been committed was searched that very night a few hours only after the alleged murder, but no signs of a struggle or of blood are reported to have been found there. Mr. London was a big strong man (over 6 feet high and very muscular) who would not have died without fighting. No notice can be alleged why your Petitioners should have killed him, for the money which the witnesses on whose evidence they were convicted swore that they saw taken from the pockets of the deceased was subsequently on the discovery of the deceased's clothes found in his pockets. There were no marks of blood upon these clothes though the witnesses for the prosecution swore that he had been stabbed or upon the sword with which it was alleged he was struck.The native bed upon which he was alleged to have been carried and which must have beensoaked with blood was never produced nor any evidence given that Makalingo to whom such bed was alleged to have belonged had ever had under a bed and that if he had it, was then had it there missing. No explanation has ever been given of how the dead man's thigh bone came to be broken and it is incredible that your Petitioners could have carried his body 9 miles along a frequented path on a brillant moonlight night without being observed.

9. The witness Nyembe is described as a half civilised native boy. As a matter of fact though it was not proved in evidence your Petitioners are all former slaves of Nyembe's father who have been freed and to whom therefore Nyembe bears no good will It is admitted that when first questioned Nyembe told a lie and afterwards tried to run away and only accused your Petitioners after he had violently treated by the Police and after he had been for some days in the custody of the native police and had had ample time to concoct a story.

10. Nyembe's evidence at the preliminary Enquiry before the Magistrate differed from that which he gave at the trial in the following material particulars amongst others:-

(a) At the first proceedings he said that Nasuru and Narere came running and then the others followed them; at the second proceedings he said they all came together.

PUBLIC RECORD OFFICE LONDON

(b) At the first proceedings he said Marere struck the deceased with a knife, at the second after he knew Dimu's story, he said Marere struck him with a sword.

(c) At the second proceedings he altered his description of the parts of the body in which the deceased was stabbed, (in order to make his evidence agree with the cuts found on the deceaseds clothing)

(d) At the first proceedings he said it was Makalingo who carried the bed, at the second he said it was Mambo

(e) At the first proceedings he said the charm Ex. 1 was given him when he was on his way to the Livali, at the second that it was given him before the ceremony which was held over him.

(f) At the first proceedings he said he told his brother all about the murder, at the second he denied that he told him at all.

(g) At the first proceedings not a word was said as to the incantation ceremony. This part of his evidence was new at the trial (after the prosecution must have realised the necessity for corroboration.)

(h) In the Magistrates Court Myembe describes the stabs in the neck, stomach chest and back. After this hearing the clothes were discovered. The coat was uncut At the trial Myembe corrected his evidence (to meet this discovery by alleging that London had removed his coat) showing that he had been carefully coached.

11. Myembe was also contradicted by Dimu, who said the Murder was committed at 4 p.m. whereas Myembe said it was at 6 p.m. and Dimu said only Mattalingo wiped his hands upon the [illegible] whereas Myembe said Marere did so also.

12. Myembe was also contradicted by the other witnesses who were called to corroborate him. He said that Mattalingo gave him one charm and in private when no one was there, and that Hamadi gave him the other, the other witnesses said Mattalingo gave him both charms in their presence.

13. Having regard to the position of Myembe when the first accused your Petitioners, and to his own conduct as admitted by himself, it is submitted that the Sessions Judge was already wrong when he said that Myembe must be treated as an ordinary witness and that his evidence was quite free from the taint usually associated with that of an accomplice.

14. With regard to the evidence of Dimbi he was admitted to be a murderer, and a person on whom no reliance could be placed and he only confessed under pressure of pardon and after plenty of time had elapsed for the story told by Nyembe to have been communicated to him.

15. The evidence that Marere instructed Nyembe what to say to the Liwali, and that a ceremony was held over him before he was taken before the Liwali, was quite consistent with a desire on the part of those who performed it to protect Nyembe and the village from the consequences of being connected with the death of a white man, and has never been proved to have been intended to prevent him from telling the truth.

Moreover other persons admittedly innocent took part in the ceremony, and Nyembe might as well have accused one of them. Mambo was not present at that ceremony at all.

16. The other circumstances which were intended to corroborate the evidence of Nyembe, only go to show that if there was a murder he was present at it and knew how it was committed, and do not in any way implicate your Petitioners or any of them in the crime.

17. The evidence of Nyembe and Dimu if true might have been corroborated in many points as to which no evidence was given.

18. The local feeling against your Petitioners and the feeling that the death of a European should not go unpunished was so strong that no counsel would appear for them until Mr. Burke a newly arrived lawyer without experience of the local law and practice was called upon to defend them on the morning of the trial without an opportunity of consulting his clients or preparing evidence Mr. Burke asked for a short adjournment to confer with them, but such adjournment was opposed by counsel for the prosecution and was refused by the Court (a most unusual course in a trial for murder) In consequence Mr. Burke was unable to properly defend them, or to examine their witnesses.

19. These witnesses, who could have proved the innocence of your petitioners, were so terrified of being connected with the death of a white man that they refused to admit any knowledge of the matter and other witnesses who could have been called did not appear at the trial at all. Baraka's father in law denied on oath his relationship though it was admitted by other witnesses.

These native witnesses were called to prove an alibi namely that all of them were engaged with Baraka in mending fishing nets at the time of the alleged murder. All except one stated that the mending of the nets was many days previous but one who was obviously hostile to the accused admitted that the mending of the nets was on the day in question though he tried to qualify this admission by saying that it was when the moon rose. The rising of the moon would however have been at the very time that the accused were alleged to be carrying the body nine miles inland.

20. Your Petitioners being undefended at the Preliminary Enquiry, were never questioned in manner directed by S. 342 of the Indian Procedure Code, and never had any opportunity of defending themselves properly either then or at their trial.

Their explanation seems to be that Myembe lost Lenden in the bush. That he was terrified at having done so and that he fled to Mombasa and that the incantation was to protect Myembe and the village from association with the disappearance of a European. And that they really know nothing of his disappearance. The accused could have proved an alibi if they had had any opportunity of collecting their evidence but though they constantly appealed for legal help none was afforded them until the day of the trial when it was too late to do anything and such witnesses as were produced were bought by the native police and were in error of them.

