

SENTENCING

SENTENCING IN MANSLAUGHTER CASES  
WITH PARTICULAR REFERENCE TO THE CASE  
OF

THE REPUBLIC v. FRANK JOSEPH SUNDSTROM

(A Dissertation Paper Submitted in part  
fulfilment of the requirements of an  
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By

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"It is certainly not our task to build up the future in advance and settle all problems for all time; but it is just as certainly our task to criticize the existing world as ruthlessly, in the sense that we must not be afraid of our conclusions, and equally unafraid of coming into conflict with the prevailing powers."

Karl Marx



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PREFACE

The debate about the Sundstrom case is a debate which has generated much heat but little light. It has largely been misguided because most of the views or developments envisaged by members of the public and some members of the judiciary is what has come now to be known as an increase in quantity and not in quality. That is the whole issue has been interpreted in the abstract.

This paper is concerned with quality rather than quantity in our legal system. The paper tries to argue that the institutions that administer justice today, are neo-colonial institutions and they serve neo-colonial ends. It also tries to indicate which changes are relevant in tackling the prevailing problems of underdevelopment.

In the beginning, I intended to use three methods to gather information to be used in this paper; personal observation during the fourth term clinical programme, unstructured interviews with some leading judges and magistrates, and information drawn from documents and the existing literature on this subject. In the end, however, I used only the first and the last method. It was necessary to use these informal means to avoid deliberate lying in interviews, which would be most detrimental for the search for truth.

This paper is not a litany of sins of our bench (judiciary), or any other person. It is an academic analysis of facts as they present themselves in our Courts.



It penetrates the appearance of the phenomena, and goes beyond to what is known as the essence. The physical human exist in the plane of the phonemena. In getting to the essence we must transcend all human personalities. The activities of a physical human being are mere external manifestations of more hidden process that do not readily strike the eye. Our primary concern in this paper is knowledge of the essence, and not individuals, who are only incidental thereto.

This paper does not have any claims to exhaustiveness. It has left out many details, many names unnamed, and many discoveries undiscovered. For this, I advance no apologies.

It is my sincere hope and desire that this humble contribution, with all these gaps and shortcomings, will excite further research by way of criticism or otherwise.

SEREJE, L.V.

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I would like to express my deep sense of appreciation to participants to the symposium on the Sundstrom case which was held on 22 October 1980, who contributed position papers; and who willingly gave of their time, energy and expertise, not necessarily in that order, to add to the success of this paper. I mention, in this regard, Mr. Gibson Kamau Kuria, Lecturer, Faculty of Law at the University of Nairobi and other lecturers in the Department of Government Faculty of Arts, both of whom readily responded to the invitations to participate in the symposium. In the same breath, I sincerely thank all participants who came from diverse walks of life of which the members of the Faculty of Law were only a small part.

I must also thank the relevant authorities and staff of the law courts together with those of the library for their co-operation all of which played a crucial part in providing materials for this paper.

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ABBREVIATIONS

- |    |               |  |
|----|---------------|--|
| 1. | Cr. App. L.R. | Criminal Appeal Law Reports                                    |
| 2. | C.L.R.        | Criminal Law Review  |
| 3. | C.P.C.        | Criminal Procedure Code  |
| 4. | E.A.L.R.      | East African Law Reports                                       |
| 5. | E.A.L.J.      | East African Law Journal                                       |
| 6. | J.C.L.I.L.    | Journal of Comparative<br>Legislation and International<br>Law |
| 7. | N.R.L.R.      | Nigerian Law Reports   |
| 8. | P.C.          | Penal Code   |
| 9. | R.M.Cr.C.     | Resident Magistrate's<br>Criminal Case                         |



TABLE OF STATUTES

1. Age of Majority Act, Cap.33 Laws of Kenya
2. Children and Young Persons Act Cap. 141 Laws of Kenya
3. Criminal Procedure Code Cap. 75 Laws of Kenya
4. Evidence Cap.80 Laws of Kenya
5. Penal Code Cap. 63 Laws of Kenya
6. The Constitution Article No.: 5 of 1969
7. Tanzania Penal Code Cap.16 Laws of Tanzania
8. Ugandan Penal Code Cap. 22 Laws of Uganda

INTRODUCTION

When I chose to write this paper, I was not unaware that a judge of no less eminence in our judiciary had given very controversial views on this subject and his views were summarised as follows:

"He said the Sundstrom case was not an exceptional one and that there have been many similar cases of manslaughter in which those accused were either bonded or given one day imprisonment."

(Daily Nation, Wednesday October 15 1980, p.3)

At first I was stunned that he had exhausted my field of study, and I even thought of dropping the idea altogether. However, after a careful scrutiny of his views, I was immensely relieved to discover that he and other correspondents had just mentioned the subject matter of my study. For instance the learned judge never gave the reference to decisions which show that the accused both white and non-white have been punished in independent Kenya equally by White Judges.

