

THE LAW OF BAIL OF KENYA (with Limited Comparative
Reference to Uganda and Tanzania)

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I've used it before you.

ABBREVIATIONS

BOOKS AND PERIODICALS

HAINES	Haines, <u>An American Realism</u>
Holdsworth	Sir William Holdsworth, <u>A History of English</u> Volumes 1,2,4,5,9,13 and 15.
P & M	Pollock and Maitland, <u>English Law Before</u> <u>The Time of Edward I</u> volume II
Veitch	Veitch C, <u>Case Law of Tort in East Africa.</u>
Y.L.J.	Yale Law Journal volume 70.

Cases

Cr. App	Criminal appeal 1967-
Cr./Case No.	Criminal case number 1979-1980
E.A.C.A.	East Africa Court of Appeal 1947-1954
E.A.L.R.	East Africa Law Reports 1958-1973
K.L.R.	Kenya Law Reports 1946-

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Criminal Procedure Code Cap 20 Laws of Kenya 1930

Criminal Procedure Code Cap 107 Laws of Uganda.

Criminal Procedure Code Cap 20 Laws of Tanzania.

Magistrates Courts (Amendment) Degree No. 11 1972 (U).

Trial of Indictments (Amendment)Degree No. 11 of 1972 (U)

Kenya Constitution.

Uganda Constitution.

Local Administration Act Cap 25 Laws of Uganda.

Legal Aid Act Cap 21 Laws of Tanzania.

THE LAW AND PRACTISE OF BAIL IN KENYA

(With Limited Comparative
Reference to Uganda and
Tanzania)

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

Reliability & Reliability with reference.

The Criminal Procedure Code at Section 123 entitles every individual to bail except in instances where murder or treason is alleged to have been committed. This raises the implication that in instances other than of murder or treason every individual should get bail, but in actual practise this is not so. One finds that certain individuals get bail, whereas some are not granted it. What then are the deciding factors determining those who may be granted bail and more who may not? This is the principal problem to be investigated in this thesis.

When one is not ^{granted} bail, he or she is locked up, which raises the issue as to whether there is a presumption of the accused being guilty of having actually committed the offence. This can be said to be a breach of an individual's constitutional right, because under Section 77(2) (a) whenever an individual is alleged to have committed an offence the presumption under the section is that he or she is innocent until proved guilty or he or she pleads guilty. Also by locking up the individual another constitutional right, as laid down in Section 77 (2) (c) which is that an individual should have adequate time and facilities to prepare a defence, which would prove quite difficult if they have been locked up, is breached.

Section 72 (3) (a and b) of the Kenyan Constitution states that any person who is arrested or detained should be brought before a court within a reasonable time. If the arrested person or the detainee cannot be brought before a court of law within twenty four hours or within reasonable time, then under Section 72 (5) he or she should be released unconditionally or upon reasonable conditions to ensure they appear for trial at a later date.

There are two people who can grant bail. One is an officer in charge of a police station,

under the powers given to him or her in the Police Act Cap 84 at Sections 23 and 24 and Section 124 of the Criminal Procedure Code. Such an officer is empowered to give anyone who is arrested and brought to his station, bail or bond taking account of the nature of offence and the bond or bail should not be ^cexcessive. As aforementioned the officer can give bail or bond in any cases other than those of murder or treason. The Criminal Procedure Code allows the officers to determine what bail is sufficient to give to the individual and as I mentioned before, it should not be excessive. I would like to find out what determines sufficiency, whether it is the character of an individual, the nature of the offence or whether the matter is left entirely on the officers' discretion, his mood and so on.

The other person to consider is the magistrate. The Criminal Procedure Code empowers any officer of court to grant bail. This is set down under Section 123 of the Code. Section 124 states such an officer of the court can determine what is sufficient bail. Section 127 also empowers such an officer to reconsider it to be insufficient. What factors influence a magistrate's judgement as to who should get bail and what amounts?

The other problems that arise come from the words 'reasonable time' stipulated in Section 72 (3) of the Kenyan Constitution when looking at this issue of reasonable time, the effects arising from non-granting of bail arise. The problem is particularly acute when looked into in the urban context, with an influx of immigrants from the rural areas due to usual rural - urban imbalance in development. Apart from being metropolitan the urban centres are thronged by a great number of unemployed persons and those who are marginally employed with the result that those adversely affected normally resort to criminal activities in order to make ends meet. Crimes such as robbery, prostitution and similar crimes become wide spread. The next thing to be looked at is the number of courts available to try all the crimes committed in the city. First of all there is a shortage of courtrooms and an even acute shortage of magistrates were increased in number there would not be enough magistrates to place in each court room.

An inspection of the courts daily register of the Nairobi courts reveals that it is completely congested. A magistrate may be given a certain number of days for a case, usually it is only a day. If the case is not heard and completed on that day it is re-allocated and this leads to a delay of up to three months time before the case is heard again. So the issue of "reasonable time" is practically not possible since courts can hardly cope with the number of cases. Already the magistrates in all court rooms are literally over worked but this does not ease the problem of congestion of cases. When one is not granted bail this means that one will be remanded in custody until the time one's case is heard, completed and decided. What then is the maximum term in remand?

The expectation among the accused regarding the inavailability of bond or bail lead them to pleading guilty when in actual fact they are not guilty. The fear of languishing in custody for months leads the accused to feel that if they plead guilty, the court will look at them leniently for not wasting the court's time, especially in minor offences. My main concern here is with the fact that a person pleads guilty because of the amounts of time he has stayed or is likely to stay in custody. Another area of concern would be where an individual has stayed in custody for a period, for example, over nine months, which is possible, and then when his case is finally heard and decided he is acquitted and discharged. The stigma of having been locked up stays with the person. He still suffers because he has probably lost his job, or his family has suffered. If he had a business it would have suffered too. But the worst of all is what society may think of him as it is very likely that he will probably be branded a criminal. And for all the months that he stayed in custody until acquittal, there is no compensation except in the few instances where successful suits for malicious prosecution can be maintained.

The collection of data was done by taking four police stations. (1) The Central Police Station, (2) Kilimani Police Station and two from Eastlands. I interviewed the officers in charge and asked them how they determine who is and is not eligible for bail and what determines sufficiency of bail or bond,

whether it is written down for them or they use their own discretion.

For the courts, I went to Makadara, Kibera and the main courts at Nairobi. I also attended the courts at Mombasa. The purpose for attending the courts sessions was to determine the manner in which the magistrates addresses the accused and how they grant bail in court. I then interviewed them and asked them how they determine the amount of bail to be given.

As for the maximum amount of time to be spent in custody this was done by looking at the court registers, records at the Central Bureau of Statistics, and interviewing some Prison Officers. This helped me to find out the rate of congestion the cases form on the court register and how many people are in custody pending trial.

Lastly I have made use of written materials from books, and recommendations from meetings and seminars as well as decided court cases as well.

The structure of this essay is as follows:

Chapter 1 - The historical background of bail

Chapter 2 - Statement and identification of the problems that arise from bail.

This is mostly theoretical, following what is laid down in the Constitution, the Criminal Procedure Code and some court decisions.

Chapter 3 - Analyses the practical aspect focusing on what really happens in actual practise using the materials from practical resources, for example, courts and police stations.

Chapter 4 - Presents the major findings and development of some recommendations for reform. This chapter is also bearing a theoretical reprise.

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CHAPETER I

HISTORICAL BACK GROUND OF THE LAW RELATING TO BAIL

The "liberty of a subject" was a very controversial issue during the 13th Century, in England particularly with regard to where the powers of arrest lay. Under the Assize of Clarendon Rolls of England, which was a written piece of legislation governing criminal law, it ordered the arrest of any unknown man even if he had stayed in that place for one night. It ordered the arrest of any person who went around armed without lawful cause. Under Article 16² of this Roll, suspicious persons fell into the categories mentioned above.

Towards the end of Henry the III's reign, which is during the years 1000 - 1200 A.D., the ordinances commanding arrest were very wide and any person who aroused suspicion could be arrested by any civilian if there were reasonable grounds for the suspicion.

It was upon the sheriff, his bailiffs the lords and the common man as well to arrest anyone who aroused reasonable suspicion. Under the Writ of 1252 Selected Charters³, whenever a "hue and cry" was sounded it was upon every individual to come out and help in the search and arresting the person suspected of having committed a felon (our equivalent is the cry of "Mwizi"⁴). This duty lay on every individual and if neglected it carried punitive measures.

Clearly the liberty of an individual was in jeopardy, because strangers could not walk around freely because they would be unknown and labelled as "suspicious persons" and arrested, especially at night. Or as Sir Fredrick puts in his books, Pollock and Maitland,⁵ a person could have stumbled over a dead body in the forest and while examining it, is seen by another or others, he was not given time to explain but was attacked and arrested and if he resisted he might find the whole village upon him, after the "hē and cry" had been raised.

Once arrested they were taken to the sheriff, who had the powers to try cases (called holding his **tourn**) as well as granting bail.

He usually granted bail not because of the individual's right to it but because imprisonment was troublesome and costly. The conditions in jail were so gruesome and terrible, as well as being unhygienic and unsanitary; so much so that a lot of people died there. There was also the issue of "itinerant Justices" who dealt with the cases outside the sheriff's jurisdiction, which were more serious crimes. These justices were delegates of the king who went around from country to country. In those days the means of communication, especially roads, were very poor and it therefore took a long time to get anywhere. This meant that some people stayed in prison until they arrived. A lot of prisoners died in prison through starvation or illnesses in the prisons which were dungeons dug underground.

Pollock writes that most people who were put in jail saw it as "a place to break out of"⁶. And he says that the NORTHUMBERLAND ASSIZE ROLL⁷- had entries that told of numerous escapes.

Therefore the sheriff tried not to keep these prisoners because the responsibility was heavy. He had a discretionary power of releasing prisoners on "mainprize"⁸. Mainprize was only available to prisoners who had not been charged with having committed homicide, any forest offence or an offence against the king or his Chief Justice. This right was set down in the "Writ of De Homine Replegiendo"⁹, but this writ was also very vague because it went on to say that an individual could not be (repleved) or mainprized in the instances mentioned above or

"any other offence which was irreplevisable under English Law".

This gave wide powers of discretion to the sheriff in deciding which these "other offences" were.

The sheriff discharged his responsibilities of keeping prisoners in his custody by giving them to the prisoners friends who had to be people of substantial social standing and responsibility. That is, they had to be wealthy.¹⁰ Even at such an early stage then this right was only available to the rich and not the poor.

Under this writ when a prisoner was taken, and later could not be found, the person who was meant to hold him in custody was taken in "withernam"¹¹ that is by way of reprisal, the person who was meant to hold him was taken into custody until he produced the prisoner.

In early law the difference between bail and mainprize were obscure, although they were intended to be different. Bail was regarded as a more stringent degree of responsibility whereas mainprize was more lax. Under mainprize, as mentioned earlier on, if the prisoner could not be found then the surety was put into prison until he could produce the prisoner. But bail was of a different nature. When one was granted bail one was committed into the custody of the surety and in practice these people were still prisoners and in custody. These sureties were likened to jailors and were called "The kings living prison." The reason why the sureties were responsible for detaining their prisoners was because under bail the prisoner and surety were said to be "corpus pro corpore"¹², that is, bound "body for body", which meant that if the prisoner could not be produced then the surety was liable to suffer the punishment hanging over the head of the released prisoner. Which would not be pleasant if it involved losing ones life, where the offence committed by the released prisoner carried a death penalty. Depending on the severity or nature of the offence the sheriff could grant "bail below"¹³ which was usually a fine or sum of money which would be forfeited if the prisoner was not produced by the surety. In this the sheriff himself could stand as a surety because it was within their income level. The other bail was "bail above"¹⁴ whereby the surety could lose his life or suffer the sentence if he failed to produce the prisoner, this was pledged to a court.

In the end the ideas of bail and mainprize became obscured until there was no distinction between the two.

The prisoner who had committed homicide or any other irreplevisable offence could make a claim under the writ of "DE ODI~~O~~ET ARIA"¹⁵ which meant "the plea of spite and hate". The prisoner had to prove to the jurors that the charge brought up against him was done in spite and in hatred. (11)

If he was successful in proving this to the jurors he could get a provisional release pending trial, if not he stayed in jail.

The law relating to release of prisoners was very unfavourable towards the prisoner because too much power lay in the hands of the sheriff with the accompanying danger of abuse of such powers.

It is not until the time of EDWARD I's reign in the 11th Century that the rules relating to bail were laid down. These rules were set down in the Statute of Westminster I 1275¹⁶, which enumerated the offences that were bailable, but not exhaustively, but in a better manner than the writs mentioned previously. This statute also reduced the powers of the sheriff. The law relating to bail and mainprize were absorbed, and later on rules as regarding bail were made more precise by later statutes. This is where a lot of the present day law in England was taken or derived from.