21. It is inconceivable that these native witnesses living on the spot could have forgotten the flashing of the search light of the steamer along the shore the Police search and enquiries on the night in question or have been entirely ignorant of the murder if it had already taken place yet they swore to entire ignorance.

22. Both Dima and Myembe were quite unable to give any information as to where the body could be found and this seems to have been discovered by accident your Petitioners therefore humbly pray that under the circumstances aforesd. Your most excellent Majesty will exercise your Prerogative of Mercy and will grant them a free pardon or in the alternative that the death penalty shall be altered to a sentence of imprisonment.

Donald McMillan Mott
Solicitors for and on behalf of
the Petitioners

Donald McMillan & Mott.
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C.O.
24192
Recd 4 JUL 08

11 & 12 Clements Lane
Lombard Street
London E.C.
4th July 1908

My Lord,

Mambo & others v The Crown.

We send herewith formal petition on behalf of the Defendants who are under sentence of death at Momba

We feel very strongly that owing to the loc racial feeling the Defendants did not have a fa trial and that there has been a serious miscarriag of justice

We applied yesterday to the Privy Council for leave to appeal which was refused on legal gr

We were unable to adduce before the Privy Cou evidence of error of fact as they will only ente an Appeal in Criminal cases on legal grounds

The enclosed petition has of necessity been prepared in great haste & we should esteem it a great favour if your Lordship will give us an interview when he can verbally put the facts before you and explain any points of difficulty which may occur to your Lordship on the perusal of the petition.

We are,
Your Obedient Servants
Donald McMillan & Mott

To His Majesty's Secretary of State
for the Colonies.

IN THE SESSION'S COURT OF THE EAST AFRICA PROTECTORATE AT MOMBASA.

Rec'd 4 JUL

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Criminal Case No. 12. of 1908.

Crown..... .....Prosecutor.

-

1. Mambo bin Myuhija
2. Nasuru bin Mwynymku
3. Marere bin Kombo
4. Baraka wa Khamis
5. Makalingo bin Babu Kombo

Accused.

JUDGMENT! -

The accused in this case are charged with murder under Section 302 I.P.C. in that they caused the death of Thomas Payne London in Mtongwe on or about the 19th December 1907.

The evidence shews that Mr. London left the Cable Ship Colonia, on which he was Engineer in charge on behalf of the contractors, on the 19th December when the ship was at anchor in Kilindini harbour to go to the mainland accompanied by Mr. Ansell in order to shoot birds.

The two men landed at the water pipe at Mkonguni and subsequently according to Myembi's evidence they endeavoured to get him and some other boys to go with them to carry their bags. The boys refused because they were engaged in fishing but when they had finished their occupation they followed the Europeans. Myembi stated he received Rs. 1. from London for getting madafu. Before finally joining the Europeans Myembi informed Makalingo and Marere

who were building that he was going to Mkonguni with Europeans.

Three boys eventually met the Europeans at Mkonguni their names are Myembi, Isa and Mfaki.

The bags were divided Myembi carrying the bag of cartridges Isa the bag of birds and Mfaki the bag of food.

They left Mkonguni together and afterwards separated Isa and Mfaki going with Mr. Ansell and Myembi with Mr. London.

From that time Mr. London was not seen again by any European.

Myembi and Mr. London went along the mud flats and there met Nasuro coming from the beach.

Nasuro asked what they were doing and what was in the bag and the European's pockets.

Myembi told him that he didn't know the contents of the pockets.

Mr. London and Myembi returned to the water pipe at Mkonguni at about 6 p.m. and it is there and then the offence charged is alleged to have been committed.

The European was bending down washing his hands with his coat off and his gun some distance away.

Both he and Myembi were looking towards the North when according to Myembi the five accused with Dimu came down.

Makalingo who is above the average height gave Mr. London a blow on the back with his hand Marere stabbed him with a sword which has been identified as Makalingo's, Baraka stabbed him in the stomach, and Nasuro stabbed him in the waist on the left side.

Dimu also stabbed him in the back.

The weapons used for stabbing other than the sword were the usual knives the natives of that class carry with them.

There are some discrepancies between the evidence given in this Court and that given in the preliminary enquiry by Myembi as to the manner in which the accused came.

Here he stated that they all came together and that he did not see them before they committed the murder. In the Court below he stated that he first saw Mzuru and Mambo running and that the others were coming a short distance behind.

In this Court he stated Mambo was sent to get a bed. Before the Magistrate he said Makalingo brought the bed from his house.

I do not attach any weight to these discrepancies the main story is the same in both Courts. Myembi seems an intelligent boy of about 13 and 14 and I was impressed with the manner in which he gave his evidence it bore every sign of being the truth and not a concocted story.

When the European was dead the accused tied him in a mat put him on a native bed and carried him in a Western direction as far as the Admiralty boundary beacon. Here they rested and according to Myembi both Makalingo and Marere wiped their bloody hands on the stone beacon.

Dimu stated that only Makalingo wiped his hands.

Both Inspector Ward and Mr. Peacock testified to the presence of dark stains and finger marks on the stone and although it was impossible to definitely say

they were blood stains. Examination of the scrapings taken from the finger marks disclosed human hair which corresponded with human hair found on Mr. London's coat which was subsequently discovered and also in colour to the description of Mr. London's hair.

The body was carried from the beacon further West until two roads met one going to the shambas and the other to a town.

Here Makalingo who through out seems to have been the guiding spirit directed Dimu to take Nyambi away to a house.

Dimu who up to this point had been carrying the coat the gun and the bag which is identified (Exhibit 5) as a camera case with the name T.P. London written inside the lid put these articles on the bed with the body and separated from the accused and went with Nyambi to Badathiki's house. From this point there is no direct evidence of what was done with the body and the aforesaid articles by the accused.

Makalingo told Nyambi that he was going to fetch an iron bar to bury the body.