I was even further relieved when I learnt that all correspondence on this case was given a very abstract insight.

In the first chapter of this paper the writer therefore provides the statutory provisions of murder and manslaughter. He then proceeds to give a brief historical background of our present Penal Code (Cap.63 Laws of Kenya) which is the major criminal law statute defining the general criminal law in Kenya. The writer in the same view gives the reasons why customary criminal law was abolished and the subsequent importation of the English criminal law which is applicable as of now.



In the second chapter the writer's concern turns to the factors which influence the judge or the magistrate in pronouncing a particular sentence. These are things such as age, sex, intoxication, repentance, mitigating factors etc..

In chapter three the writer analyses Sundstrom's case critically by examining whether the aims of punishment were strictly adhered to by Mr. Justice Leslie Gerald Eyre Harris in setting the accused scot free.

Chapter four raises important points on the question of the independence of judiciary. The judiciary as an institution that safe guards and protects the fundamental rights, liberties and freedoms in any given society plays a very important role in it.

This is because in order for that society to uphold constitutionalism and the rule of law, all its members must feel secure and must be protected by the law from arbitrary use of powers the executive may wield. Through the concept of separation of powers, the judiciary is made 'independent' of the two powers, namely the Executive and the Legislature. This is done so that in its state of independence the judiciary may in theory feel free to curb any excessive uses of power by the executive.

It is therefore the aim of this paper to examine the role of the judiciary in independent Kenya, with particular reference to some criminal cases and especially so in relation to the Sundstrom's case which is the subject of this study. This is because there are some criminal cases which have arisen in the past that have raised comments about the independence of this very important institution. It should be added quickly that the task of proving such an allegation is a very serious and



onerous one. Nowhere in the course of cases examined does the judiciary state expressly that there has been influence on it to secure a particular conviction or make a particular judgment.

Any exercise geared towards proving allegations of executive influence on the judiciary necessitates one to 'read between the lines' and come to a conclusion as to whether on the same facts in a different case, in the absence of any influence the judiciary would have come to the same conclusion. Thus the task the writer has undertaken is a difficult one and should therefore be read subject to the aforesaid. Although the cases discussed are criminal in nature, they have political implications in them. Therefore it has been felt necessary to put them in the prevailing political context in order to see the implications it might have on the trial.

Some conclusions are then drawn from the judgments. It must be added quickly that such cases as the ones discussed here are not many, and the fact that they were decided in the manner in which they were, is no indication that criminal cases are not normally disposed of with the utmost impartiality by the judiciary.

The writer will seek to make recommendations and suggestions as to how the judiciary can be made to be strong and impartial so as to be better equipped to play its challenging role of upholding constitutionalism and the rule of law by echoing the values of the mass of the people and to appeal to the same values.

## CHAPTER I

Homicide is such an important class of crimes that it is remarkable that the common law has had little success in defining what it is. The lack of flexibility in English law, explicable by historical reasons, resulted in manslaughter becoming the residual category of culpable homicide not amounting to murder.

As the doctrine of mens rea developed in English criminal law, and as the definition of murder grew precise over the years, paradoxically the definition of manslaughter grew more diffuse and uncertain. This was because those criminal homicides which were not within the increasingly technical definition of murder were classed as manslaughter.

Judicial attempts to define particular types of manslaughter were largely unsuccessful except in the case of provoked killing. Nor is much help to be derived at the present time from the classic criminal law texts.<sup>1</sup>

### A. LAW OF HOMICIDE AND PROCEDURE IN KENYA

Murder according to the Penal Code of Kenya is committed when any person who of malice aforethought causes the death of another person by an unlawful act or omission, and death penalty is mandatory for any person convicted of murder.

Section 203 of the Kenya Penal code states:



"Any person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder."

Section 204 spells out the punishment for murder:

"Any person convicted<sup>2</sup> of murder shall be sentenced to death."

Murder in Kenya, is not legally defined in degrees as in other countries where it can be in the first or second degree.

Manslaughter is defined as an unlawful act or omission which causes the death of another person.<sup>3</sup>

Section 202 of the Kenya Penal Code states:

"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."

Section 205 gives the punishment for the felony of manslaughter:

"Any person who commits the felony of manslaughter is liable to imprisonment for life."<sup>4</sup>



In murder malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances:

- (a) an intention to cause death or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause death of or grievous harm to some person, whether such person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;
- (c) an intention to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.<sup>5</sup>

The Kenyan law of homicide defines what is unlawful omission, as to mean an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.<sup>6</sup>

The punishment for murder is mandatory, being a sentence of death (S.204, P.C.). But if the charge is manslaughter, or has been reduced from murder to manslaughter, then there is a discretionary area available to the judge. The maximum sentence



for manslaughter is imprisonment for life. But the judge can impose a lesser sentence than the maximum depending on the circumstances of the case. There is no provision for payment of a fine or compensation in criminal homicide cases.