THE POSITION IN EAST AFRICA:-

The law relating to bail was imported to East Africa from India. The Indian one being in turn borrowed from England. This was set down in a Criminal Procedure Code. The law was imported to East Africa, now Kenya, by virtue of the 1897 East Africa Order in Council¹⁷ under Article 11 - which provided that

"Such civil and criminal jurisdiction shall so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Code of India... "

This same provision was incorporated into the 1902 East Africa Order in Council which replaced the 1897 one. And Article 15 sub article (2) provided the same.

The 1911 East Africa Order in Council amended Article 15 by allowing common law, doctrines of equity and statutes of general application that were in force in England on 12th August 1897 to apply in so far as circumstances permitted. The same ^{gave his MAJESTY - IN -} Council power to create, modify, alter or repeal any Ordinance passed for the Protectorate.

This meant that the Indian law as to Criminal Procedure applied as well as those aspects of English law from which they were derived.

The same provisions of the 1911 East Africa Order in Council were incorporated into the 1921 Kenya Colony Order in Council. The Governor under Government Notice number 422 of 1923 was given powers to create legislation with the help or consent of the legislative council. These laws were subject to alteration, repeal and modification by His Majesty the Kind of England.

In 1930 in exercising his powers and those of the Legislative Council¹⁸, the Governor of Kenya, His Excellency Sir Edward William Macleay Grigg passed the Criminal Procedure Code. The reasons for the creation of this law were given by the Honourable A.D.A MACGREGOR, K.C. who was the then Attorney General. He said that there was a need to replace the Indian Legislation with English legislation because the way the Indian legislation dealt with offenders was

"totally un-British and wicked"¹⁹

He also added that poverty under this law was treated as a crime, when it should not have been. He gave an example, which caused laughter in parliament of an instance when he said that

"when one was called upon to enter into a bond and one did not have money... "

"... imprisonment (that is custody) follows as a matter of course"²⁰

He was referring to vagrants who were mostly natives who could not afford bail.

Where the Honourable Attorney General criticises the Indian legislation as being un-British and wicked, he is leading people astray, because if Indian legislation was borrowed from England, it automatically follows that, that legislation is British. So the legislation is British because it was borrowed from there. Therefore if it is not suitable, that is the Indian legislation then the British one too would be unsuitable.

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Alternatively it may be argued that the British introduced in India oppressive colonial laws that were not applicable to them at home.

This Criminal Procedure Code was adopted after Independence, and it changed from being Chapter 21 of the 1930 Ordinances to the present one, Chapter 75 Laws of Kenya. The major amendment relating to bail was Section 121 which included those accused of rape, it was revised and became Section 123 in 1968. In 1976 it was changed to exclude those people accused of rape and included capital offences only. The substance of law was to cater for capital offences only. Otherwise the law relating to bail in the Criminal Procedure Code remains the same. And also remains as vague as it was in early times.

The next chapter discusses the law of bail as set down in the Criminal Procedure Code and in the Kenyan Constitution. It covers the theoretical part as to how law should be and ought to be in East Africa with emphasis to Kenya.

CHAPTER 2

THE LAW OF BAIL "AS IT IS" AND " OUGHT" TO BE IN EAST AFRICA WITH EMPHASIS ON KENYA

The bulk of the law of bail and its detailed provisions is to be found in the Criminal Procedure Code (Kenya)¹. The important section embodying this law is Section 123 of the Criminal Procedure Code². That Section states that:

" when any person, other than a person accused of murder, robbery with violence or attempted robbery with violence or treason is arrested or detained without warrant by any officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail.

Provided that such officer or court may instead of taking bail from such person release him on his executing a bond without sureties for his appearance as hereafter in this part provided.

This section lays down that every individual is entitled to bail except in instances where they have committed an offence punishable by capital punishment. The previous Criminal Procedure Code³ at Section 121 was totally different as it provided that murder, treason and rape were non-bailable offences and not necessarily offences that carried capital punishment. The present C.P.C. has amended the older one and excluded rape and this covers capital offences only.

Much of the law relating to bail in Uganda is found in the Magistrates Courts Act 1970 and not in the respective C.P.C. (U)⁴. Section 177 of the Magistrates Courts Act provides that when an accused is brought before a magistrate the magistrate in his or her discretion must either grant him bail or remand him in custody. This law applies to the Magistrates Courts only and not the High Court.

The Tanzanian law is incorporated in the C.P.C. (T)⁵ also at Section 123. Its provisions are more or less the same as that of Kenya in so far as it provides for murder and treason as non-bailable offences. The difference arises on the issue of bail for capital offences, for they do not have capital punishment at all, because they do not believe in taking away anyone's life.

Uganda and Kenya provide for capital offences. Another major difference arises in the law of Uganda relating to bail. Under Section 74 (A) of the Magistrates Courts (Amendment) Act⁶ also to be read with Trial of Indictments Decree⁷, it has been said earlier on that offences punishable by death are not bailable but these two Ugandan Acts provide that a person who has committed a capital offence and has been in remand for a period exceeding three hundred and sixty days in the aggregated can apply to be admitted to bail. This was upheld and followed in the case of ZUBAIRI v UGANDA⁸ where the accused was allowed to be admitted to bail even though he had been arrested for a capital charge because his case had been excessively delayed. Kenya has no similar provision.

Section 123 (1) C.P.C. (K) provides that the issue of bail can arise at any time, that is, before the proceedings are initiated or during the course of them. The same provision is made in the C.P.C. (T) but the Magistrates Courts Decree (U) doesn't mention it. In Kenya the issue of bail can arise when the person has been arrested and put in the custody of the officer in charge of a police station. Or Bail can also be brought in court before the proceedings commence or after. The section states

"at any stage of the proceedings"

The section also gives powers to the police officers in charge of a police stations and officers of the courts, (magistrates/judges) the powers of granting bail.

The Section and the proviso lay down the types of bail/bond one can get or apply for, but these are subject either to the magistrate or the officer in charge's discretion.

The section provides for bail which can be a cash bail or a bond with sureties. The cash bail is usually set at rates that even if the accused absconds the amount is enough to repair damage done or compensate for anything lost or injuries suffered. Cash bail is usually given to offences subject to minimum sentence as was done in the case JAFFER v REP⁹, where the court held that all offences falling under the Minimum Sentences Act (T) are bailable and proceeded to offer a cash bail of 5,000 shillings and one surety.

In the case where the offences are of a graver nature but do not amount to capital offences bail can also be granted depending on the merits of the case or the circumstances of it, and if the magistrate or officer is satisfied that the accused merits bail they may allow a bond to be executed with sureties. Bonds usually are for larger amounts of money or property is offered as security. The accused can either provide this security or his sureties do so, although in most cases it is the sureties who provide the security, because the accused in most cases has no financial means nor capacity to have such resources. So it is upon the sureties to provide, and therefore have to be people of substantial standing (that is wealthy) in society. These sureties do not just offer themselves, the accused has to know them beforehand, in most cases they can either be friends or relations, and accused must ask them to assist him in his plight.

The proviso to Section 123(1) provides for a bond without sureties. This can be a free bond on the accused's own recognition that he will appear for trial and he does not have to pay anything or deposit any security. In a case where the accused has executed a bond without sureties or no security and he fails to appear in court, a warrant of arrest will be issued and when found he shall face criminal charges of absconding which carries six months imprisonment.

Where there is a surety or security and one fails to turn up for his trial, the surety forfeits the amount deposited, or in the case of property it is forfeited to the state. The case of NSUBUGA v UGANDA¹⁰ lays down the law as to forfeiture it states that before forfeiture can take place proof that the accused failed to turn up for the trial is required. It was held that:

"(i) a mere statement by the prosecutor is not sufficient to satisfy the requirements of Section 130 (1) of the C.P.C. (U)

(ii) evidence should have been given on oath"

In this the prosecutor had stated that the accused was absent but no evidence was called to prove this. So it is upto the prosecution to prove that the accused was not in court before his money can be forfeited. The law of Kenya C.P.C. Section 131 takes the same position.

The law as to sureties is provided for as well in Section 123(K) C.P.C. A surety can be defined as a pledge by another person guaranteeing that the accused shall appear for his trial and if he does not then the surety shall pay to the court a certain sum which has been fixed by the court. The qualifications for a person standing as surety were discussed in an unreported case R v FOR-GABHAI JESSA¹¹. A Person standing as surety must be someone of social standing in the community, he must also be financially capable and he must be over 21 years of age. This aspect of social and financial standing dates back to the early stages of the development of the law of bail as has been earlier indicated, where the only people allowed to stand as sureties had to be land owners¹². In those days land owners were the wealthy people of society. There was also the aspect that when land was tied up there was less likelihood of the prisoner absconding, because the landowner would act as an effective jailor for fear of losing his land, since the latter was by then a very important form of property. This aspect of property being put up as security was also discussed in the Legislative Council(K) when the 1930 Criminal Procedure Bill was being debated upon¹³.

The HONOURABLE E.M.V. KENEALLY¹⁴ recommended that clause 126 be altered, and the court should be given discretion as to what property should be deposited since the section did not provide for this, and that people were likely to deposit perishable property.

This was mainly geared against the natives¹⁵. To which the HONOURABLE A.G.¹⁶ answered by telling him that currency notes which were a form of property was what was intended to be deposited and also other types of property - land in this case. In Uganda the position before its amendment was that people could deposit bicycles or even bananas as security, or whatever one had that they thought to be valuable.

The introduction of the monetary and proprietary aspect into bail law has led to a distinction based on wealth, the haves from the have nots. This has led to the poor being deprived of this right to bail, and bail no longer serves the purposes it was intended to serve.

Section 123 (2) C.P.C. (K) provides that

" The amount of bail shall be fixed
with due regard to the circumstances
of the case, and shall not be excessive".

Starting with the issue of excessiveness an interesting point arises as to the determination of what is excessive. Since the mode of granting bail is discretionary and there are no fixed guidelines as to the amount to be granted for such and such a case, it is the magistrate or officer who decides on the amount and to them what they grant is sufficient. It ranges from free bond to a deposit of 10,000/= shillings and over. Who then determines "excessiveness" since to the magistrate who is giving it, it merits the offence? "Excessive" can only be determined with respect to the person brought before the court and the amount of property he has in terms of money and other forms of material wealth, that is if he has any.

The only remedy against this issue of "excessive bail", is for the accused to appeal to the High Court which has powers to revise it. These powers are set down in Section 123 (3) C.P.C. (K) which states,

"The High Court may in any case save where a person is accused of murder or treason direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced".

The case of R v MWAMBOLA¹⁷ is illustrative of this section.

Here the accused had been alleged to have disclosed "classified" material and owing to the nature of the offence the District Magistrates Court refused to admit him to bail. The High Court over-ruled the District Magistrates decision and ordered the accused to be released on bail, because the reasons given by the District Magistrates Court were not justified.

Going back to Section 123 (2) C.P.C. (K) the section provides that the circumstances of the case shall determine the amount of bail to be offered or whether the magistrate will grant it or not. This power of granting bail is a discretionary one and it is upto the person granting it to look at each case on its own merits and decide whether bail should be granted or not. A test for granting bail was set down in the case of JAFFER v REP¹⁸ where it was stated that:

"...the true test of a bail application will be detrimental to the interest of justice"¹⁹ /- Emphasis added -/

The term "interest of justice" embraces the following discussed circumstances. In some cases a person is arrested on in-complete evidence and the police, in the interest of justice want him detained so that he may not damage evidence by ^{interfering with potential witnesses} intimidating them. They need time to complete investigations so they want a means of safeguarding evidence or witnesses. This issue was raised in the case of PANJU v REP²⁰ where EL. KINDY J, was considering the principles of granting bail pending trial.

The prosecution had alleged various matters one of them being that the accused would interfere with witnesses. The learned Judge had this ²¹ say

"As for the allegations of interference with witnesses, I would say that it is not substantiated. It should not have been difficult to do this if such allegations had any basis"

He then went on to add that the officer investigating should have sworn an affidavit explaining what he had done and the results of it. He then said ²²

"Before any one can say there would be interference with vital witnesses at least some facts should be led to the court, otherwise it is asking the court to speculate. Speculation has no limits and it is for these reasons that I refrain from taking into account matters raised by the Senior State Counsel."

The case of Panju ²³ also discussed another aspect for non-granting of bail and that was the likelihood of the accused absconding. Here an argument was raised that the accused lived near the border and that there was a likelihood of him escaping. Since it is in the best interest of justice that the presence of the prisoner be secured for the trial, precautions have to be taken to ensure that the prisoner does not leave the jurisdiction of the courts. This, it was suggested may be done by putting the person in custody or by confiscating his travelling documents. The court rejected this argument and ruled that this can be done the prosecution had to prove this likelihood and not merely allege it.