Nyambi and Dimu slept at Badathiki's house on the baraza apparently unknown to the owner. And next day Nyambi went to Mwenyi Mkubwa and Banatano and followed his vocation of fishing subsequently proceeding to Mombasa to buy oil at Mwenyi Mkubwa's request after a successful day.

The night was spent in Mombasa and Nyambi was there seen by Nasuro.

In the evening of the next day Nyambi returned

to Mtongwe and at his mother's house was the subject of a series of incantations conducted by Makalingo, Marere and Nasuro.

These are described and in this particular Nyembi's evidence is amply corroborated by Dimu, Rahali and Mwenyikuu and as to the purchase of kaniki by Dimu and Nasuro for the purpose of the charm by Rashid.

The Liwali Ali bin Salim had come across to the mainland and the object of these incantations was to prevent Nyembi by magic from telling the truth.

The charms alleged to have been given Nyembi are in evidence (Exhibits 1 & 2) Exhibit 2 is a verse of the Koran and Exhibit 1 is unintelligible, Exhibit 2 Nyembi stated was given to him by one Kamadi. Marere, Baraka and Makalingo told Nyembi not to tell the Liwali the truth but to state that the European wished to commit an unnatural offence and pointed a gun at him whereupon he ran away.

Nyembi was covered with Kaniji verses which were read by Nasuro.

A black fowl was killed and Nyembi had to step over the blood which was spilled on the road.

Nyembi testified to the fact that he at first told the Liwali the story which had been suggested to him by the accused but that a slap which hurt from a European, presumably a police officer, and a command to tell the truth induced him to relate the real facts which the charms and the fear that he would be killed had hitherto prevented him from telling.

Taking into consideration the semi civilised state of Nyembi, the apparent superstition which prevails among his fellows and his account I do not

think it remarkable that Myembi should have put some belief in the charms and the fear of injury coupled with the effect of the incantations are I think sufficient reasons for him not reporting the offence to any one in authority.

It has been urged for the defence that Myembi is little better than a participator in the crime because he took no means to disclose it and that his evidence is no better than that of an accomplice. In support of this the case of Queen v. Ohende Chandalence and two others is cited (XXIV W.R.58).

In that case the witness knew the preparations alleged to have been made for administering poison to the deceased Baroo by his wife Nobauee and the man Ohenda with whom she had an intrigue and the witness was thus a participator in the alleged crime in that she did not try to prevent the offence or disclose it. In my opinion this case stands on an entirely different footing.

Here instead of an adult we have a boy whose mind had been influenced by fear and witchcraft.

After the crime had been committed and who from his age and the nature of the crime could not have been expected to try and prevent it at the time of its commission.

His evidence must I think be given the credence which is due to the evidence given by an ordinary witness and is altogether free from the taint which is associated with the evidence of an accomplice.

Dimu who is an accomplice and who has been pardonned on condition that he gave evidence against the accused and whose evidence must be viewed with all the care and caution with which it is necessary

to view the evidence of a person who but for turning approver would be in the same position as the accused has testified to the same facts as Myombi in every important particular.

The assessors were impressed with the credibility of Dimu's evidence and corroborated as it is by Myombi's evidence and as to the incantations by the other native witnesses I have no hesitation in believing it.

Dimu stated that he was brought down to the scene of the crime by Nakalingo not knowing what was going to happen and there found the other accused already near the water pipe. This is important because I think the obvious inference from the fact of them being in readiness near the water pipe and from the fact that Marere was armed with a sword is that the four other accused did know what was afoot and that Mambu although he took no active part in the killing owing to having no weapon had conspired to commit the crime and had taken active steps towards the commission and was present to assist the other accused and is therefore equally guilty.

Dimu identifies the gun (Exhibit 4) and the cartridge bag (Exhibit 5) as those he carried.

Ali bin Salim gave evidence of how the hole was discovered at Kisantongoe which is in the direction the accused were last seen going with the body.

The clothing bones cartridge bag and other articles exhibited were found in that hole, and I think great credit is due to him for the skill and thoroughness with which he conducted his search and investigations and the result.

The coat (Exhibit 6) and cartridge bag both bear

the name of the unfortunate victim and from the medical evidence of Dr. Robertson it is clear that the bones belonged to a recently deceased European. From the fact that the bones and London's clothes were found in the same hole the inference that the bones were those of Mr. London is irresistable.

Inspector Ward described how the gun was found pushed down another hole and how the kaniki was taken from Kyambi's waist with the charms (exhibits 1 & 2) wrapped in it.

The motive for the crime suggested by Dimu i.e. robbery seems inadequate for such a brutal atrocity and it is probable that another motive appealing to these semi savage superstitious people exists.

The accused have denied the offence and some of them have called witnesses with a view to providing an alibi but those witnesses emphatically deny that they were with anyone of the accused on the night in question. The demeanour of all such witnesses was hostile to the accused but it was impossible to shake them in their denial of the presence of any of the accused in their company at the time of the offence.

A particularly horrible and atrocious crime has been committed and on the evidence I have no hesitation in agreeing with the assessors opinions as to the guilt of the accused. I find each and all of the accused guilty of murder under Section 302 I. P. C. and sentence each and everyone of the accused to be hanged by the neck until he is dead.

(Sgd.) J. W. BARTH.

22nd. February 1908.

The accused are informed of the period in which

to appeal.

(Sgd.) J. W. BARTH.

I Certify that this is a true
copy of the original.
(Sgd.) Thos.A.Hammer.
24.2.1908 Deputy Registrar.

HIGH COURT B.A.P.MOMBASA.

Copy asked for 22nd February 1908.
" ready 24th February 1908 I to H.P
" delivered 24th February 1908.

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24192
Recd 4 JUL 08

IN H. B. M's. COURT OF APPEAL FOR EASTERN AFRICA AT ZANZIBAR.

Criminal Appeal No. 4 of 1908.

From Session Case No. 12 of 1908 of The High Court of East Africa, Mombasa.