The law of homicide in Kenya therefore bears little that could be said to relate to prevention. It is largely punitive and makes no provision for the compensation<sup>7</sup> of the victims of homicide to whom the state bears the responsibility of protection.

How does this compare with traditional views on the purpose of punishment for homicide in Kenya? It has been argued that the aims of customary criminal law can be explained as being twofold: firstly as being committed to the maintenance of the social equilibrium; secondly as being committed to the promotion of reconciliation.<sup>8</sup>

The equilibrium theory contended that anti-social conduct had the effect of material disruption to the social structure and the economic forces acting on the society. This anti-social conduct was therefore said to disrupt the equilibrium because of the reaction it provoked from their world of the ancestors and the supernatural. That is if the ancestors were angered by the evil conduct of the society's members they were to unleash their wrath on the entire community.

Any anti-social conduct was therefore regarded as likely to lead to kinship divisions and animosities which would be fatal to the society's coherence. (e.g. among the Kikuyu once murder had been committed the equilibrium was reinstated by the payment of compensation to the angered family or clan).



The conciliatory theory aimed at a permanent and amicable settlement. Instead of using force to arrive at a verdict, the adjudicators adopted an arbitratve and free-will settlement. Their main tools were persuasion and reason. In other words the objects were 'settle rather than decide, appease and reconcile rather than enforce."<sup>9</sup>

The overriding aim being to effect a mutually acceptable settlement between the parties. For many offences of varying significance, particular sanctions were not laid down in advance but penalties depended on their circumstances and the dictates of the individual case.

Apart from the aforesaid objectives customary criminal law had also other sanctions which differed from the English Penal System. These were ostracism, ridicule and the curse.

Thus unlike the English Penal System African customary criminal law insisted on the compensation rather than on declaratory judgment.

There is however, some truth that is detectible throughout the history of man, that the conquered people must relinquish their customs, their legal system and all their values and attitudes to life and accept the ways of the conqueror. In this imposition process, the only criterion of evaluating the two systems and their norms is usually based on the a priori presumption that all the conquerors values are the better and hence not capable of being questioned. The British in East Africa were not exceptional in this case. They likewise imposed their values on the Africans.



By the end of the 19th century the scramble for Africa was already under way. The British took over East Africa and assigned to themselves the 'burden' of civilising the backward natives that lived in this region. The process of 'civilisation' actually meant uprooting the 'backward, primitive and barbarous' ways of what they themselves believed to be the most civilised culture in the world. This was not a peculiar case with the British, it happened in Francophone Africa too. They too wanted the African to benefit from the culture of the most 'civilised' nation in the world.

In East Africa therefore the process of anglicisation began in this spirit. The British changed the culture, the laws and most of the other values of the Black man and imposed his way of thinking irrespective of the interests of the indigenous people.

Having decided that the African way of thinking was going to give way to the British way of thinking and institutions, the British through a string of laws set out to entrench this renovation. Pursuant to this policy, the major tool in their hands was the coercive arm of the law. It should be pointed out at the outset that law plays a very central role in society, it is the centre from which every other aspect of life draws its force and can be used to influence or change morals, a peoples' culture their economic structures and their attitude towards life generally.

In order to understand our present criminal law one cannot but, have recourse to a brief historical review of the present Penal Code and the reasons that led to the abolition of customary criminal law.



B. HISTORICAL BACKGROUND OF THE KENYAN PENAL CODE

The Penal Code (Cap. 63 Laws of Kenya) is the major criminal law statute defining the general criminal law in Kenya. But it must be mentioned that there are many other statutes dealing with different areas of law which call for criminal sanctions.

The Penal Code was introduced to Kenya on the 1st August 1930 by Act 10 of 1930 (Originally Cap. 24).

It replaced the application of the Indian Penal Code<sup>10</sup> in the then colony of Kenya. The Penal Code was based on the colonial Office Code which in turn was based largely upon the Queensland Criminal Code of 1897.

Sir. Samuel Griffith who was mainly responsible for drawing up the Queensland Code used as his sources, the English Criminal Code Bill of 1880 and the Indian Penal Code of 1860.

Sir. Samuel Griffith apparently also drew inspiration from the Italian Penal Code of 1888 and the Penal Code of New York State.<sup>11</sup>

Our present Penal Code (Cap. 63) draws then, upon a wide spectrum of sources.