Mazaras J., in the case of JAFFER v REP ²⁴ said that after the two aspects, which have just been discussed, have been considered, the magistrates have to direct their minds to these other considerations

"...considerations as to the nature and seriousness of the offence, the severity of imprisonment...the strength of evidence in support of the charge" ²⁵

The seriousness of the offence is a related issue to absconding, because it determines whether there will be a risk as to the accused not appearing for trial. This is because if someone knows that he will receive a lenient or small sentence the possibility of him turning up is greater than that of a person going to receive a heavy or severe punishment such as capital punishment. Persons charged with robbery with violence cannot be let off because there is a high risk of them not appearing. They would rather lose their money or property than their lives. But as mentioned earlier the Ugandan law²⁶ provides an application for bail for persons who have committed capital offences and have been in remand for a period exceeding three hundred and sixty five days in all as was in ZUBAIRI'S²⁷ case. The other sub-section²⁸ provides for those remanded for other offences for a period exceeding one hundred and eighty two days in all. Kenya has no such provision. All bailable offences are ones which are not capital offences and the bailable ones are discretionary.

The law in Tanzania is that all offences falling under the Minimum Sentences Act are bailable, JAFFER v REP²⁹.

Another aspect not discussed in either of the cases is that of the prisoners safety, whereby to let him go free and back into his society, community or locality may arouse passion and anger amongst the people he has wronged. Violence may be sparked up. An example would be where an accused is alleged to have raped or indecently assaulted a young girl or one of tender years. A cooling off period is desirable in the interests of law and order. The case of R v GAJJAN SINGH and ANOR³⁰ is illustrative of this. Here the landlord was charged with a criminal offence, and letting him off would have led to a breach of the peace. That is his tenants would have attacked him.

There is also the aspect of the accused himself, the estimation of his self-preservation, that is, whether he is likely to commit suicide or be able to maintain or look after himself?

All these considerations may be brought up when an application is made. It is however not enough merely for the prosecution to allege them, they have to prove them so as to oppose bail as was set down in PANJU'S³¹ case.

So far only bail pending trial has been discussed, bail can also be applied for when a person has already been convicted by a court of law and he wants to appeal against such an order. He can make an application for bail pending appeal during this period. The written law concerning bail pending appeal is clear and unambiguous as the one relating to bail pending trial. This is provided for in Section 356 (1) C.P.C. (K) which provides that

"The High Court or the subordinate court which has convicted or sentenced a person may grant bail or may stay execution on any sentence or order pending the entering of an appeal, on such terms as to security for the payment of any money or the performance of any act or the suffering of any punishment ordered by or in such sentence or order as to the High Court or such subordinate court may seem reasonable."

so a person can apply for bail pending his appeal from the court that convicts him or sentences him. The difference between this application and those where there is trial pending is that where as in the latter one can appeal to a higher court because one has not been granted bail, in an application pending appeal once the convicting or sentencing court rejects the application there can be no further appeal to a higher court. The authority for this is R v NEMCHAND³².

The grounds for granting bail pending appeal are all laid down in the case of SOMO v REP³³. These are:

- (a) one must show that there are unusual and exceptional circumstances that warrants getting bail.
- (b) the appellant must be of good character and the offence committed was non-violent, nor did it involve personal violence,
- (c) that the application is not frivolous nor vexating and intended to cause delay as to the sentence. And, the most important one of all is that
- (d) the appeal has an overwhelming chance of being successful.

An "exceptional and unusual circumstance" was explained in the case of R v KANJI³⁴ where two men were convicted of assault occasioning actual bodily harm. One was sentenced to eight months and the other four months imprisonment. Both appealed against conviction and sentence. The trial magistrate released one of them on bail and the other was refused. In allowing the application of that other the judge said

"The appellants' appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one-fourth to one third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that this co-accused who is in no respect in a different position from him as regards bail, has been admitted to bail³⁵.

The judge held therefore that the simple fact of there having been two identical applications with one being allowed and the other refused was of itself an unusual and exceptional circumstance coupled with good character, a first offender read together as per the quotation.

Good character of the accused is not in itself a sufficient reason to grant bail, this was held to be so in the case of LAMBA v R³⁶. Nor was it in itself an "exceptional circumstance and unusual". It must be coupled with some other factor to make an application to bail successful. This was discussed and considered by MADAN J in the case of HASHAM v REP³⁷ where he decided that the shortness of sentence which happened to be the maximum for the offence of which the appellant was convicted was a ground for allowing bail particularly if the appellant was a first offender and his previous character, good.

The shorter length of sentence cannot itself be a special ground for appealing for bail unless the maximum has been granted to a first offender and therefore an appeal is arguable. A judge should take into account that there is a possibility that the sentence might be served before the appeal can be heard or it is being served when the appeal is heard.

Delay alone was also said not be a ground on itself for an application for bail. It too must be accompanied by some other factors or circumstances.

Still on the point of a short sentence it is highly unlikely that a person applying for bail pending appeal is likely to abscond as would one given a long sentence. Nor is it likely that such a person would apply frivously so as to delay sentence as would someone with a longer sentence. All these points were raised, considered and discussed by TREVELYAN, J. in SOMO's³⁸ case. But he still maintained that

"...the most important of them was that the appeal will succeed. There is little if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so, that the applicant will be granted his liberty by the appeal court"³⁹ /=Emphasis added by the Judge

And he stressed overwhelming deliberately because he thought it to be crucial for an applicant to prove successfully that there is an overwhelming probability that his appeal will succeed.

So as Trevelyan, J. put it clearly in SOMO's case⁴⁰ for an application for bail to be successful two factors have to be proved. These are that there is an "overwhelming possibility" that the appeal will succeed and that there were "exceptional and unusual circumstances" in the case, that merit the applicant to get bail.

Going back to the issue of bail pending trial, when one is not granted bail because the magistrate or police officer feels that the person does not qualify this means that the person will be locked up in custody until his case is heard.

The mere fact of locking the accused may be guilty of having actually committed the offence. This can be said to be a breach of the individual's constitutional rights as shall be discussed presently.

The fundamental rights and freedoms of an individual are enshrined in the Kenyan constitution under Chapter V. Uganda too has the fundamental rights and freedoms of an individual incorporated into their constitution. Tanzania on the other hand has none but it is an upholder of human rights. This is demonstrated by the fact that they have an Ombudsman which is thought to be a better way of safeguarding an individual's rights.

The rights of an individual are such as the right to ones life, liberty, protection by the law, the right to associate, to assemble to express oneself freely and the right to ones privacy and protection of ones property. These rights are designed for every individual regardless of his colour, race, sex or creed. The rights relevant to this topic are those relating to an individual's personal freedom and liberty and the right of an individual to be protected by the law, that is the safeguards offered by the law. These rights are covered under Section 72 - which deals with the right of liberty and Section 77 - which deals with the right to protection of the law.

Starting with section 72 (1) of the Constitution (K) it states that

" No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases,..."

This section sets out the rights of an individual to his personal liberty, it is then followed by sub-sections which set out the limitations to this right which are:

ss (c)" In execution of the order of a court made to secure the fulfillment ^{if any collection imposed} on him by law."

ss (d) " for the purpose of bringing him before a court in execution of the order of a court."

ss (e) " upon reasonable suspicion of his having committed, or being about to committ, a criminal offence under the law of Kenya"
[Emphasis added]

Discussing the issue of reasonable suspicion brings in the issue as to who has powers to arrest this individual who is suspected to have committed an offence or is about to. Firstly the police have powers under Chapter 84, the Police Act⁴¹, to arrest anyone with or without a warrant where a person has committed or is about to commit a felony or an offence. Individuals also have the powers) to arrest a person suspected to have committed an offence or) is about to. These powers are given to them under Section 34 of the C.P.C. (K). There powers of arrest by a private person on reasonable suspicion were discussed in the case of M'IBUI v DYER⁴² where it was held

" In Kenyan law there is no distinction between the power of a police officer and of a private person to arrest without a warrant on suspicion of felony, as long as there are reasonable grounds for the suspicion, a private person is entitled to arrest and in doing so to use such force as is reasonable in the circumstances or is necessary for the apprehension of the offender"⁴³

Once arrested by a private person he must be given to the police as soon as possible and should not be detained, this is set down in Section 35 of the C.P.C. (K), and the authority on this is the case of BEARD v R⁴⁴ where two private persons arrested and detained an individual who they suspected to have committed a felony and they did not hand him over to a police officer or an officer in charge of a police station without unnecessary delay. It was held that the detention was unjustified and the two persons who arrested and detained the accused were found guilty of wrongful confinement and were convicted and sentenced and one of them was not a citizen even got a deportation order from the court.

No individual has powers to detain another, these powers lie with the police officers in charge of a police station, they are the one to decide whether to release or detain anyone.

Section 72 (3) goes on to state that where a person is arrested or detained as mentioned under section 72 ss(d) and ss(e)

" and who are released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court of law within twenty four hours of his arrest or from the commencement of detention..." [Emphasis added]

The issue of bringing an accused before a court of law within twenty four hours of his arrest was discussed in the case of GAWERA v EAST MENGO DISTRICT ADMINISTRATION⁴⁵. Here the plaintiff had been arrested by a chief under the powers given to him under the Local Administration Act⁴⁶. Here the plaintiff could not have been brought before a magistrate on the day after his arrest because it was a public holiday.

The chief had powers under the same act at Section 40 ss(5) to release a person on bond. The section reads as follows:-

" Any person arrested under powers conferred by this section, unless released on both or otherwise shall within twenty four hours be taken before a court of law."

In this case the chief did not release the accused because there was an aspect of interference with witnesses, and he could not be brought before a magistrate within twenty four hours because of the Public Holiday. The learned PHADKE, J. sided with the chief and he took judicial notice that the accused was arrested on a Thursday and the next day was Good Friday and a public holiday so the plaintiff could not have been taken before a magistrate on that day. He held that there was compliance with Section 40 (5) as it was not possible for the chief to have brought the plaintiff before a court of law within twenty four hours.

This case laid down the authority that the issue of twenty four hours need not be complied with on a public holiday.

One can't say the decision was wrong because if it were not for the issue the plaintiff interfering with witness the plaintiff would have gotten a temporary release. The chief never took into consideration any evidence to show that this was likely, he just assumed that the plaintiff, who was a big shot with a lot of influence was therefore likely to interfere with witnesses, which was not proper in law.

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Reasonably practicable time can fall under the same category as being brought before a court of law within twenty four hours. If there is a Public Holiday it can-not be practicable for an accused to be brought before a court. Usually the case is that persons who are arrested on a Saturday afternoon by the police and are not granted bail, have to stay in custody until Monday when they appear in court. This is because it is not possible for them to be brought to court on a Sunday the court does not sit then.

Section 72 ss(4) then states that,

" Where any person is brought before a court in execution of the order of court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not thereafter be further held in custody in connection with these proceedings. or that offence save upon the order of the court" [Emphasis Added]

From this quotation the powers of the court are under emphasis showing how they can decide, that is their powers are discretionary.

Section 72 ss(5) goes on to state that

" If any person is arrested or detained as mentioned in ss(3) (b) of this section and is not tried within reasonable time then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in

particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial" [Emphasis Added]

This section is very important especially when discussing the issue of reasonable time and the effects of not bringing a person to court within reasonable time. This section was put there to safeguard those who were likely to change their pleas to guilty because their stay in custody was lengthening. These effects plus the ones that bring about delay in hearing trials will be discussed at length in the following chapter.

The same section goes on to elaborate the extent the court can impose the restraint in the words

"...he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial" [Emphasis Added].

These the court decides on the circumstances relating to the case and in the best "interest of justice"⁴⁷. Clearly we can see that although the word "bail" is not used in this section the constitutional right to bail of any prisoner are defined. It would also mean that once a person is arrested at the time of arrest or when he is brought before a court the right to bail arises immediately. But do all people who are arrested get bail? Looking at section 72 (5), a part of it states

"... including in particular such conditions as are necessary..."

which would mean that if a prisoner does not fulfill these particular conditions he is not entitled to bail. This then leads to a breach of the constitutional rights laid down in section 77 (2). Section 72 (5) and section 77(2) are inconsistent and therefore contradict each other. Section 77(2) gives the right to bail to every one who has committed an offence and it states their entitlement to it whereas Section 72(5) denies certain cases according to the conditions set down to prevent some getting bail. Section 77 (2) states that

"Every person who is charged with a criminal offence:-

- 21 -
- a) shall be presumed to be innocent until proved or has pleaded guilty.
 - b) shall be given adequate time and facilities for the preparation of his defence".