Nasaru bin Mynymkuu
Marere bin Koimbo
Baraka bin Khamis
Makalingo bin Babu Koimbo
Mambo bin Mynyhija
} *Appellants.*

versus

The Crown ....*Respondent.*

JUDGMENT

After giving most careful consideration to all the facts and incidents of this case I feel compelled to differ from the judgments of my learned brethren which I have read and so hold that the evidence put forward in this case is not such as would safely justify this Court in upholding the conviction and sentence against the *five* prisoners.

There is no doubt I think but that the deceased was cruelly and foully murdered and it may well be that it may be considered necessary to make some striking example amongst the natives of that part of East Africa to prevent any such dastardly outrage in future.

That however is in no way the province of the Courts of Justice. Sitting here as a Court of Criminal Appeal the only point we have to decide is whether the evidence submitted by the Crown in the Court below is in law sufficient to justify us in holding that each of these five prisoners was guilty of murder. In coming to such conclusion we are bound by the ordinary laws and rules of evidence as laid down by the Judges of India and England in reported cases.

There are two classes of witnesses for the prosecution in this case, one consisting of Dima and Myembe who testify to having seen the murder committed, and the other of witnesses who give evidence to support the charge of incidents before and after the murder.

Of the two who give direct evidence against the five accused, Dima is by his own confession an accomplice and as such by English and Indian Law his evidence must not be relied upon unless it is corroborated.

It was confirmed in the main details by the evidence of a youth Myembe whose corroboration, if his evidence can be treated as that of an ordinary witness, would be amply sufficient.

It has however been contended before us that his evidence must be treated as that of an accomplice and therefore cannot be relied on without sufficient corroboration as to the connection of the five prisoners with the murder.

It will be useful before going into the facts of this case to deal with the authorities on the point as to what is an accomplice and what evidence is considered in law no better than that of an accomplice.

The law is the same on this point both in England and India but I will deal with the Indian Authorities in which most of the English cases are quoted. The earliest important case is that of Queen *v.* Chandalinee reported 24 W. R. Cr. 55 (1875).

It was there decided by Markby and McDonald J. J. that the evidence of a woman who was an inmate of the same house as accused and was present when a little girl on the instruction of the accused gave the deceased a poisoned cake, must be considered as no better than that of an accomplice as she took no means to prevent or to disclose the crime.

The same ruling was applied to the evidence of a man who sold poison (4 annas of Aconite root) to the accused some 8 days before, although he was not present at the poisoning and there was no evidence that he had any knowledge of what the poison was for. His evidence was nevertheless held open to suspicion as after the poisoning of the deceased he did not appear to have disclosed the fact that he supplied the poison though he must have realized the cause of the victims death.

In the case of the Queen *vs* O'Hara I. L. R. 17 Calcutta p. 642 (1890) the report shows that 4 drunken soldiers went out together armed with two rifles and several rounds of ball cartridges to shoot wild pigs. After attacking several inoffensive villagers and getting toddy from them they came to the house of the deceased who was asleep and asked him for some more toddy. He refused and was dragged out of the house; O'Hara the accused led him followed by Goldsworthy and then O'Hara shoved him in a ditch. Goldsworthy remonstrated with O'Hara who had a rifle with him and told him not to shoot him as if anything happened there would be a terrible row. In spite of this O'Hara knelt down, shot at the native and killed him but none of the four soldiers informed the authorities. When O'Hara was tried for murder before Mr. Justice Norris and a special jury, Goldsworthy gave evidence without any pressure and of his own free will, as to what had taken place on that night and on the Judge directing the jury that Goldsworthy was not an accomplice O'Hara was convicted on his evidence and that of McDermott another of the four soldiers. The prisoner applied for a review and the full Calcutta Bench consisting of five Judges held that under the circumstances Goldsworthy was an accomplice and that the Judge had wrongly directed the jury on this point. The Court therefore ordered a review of the judgment. Norris J, himself who was present on the Bench stated that "a careful consideration of the arguments has satisfied me that I ought to have told the jury that Goldsworthy was an accomplice."

Another of the 4 soldiers one McDermott who gave evidence against the accused stated that he was with the 3 others when they went on the expedition and that the native was taken out of his bed as described, tht he himself got to the pond and went past it, that he heard two shots fired upon which he turned round to look for his

three comrades: that he found them at the tank and looking for native saw him standing out in the pond: that he then asked his comrades whether they gave him a swim but that they made no reply and only laughed. As the full Bench decided that the Judge was wrong in directing the jury that Goldsworthy was not an accomplice and that there must be a new trial it was not necessary for them to express any opinion in their judgment as to whether McDermott ought to be held to be an accomplice or not.

After delivering their decision as to the review they however sat to deal with the case on the evidence as it appeared from the notes of Mr. Justice Norris.

The report does not contain any note as to what they decided with regard to McDermott's evidence, but it is clear that they either rejected it on that ground or else held it was not sufficient corroboration of Goldsworthy for in spite of the evidence of these two soldiers they quashed the conviction and set aside the judgment and sentence.

The case of Ishani Chandra reported 21 Calcutta p. 328 (1894) carries the matter a little further.

There an informer was upon his own statement cognizant of the commission of an offence and omitted to disclose it for six days. Trevelyan and Rampani J. J. in giving judgment on this point said "We "are not prepared to state that he (the informer) was an accomplice. He may have "been one but it would be impossible to say "in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it and omitted to disclose "it for six days. From any point of view we "do not thing that this testimony is such "as to justify a conviction except where he "is corroborated."

The case of Ahmuddin vs. Q. E., I. L. R. 23 Calcutta p. 361 (1896) is perhaps the strongest authority of all. There (Ghose and Hill J. J.) held that two servants of the accused who were not even present at the murderous assault alleged to have been committed by the accused but later appeared on compulsion to have carried away the wounded man to a field where he was left must be regarded as no better than accomplices. The Court in delivering judgment said "We cannot but regard the "evidence of these two witness as no better "than that of accomplices, at any rate they "took such a part in this transaction as to "make it most unsafe for the Court to rely "upon their evidence unless corroborated in "some material respects in convicting the "accused."