The reason for the change was made clear by the views of legal advisers at the Colonial office, for in 1927, the Secretary of State in a dispatch explaining the reasons for the change in East Africa from the Indian Code stated that he was:



"... advised that officers will find it easier to apply a code which employs the terms and principles with which they are familiar in England than one in which the terms and principles have been discarded for others of doubtful import."<sup>12</sup>

This same reason was voiced by the, then Attorney General Mr. A.D.A. McGregor when introducing the Bill in the legislative assembly. He said:

"the purpose of the Code was to substitute for the existing criminal law of the colony which is the Indian Penal Code as applied to the Colony with an English terminology and English principles of Justice and jurisprudence."<sup>13</sup>

This shows that the change was merely to import English principles of criminal law without regard being had to the local requirements as no expert opinion on native customs was obtained in order to determine what may reasonably be accepted as crime by the native.

This therefore brings us to the examination of the reasons that led to abolition of customary criminal law at the end of the colonial period.

#### C. REASONS THAT LED TO THE ABOLITION OF CUSTOMARY CRIMINAL LAW

The position of customary criminal law as of the end of the colonial period was that it was characterised by the fact that it was not written and that it applied separately and therefore was considered unsatisfactory.



The first reason advanced in support of the abolition of customary criminal law was because it was unwritten and therefore uncertain and lacked precise definition.

Therefore it was necessary that the unwritten customary criminal law be abolished and those which might be adopted be written and defined in a written law. Whether this assertion was true is doubtful. This is because if the only undesirable character of customary criminal law was that it was unwritten and therefore uncertain, it could easily have been reduced to written form and incorporated in the criminal law. Thus in that way they could be written and certain rather than being uncertain. But what was inherent in the process was the cultural arrogance of the legislatures of the colonial period and this attitude has continued in our present legislature even after independence for we have had no significant changes or reforms in the criminal law since independence.

The other reason was that it was characterised by the fact that it applied separately and discriminatorily. Thus in some cases customary law applied only in small areas amongst a particular tribe and it could be difficult if such law were retained since it appeared that each tribe would have its own criminal law and hence would present difficulties in enforcing. From the above reasons it became acceptable that all criminal laws should be written and uniformly applied. Thus in 1960 The London Conference on the Future of Law in Africa<sup>14</sup> was held and it recommended that the general criminal law should be written and should be uniformly applicable to all persons in a given territory.

This was followed by the African Conference on Local Courts and Customary Law<sup>15</sup>. The recommendations were either to abolish customary criminal law completely leaving the general penal code, as the source of the criminal law in the country or to retain customary offences to exist side by side with the Penal Code but to restate them authoritatively and allow them to continue



Lastly to modify the penal code so as to incorporate indigenous ideas of crime or specific offences previously generally recognised in local customary law.

In response to the above conference the then Minister for Justice and Constitutional Affairs the late Tom Joseph Mboya stated that:

"Customary law should be codified, understood and administered in a much more effective way."<sup>16</sup>

As a result the government initiated a research project for the ascertainment and recording of customary criminal law offences with a view to their incorporation into the written law of Kenya. The offences were recorded by Eugene Cotran and reported in 1963.<sup>17</sup> They were accepted in principle but no legislation was introduced to give them statutory effect. Therefore we take it that the Kenya Government chose to adopt one of the recommendations of the African Conference on Local Courts and Customary Law, that is to abolish customary criminal law completely leaving the general penal code, as the source of the criminal law in the country. Specific abolition was incorporated in Kenya Independent Constitution which provides that:

"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed in a written law."<sup>18</sup>

The effect of the failure to act on the Cotran Report on Customary Criminal offences by 1 June 1966 was effectively to abolish customary criminal law.<sup>19</sup> In doing so the policy of the Kenya Government appeared to be directed to the elimination of customary criminal law, as being uncertain, ill-defined and discriminatory. This was constitutionally reinforced by making it unconstitutional to punish any person for an offence not defined by the law.<sup>20</sup>



The present Penal Code (Cap. 63) therefore defines the principles of criminal liability and general defences with reference and unique similarity to the English law.

The companion Criminal Procedure Code<sup>21</sup> provides modes of trial strictly comparable with those followed in England. Thus some offences are merely defined by reference to the law which is for the time being applied in England.<sup>22</sup>

Therefore bearing in mind that the Penal Code (Cap. 63) is the major statute defining the criminal law in Kenya (and its companion the Criminal Procedure Code (Cap. 75) providing for modes of trials strictly comparable with those followed in England) it follows that the aims of our penal system would be identical to those of the English penal system with slight variations in the types of sentences in certain offences.<sup>23</sup>

Sentencing is defined as a process through which courts order punishment of convicted persons. A sentence is, therefore a judicial order directing that a specified form of punishment be inflicted on a convict. The principles that govern sentencing are therefore closely related to the objectives of punishment itself.