The presumption is that an individual is presumed to be innocent unless he himself pleads guilty or until he is proved to be guilty. At the stage where an individual is arrested and the officer in charge of a police station refuses to grant the individual bail, the person is therefore put under custody. This means that there is some belief that person is guilty of having committed the offence. The same applies when the person is brought before a court of law. Section 72 (5) states that a temporary release be given upon such conditions as the court thinks fit or if they think the person does not merit bail they can forgoe the right. As discussed before, to take an example, the prosecution can raise the issue that the accused will interfere with the witnesses, which then makes the accused lose his rights to bail. This raises the issue of guilt. The point is that when a person is brought before a court of law his first appearance is always preliminary to the trial, this is unless he pleads guilty, so if a court refuses to grant a temporary release at such a preliminary stage this then means that they have a belief that the accused is guilty or has some guilt. They have decided the problem or the case is the first appearance. What they then want is to establish his guilt absolutely so as to leave no doubt that it was the accused who did the offence. This is done in later trials, (that is later court appearances). This is clearly contrary to the constitutional section dealing with the presumption of innocence of an accused. Instead it is replaced with an assumption of guilt. It is also very unfair on any person to be held to be guilty at such a stage when it would be deemed impossible to make a decision and no evidence has been brought forward. The courts being the meters of justice should guard themselves from making such contraventions.

The other breach relates to the accused not being given facilities to prepare for his defence, when he has been put under custody. The Tanzanian law safeguards this right more than the other two East African countries. It⁴⁸ provides that a person arrested should be given adequate facilities to prepare a defence, and in the instance that one can not afford legal aid then the court should address itself to this issue and should apply through the Registrar of that court, so that the accused should be given facilities or free legal aid to help him prepare for his defence. In the case of MOHAMED SALIM v R⁴⁹ the accused was charged with murder and it was held that

"...it was clearly desirable in the interests of justice that a person on trial on a capital charge should have the benefit of legal aid in the preparation and conduct of his defence and the Registrar or a Judge should always give anxious consideration to this..."

If any individual is deprived of this right in Tanzania, after conviction and upon appeal, the court of appeal might feel obliged to order a re-trial if it appears that the person accused had been prejudiced by the inability to prepare his defence (that is getting a lawyer).

This brings us to the end of the law of bail as it is set down in the Kenyan constitution and the C.P.C.(K) and also the other two East African countries respective laws.

The next chapter deals with the consequences brought about when bail is not granted and other factors related to the evils of not granting bail, that is the factors that bring these about.

AN ANALYSIS OF THE PRACTICAL ASPECT OF BAIL

This chapter focuses on the socio-economic variables in the Kenya society within which context the institution of bail is administered. This is confined to looking at:

- 1) migration from the rural areas to the urban centres. This will then lead to the issue of
- 2) whether the machinery for the administration of justice is capable of coping with the increasing demands brought about by urban growth.
- 3) thirdly, we shall examine the effects of not granting bail to those victims of the rural urban migration and urban growth - and the resultant poverty and unemployment.

1. MIGRATION FROM RURAL AREAS TO URBAN CENTRES

According to the 1969 census data¹ the average rate of growth of the eleven urban centres, namely Nairobi, Mombasa, Kisumu, Nakuru, Thika, Eldoret, Nanyuki, Kitale, Kericho, Nyeri and Malindi was 8.7%. The rate of growth for Nairobi was 10.9% whereas for Eldoret and Nanyuki which are smaller towns in size as compared to Nairobi was 0.4% and 1.5% respectively. Another source² states that the annual intake of immigrants by Nairobi is over 50,000 persons.

b. Who are these immigrants

The majority of the urban in-migrants are men of the age groups ranging from 20 years and over. A survey³ carried out shows that 62% of the in-migrants were male the remaining 38% were women. Of the 62%, 53% of them were single males, 20% were married and had brought their wives with them into the towns, and 27% were married men but their wives were resident outside the urban centres. Another survey⁴ refutes the issue of the men migrating into the urban areas with their wives. It says that it is only probable but not a definite issue. The survey states that the wife resident with ^{the} man in the urban centre was usually a second wife that the man had married in that town.

This tends to hold more grounds than the issue of African males migrating into the urban areas with their wives, because there is a greater tendency for them to leave their wives in the rural areas.

As indicated earlier on, there is a greater tendency for the young to move into the urban centres than the old. This is indicated in TABLE A⁵ (which applies to males only, but does not mean young females don't have a tendency to migrate. They do, but the percentage is small as compared to the men.)

The Table shows that a greater percentage of those who migrated to the urban centres in 1968 were between the ages of 20 years to 24. From the ages of 39 years and over the tendency to migrate diminished. But in 1969 as the Table shows, the age increased and those who were less prone to immigrate were those from 49 years and over.

Referring to Table B⁶, one can see the direction of migration. This is usually into the town situated in the province that the migrant is resident. An example taken from the table shows that 12.5% from the rural areas in Nyanza Province migrated to Nairobi, whereas 31.7% migrated to Kisumu. In comparison, 31.1% migrated into Nairobi from Central Province and 41.8% to Thika also from Central Province, whereas only 4.0% from Central Province migrated to Kisumu. Another example is the Coast Province 25.3% migrated to Mombasa, 15.1% to Malindi, whereas only 1.3% migrated to Nairobi and 0.8% to Kisumu.⁷

c. Reasons for Migration

Generally migration on a big scale began shortly after independence when most African's expectations were at their peak, for they thought that now the white man's rule had come to an end they could now move into the towns and take up the jobs that were left over. They also come to the towns in search of a better life. And this search still continues, people still come from the rural areas to the urban areas.

Most young people move to urban centres for the following reasons: one, that they want to obtain freedom from their elders; two, that these people have had a basic form of formal education and are unemployable in the rural areas. The availability of schools in the rural areas is limited and therefore there are very few schools for everyone to go to. So most of the young generation who tend to migrate are usually those who have reached the end of their educational stream and have no other opportunities for additional education. This can also be seen more clearly when looking at Table A⁵, the first column with the figures for 1968 and 1969, the age groups of between 15 years and 19 years, the rate of movement is quite high. These young people, one can say range from Standard 7 leavers to those who have completed their education at Form 4 level, this is because in the rural areas there is a tendency for people to start schooling at a later age. With this basic form of education, these young men cannot envisage how they can be tillers of the land. What they want is "white collar jobs" and this sets them off to the cities to search for it. Another reason for them moving is that with this formal basic education plus some contact with the urban centres, gains them a lot of prestige in the society they have left behind. The problem created by this mode of thinking shall be dealt with under the effect of urban migration.

In most rural societies, it is mostly the women who indulge in farming and that is why most women don't tend to migrate a lot. Also they tend to get married off when they are pretty young, so by the time they become proper adults, they usually have a family and are therefore burdened with responsibilities which tie them down. Usually what happens is the man in the family leaves the wife on the land and goes off to the city in search of a better life shunning his responsibilities. But there are some migrants (male) both young and old who do not engage in farming at all, this is because they are landless and have no access to it at all.

It has been found that Central Province has the highest proportion of men who have no land nor any access to it. TABLE B arguments this statement because the total percentage of migration to the urban centres is the highest then any other Province, the percentage being 22.4%. This then leads us to the next issue, which is the effect that arise or that are caused by this movement of people from the rural areas to the urban centres.

d) Effects of Migration

Usually most in-migrants come to the urban centres in search of jobs and a better life, only to have their hopes and expectations dashed. This then means that they are unemployed and in this way they swell up the "unemployed labour force" and increase its frustrations and hopelessness. ^{This comes about because in urban cent} the increase of industries and hence job opportunities does not increase at the same rate with population growth. Thus the increase in population at a faster rate than industries, and therefore jobs, leads to this situation of unemployment. This state of affairs leads to a state of disorganisation in state planning. It is also a contributory factor to the increase in crime in urban areas⁹.

Migration brings about a feeling or sense of rootlessness. In that a lot of migrants are usually single and therefore lonely because in most cases they might have no relations in the city to depend upon for help. So in cases where they cannot find any employment they have no one to turn to for help. And their pride will not let them return back home, so they stay put in the town. This disappointment tends to make people turn to anti-social behaviour, in order to get back at society for depriving one of, in most cases, material wealth. And also anti-social behaviour helps them find a sense of belonging and helps them to become members of a society again. To illustrate, a woman who can't get employment and is desperate may turn into the business of prostitution, whereas if it is a man he might become a pick-pocket, a thief or even turn to robbery.

In this way they will be able to have a means of living and therefore money to send back home.

Another area that brings about discontentment is the issue of accommodation. Urban population growth has outgrown the speed with which accommodation can be provided. A sizeable portion of Nairobi's population lives in shanties at Mathare Valley and Kibera. Some are found over-crowded in sub-standard housing localities such as Old Pumwani, Muthurwa, Landhies, "Kunguni" "Ofafa", Gorofani, Shauri Moyo and many others all located at what is known as Eastlands. Usually people who come in search of jobs and end up being unemployed end up staying in these localities because economics or finance will not let them stay elsewhere. Also those who have found "other" means of livelihood can also be found staying here. Most people living in these areas mentioned suffer from the following problems, one of them is educational, the other is that they are prone to health hazards, but the biggest problem of all, ^{is that of overcrowding. A great portion of} a population squeezed into a small locality. All these problems lead and add to their frustration and discontentment.

The word overcrowding is of great importance because the greater the degree of contact, as well as the many activities and transactions that go on, leads to the creation of potential areas of conflict, and the scope of such conflicts increases as well.

Table C¹⁰, shows the numbers of cases filed in urban areas as compared to rural. This table illustrates the point that the greater the degree of contact, transactions as well as activities the greater the scope of conflicts which in the urban areas can only be resolved by courts of law. In Coast Province, taking Mombasa as an example there were 24,894 reported crimes whereas in remote areas like HOLA there were only 516 reported crimes. In North Eastern Province Wajir had 164 reported crimes and Garissa 461. In Nyanza Province Kisumu and Kisii towns had the highest number of reported crimes whereas a town like Kolele had only 39.

The numbers of crimes committed in urban areas is magnified or rather is in great proportions as compared to rural centres.

This brings us to the next topic which is the effect and relevance of the machinery for the administration of justice and other related machinery and whether it can cope with the demands made upon it.

2. THE MACHINERY FOR THE ADMINISTRATION OF JUSTICE AND OTHER RELATED FACTORS

The effect and relevance of the machinery for the administration of justice, in short the courts, lies in the fact that the large and dense concentration of people in towns involves a greater degree of human contact and also creates a social complexity. This concentration of people as has been shown is brought about by the forces of urbanisation. There is need therefore to maintain a healthy and peaceful environment in this area where there is a concentration of people in a comparatively small area . This brings about ever increasing demands on the machinery for the administration of justice. Whether this machinery is capable of coping with these demands brought upon it can be determined by the speed with which it disposes of matters brought before it for adjudication. Table D¹¹ illustrates this point, this Table is for all the magistrates courts in Nairobi. From the table we can see that at the end of December 1975 there were 14,440 cases pending, during the course of the year 1976, 39,438 cases were filed bringing the total number of cases to 53,878 of these 34,254 cases were heard and at the end of the year 1976 there were 19,624 cases pending. Which is an increase by 5,184 cases as of the previous year which were pending. These cases which are pending are usually added onto those of the following year and this places a big burden on the magistrates, for example if at the end of 1976 there were 19,624 cases pending and then for the year 1977 48,121 cases are filed the total number of cases for that year will be 67,745 cases. To find how over burdened the magistrates are, one has to find the number of cases they have per day. This can be done by simple mathematics¹². In Nairobi there are a total number of

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fourteen magistrates. These can be broken down into one Chief Magistrate, four Senior Resident Magistrates, five Resident Magistrates and ^{one} Acting Resident Magistrate and lastly three District Magistrate II. The following are figures showing how many cases a magistrate has per day. The total number of cases for the year 1977 was 67,745, and the total number of magistrates was fourteen, giving an average of 4,839 cases per magistrate per year or 403 cases per magistrate per month. This amounts to 101 cases per magistrate per week. Since all magistrates have 5½ day week, 18 cases per magistrate per day. This figure is clearly too large for any person who has an eight hour day, and if each case is allocated an hour each, clearly 18 cases per day is too many. To make it worse this is not the only work magistrates have. On top of these 18 cases per day, there are pleas to be taken, re-allocations have to be made especially by the person who is in charge of particular courts usually the Senior Resident Magistrates. They have to reallocate those cases which have not been heard completely, it is obvious that if a magistrate is given an hour to hear a tangled case with many witnesses, that hour will not be enough, so the work of the Senior Resident Magistrate is to find somewhere in the already overcrowded register to squeeze the case in, this point will be dealt with in detail because it is of grave importance. Carrying on with the issue of the amounts of work a magistrate has, it is usually normal procedure that when a person is found guilty or pleads guilty to put them in remand for two weeks so that the prosecution can go through or look for any previous records of the accused to enable the magistrate to decide on the sentence. Therefore on top of all the work magistrates have cases of recording and sentencing those who were previously before them. All this work, creates a very heavy load on the machinery for the administration of justice and this machinery can never cope, because as seen from Table D there is an ever increasing number of cases pending at the end of the year.