The only case that seems to reject the view that the evidence of such quasi-accomplices ought not to be admitted is a decision of Bhasuam Ayyangar J. reported in 27 Madras p. 271 who stated in his judgment that he felt constrained to dissent from the view taken by the learned Judges of the Calcutta High Court in the cases I have already alluded to, and he therefore held in the case before him that the evidence of a witness one Velappa, who secretly saw the murder committed and was afterwards compelled by the murderer to assist in the concealment of the body and under threat of being murdered did not disclose the crime for 15 days was not sufficiently tainted as to require corroboration. This case was originally tried by the Sessions Judge who held that this witness was an accomplice. It was then heard by Subrahmania Ayyar and Boddam J. J. who differed. The first Judge holding that the evidence of this witness ought to be accepted whilst Boddam J. held that it required corroboration. He stated in his judgment page 285 after quoting the Calcutta cases with approval: "In my opinion even if the first witness (Velappa) was not an accomplice having regard to the fact that he was cognizant of the crime for 15 days without disclosing it and that he had a cause of quarrel with the accused when he did disclose it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime and as there is no such evidence I think the accused ought to be acquitted.

Because these two Judges differed the 3rd Judge Bhasyam Ayyanger was called in who gave his opinion as stated above and therefore by a majority of two to one the evidence was accepted. The decision is no doubt entitled to weight but it can in no way be taken to overrule the decisions given by so many Judges in the Calcutta and other cases.

I will now deal in the light of those authorities with the position of Myembe. He is stated by the Judge to be an intelligent boy of 13 or 14. He acted as guide boy to the deceased and was with him up to his death. He was Dimu's neighbour and knew all the accused. When Dimu and the others came up towards the deceased on the day of the tragedy he does not as one would expect seem to have asked them what they wanted or to have been at all surprised to see so many come up together. It must be remembered that this boy did not go and act as guide at once when requested at about 10 or 11 o'clock but came to the Europeans between about 12 or 1 when they were taking their first rest at the water pipe.

He therefore had ample time to be present at the discussion which must have taken place between Dimu and the others whoever they were when the murder was first arranged. It is also to be noticed though it is perhaps a small matter, that when Mr. London was washing the boy was about 30 feet off near the deceased's gun which he could have withdrawn if the deceased had tried to get at it.

The fact that the boy did not call out to his friends when they came up; that he gave so many accounts of how they arrived and tried to make the Court believe that he did not see them *come* up though he eventually admitted it; that he did not give any cry of warning to the deceased when he saw them about to attack him; that he did not run away frightened when he saw what was happening; that he stayed without pressure while the body was searched and the bed fetched and the corpse put upon it: and finally that he was entrusted

with the secret as to where the body was to be eventually concealed, all this raises the very strongest suspicion that the boy was cognizant from the very beginning that this murder was going to be committed and was in the conspiracy. It seems almost incredible that these murderers should venture forth to kill a European who had a gun with him and who they knew was accompanied by a boy who would be a witness against them without first sounding the boy and if willing enlisting at least his non-interference. In any case the boy was present when the murder was committed took no steps to hinder it or withdraw, and though he was two days alone in Mombasa before any charm was put on him and therefore had ample opportunity he did not inform any one of what had happened. He did not even tell his brother Mwenye Kuu whom he saw the next day although in the Magistrate Court he swore that he had and also related an imaginary answer of his brother that the accused would come and kill him if he went to the hut at Zewani that Dimu told him to go to. This was obviously said by Myembe before the Magistrate to show that he was too frightened to tell any one of the murder. It sounds quite plausible but in the Sessions Court he had to withdraw it altogether and admitted that Dimu had never told him to go to the hut and he had never informed his brother anything about the murder. When questioned by the Liwali he does not hesitate to tell him a gross lie with regard to his leaving the accused before his death though the Liwali would be a person he would naturally be in great awe of, and it is and not until the 25th *i. e.* 8 days after the murder that he for the first time gave the account which he gave at this trial and then not until he was forced to by being [illegible] by one of the Police. In the [illegible] he had twice tried to run away. It is perfectly true that the lie was suggested to him by others and that he was given a charm to keep up his courage either to enable him to tell the lie, or to prevent him from saying anything else. From first to last however no threats were made to him and it is not suggested any where that he was told or instructed that failure to keep his word after the charm was given him would have any evil effects upon him. The people he is alleged to have shielded were not as far as I can find from the record people having any authority over him such as his master, brother, mother or his cousin. Further I have examined his evidence very carefully as given before the Magistrate and Judge and it all shows in my opinion that he never hesitated to prevaricate when it was necessary to exonerate himself or to fix the guilt on these five accused.

I have already dealt with his untrue statement that Dimu wanted to keep him in a hut and that his brother to whom he (Myembe) had confessed suggested the accused would murder him if he went there. All on his own admission untrue. I have also mentioned that in cross-examination at the Sessions trial he pretended in order I suppose to explain why he had not warned the deceased, that he did not know where the men came up from because he was looking in another direction and that the European was already stabbed before he looked round whereas in the Magistrate's Court and in answer to the Judge he admitted he saw them coming from the houses and described in detail what they did.

Yet again in the Magistrate's Court he volunteered the statement that the bed which was brought was from Mackalingo's house and added that he knew it was from Mackalingo's house because Mackalingo brought it. Before the Sessions Judge having heard in the meantime Dimu's evidence who stated that Mamboo and Mackalingo brought the bed he denied absolutely that he had said the bed was from Mackalingo's house and said Mamboo brought the bed.

The most remarkable point in his evidence however is with regard to the deceased's money and the motive for the murder. Before Myembe was called in the Magistrate's Court, Mr. Ansell had stated that the deceased had about Rs. 15 in his pocket, one of which he had given to a boy whom Mr. Ansell in Court thereupon identified as Myembe. Myembe admitted it and therefore he knew that the deceased was that day carrying his money like nearly all Europeans do in his trouser pockets. With the apparent object therefore of suggesting that these five accused murdered the deceased for his money he stated in the Magistrate's Court that at Wangwa they *i. e.* the deceased and Myembe met Nasuru who asked what the European had in his bag to which the boy answered cartridges and that Nasuru then asked what has he in his *trouser pockets* and Myembe said "I do not know."