The aim of the state as expressed in its criminal law is of more modest dimensions to safeguard its own existence, to maintain order and to make it possible for its citizens to live a good life, free from molestation from others. The state simply designates certain actions as punishable offences because they are the ones that are regarded as socially the most harmful, taking into account the question whether they can be detected in a reasonable number of cases and the law be enforced. The Penal system exists: to devise suitable methods for dealing with

actual law breaker and to prevent as far as may be the commission of offences by others. The purpose of criminal punishment can therefore be summarised under the following heads viz, deterrence, protection of the public from the hard-core criminals, reformation or rehabilitation of a criminal and finally material compensation for the victim. It is against this historical background that the law of manslaughter operates in Kenya today.



CHAPTER II

In this Chapter the writer's concern turns to the factors which affect the courts or judges in arriving at their respective judgments. This approach therefore will be strictly limited to judicial practice, the attempt being made in no way other than through an examination of decided cases.

As mentioned earlier in Chapter I, theoretically, punishment of criminals is supposed to serve one or more of four purposes:

- (a) deterrence, both of criminal (i.e. special deterrence) and also of Society at large (i.e. general deterrence);
- (b) rehabilitation;
- (c) isolation from the public of hard core dangerous criminals;
- (d) material compensation for the victim. However, since legislation is silent as to the aims and objectives of punishment over a long period of time the courts themselves have developed theories of sentencing. It follows therefore, that after a conviction of the offender the court is faced with one of the most difficult, and yet one of the most important, parts of the trial process namely to impose the appropriate sentence.

In Kenya Courts have in practice, applied several different criteria in passing sentences. Of these the two main considerations are:

- (a) the gravity of the crime in question; and
- (b) the responsibility that could be attributed to the accused for the offence in question.

In considering the gravity of the offence the court's policy have been greatly influenced by the legislature, speeches articulated by senior people in the government and by their personal and social backgrounds. For example where the legislature provides for a severe penalty the offence is regarded as grave.<sup>1</sup> Therefore, a judge who is a staunch believer in the institution of private property will generally award stiff penalties in offences against property. Likewise a racist judge will be influenced by his racial bias in the sentences he may award. This is because statutes provide a maximum penalty; and often also a minimum.

In spite of these limitations, the latitude allowed to the discretion of the judge or magistrate is, in most cases, very wide - too wide indeed to serve him as an accurate guide when assessing a penalty. His discretionary powers being so great, and there being no general consensus of expert opinion to help him, the judge's personal feelings and bias must inevitably determine the nature and extent of his sentences to a greater degree than is desirable.

The social and political environment also matters. In colonial days the courts which essentially supported the racial set up in the country considered any offence that deemed to pose a threat to the racial set up a grave offence.



This was because colonialism was rooted in racism.<sup>2</sup> Thus in Kuruma s/o Karui v. Reginam<sup>3</sup> the accused was stopped and illegally searched by police at Chania Bridge near Thika. Two rounds of ammunition were found on his person. He claimed that the bullets had been planted. He was charged and convicted of the unlawful possession of the said ammunition. The penalty was death. His appeals to the Court of Appeal and subsequently to the Privy Council was dismissed.

In imposing sentence therefore the High Court has repeatedly emphasised the necessity of allowing the accused to inform the court all relevant facts about himself, such as the family background, his criminal record if any or other facts which should be considered in mitigation of sentence.

A. MITIGATING FACTORS

After an accused person has been convicted of the offence charged with, where the sentence is not a mandatory one, he is given a chance to say something in mitigation, if any. It must be pointed out at the outset that mitigating factors are not defences. They do not affect the verdict, but might influence the court in determining the degree of leniency to be accorded to a convicted person.

Mitigating factors usually fall into two broad categories<sup>4</sup>:

- (a) relating to the degree of the offenders moral responsibility for his offences; and
- (b) his reformability.



The first category refers to situations where other factors aided or compelled an accused to act in a manner he did when he committed the offence.

The second category is concerned with the evaluation of the criminals potential for good behaviour in the future.

However, a court is not bound to give consideration to mitigating factors. It has a discretion to ignore facts in mitigation when the gravity of the crime or other relevant factors outweigh the individual circumstances of the offender. Thus in the case of Republic v. Steward<sup>5</sup> although the court on appeal, stated that it believed the accused was unlikely to commit another similar offence again, i.e. was reformable and that the best course from the accused's point of view, would be to allow him to continue with education and to receive disciplinary training, it felt that the need for general deterrence outweighed mitigating factors and therefore upheld the three years imprisonment sentence.