This congestion of the courts daily register can have very detrimental effects on those ^{people who have not been granted} bail.

Which bring us to the issue of how bail is given in actual practise. The normal practise is, that when people are first brought to court for an alleged offence their pleas are taken. If the plea is guilty then the prosecution will read the offence and facts and justice will be meted out to the offender then and there on his own plea of guilty. Whereas the procedure when there is a plea of not guilty, which is often the case, is more lengthy depending on the facts of the case and whether they are complex or not. This survey of bail in practise was carried out in three courts in Mombasa and 3 courts in Nairobi.

Starting off with the Mombasa courts the first one visited was the Senior Resident Magistrates Court¹³ who takes the pleas for the main courts in Mombasa. The way he gave bail was totally unfair because he did not seem to address his mind to the person before him.¹⁴ To him the main object was make the person stay in remand.¹⁵ What is meant by addressing the person or his mind to the person in front of him is to take in his attire, his demeanor and ask the person questions as to how he earns his living. Such questions help in deciding the amounts to give as bail, which this magistrate never did as did the other 16 magistrates. The other two magistrates took these factors into account and the following cases illustrate the disparities in figures, or amounts given by the three magistrates. In the cases where the accused were charged for being in Kenya for over 90 days without registering as an alien contrary to section 40 of the Aliens Registration Act, the Senior Resident Magistrate¹⁷ gave a bond of 2000/= Kenya Shillings plus one surety in the following cases, R v Avery Ntesha¹⁸ and also in the case of R v LEMA MARTI¹⁹ and in the case of R v OLESHI KIBESA.²⁰ And for some four other cases of the same nature involving Tanzanians who had not registered .

Whereas the other Resident Magistrate in cases of the same charge R v HASSAN AHMED²² and R v HUSSEIN BAKARI²³ gave the accused bail worth 250/= Kenya Shillings. It is only in the case of R v JUMA SAID ABDALLA²⁴ that the magistrate told the accused to pay a cash bail of 750/= Kenya Shillings or be remanded.

In this instance not only had the accused failed to register as an alien but, during the process of Registration of voters, he told a lie that he was a Kenyan citizen and therefore obtained a voters card. Even though the offence is of a graver nature the bail for it does not even amount to half of the one offered by the other magistrate.

Another illustration of this disparity is also between the same Senior Resident Magistrate and another magistrate.²⁵

In the case of R v JUMA ALI²⁶, where the accused was charged with assault causing bodily harm, the accused was offered either a bond of five thousand shillings (5,000/=) plus one surety or cash bail of three thousand shillings.(3,000/=). This was offered by the former magistrate whereas the latter in the case of R v MUTUA KILONZO²⁷, where the accused assaulted another by biting off his ear and causing him bodily harm, the accused got a bond of either 1,500/= shillings plus one surety or to pay a cash bail of seven hundred and fifty shillings. (750/=).

Other instances where large sums have been granted was in the case of R v ABDUL FARAHA²⁸ where the accused was charged with being a rogue and vagabound and also found in a situation that it was assumed he was about to commit a felony. He was given a bond of three thousand shillings plus one surety. Most probably the cash bail would have been approximately two thousand shillings or one thousand five hundred. Looking at the figures, (of the examples) offered by this Senior Resident Magistrate, clearly they are outrageous because even for a person with a job earning an ~~overall~~^{average} salary these figures offered would be too much for them to pay. What about these people found roaming around about to commit felonies at night? It is obvious that the sum of two thousand shillings is beyond their means, (if they have any that is). And even if they were to opt for bonds and sureties most likely they have no reliable persons who can be trusted to stand surety for them, because these other people might be of the same status or "profession"! So the rights to bail is not available for them even though they have been offered it.

In another two cases, one was of defilement of a girl contrary to Section 145 of the Penal Code, R v MANGISI KONGO²⁹ this Senior Resident Magistrate gave no bail nor bond, and also in the case of R v MUHARAMIA KUKIA³⁰ which was of stock theft contrary to Section 278 of the Penal Code, the accused was offered no bail nor bond. In an interview the Senior Resident Magistrate gave his opinion as to how bail should be granted, in other words his own version as to how he grants bail to others. He first takes in the physical appearance of the accused, that his clothing and the manner he carries himself and the manner he answers to his charges. These factors to the Senior Resident Magistrate are of great importance. The next issue of importance is the charge of assault is one of a very grave nature because he believes that in an organised and lawful society, no other should molest another and there are other ^{ways of resolving disputes rather than} using violence. He agreed that the granting of bail was one aspect that a magistrate had to use his discretion because there are no set down rules and terms and conditions as to how bail should be granted, the amounts that should be granted and which people are eligible for bail. So anybody who assaulted another or crossed over into another country had committed a very grave offence (not that this is not so) and so should be given excessive bail. The conclusion arrived at³¹ was that the Senior Resident Magistrate takes one look at whoever is brought before and either expects that everyone who is brought before his court is of a certain financial standing and therefore can afford to deposit the amounts required or take a bond and produce the surety required. Otherwise if he could not have been of the assumed financial standing why did he end up at the main courts, he should have gone to the lesser courts of the District Magistrates³².

The other aspect to it is that whoever is brought before him, to his opinion that person is guilty and by giving him this excessive amount he is being punished for what he has done. Another angle to it all is that he is being denied his liberty, at the same time being given it. In other words he is being told what price his liberty will cost him, and since he can't afford it he cannot get it.

This latter conclusion explains why bail nor bond was not given in the earlier mentioned cases of stock theft and assault to a young girl. Here, it would seem that they were not given because the amount would have been too great and since they would not be able to afford it why should any words and breath be wasted telling them the amounts? In other words they were not entitled to bail because they could not afford them. And most of these people brought before a court are so ignorant and illiterate, and always unrepresented so that idea of raising the issue of bail and insisting that they get it, and appealing against its excessiveness never occurs to them. The only case where there as to excessiveness in Mombasa was the case of R. Aggrey Olilo in a charge for assault and was given a bond of 5,000/- plus one surety at a further mention he had gotten himself an advocate who appealed that the bail was too excessive and surety could not be raised. He was given a cash bail of 500/-, by the other *magistrate*.

First of all an opinion as financial capacity and guilt of an accused should never be assumed. Secondly, if one is to address oneself to the person in front, that is the accused, it helps to ask questions as to what he does, that is occupation and amount earned and numbers of dependants so as to arrive at a proper analysis as to how much bail should be granted. This method helps because it cuts down hardships that the accused, his relatives and family suffer if he is remanded in custody. This will be discussed in more details later *on*.

In another interview with a Senior Resident Magistrate at Makadara Courts in Naiorbi, the magistrate said that the type of people brought before her never raised the issue of bail due to their ignorance of it. She also took into consideration the surrounding locality and her jurisdiction (that is really the police jurisdiction) this covered the areas Maringo, Bahati, Mathare, Jericho, Jerusalem, Makadara and the other places that make up

Eastlands. She realised that the people who lived here were those who were the lower working class and were very lowly paid and also the amount of education they had was negligible if not any, that is non at all. She also said she understood and considered the problems that these people encountered, that is the amount of room these people lived in as some lived in squalid conditions in shanties, others lived in rooms built during the colonial era and measured 10 feet by 10 feet along and across and usually these people have large familys so they live cramped up.

There was also the issue of everything being communal that is kitchen and sanitation facilities and there was always this constant association which could easily lead to conflicts in such an overcrowded area. Taking into consideration all these factors, she said that anyone brought before her was examined closely and related to these factors, by being asked where he lived and occupation and dependants. From this she determined how much bail or bond was to be given. She said that since they were ignorant as to their right to bail she was the one who puts it forward to the accused. For mere assault cases, which are very numerous in these areas, the magistrate always offered cash bail, whereas for other serious offences she gave bonds plus sureties. Her conclusion or rather deduction was that no one can ever raise the bond and sureties in most cases where they are given. Whereas it was different for cash bail depending on the amounts, which in most cases never exceeds five hundred shillings. She said that she never refuses anyone bail or bond even when she thinks they do not deserve it. In such an instance she just makes it such a vast amount that it is out of their reach. Which amounts to the same thing really because the accused doesn't get his freedom. Her method is actually better than the one used by her counterpart in Mombasa. In a case in Mombasa for example, the rape case of RV MANGISI KONGO³⁴ the accused was offered no bail or bond most likely because the amount would have been too vast, that the magistrate felt that it was a waste of time to even mention it. Whereas the senior Resident Magistrate at Makadara would rather waste her breath in telling the accused the amount so that she feels she has not deprived the accused of his constitutional right absolutely. An example is there the case of R. ALI MOHAMED³⁵ where the accused had unlawfully carnal knowledge with a young girl without her consent, amounting to rape. The young man a Somali was very miserable looking, that is he was very shabbily and dirtily dressed and gave an impression of sheer poverty which he might have been. He was given a bond of Shs.10,000/- and one surety of the same amount which he couldn't raise so he was remanded in custody. It is a matter of giving someone a right at the same time depriving him of it.

Another instance which shows that the Makadara Magistrate never deprives any one his or her constitutional right is the case of R v JOHN MARK AYENG³⁶ where the accused had been charged with creating a disturbance causing a breach of the peace at the V.I.P. stand at the City Stadium by throwing chairs about. Bail was opposed by the Prosecution because the accused had been charged previously as well as recently on a similar charge (in nature) where he had been given bail and he had jumped it by not appearing on the date he was meant to appear in court. The magistrate asked the accused why he had done this and whether he knew that it was a serious offence. He replied that it was not due to his fault because he had arrived but his case never came up for hearing upon asking the Inspector prosecuting he was told after a search that the file had been misplaced (maybe even lost) and couldnt be traced. Since it was not his fault, the Magistrate concluded that he had not jumped bail, and if he had the prosecution had to prove that on the material day he had not appeared by showing the misplaced file which they couldnt and didnt find. So instead of not granting the accused bail she instead gave it to him, which was a bond of Shs.5,000/- plus one security of the similar amount. Which he managed to pay. The magistrate had taken into account the demeanour of the accused and his appearance. He was both aggressive and arrogant and pot - bellied which meant that a surety of that amount could be obtained easily for he looked like a well to do person. But usually she would have given him another cash bail had he been miserable humble and poor looking because to her opinion the offence was not grave in nature. In cases which are grave in nature she does not hesitate to give bonds plus sureties of vast amount no matter what the appearance of the accused and his demeanor might be. This can be illustrated by the case of R v ALI MOHAMED³⁷ and also in the case of R v GEOFFREY GACHUI³⁸ where the accused was charged with attempting to steal a vehicle. He was given a bond of Shs. 10,000/- plus one surety of the same amount. Here the accused was pathetic looking, he was poorly dressed in an old fashioned and dirty jacket which had a lot of buttons missing. But no leniency was spared to him.

Examples of where this magistrate gave cash bail are the cases of R v JOHN MACHARIA³⁹ and R v THOMAS NYAMWAKA AYOO⁴⁰ where the accused were charged with assaulting complainants and occasioning them actual bodily harm. They were given cash bail of 500/= or remand.

Continuing on the issue of attitudes of magistrates at the main courts in Nairobi the Chief Magistrate adopts an even peculiar method of giving bail or bond. He never gives bail or bond unless the offence is serious and will take time to hear, that is the process of calling witnesses and other types of evidence will take some time. If the case involves no technicalities no bail shall be offered, and he usually tries to fix an early hearing for the accused. This can be seen in the following examples. In the case of R. v JOHN MWANGI⁴¹ and another⁴¹, the two accused were charged with being pick-pockets and had stolen cash and charity sweepstake tickets from a certain Dorothy Nduku's bag. To the Chief Magistrate this case does not involve a lot of technicalities just a matter of proving whose belongings they were and the actual act of theft. To him it is also not serious, by serious what is meant is a grave offence in nature. Here he offered no bond nor bail. He just fixed an early hearing date. The plea was taken on the 4th of February 1980 and the hearing date the 13th of February, 1980 so the accused stayed in remand for an average of nine days. Also in the case of R v GERALD MAFARI⁴² where the accused was charged with theft from the person, for he has stolen a watch from Miss. Grace Ndula. Here no bail or bond was offered, instead a date was set that the case may be heard as soon as possible. But the accused refused and insisted on having bail or bond. He was given 5000/= bond plus two sureties of the same amount, which he couldn't raise and was instead remanded in custody. But wisely for him he still got an early hearing date. His plea was taken on the 4th of February 1980 and the hearing date was set for the 13th February, 1980.