On January 1st Dimu confessed and presumably told the same story that he did at the trial *viz.* that Masere after the murder and after the body had been searched had taken the Rs. 15 from the pockets of deceased which fully bore out the suggestion of the motive of robbery. However, about three weeks after Myembe's evidence before the Magistrate, the body was discovered and the whole Rs. 14 *i. e.* Rs. 15 less the Re. 1 given to Myembe was found in the trouser pockets of the deceased. How could the murderers have overlooked the money in the trouser pocket when according to the boy, Nasuru especially had the contents of the pockets in view, and why if robbery was their motive had the murderers not taken the Rs. 15 the only monies the deceased had.

The boy was quick enough to see how this discovery weakened his story and we find that in repeating his story before the Judge he carefully left out all mention of trouser pockets and stated that Nasuru asked him what was in his pockets. In addition to all this it must be borne in mind that though on account of his youth he could not be considered a very guilty party, still, directly the deceased disappeared it was on him that suspicion would naturally fall as being the last person with whom the murdered person was seen alive and unless he cleared himself he was in grave danger

of being charged with the offence. As a matter of fact he was arrested in spite of his first story and eventually kept in police custody until the trial.

For all these reasons which I have set out in great detail as I reluctantly feel compelled to differ from the other Judges. I am of opinion that it would be extremely dangerous to treat this boy's evidence as being other than that of an accomplice.

I am therefore compelled to treat the evidence of the only two witnesses who speak to the actual committing of the crime as that of accomplices. Is there sufficient corroboration of their evidence on the record to justify this Court in finding all and every of the prisoners guilty?

The amount of corroboration required for such testimony has been decided both by the Courts in England and India and is dealt with by the well known Judge Sir Douglas Straight in Q. E. v. Ram Savan 8 Allahabad p. 307. He says in his judgment "Not only is it necessary that the "evidence should be corroborated in material "particulars but the corroboration must "extend to the identity of the accused person "and in this connection I may refer to the "case of R. v. Webb in which William J. "said You must show something that goes "to bring the matter home to the prisoner. "Proving by other witnesses that the rob-"bery was committed in the way described "by the accomplice is not such confirmation "as will entitle his evidence to credit so as "to affect other persons. Indeed I think it "is really no confirmation at all as every one "will give credit to a man who avows himself "a principal felon for at least knowing how the "felony was committed. It has always been "my opinion that confirmation of this kind "is [illegible] whatever." A little further on he quotes Lord Abinger's dicta which are cited in Taylor's work on evidence as represent-ing the latest principles which the Courts in England have applied in dealing with this question.

Lord Abinger said in the case before him "I am clearly and decidedly of opinion and "always have been and always shall be that "there must be a corroboration as to the "the particular prisoner" and later when summing up to the jury. "I am strongly "inclined to think that you will not consider "the corroboration in this case sufficient. "No one can hear the case without enter-"taining a suspicion of the prisoners guilt "but the rules of law must be applied to all "men alike. It is a practice which deserves "all the reverence of Law, that Judges have "uniformly told Juries that they ought not "to pay any respect to the testimony of an "accomplice, unless the accomplice is corro-"borated in some material circumstances. "Now in my opinion, that corroboration "ought to consist in some circumstances that "affects the identity of the party accused." Straight J. continues on the next page of this judgment. "So that, as I understand "the rule, there must be some corroboration "independent of the accomplice, and the co-"confessing prisoner, to show that the party "accused was actually engaged directly in "commission of the crime charged against "him. I may add that it is of no value and "makes no difference if there are two accom-"plices. A second accomplice does not im-"prove the position of the first, nor does "the fact that there are two make it unne-"cessary that both should be corroborated. "Again, the accomplice must be corroborated "not only as to one, but as to all, of the per-"sons affected by the evidence, and because "he may be corroborated in his evidence as "to one prisoner, it does not justify his evi-"dence against another being accepted with-"out corroboration."

It is clear from this case and the other cases referred to in Princeps Criminal Procedure page 299 that facts which do not show the connection of the prisoner with the commission of the offence charged are no corroboration in the sense in which the word is used in such cases although they may tend to show that certain portions of what the accomplice says are true.

The evidence therefore given as to finding of blood and hair on the beacon is no corroboration though of course it would have been if the finger prints of any of the accused had been found marked on the beacon.

What corroboration therefore is there that it was these five men, all of these five men and no others that assisted Dimu to commit this terrible crime. The other Judges found sufficient in the evidence of the presence and participation of the accused in giving the boy Myembe the charm and in exhorting him to tell the lie as to his leaving the deceased before his death. In view of the reliance placed upon the evidence by the Sessions Judge and [illegible] brother Judges here I have given [illegible] most careful and anxious attention [illegible] cannot find in it the corroboration necessary to fix these five men with the crime.

I think that is quite clear from the [illegible] dence of Bahali and Mwenye Kuu that [illegible] of the accused together with Nasiri [illegible] Hamadi gave the boy charms in the pre-sence of many people but there is absolutely nothing to show that it was [illegible] them to the boy to save themselves rather than him. The whole of the circumstances seem equally consistent with a desire to shield the one person upon whom every one in the whole village knew that suspicion rested as he was the last person in the company of the deceased before his death. It is quite a common thing in countries like East Africa where the natives are not yet properly civilized to punish by way of example the whole village or tribe if members of that village or tribe commit grave or repeated offences against the law and natives of the village were probably well aware of such a practice. Judge Manning stated during the course of the [illegible] that he was much struck with the fact that the five accused and they only took a leading part in the ceremony. According to the evidence of the two independent witnesses however Mamba was not even present from start to finish and it was Nasiri who read the verses and [illegible] Hamade Mada who according to the evidence of Myembe before the Magistrate gave him the charm Ex. 2. There were in fact in addition to the accused many other people present who it is not suggested were connected with the crime. The boy's mother, and foster mother his half brother Mwenye Kuu and his cousin Bahali, [illegible] Babu Huja, Hamade, Madu, Mwene-[illegible] were all there.