B. WEAPON USED

In cases of manslaughter and lesser assaults another relevant point to consider in a case is whether the weapon used was dangerous or not. In a 1941 Kenyan case, Rex v. Retif, Sir Norman Whittely, the then Chief Justice, pointed out that nature of the weapon used may be a circumstance proper to be taken into account when considering the difficult question of capacity to form the intent to cause death or grievous bodily harm without which the offence would not be a murder. In Rex v. Retif (Supra) a knife as used by the appellant was deemed dangerous.

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Where an offence results in injury it is imperative for the court to consider the nature and extent of such injury before awarding sentence. For instance if a man uses a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon. But where a dangerous weapon or instrument is used, which if used would produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party. Therefore where an assault or other unlawful act results in injuries well beyond what could reasonably have been anticipated, including fatal injuries, the assailant's sentence should be assessed according to the inherent gravity or likelihood of danger in the assault itself; rather than according to the gravity of the unexpected consequences. In R v. Wilson Munsha<sup>6</sup> the court stated that:

"One criterion in deciding whether a case of manslaughter calls for a substantial sentence is to ask oneself whether if the injuries inflicted had not turned out to be fatal, any ... serious charge would have been brought against the accused. If the answer is no, then a light sentence is called for. If the answer is yes, a substantial sentence is called for."

The Court of Appeal for East Africa applied this principle in R. v. Saidi s/o Abdalla.<sup>7</sup>

Here the accused, a youngman, got involved in a wordly argument with his step-mother over 50 cents. His younger brother tried to intervene in the quarrel and called the accused a bloody-fool. Angered, the accused boxed the ears of his younger brother and hit him twice on the body with his fists. Unfortunately the young boy had a swollen spleen, three times the normal size, which ruptured as a result of



the blows and eventually caused the boy's death. The accused was convicted of manslaughter and sentenced to four years imprisonment with hard labour. On appeal to the East Africa Court of Appeal, Sir Joseph Sheridan C.J. held as follows:

"The sentence is manifestly excessive in the act, which had its origin in a petty quarrel and had it not been for the deceased's abnormally enlarged spleen the probability is the case would have been to bind the accused over."

Sentence was set aside, and imprisonment for one day substituted.<sup>8</sup>

Similarly in R. v. Gabriel Alego Odhiambo<sup>9</sup> (unreported), the deceased was the father of the accused. On 24th day of November, 1976, deceased went outing after lunch and came in the evening with dry fish. He asked his wife to prepare it for him. The wife said she had no flour in the house except cooked potatoes. Deceased abused her saying "You woman with wet vagina".<sup>?</sup> Accused said do not shame us to the deceased. Deceased hit the accused with a stick. Accused took the same stick and hit his father who died instantly due to a fractured skull. Accused was aged twenty and had been in custody for one and a half years. In his judgment Cotran, J., sentenced the accused to one day's imprisonment after taking into consideration the unusual circumstances of the case.

It must not be thought, however, that just because the death or injuries resulting are unforeseeable, the offence should be treated as a minor one for in other cases it may be serious enough to justify a heavy sentence. Thus in R. v. Cliopas Kiptarus Trip<sup>10</sup>, the facts were as simple as follows: Both the



accused and deceased were employed at a sugar plantation as casual labourers. On 2nd May 1980 a quarrel between accused and deceased developed but stopped. On 3rd May, 1980 accused armed himself with a panga and ambushed the deceased, cut him on the neck and fled. The deceased died on the spot as a result of severance of major blood vessels. The accused was convicted on his own plea of guilty to manslaughter. In his judgment Scriven, J., said that:

"those who have weapons to kill cannot expect less than five years imprisonment. But taking into account the extreme provocation the accused was a victim of tribalism and has been in custody for more than six months now I think I can waive this to four years imprisonment."

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C. AGE

The age of the accused person or offender is also a very important factor in influencing punishment. Under our law S. 2 of the Age of Minority Act (Cap. 33 Laws of Kenya), provides that any person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.

An offender under the age of twelve years cannot be sentenced to imprisonment.<sup>11</sup> Moreover a young person above that limit and under sixteen should not be sentenced to imprisonment "unless the court considers that none of the methods in which the case may be legally dealt with ... is suitable."<sup>12</sup>



Particular efforts should be made to keep young offenders out of prison, because of the bad effects confinement and sustained contact with hard-core criminals may have on them. In Letoyiani v. Republic<sup>13</sup> Harris, J., said that the provision:

"is one of great importance and forms part of the effort by the state to divert young persons from the ways of crime before it is too late."