In contract the case which involves technicalities always gets bail or bond, usually both plus sureties of the same amount. As was in the case of R v ELIJAH GITITU and Others⁴³ where the four accused were charged with (1) forging a receipt and purporting it to be genuine (2) uttering the receipt fraudulently and (3) with intent to defraud attempted to obtain forty-six iron sheets worth 18,600/- from a Tools and Hardware Store. Their pleas were taken on the 4th of February 1980, there mentioned date was set on the 19th February, 1980 and the hearing date was set for the 28th of February, 1980 and it was allocated two days to be heard. Therefore the accused was to be in remand for a total of twenty four days plus some extra days from the date of hearing to the date that judgement was to be delivered which could amount to one month and more. In case where the accused would be in remand for such a long time it is better that they be offered bond, which they were. They were offered each a bond of 10,000/- plus one surety of the same amount. Of these only one of them managed to get a surety and the other was the better dressed and carried himself well and even had a lawyer to represent him. Whereas the others were only "mukokoteni"⁴⁴ pullers and were shodily dressed and gave the impression of being poverty stricken.

Another case giving the same illustration is that of R v JOHN BUZIZI⁴¹ the accused was charged with handling stolen property or receiving the property knowing it to have been stolen. The plea was taken on the 4th of February, the mentioning date was on the 18th February 1980 and the case was to be heard on the 5th of March 1980. The same concept of time that would be spent in remand was taken into consideration and he was offered a bond of 10,000/= plus one surety of the same amount.

To this magistrate the personal appearance and demeanour of the person in front of him and any other related factors, such as family or occupation are of no interest. He is so indifferent to everything around him that even the accused is of no significance to him.

The only important factor to him is the case, the charges, the technicalities involved and the time it would take for the case to be dispensed with from the time the plea is taken to the date judgement is delivered. To him anything else is of no importance, the accused might as well not be brought before him because he has no interest in him, the court might as well consist of himself his court clerk, the prosecutor and the file⁴⁶. That is to emphasis on his taken a very indifferent attitude to surrounding factors.

Discussing the issue of "reasonable time" for it comes or fits in here, he has the time to allocate cases the way he wants because he is the Chief Magistrate and he controls all the courts in Nairobi and also fills in the register allocating cases to all the magistrates under his jurisdiction. It is not able that he usually gives out all the technical cases to his magistrates and since his register is free because of allocation he allocates to himself the cases that can be dispensed of quickly as has been shown

All these different attitudes of the magistrate ends up in the final result to not giving the accused his personal freedom. Which is what law is all about. The law is set down in a particular manner or rather in a particular manner which in itself is not very clear or it has many loop-holes. In this case the loop-holes are the magistrates discretion taking into consideration conditions and circumstances, the magistrates exercise their discretion in various ways.

As a famous jurist⁴⁷ in jurisprudence on American Realism put it, it varies from magistrate to magistrate depending on that magistrate's educational background, his home background and also his temperament. All these factors help influence the manner in which he thinks and the decision he arrives at. In the three examples given this is very true, the Senior Magistrate of Mombasa a European from Britain his attitude towards the accused totally different from that of the Senior Resident Magistrate of Makadars who is an African woman.

Her understanding of problems and related factors is much better than the other two. The Chief Magistrate is of Asian origin. These are three examples of three different persons who have different educational backgrounds, home backgrounds and obviously temperament but are all in the same profession.

We have arrived now at the conclusion that where a magistrate feels one does not deserve bail for reasons best known to him he will not grant it therefore the accused will be remanded in custody. This should be of the courts daily register. As we have discovered, magistrates cannot cope with the constant number of cases coming in. What usually happens is that most cases can never be heard in reasonable time. As has been said, the Chief Magistrate has no problem in hearing cases in good time because he burdens or rather pushes cases to his junior magistrates. His work is of a distributor of cases so he has the time to fix cases onto his register.

We may ask here whether this Chief Magistrate hears these cases in reasonable time? One has to define what is meant by "reasonable time". Because even in the case of R v JOHN MWANGI⁴⁸, he was not given bail because his case was to be heard in nine days time. Is nine days "reasonable time"? He still had to stay in remand till his judgement was delivered which could have been in another week's time because the magistrate had to listen to all the evidence that was given by the defence and the prosecution and then adjourn to go and analyse this evidence and write out a judgement. This can take some time as it depends on the magistrates' mood. He might even take weeks to write it out because in law there is no fixed date stating how long a magistrate should take to write out his or her judgement. It is upto his discretion to fix his or her deadline and then deliver that judgement.

"Reasonable time" cannot be defined but one can fix it, at the most, at two weeks⁴⁹. But obviously this can never be the case in other magistrates courts the issue of "reasonable time" is only a theoretical term used in law, practically there is no issue of reasonable time.

And there will never be unless the amount of crimes and case applications to court are cut down, this is not wishful thinking as it cannot decrease but only increase unless

Courts go about this issue of reasonable time in this manner. Firstly it starts from the time the accused is arrested by the police. If he is arrested over a weekend he will not appear in court until Monday morning. If he is lucky he might get a police bond and go free over his weekend and appear on Monday morning to take his plea. The next process is if the plea is that of guilty, justice shall be meted out then and there. If his plea is not guilty he might be able to afford bail or bond as previously discussed. If he can afford it he is lucky because he has his freedom to do and go where he wants until the day his case is heard and decided. But if he is unfortunate to be unable to raise bail or bond he will be remanded for a period of time. In practise no-one should stay in remand for a period of more than fourteen days from the time the plea is taken, so fourteen days after the plea is taken the accused comes to court for his case to be mentioned. At the District Magistrate III's courts in Mombasa, a common practise there was that most people charged for petty criminal offences who had pleaded not guilty usually requested to change their pleas when they were brought back for their cases to be mentioned. On one day, about ten people changed their pleas and this caused concern to the magistrate⁵⁰. He even asked the prisoners whether they had been caned and punished in order to change their pleas. To which they answered no. Rumour had it that these people were exposed to other criminals who had been through the court process and they usually held "most courts" and dispensed their idea of justice. So they would advise their fellow colleagues that they had better go and change their pleas because firstly the court process would take so long and may be they would be in remand for over two months and secondly for the offence committed there was usually a short term prison sentence for approximately one to two months, or a fine of about 150/= to 250/= shillings. So their advice to others was to go and change their pleas and get justice then and there because the time spent in remand would be more than the time that they would get as a sentence.

Or they may be able to pay the fine through contributions by relatives and thereby buy his "real" freedom. Usually contributions by relative is rare.

The advice given by inmates, is very valid in the case of R v IBRAHIM ADDI⁵⁷. Here the accused had been charged with assault causing actual bodily harm to the complainant by hitting her on the forehead with a bottle whereby she sustained a wound. The accused was arrested on the 1st of June 1979, he was taken to court on the 2nd of that month, and his plea was taken to which he pleaded not guilty. His case was set for mentioning on the 16th of June and hearing on the 25th June on the date of hearing the case the complainant was not in court because she was still in hospital. So the case was moved to the 9th of July, but on that day the statement of the doctor who treated her was not ready and the case was adjourned to the 23rd of July. Due to other reasons it was not heard then. The accused had been in remand since June and on the 2nd of August he decided to change his plea, which was very wise of him otherwise his case would have gone on and on and he probably would have ended up staying in remand for a period of over three to four months. He then got a sentence for either fifty days imprisonment or a fine of 250/= Kenya shillings. No consideration of the time spent in remand was taken.

In the other cases of R v NICHOLAS KARANGO⁵² and R v AMINA ABDALLA⁵³ the same happened. The accused, the second case had been charged with assault causing actual bodily harm and had stayed in remand for over three months. The issues were the same in that the complainant had miscarried and was in hospital and therefore could not appear in court. Thereon the case kept on being adjourned for various reasons upto the fourth of August where the accused took it upon herself to change her plea and therefore get ready justice. Her husband and family were not taken into consideration nor the time spent in remand. She was told to pay a fine of two hundred and fifty (250/=) or fifty days imprisonment.

In the other case the accused was charged with stealing from his employer a pair of trousers. He changed his plea after being in remand for over three months and on the 4th of August 1980 he changed his plea. He was fined four hundred and fifty shillings (450/=) or 60 days imprisonment.

in all these cases the time spent in remand is more than the actual time that will be spent in prison. In a case where someone cannot afford the bail, the sentence will be plus the amount of days spent in remand. No consideration is ever taken of the amount of time spent in remand. So those people who are wise enough to change their pleas at time their case is mentioned, (this is in application to less serious offences) will be better off than the ones who want their cases finally are judicially determined. No one should plead guilty when in actual fact they may not be guilty.

A District Magistrate III⁵⁶ agreed that the cases where people stayed in remand for months on end was a very prevalent thing. But there was nothing that could be done to improve the situation. He was talking in relation to the area he has jurisdiction over, which is Kibera, a low class residential area where most residents do not have jobs at all. Some are self-employed and sell vegetables and brew changaa and most of the income goes into drinking. And most do not even have what can be called a home, so to Mr. Kanyuttu, the



Magistrate, the issue of releasing them on bail or bond is not possible because there will be a difficulty in tracing these people in this slum area. This is clearly against the interests of justice. He condemned some Police Officers in court, (rebuke appeared in the Newspapers the next day)⁵⁷ for having offered Police bond to changaa brewers and not taking down proper addresses of the accused. It was improper he asserted, to appear in court with^{out} the accused and also without the money which they had left at the Police Station. He wondered how the **court** could forfeit the money if it was at the Police Station?

Questioning two Officers in charge of Police Stations, one from the Central Police Station and the other from Kilimanjaro Police Station, about what they thought about Mr. Kanyutu's comments. They both said that these were very rare cases of giving bonds to changaa brewers since most of the times they were never given bail or bond. The reasons being, first, that sometimes they could not afford the amounts and secondly their addresses were uncertain, that is, they had no fixed abode to be traced to. The police officer at the Central Police station said that they gave two kinds of bail, one a cash bail and the other a bond which could be free bond or a deposit of money with a surety. He said that this was a right of the accused person, so that it was upto him to raise the issue, that is if he wanted bail he should

ask for it himself. This presupposes that the accused persons know the law. The officer in charge said that he never tells the accused of these rights the only thing that is told to the accused is cautioning, that is that the accused do not have to say anything if they don't want to but if they do these would be held against them as evidence. Asked how amounts were fixed he said that this varied from offence to offence depending on the gravity of the offence. For murder and treason there was no releasing on bail, obviously. He said that he never gave drunk and disorderly people, changaa brewers, rogues and vagabounds and people (women) caught soliciting any bail or bond because they would not honour their bail and terms and would end up absconding. He only gave free bond in special cases and he gave examples such as some University students who were arrested and upon production of their identity cards he gave them free bond and asked them to report to the police station at various specified times over that week-end untill Monday when he would take them to court to answer their charges.

When asked what would happen when cells are congested as a result of non-issuance of bonds or bail, he answered that if his police prison cells got congested he transferred people to other Police stations cells.

From a personal experience, in court, there are very few instances where an accused has been given bond or bail by policemen. Even though given the powers to grant bail or bond they never really use them they

would rather use their powers to lock people up.

In another interview with the Commissioner of Prisons, he said that there was a marked increase in prison population and every prison institution in Kenya especially in the urban centres reported conditions of overcrowding. Table E illustrates the growth of prison population in Nairobi area alone, between the years 1973-1977. He said that most of the congestion was caused by remand prisoners who were of such great numbers that they distorted the other prison population. He was of the opinion that a prison should be built to cater for remand cases only and this would also prevent the association between convicted prisoners and remand prisoners, because contact was not a good one, especially where remand prisoners were innocent people.

Asked how he dealt with remand cases he answered that the maximum period of remand was fourteen days where upon what usually happened was that they were taken for their case to be mentioned and were brought back to the remand cells, for fourteen days. Where the people remained in remand for sixty days, he wrote to the chief magistrate giving information on the number who had stayed in remand for more than sixty days, and the courts from which they came. He also gave their prison numbers, their names and the dates that they were brought into remand. The letter⁵⁹ dated the 15th Jan. 1980 from the Prisons Com^mander

to the Chief Magistrate illustrates this point (Table F)⁶⁰. The Commissioner was of the opinion that something was wrong in the way courts operated in the granting of the bail/bond to permit temporary release. He did not understand why people were not granted bail/bond and felt that by sending them to his prisons it was a waste of his officer's time and also a waste of Government funds and also detrimental to the mental state of the person brought to the prisons. These are valid points firstly, Table G⁶¹ illustrates Mr. Mutua's (the Prison Officer) comment's regarding putting people in remand as a waste of his officers time and government fund. Analysing Table A one can see that there were a total of 63,497 people in remand in 1978. Of these 17,182 were committed to sentence, imprisonment and detention. Worked out in percentages this is only 27.1% of the total remand population for 1978. Whereas the number of people who were discharged, fined or acquitted was 40,995 and as a percentage of 63,497 it amounts to 64.6% of the total remand population of 1978. Clearly putting in a certain number of persons and releasing 65% of them is a sheer waste of man-power spent to administer and look after these people. And the amounts spent on feeding and upkeeping of these people is a sheer waste of money when in the first place they could have been released. If the percentages were vice versa that is 65% of the prison remand population got imprisoned or detained and 27% got released then the position would be understandable and

clearly there would be nothing wrong in the operation of the machinery for the administration of justice and the way it grants temporary release. Since the figures are not how they are meant to be then clearly there is something wrong somewhere in this machinery, which needs rectification.