If the four accused made Myembe go through this ceremony with the special object of preventing the boy from divulging their names or their connection with the crime it seems to me extraordinary that something was not said or suggested at the time of the ceremony which would have made it plain to the boy that at any cost he was not to say anything about them. It is also difficult to believe that all these people could have been present at the ceremony many of them the boy's nearest relations without their enquiring and finding out why such a ceremony was being performed and in whose interest it was held. Only two however of those present were called by the prosecution and Hamisi who was called for the defence was not asked anything as to what was said or took place at this ceremony. No local headman or specialist in charms is called to explain whether it is the practice amongst such natives to use such a ceremony with a view to protecting the person to whom the charm is given or as a special form of oath to bind the person from divulging something which is the secret of others. Nasiri the verse reader is not called to say what the object of reading those verses was or who called him and paid him for the ceremony nor is Hamadi Madu who had a discussion with Nasuru about the disappearance of the European and actually gave the boy the charm Ex. 2. Therefore though I fully appreciate that the lie the boy was to tell would if believed prevent further questions being put to him and that if these five accused really were the murderers would indirectly make it very difficult to find out who they were still it seems to me from the evidence of Myembe [illegible] and Bahali (the only two of the spectators called) that it is just as likely that the [illegible] was suggested to him to remove suspicion from and prevent the probable con-[illegible] of Myembe himself, or his near relations who would naturally be suspected [illegible] to avert trouble from the whole village. In my view therefore the evidence as to the ceremony is not sufficient corroboration of the connection of these five people with the murder. What other corroboration is there? There is the evidence by Mr. Peacock that blood stains were found on the clothes of Makalingo which were sent to him by the Police for examination. Mr. Peacock however does not express any opinion as to whether they were human blood stains or not, or as to the probable age of the stains and Makalingo was not asked by the Judge any questions (under section 342) to see if he could explain their presence. The blood might have been the blood of a chicken or [illegible]. The evidence is therefore of no practical value.

It appears to me that in a case of this description where so many details have been given by the informers one would naturally expect to find evidence corroborating at least some part of their story. The spot where the deceased is alleged to be killed is I understand a favourite landing place for shooting parties and for the members of the Navy who have a recreation ground quite near and the time according to Myembe was about 6 or according to Dimu 4 or 5 o'clock.

No witness is called to explain why these six natives who have seen so many Europeans and done them no harm should suddenly make up their minds to kill a man they had never seen before and there is no evidence of their being seen conspiring together. No person is called from the village to say that on that evening these six men left together in the direction of the water pipe and though according to the Government chart the village is about half a mile off no one is called who met them or any of them during the whole of that half mile journey.

It is quite clear that if the murder was committed at the water pipe it did not take place at the time suggested by Dimu i.e. 4 or 5 o'clock. Mr. Ansell unfortunately could not be called at the Sessions trial so we do not know exactly what time he left the beach but it could not have been before about 5-30 and his boat would have been in sight for some considerable time longer. The two boys who were with him and who I understand live in the same village as the accused might however have been called to prove the time Mr. Ansell left and to say if they met any of these accused on their way back to the village.

Farman and Hamisi with whom Dimu says he was working at the time Makalingo took him away to the murder did not give evidence to this fact. There is no evidence of traces of any kind on or near the water pipe to bear out the informer's story.

The bed which must have been soaked in blood was not found in any of the accused's hut nor is there any evidence that after December 10th any of these accused burnt or destroyed a bed or that one of their beds is missing.

The ring has not been found nor is there any evidence that such a ring was seen in the possession of any of these five men and the money which the informer says the accused took was found in the deceased's pockets. A sword rather more curved than the usual type with two stars, a half moon and KEMPTON stamped thereon was produced at the trial but there is no evidence as to where it came from. The informers alone say that Makalingo owned a sword, and that the one produced was his though nearly all the village could have been called to prove it if the sword was really Makalingo's. No one is called to say that Makalingo or Marere took a sword out with him that evening. A footprint corresponding with that of the boy Myembe is found by the beacon but there is no evidence that the other foot prints or the finger prints on the beacon correspond in any way with the foot prints or finger prints of any of the accused. No one proves that Dimu and Myembe slept at Badathiki's house or were seen there together that evening though according to the evidence they must have got there between 6 and 7 p.m.

Finally though the five accused are said to have carried the body to the beacon and

the murder in this case.

There are some other points in the case. It appears from the record that neither in the Magistrate's Court nor Sessions Court were the accused questioned and the questions and answers reduced to writing. Nor in either Court were the accuseds' statements signed or marked by the accused. Sections 340 and 364 of the Criminal Procedure Code are absolutely imperative upon these points; and any omission to comply with them can be properly remedied only by the procedure laid down in section 380 of Criminal Procedure Code. It may possibly still be the case that the certificate appended to each accused's statement by the Magistrate would be sufficient to cure the defect (R. v. Yakub Khan 5 A.C. 238 at 250 but I prefer however to rely upon Article 20 of the East Africa Order in Council of 1902 in holding that the trial is not invalidated by reason of the omission.

Mr Bowse, in the course of his very able defence of the accused, further drew attention to a statement in the judgment of the Sessions Court Judge in relation to Dunu "who" he says "has been pardoned on condition that he gave evidence against accused." A similar slip appears in the opinion of the assessor Mahomed bin Matano. It is clear, however, from the record that the pardon was in fact correctly tendered by the Magistrate to the accused viz upon condition that he made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. I do not think, therefore, that the points affected the trial of all.

The only point in the case upon which I feel doubt is whether Mambo is guilty in quite an equal degree with the other accused. It is true that he was present at the commission of the crime, that he brought the body; that he helped to carry away the body; and that he did not disclose the story of the murder to the authorities. He did not however strike the deceased nor take any practical part in the murder and the whole tenor of the evidence suggests that he was rather a passive on-looker than an active participator. I agree that he is technically as guilty as the actual murderers, but I think justice would be sufficiently met if his punishment were reduced to ten year's rigorous imprisonment.