D. EQUALITY

Equality before the law and the independence of the judiciary is the foundation of the rule of law. In Kenya S. 82 (2) of the Constitution which is the Supreme law of the land provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

This principle of equality is echoed in the law of sentencing which is founded on the principle that, other things being equal, crimes of equal gravity deserve sentences of similar severity. If any differentiation is to be made between two accused convicted of the same crimes, it must be done on the basis of factors which are recognized as legally relevant for differentiation.<sup>14</sup> That is why any difference in the sentences awarded should be fully justified by particular circumstances of a case and the reasons for such discrepancy should be fully set out. In other words, equal criminals should be treated equally. In doing so courts will avoid arbitrariness, will facilitate rationalization, uniformity and consistency, making review by appellate court easier<sup>15</sup> and make justice more understandable, convincing and efficient.



It is in attempt to achieve some form of this consistency that the doctrine of precedent plays a very vital role. The doctrine of precedent requires that decided cases of Superior Courts should be followed by lower courts where similar issues and fact situations arise in later cases. However, it should be pointed out that in the case of Young v. Bristol Aeroplane Co. (1944) 2 All. E.R. 293 at p. 300 as quoted in Kiriri Cotton Mills v. Devani (1958) E.A. 293; Lord Greene, M.R., said as follows:

"That the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

The other factors which also influence sentence are repentance and if the accused is a first offender. In general, imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in an area. As far as the accused person is concerned it has been held that the degree to which an accused has facilitated the work of the police and of the courts may be taken as an indication of his repentance and willingness to reform. In particular, voluntary surrender, the furnishing of information to the police and a plea of guilty have been accepted as mitigating factors.

In an attempt to show that crimes of equal gravity should receive sentences of similar severity, the writer compiled a small table of decided manslaughter cases to support his propositions. The study covers the towns of Kisumu, Kisii, Kakamega, Nairobi and Mombasa. The reason for the writer restricting himself to the towns of Kisumu, Kisii and Kakamega is that the Court of Appeal sits in Kisumu when hearing appeals from both Nyanza and Western Provinces and this happened to be where the writer carried out his fourth term clinical programme. The other towns however, have been included for comparison purposes.



The study shows that crimes of violent deaths committed in these towns were committed by the majority of offenders under more or less similar circumstances with very slight variations.

The sample consisted of thirty cases decided by the High Court between 1979/1980. They were cases subsequently dealt with by the Court of Appeal on appeal on sentence.

The main weakness of this method of research is inherent in the appellate system itself. Only sentences considered as severe ones or manifestly excessive in the circumstances by the appellant are brought before the Court. Since this research is not intended to be exhaustive the data is sufficient to give a good idea of what criteria and reasons the Court uses in passing sentences, what the average sentence in various circumstances was and the most used weapons.

The table (see page 24) shows that in most homicides alcohol is always mentioned as having been present in the offender or the victim or both the victim and the offender by the majority offenders.

The problem as will be seen is the determination of the presence of alcohol in the victim and even the offender. While we cannot be wholly sure that those offenders who claim to have been drunk were actually drunk, we have little ground on which to stand in order to doubt their statement.

From the table of cases one can see that the majority of the accused persons advance intoxication as a 'defence'. There is also ample evidence to show that a great deal of violent homicides are committed or perpetrated by or against persons who are under the influence of alcohol<sup>16</sup>. This can be seen in the column showing the reasons for enhancement or reduction of the particular sentence on appeal by the Court of Appeal.



The study also shows that the average sentence awarded on appeal was five years imprisonment or more.

It also shows some similarity in the use of weapons by offenders. Spears, pangas, knives, sticks, axes, hoes are commonly used. For instance in Western and Nyanza provinces spears, sticks, pangas, knives, are the common weapons indicated on the table to have had been used in most methods of killing.

With an exception of a very few cases, such as killing by inflicting fatal blows, the majority of the offenders used the daily seen, touched and used objects in slaying their victims.

A close examination of the table will reveal that at this juncture it is important to note that our courts have, by and large, been lenient in cases of homicide and that in many cases where malice aforethought might be inferred by strict interpretation of statutory and case law a conviction of manslaughter is usually arrived at instead.

This is facilitated by one major problem. This major problem is the determination of alcohol and especially the degree in circulation at the time of the commission of the crime for under ideal conditions offenders and victims should be examined within twentyfour hours of the crime.

In most towns with the scarcity of qualified medical personnel and with the problems of communication an accused person may not be able to appear for examination for several days after the act. The police are not trained to take blood



samples for serological tests; and even if they were, in some cases the police do not get to the scene of crime for some days. For instance in Nyanza and Western provinces, there is only one Government pathologist. The only way alcohol may appear in a homicide case is either from the accused when he may give a statement and mention that he was drunk or was coming from a beer party or by the witnesses. This is also sometimes established by the postmortem report performed on the deceased.

Lack of adequate laboratory facilities in such cases and enough medical manpower is more reflective of the high rate of Courts' reduction of murder cases to lesser charges of manslaughter other than the courts being lenient.