Secondly, Mr Mutua mentioned that locking up a person in remand has a detrimental effect on the mental status of that individual. Going back to Table 4, it shows that a large amount are eventually discharged and they could, as in most cases, be discharged after staying in remand for a period exceeding sixty days as is the case. As indicated in the letter⁶² from the commissioner of prisons to the Chief Magistrate, from Nairobi Main Courts there were 215 people who had been in remand for a period exceeding sixty days. From Makadara there were 162 persons and so on. So even though one is discharged the stigma remains. To the public in general if one stays in prison, be it on remand or not for a period of about a month this amounts to being punished and imprisoned and so to them there is no distinction between prison and remand. Once one has stayed in remand for more than a month to the general community that the remand prisoner comes from, there is a presumption that there is a likelihood of him having committed the offence. So even when he is eventually discharged the community has already delivered its verdict of guilt and therefore ostracise him

from their community. He therefore becomes a misfit and a reject at the same time. As mentioned earlier on, when one finds it hard to fit into a society this tends to lead to anti-social behaviour to hit back at society because it is the one which caused this suffering. On top of rejection there is also loss of employment if he had any. Most employers do not want their business to be associated with offenders. So they usually give these affected employees a temporary suspension from work to go and sort out their matters. In cases where there is no forthcoming verdict as in lengthy cases or where the case keeps being put off the employee will get sacked. The two factors of being a misfit in society and loosing one's employment make it also hard for the person to adjust and fit in with his family as well as making him more angry and frustrated.

The only recourse one has when one has suffered wrongfully is to sue under malicious prosecution as specified under the law of torts⁶³. Here one can state to the court all the losses one has suffered due to the fact of being maliciously prosecuted and in remand for a long period of time. One can claim that he is entitled to damages to loss of reputation and employment and other facts. But this remedy has its shortcomings as well because it involves another court process. One has to apply to the already overcrowded courts and then it will be upon them to allocate a date of hearing which could be upto a year or more from the date of application. Then there is the

issue of taking in evidence and arriving at a decision which is slow and takes time as well. Looking for case law on this aspect of malicious prosecution is like looking for a pin in a haystack because there is a negligible amount of case law on it. Most likely the reason could be that the remedy usually involves a lengthy and tedious affairs from the time of application to the time of judgement being delivered. Which leads one to give up hope and abandons the case and so justice is never obtained against the injustices suffered. There is also the issue of people's ignorance that they can do this.

The next chapter an attempt is made to assess where the machinery for administration of bail has gone wrong and what recommendations can help to restore the situation.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

As has been shown in previous chapters, bail is meant to be a mechanism for the release of defendants prior to their trial. But in actual practice this is not done due to numerous practical and social constraints. Financial conditions set down by the Magistrates and Police Officers, their temperaments and their different ways of thinking greatly affect bail administration. This leads to a violation of the defendants rights in that the amount of money fixed for bail or bond deprives them of bail because it is usually way beyond their financial resources or capabilities. It also deprives them of a means for preparation of their defences and also goes against the presumption that one is innocent until proved guilty. There are all clear violations of the principles of bail.

One cannot of course fix a uniform bail because circumstances vary from case to case and also moods of magistrates and police officers vary from policeman to policeman, magistrate to magistrate. To fix a standard or uniform bail would be violating the law of probabilities, because no one can ever foresee how events may occur, different events happen in different ways, time and circumstances, and to set down definite laws to govern uncertain circumstances, would lead to arbitrariness. What should not be done is to fix amounts in accordance as to what is theoretically thought of as important in society. What is meant here is for example, where an accused has stolen property and a bond is fixed at Shs.10,000/- plus one surety. That is giving prominence to property protection. What should be done is that bond should be fixed in relation to the accused person, something within his means.

As seen, the law of bail leads to people being deprived of it, but the evils that arise from its deprivation lie in the court procedure, and the burden on the machinery for the administration of justice. The speed at which cases are dealt with, and disposed of are important. It has been shown that speed is so slow that a lot of cases are never dispensed with immediately and a lot of them are carried forward and when added to new cases, leads to congestion. Congestion leads to the accused staying in

remand for even longer periods.

One recommendation is to increase the numbers of courts and magistrates. It is easier to increase the number of courts and court rooms since all it involves is to convincing the Government to give out more money so that they may be constructed. But it is observed that it is not easy to talk about increasing the number of magistrates as more and more magistrates tend to leave the profession and very few lawyers join the bench.¹ This is mainly due to the society we live in since the main objective after one has had the basic or maximum education is to make money. In this profession the work is more than the money gained. The magistrates work is very unappealing as it involves a lot of writing. They write down everything that is admitted to court as evidence. This proves tedious and taxing upon them. It is necessary to ease this burden of writing which contributes to the speed in which cases are disposed of. It is therefore suggested that a stenographer be employed or a dictaphone installed as this would decrease the burden of writing and increase the pace of court work. This would involve, again, convincing the Government that these are necessary.

From here, after analysing and discovering that the bail system in Kenya is unsatisfactory and needs dire reform, it is only practical to look at other bail systems in the world which were wrong and needed reform. Taking as examples the United States of America and England, their bail systems were completely in-adequate and needed reform as the Kenya one and they eventually instituted reforms: Since Kenyan bail law needs reforming it could benefit a lot by borrowing ideas from the reforms of these two countries and extracting valuable points that are relevant to the society in Kenya.

We start with the system in the United States of America, where it was realised³ that the bail system needed reform because it had become commercialised by bondsmen. It was realised that the monetary issue of bond was the thing that made it bad in that a lot of people could not raise it and were therefore deprived of it. It was recommended that this monetary aspect should be removed and replaced by a better system.

The way bondsmen had commercialised the bail system is that when an accused was brought to court, there would be a lot of these bondsmen hovering around trying to convince the accused to hire them. It was

found that even court officials tried to recommend certain bondsmen because they would either earn commission from the bondsmen or they in fact owned the bond businesses or were partners in them. Some of these bonding businesses were owned by big time crooks in New York City. The bondsmen would agree to stand up as sureties for the accused for the amounts given by the court, then from this the accused had to pay them 10% of the bond, whether they were finally convicted or acquitted or discharged. It became a very lucrative business. The bondsmen made sure that the accused did not escape because they wanted their 10% share as well as not wanting to pay to the court the amount in forfeiture if the accused absconded.

This led to the need for the bail reform because the objectives of bail were not being carried out and a lot of injustices followed thereof. The bail reform movement was started off by a certain Louis Schweitzer and his assistant Herbert Sturz and it was called the Manhattan Bail Project which started in 1960 in New York City.

The primary aim was to eliminate the reliance on money and buying of freedom. They therefore set out a system available to the poorer members of society and especially youthful offenders. They introduced the Own Recognisance system which was in existence before but was not utilised fully. They emphasized on it by constructing a questionnaire⁴ which was given to the accused to solicit satisfactory account of the accused. To this the accused was given a certain amount of points and if the accused managed to score an average of ten points he was eligible for bail. When the system came into fully operation, the facts of the accused were verified over the phone by the court officials and if proved correct then the accused was released on his own recognizance and told either to report to court on certain specified days or to the police station at specific times or days. This type of bail was only available for the lesser offences but not homicide cases or treason ones. Table 1⁵ shows how this type of bail was successful in the United States.

In the States, therefore under this reform, sureties were done away with because they were violating and spoiling the law of bail. But the monetary aspect was not thrown aboard completely. It was suggested that if the American courts wanted to give an amount that should be paid for bail, it should only be nominal, like for example one dollar. Al' in all this law reform has proved favourable in the United States, and discriminatory factors have been slowly arrested.

But would such recommendations be satisfactory to Kenya especially when asked to give a satisfactory account of oneself and the verification over the phone? What would be needed is a social worker to go and investigate and come back and report to the court on their findings. This would take some time and the accused will be deprived of his freedom over more days of investigation. But all in all he might eventually get temporary release if the answers are verified. This recommendation has its own shortcomings but in time it could be quite effective.

The other bail reform system to be looked at is the one in England. In England also, there was a bail reform movement in 1971 which was carried out by the Working Party. The main reason for the reform movement was the concern by the Minister over the overcrowding of prisons and the lack of money to build more. The Government was anxious to give bail in all cases that were reasonable and they wanted to improve the quality of bail decisions by setting out clearly the questions the court should address its mind to. It was also thought that procedure should be improved. The Working Party started by looking at the Manhattan Bail Project and they actually tried to implement it through the Camberwell Project by recruiting probation volunteers to investigate on the accused and make available to the court adequate information about the defendant and his ties with his community. But this project fell through because it proved unfavourable in England in that it encountered problems in the rural areas. This was attributed to the different way the law had developed in the United States and the level of development of the United States which was not the same as in England. The English Bail Reform Act 1976 therefore was passed and at paragraph 9 (b) of Schedule 1 to the Act, it recognised the importance of community ties, but it did not over emphasise on them as did the Americans.

The Working Party realised the difficulties and problems caused by leaving bail to be applied according to the discretion of magistrates and policemen in the recommendations which were unimplemented in the new Act.

In the Act the courts and police are required to state the reasons for refusing of bail and evidence that can be used and have to be used to support the reasons for its refusal.

Firstly, the Act at Section 4 (i) creates a general right to bail in all criminal proceedings including after conviction. Secondly, the Act lays clear reasons and evidence which may support the refusal of bail. The new Act abolished the concept of own recognizance and dealt more with the importance of sureties.

It also created an offence for failing to answer bail. It also created the appeal to bail which is to lie in other courts of the same jurisdiction and not necessarily to a higher court. It however stated that bail was not available for treason cases.

The concept of financial propriety of the sureties was not totally dispensed with but the amounts were not to be vast. And where it came to forfeiture of the security it would be portion of it, so that it would remove the burden and the unappealing thought of becoming a surety. In the case of the protection of the defendant especially in the case of juveniles, the sureties can be his parents or guardians and they do not have to pay or deposit an amount, but must promise to bring the juvenile to court when required. This was fair instead of exposing the child to the conditions of the prisons. All in all the English Act of 1976 laid down precise law as to when bail should be refused and the reasons that should be given for it.

As discovered earlier on, it is absolutely important that reforms be carried out in Kenya and Kenya could benefit from a study of the two bail reform systems suggested by borrowing and extracting more points relevant for its society.

THE % DISTRIBUTION OF THE AGE OF MIGRANTS

(i)

TABLE A

A G E

	15 - 19	20 - 24	25 - 29	30 - 39	40 - 49	50 - 59
1968 - survey of Urban In - Migrants	23.8	40.9	17.5 0.0	12.9	4.4	0.5
1969 - Census age distribution of African males	22.5	17.2	14.1	21.5	14.8	9.9

Source: Rempel
1968

Survey done by
Rempel

THE PROVINCIAL BIRTHPLACE OF THE KENYAN POPULATION EMERATED IN EACH URBAN CENTRE IN 1969

TABLE B

PROVINCE OF BIRTH

Urban Centre	Nbi.%	Nyanza %	Western %	R. valley %	Central %	Eastern %	Coast %	N. Eastern %	Total
NAIROBI	-	12.5	13.1	3.1	31.1	15.2	1.3	0.2	76.5
MOMBASA	11.8	9.3	6.4	1.0	6.0	15.1	25.3	0.2	75.1
KISUMU	1.7	31.7*	23.3	3.0	4.0	1.8	0.8	0.1	66.4
NAKURU	1.5	16.6	16.7	6.4*	21.6	2.9	1.9	0.1	67.7
THIKA	1.6	7.3	4.9	2.4	41.8*	10.2	0.6	0.2	69.0
ELDORET	7.9	13.2	29.5	9.2*	10.2	1.8	0.9	0.2	72.9
NANYUKI	1.9	4.2	3.5	7.8*	39.4	10.4	0.7	0.8	68.7
KITALE	0.6	8.9	31.2	9.6*	10.1	1.6	0.4	0.2	62.6
KERICHO	2.0	21.6	11.7	7.6*	14.9	2.2	0.5	0.1	60.6
MYERI	1.2	4.0	2.7	3.5	10.1*	6.0	1.0	0.1	28.6
MALLINDI	18.2	2.1	2.2	1.0	3.8	3.7	15.1*	0.5	47.2
TOTALS	3.5	12.2	12.0	3.1	22.4	13.0	7.4	0.2	73.8

* These % exclude those born in the district which town is located.