For these reasons I would confirm the conviction and sentence of the four accused Nasuru bin Mynyuku, Macero bin Kombo, Baraka bin Khamis, and Makalingo bin Babu Kombo, but, while confirming the conviction of Mambo bin Mynyuku I would reduce his sentence to that of ten years rigorous imprisonment.

MURRISON

4th May 1906

I agree with the judgment of Judge Murrison and endorse the remarks which he has made with regard to the refusal of Mr Burke's application for an adjournment. I therefore confirm the conviction and sentence of Nasuru, Macero, Baraka and Makalingo and confirm the conviction of Mambo and reduce the sentence to 10 years rigorous imprisonment.

PETER GRAY

4th May 1906

C 7/ 167
24192
Rec°
Rec 4 JUL 08

IN H.B.M.COURT OF APPEAL for Eastern Africa.

Cr. Appeal No.4 of 1908.

MAMBO AND OTHERS (Original accused) Appellants

vs.

CROWN (Original Prosecutor) Respondent

I, JAMES ALBERT CORUPTION BURKE of Mombasa Barrister at Law make oath and say as follows: -

1. That on the 6th day of February 1908 I received a letter from the Deputy Registrar of the High Court of the East Africa Protectorate offering me the defence of the five accused in the Town Magistrate's Court and at the Sessions Trial at the fee usually allowed for the defence of accused at the Sessions only.

2. That I refused the defence for reasons stated in my letter which is on the file of this case.

3. That on the morning of the day fixed for the trial of the accused at the Sessions Court I received a letter without an accompanying copy of the committal proceedings, informing me that the Court requires me to undertake the defence of the accused at the trial.

4. That I appeared when the case was called and applied for an adjournment which was refused, and I had to conduct the case on that day as best I could having had no opportunity of conferring with the accused. The case was taken at 10 a.m. and was heard up to 4 p.m. with the usual interval of one hour and a half for lunch.

5. That I truly and verily believe that had a short adjournment been granted I would have had time to confer with

the accused read up the proceedings in the Town Magistrate's Court and been able to far better conduct the defence of the accused.

6. That I also truly and verily believe that that adjournment not having been granted and my not having an opportunity before the commencement of the trial to confer with the accused, or to read up the proceedings in the Town Magistrate's Court hampered me in my defence of the accused.

(Signed) J.A.G.BURKE.

(Stamp)
1 R. (Seal) (East Africa) (Court.)

SWORN at Mombasa,
This 21 day of April,1909,
Before me,
Thos. Parkinson,
Registrar.

H I G H C O U R T

M O M B A S A .

6th February 1908.

C/109.

Sir,

I have the honour to inform you that your name appears next on the rota of pleaders to whom the Crown may on occasion entrust the defence of pauper prisoners and to enquire therefore whether you are prepared to undertake the defence of the accused in Criminal Case No.1132 of 1907 at the customary inclusive fee of Rs. 45/-.

Kindly notify me of your decision at your earliest convenience and if the reply is in the affirmative I shall be obliged by your calling on me here forthwith.

The accused will be brought before the Court on remand on Monday next.

I have the honour to be, Sir,

Your most obedient Servant,

(Sgd.) Thos. A. Hannen,

Deputy Registrar,

High Court.

J.A.C.Burke Esq.,

M o m b a s a.

COPY

MOMBASA,

7th February, 1908.

Sir,

In reply to your letter C/109 of yesterday's date, I beg to state that I do not think that I shall be able to undertake the defence of the accused in Criminal Case No. 1138 of 1907.

I understand that I should have to represent the interests of the accused at the enquiry on Monday next. It is at present very unlikely that I shall be in a position to do so on Monday.

In order, then, that the interests of the accused should not be in any way prejudiced through the absence of a Pleader to represent them, I beg to suggest that another Pleader be engaged in my place.

Yours faithfully,

(Sgd.) J. A. C. BURKE.

The Deputy Registrar,
High Court,
Mombasa.

HIGH COURT,
MOMBASA
19. 2. 08.

C/193.

Crown vs. Nasuru & 4 ors.

Sir,

I have the honour to inform you, that I am instructed by Judge Barth to inform you that the Court requires you to undertake the defence of the accused in the above case, which comes on for trial to-day. The Judge is aware that you have already refused this defence and has requested me to point out that this procedure adopted by you is contrary to the etiquette of your honourable profession.

I have the honour to be, Sir,
Your most obedient Servant,
(Sgd.) J. W. H. PARKINSON,
Registrar,
High Court.

J. A. G. Burke Esq.,
Pleader,
Mombasa.

Draft telegram. Sent 4.15 pm W.O.[?] 4 July [?] 24152 EAP. 172

Sadler [?] Governor Nairobi. Hockey 4 July

Doggelcraft [?] Hollowoyed [?] 5 June

Ref. to your desp. No. 275

Board refused

T.C. of King's Council [?] Lockamore [?] 3 July [?]

antique [?] have to appeal

attended through solicitors [?] have informed [?] notifying [?] after the [?]

addressed petition to

[illegible] for Pardon or [illegible]

postponing [?] affecting provisions

do not carry out sentence of death

[illegible]

pending further instructions

C. P. L.

4 July

at once

Min/
24192

E.A.P.

8
9

9 July 1908

DRAFT.

Messrs McKilliam Shortt,

MINUTE.

Mr. Lobb 8/7/08
Mr. Ellis HWL 9/7/08
Mr. Just.
Mr. Antrobus.
Mr. Cox.
Sir C. Lucas.
Sir F. Hopwood.
Mr. Churchill.
The Earl of Elgin.

Gentlemen,

I am directed by the E of C to acknowledge the receipt of your letter of the 4th instant, forwarding a petition to H.M. the King on behalf of certain natives of the E.A.P. who have been sentenced to death for the murder of a European Engineer.

2. Lord Crewe is awaiting the receipt of a despatch from the Govt of the Prot containing a complete record

record of the case,
and a further
communication
will be addressed
to you on its receipt.

3. In the meantime
the Govt has been
instructed by telegraph
not to carry out
any of the death
sentences in the
native question
pending further
instructions.

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