Source: unpublished data .. 1969 census by Central Bureau of Statistics - Ministry of Finance & Planning

(iii)
TABLE C

RATE OF OFFENCES IN RURAL AREAS AS COMPARED TO URBAN

<u>COAST PROVINCE</u>	<u>CRIMINAL</u>	<u>TRAFFIC</u>	<u>CIVIC</u>
MOMBASA	24,894	20,516	7,840
LAMU	700	157	38
HOLA	516	156	42
MALINDI	1,496	947	605
UKWALA	872	1,713	89
<u>NORTH EASTERN PROVINCE</u>			
WAJIR	164	70	-
GARISSA	461	263	-
<u>NYANZA PROVINCE</u>			
KISUMU	1,241	18,396	1,015
KISII	4,283	7,775	892
KOSELE	39	3	213
MANGA	566	NIL	332
HOMA BAY	1,485	1,980	231
NDHIWA	185	8	197
<u>RIFT VALLEY</u>			
NAKURU	19,066	12,642	1,371
TAMBACH	397	NIL	26
ELDORET	7,677	8,121	583
KABARNET	784	NIL	64
KAJIADO	650	305	34

* Note: List not complete - Provinces have more towns than listed - these few listed for purposes of comparison.

High Court Criminal Registry (source)

(iv)

TABLE D: Annual statistical Returns of cases

	<u>Cases pending</u>	<u>Cases</u>	<u>Cases</u>	<u>Cases pending</u>
	On 31.12 of	Filed	Heard	On 31.12 End of
	Previous Year			Year.
1976				
Criminal	10,381	35,941	29,847	16,475
Civil	4,059	3,497	4,407	3,149
Totals	14,440	39,438	34,254	19,624
1977				
Criminal	16,475	44,565	53,247	7,793
Civil	3,149	3,556	3,442	3,263
Totals	19,624	48,121	56,689	11,056
1978				
Criminal	7,793	38,290	40,802	5,281
Civil	3,263	2,935	3,009	3,187
Totals	11,056	41,225	43,811	8,468
1979				
Criminal	5,281	50,656	49,461	6,476
Civil	3,187	3,947	1,970	5,104
Totals	8,468	54,603	51,431	11,640

Source: Chief Magistrates Courts Nairobi

TABLE F

Extracts from letter to Prison Commander from Chief Magistrate dated 15/1/80

1. List of amount of Prisoners from each court that have exceeded 60 days in remand as from 14.1.80

Courts

Law Courts	215
Makadara	162
Kibera	154
Kiambu	14
Githunguri	3
Limuru	10
City Council	1

Names of Prisoners

	<u>Prison Number</u>	<u>Name</u>	<u>Duration</u>
1.	NBA/5431/79/R	Alfred Onyango Mkula	9/8/79 - 14/1/80
2.	NBA/5452/79/R	Christopher Oluoch	9/8/79 - 14/1/80
3.	NBA/5626/79/R	James Kibe Mburu	17/8/79 - 14/1/80
4.	NBA/5625/79/R	David Maina	17/8/79 - 14/1/80
5.	NBA/5598/79/R	Jonathan Muchomo	16/8/79 - 15/1/80
6.	NBA/5682/79/R	Andrew Odhiambo Okello	20/8/79 - 15/1/80
7.	NBA/5693/79/R	George Amongi Abuya	20/8/79 - 15/1/80
8.	AND SO ON		

* Note that it has been shortlisted - there are more prisoners than listed.

TABLE G

(vii)

DISPOSAL OF REMAND PRISONERS

	Men	Women	Boys	Girls	Total
In custody as at 1/1/78	4,198	201	6	-	4,405
Admitted during the year	54,143	4,873	75	1	59,092
Total.....	58,341	5,074	81	1	63,497
Committed or sentenced to imprisonment	16,302	869	11	-	17,182
Convicted or committed to detention camps	480	3	-	-	483
Discharged on fine payment or acquitted	36,961	3,963	70	1	40,995
Died	26	-	-	-	26
Escaped	10	1	-	-	-
Transferred elsewhere eg. Mathare Mental Hospital	324	6	-	-	330
Remaining in custody	4,238	232	-	-	4,470
	58,341	5,074	81	1	63,497

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TABLE HQUESTIONNAIRE FOR BAIL REFORM PROJECT

<u>Points</u>	<u>Prior record</u>
1	No convictions
0	One misdemeanor convictions
- 1	Two misdemeanor convictions or one felony conviction
- 2	Two misdemeanor convictions or two or more felony convictions
	 <u>Family Ties</u>
3	Lives in established family home and visits other family members (immediate family only)
2	Lives in established family home (immediate family)
	 <u>Employment or School</u>
3	Present job one year or more , steadily
2	Present job four months or present and prior six months
1	Has present job which is available or unemployed three months or less and nine months or more steady prior jobs. or unemployment compensation or welfare
3	Presently in School, attending regularly
2	Out of School less than six months but employed or in training.
1	Out of School three months or less, unemployed and not in training.
	 <u>Residence</u>
3	One year at present residence
2	One year at present or last prior residence or six months at present residence
1	Six months at present and last prior residence or in New York City five years more.

TABLE I

Success of Own Recognizance Reform as compared to Bail

TOWN	1962		1971	
	O.K	BAIL	O.R	BAIL
BOSTON	0.2	0.1	0.9	0.2
CHICAGO	2.3	0.3	0.0	0.3
DENVER	0.1	0.6	0.0	1.0
KANSAS CITY	9.5	1.1	0.9	0.9
LOS ANGELES	0.2	0.3	1.0	0.1
SACRAMENTO	0.2	0.3	1.0	0.1
SAN DIEGO	0.8	0.4	0.1	0.5
SAN FRANCISCO	0.4	2.0	0.04	1.4
SAN JOSE	0.0	0.9	0.2	0.5
WASHINGTON D.C.	3.0	0.4	0.7	0.3
WILMINGTON	0.0	0.8	0.2	1.8

O.R. - Own Recognizance

NB: List short for purposes of convenience

Source: Bail Reform in America

FOOT NOTES

FOR CHAPTER 1

1. P & M, English Law Before the time of Edward 1 C.P.U. (1968)
Assize of Clarendon Rolls P.583
2. I bid Article 16 T.583
3. I bid Writ of 1252 selected chapters P.582
4. "Mwizi" Swahili word for thief.
5. Infra (see note number 1) arrest of suspicious persons p.583
6. I bid a place to break out of p.584
7. I bid Northumberland Assize Rolls p. 584
8. I bid "Mainprize" - manūcaptus in Latin p. 584
also see HOLDSWORTH , A History of English Law S & M (1966)
vol. 9 p. 105.
9. Infra (see note number 1) writ of De Homine Replegiando
from the Latin Replegiatus - meaning repleving and equivalent
to mainprize p.585.
Infra (see note number 8 HOLDSWORTH vol.9 p. 105)
10. 70 Y.L.J. Element of wealth p. 967
11. Infra (see note number 8 HOLDSWORTH) vol.9 "Writ of Withernam "
p.105
12. I bid " Corpus pro Corpore "that is bound body for body p.525
13. I bid " bail below" given to the Sheriff p.253
14. I bid " bail above" given to court p. 253
15. I bid " DE ODIIO ET ARIA" that is hatred and malice or spite and
hate p. 107
also see Infra (see note number 1) p. 587
16. Infra (see note number 1) statute of Westminster 1275 p. 586
17. Orders in Council - Laws of Kenya 1927 1st SEPTEMBER
Orders in Council Debates 1930 p. 39
18. Legislative Council Debates 1930 p. 39
19. I bid " totally wicked and un - British" p. 39
20. I bid quotation at p. 40

FOOT NOTES FOR CHAPTER 2

1. Kenya Criminal Procedure Code Cap. 75 Laws of Kenya.
2. It shall be herein referred to as the C.P.C. (K) or C.P.C. (a) or C.P.C. (T).
3. Cap. 7 Later Cap. 21 Laws of Kenya 1930
4. Cap. 107 Laws of Uganda C.P.C. (U).
5. Cap. 21 Laws of Tanzania C.P.C. (T)
6. Magistrates Courts (amendment) Decree 1972 amended by Decree number 11 of 1972
7. Trial of Indictments (amendment) Decree 1972 amended by Decree number 11 of 1972
8. (1973) E.A. 471 (U)
9. (1973) E.A. 39 (T)
10. (1968) E.A. 10 (U)
11. High Court Bulletin Number 54/1963 p.31
12. P & M English Law before the Time of Edward 1 Vol. 11. C.P.U. (1968).
13. Legislative Council Debates 1930 P.39
14. Hon. E.M.V. Keneally - European Elected Member (E)
15. Emphasis my own - natives were more or less likely to deposit their perishable market products.
16. Hon. A.D.A. MACGREGOR K.C. - the then A.G.
17. (1968) E.A. 136 (T)
18. Infra (see note number 9)
19. I bid p. 41
20. (1973) E.A. 282
21. I bid p. 284
22. I bid p. 284
23. I bid
24. Infra (see note number 9)
25. I bid p. 41
26. Infra (See note number 6 and 7)
27. Infra (see foot note 8)
28. Infra (see foot note 6 & 7).
29. Infra (see foot note 7)
30. (1947) 14 E.A.C.A. 2.
31. Infra (see foot note 20)
32. (1954) 21 E.A.C.A. 266.
33. (1972) E.A. 476 (K)

34. (1946) 22 K.L.R. 17
35. 1 bid p. 17
36. (1958) E.A. 337
37. Cr. App. 552/1967
Discussed by Trevelyan , J. in Somo's case.
38. Infra (see foot note 33)
39. 1 bid Trevelyan's discussion p. 478
40. 1 bid
41. Police Act Cap. 84 Laws of Kenya
42. (1967) E.A. 315 ~~X~~
43. 1 bid p. 316
44. (1970) E.A. 448 ~~X~~
45. (1972) E.A. 145 (U) ~~X~~
46. Local administration Act Cap. 25 Laws of Uganda
47. As discussed in Panju's case and Jaffers.
48. Legal Aid Act Cap. 21 Laws of Tanzania.
49. (1958) E.A. 202 (T)

FOOT NOTES FOR CHAPTER 3

1. Ministry of Finance and Planning, CENSUS REPORT unpublished 1969
2. Daily Nation July, 14th 1973
3. Infra (see foot note 1)
4. I.L.O. Report 1972 p. 47
5. Table A - appendix p. (i)
6. Table B - appendix p. (ii)
7. NB - Note figures have increased greatly in '0 years
8. Appendix p (i)
9. Comment/observation of senior assistant Police Commissioner
10. Appendix p.(iii)
11. Appendix p. (iv)
12. Daily average cases.
13. Mr. Schofield
14. Own opinion - " it was based on pure racism"
15. Own opinion - " based on amounts".
16. Resident Magistrate - Mr. Stephen Mwangi
District Magistrate 111 - Mr. Manuel Randu
17. Infra (see foot note 13)
18. Cr. Case No. 2752/79 Mombasa
19. Cr. Case No. 2758/79
20. Cr. Case No. 2751/79
21. Infra (see foot note 16) R.M takes pleas when S.R.M. unavailable.
22. Cr. Case No. 2793/79 Mombasa
23. Cr. Case No. 2769/79 Mombasa
24. Cr. Case No. 2765/79 Mombasa
25. Infra (See foot note 16) D.M. 111
26. Cr. Case No. 2762/79 Mombasa
27. Cr. Case No. 2803/79 Mombasa
28. Cr. Case No. 2761/79 Mombasa
29. Cr. Case No. 3551/79 Mombasa
30. Cr. Case No. 2970/79 Mombasa
31. Own conclusion as to the attitude taken by the S.R.M.

32. D.M 11 and 111's
33. Infra (see foot note 2 a)
34. Cr. Case No. 1941/80 Nairobi
35. Opinion - my own
36. Cr. Case No. 990/80 Nairobi
37. Infra (see foot note 34)
38. Cr. Case No. 977/80 Nairobi
39. Cr. Case No. 965/80 Nairobi
40. Cr. Case No. 926/80 Nairobi
41. Cr. Case No. 210/80 Nairobi
42. Cr. Case No. 211/80 , Nairobi
43. Cr. Case No. 212/80 , Nairobi
44. Swahili word for a cart.
45. Cr. Case No. 218/80 Nairobi
46. Opinion my own
47. American Realism - Secondary source
48. Infra (see foot note 41)
49. Opinion my own upon analysis
50. Infra (see foot note 16) D.M. 111
51. Cr. Case No. 2807/79 Mombasa
52. Cr. Case No. 2978/79 Mombasa
53. Cr. Case No. 2764/79, Mombasa
54. **Ibid**
55. appendix
56. Kibera Law Courts - Mr. Kanyuttu D.M. 111
57. Daily Nation 12th February, 1980
58. For what charge not specified most likely for being drunk and disorderly.
59. Extract of Letter - from Prison Commander to Chief Magistrate appendix p.(vi)
60. Appendix p.(vi)
61. Appendix p.(vii)
62. Infra (see foot note 59)
63. Veitch, Case Law of Tort in East Africa S & M (1972 p.192 - 201

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