Whether all the factors which were considered in this chapter as those that are to be taken into account in awarding a sentence were considered properly in the case of Sundstrom is the subject of the next chapter.

E. TABLE OF CASES OF MANSLAUGHTER  
CHARGES 1979/80

PLACE	CRIMINAL APPEAL CASE No.	HIGH COURT SENTENCE IN YEARS	COURT OF APPEAL SENTENCE IN YEARS	REASONS FOR ENHANCEMENT OR REDUCT- ION OF SEN- TENCE	TYPE OF WEAPON USED
1. KISUMU	10/1979	Life impris- onment	10	Offences reduced to manslaughter due to into- xication	PANGA

2. KISUMU	15/1979	Life impris- onment	8	Both persons were drinking together provocation self- defence.	PIECE OF WOOD
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PLACE	CRIMINAL APPEAL CASE No.:	HIGH COURT SENTENCE IN YEARS	COURT OF APPEAL SENTENCE IN YEARS	REASONS FOR ENHANCEMENT OR REDUCTION OF SENTENCE	TYPE OF WEAPON USED
3. KISUMU	30/1979	Death	5	Provocation	STICK
4. KISUMU	52/1979	6	6	Previous relevant convictions	KNIFE & RUNGU
5. KISUMU	54/1979	6	6	Drink; sentence not manifestly excessive	RUNGU
6. KISUMU	8/1980	7	7	Drink; sentence not manifestly excessive	SPEAR
7. KISUMU	9/1980	10	10	Not manife- stly excessive	HOE & STICKS
8. KISUMU	14/1980	14;10;8	10;8;8	No reason for disparity both drunk	PANGAS
9. KISUMU	29/1980	5	5	Drink	STONE
10. KISUMU	31/1980	3	3	Sentence not excessive; accused drunk	STICK
11. KISUMU	49/1980	4½	1	Self-defence	KNIFE



PLACE	CRIMINAL APPEAL CASE No.:	HIGH COURT SENTENCE IN YEARS	COURT OF APPEAL SENTENCE IN YEARS	REASONS FOR ENHANCEMENT OR REDUCTION OF SENTENCE	TYPE OF WEAPON USED
12. KISII	53/1979	7	7	Sentence not manifestly excessive, drink	FIREWOOD
13. KISII	51/1979	4½	acquitted or release	Self-defence	PANGA & SPEAR
14. KISII	2/1980	5	3	deceased started the trouble	PANGA
15. KISII	3/1980	4	release	drink	RUNGUS & PANGAS
16. KISII	16/1980	4	3 months	sentence showed unjustic	STICKS & SINI
17. KISII	25/1980	5	5	Drink; sentence not excessive	STICK
18. KISII	34/1980	2	released	Non Action	-
19. KISII	36/1980	5	5	sentence not manifestly excessive	JEMBE
20. KISII	50/1980	3½	3½	Affray	KNIFE

PLACE	CRIMINAL APPEAL CASE No.:	HIGH COURT SENTENCE IN YEARS	COURT OF APPEAL SENTENCE IN YEARS	REASONS FOR ENHANCEMENT OR REDUCTION OR SENTENCE	TYPE OF WEAPON USED
21. KISII	54/1980	8	5	Took into account offences with which accused was not charged	SHARP INSTRUMENT AND PANGA
22. KISII	62/1980	5	5	accused was drunk; sentence not excessive	KNIFE
23. KISII	63/1980	3	3	sentence not excessive	STICK
24. KAKAMEGA	74/1979	8	5	Drink	RUNGUS & PANGAS
25. KAKAMEGA	53/1980	3½	3½	Drink; sentence not manifestly excessive	PANGA
26. NAIROBI	7/1979	8	8	Drink	BLUNT INSTRUMENT
27. NAIROBI	18/1980	4	4	Drink; sentence not excessive	SWORD STICK
28. NAIROBI	26/1980	12	12	Drink (Changaa) sentence not excessive	IRON-BAR



PLACE	CRIMINAL APPEAL CASE No.:	HIGH COURT SENTENCE IN YEARS	COURT OF APPEAL SENTENCE IN YEARS	REASONS FOR ENHANCEMENT OR REDUCTION OR SENTENCE	TYPE OF WEAPON USED
29. NAIROBI	33/1980	6	2	sentence manifestly excessive; self-defence	-
30. MOMBASA	40/1980	10	10	sentence not manifestly excessive; drink.	FATAL BLOWS

CHAPTER III

THE SUNDSTROM CASE ANALYSIS

Murder, according to the Penal Code of Kenya is committed when any person who of malice aforethought causes the death of another person by an unlawful act or omission. Malice aforethought is deemed to have been established by evidence proving any one of the various circumstances:

(1) an intention to cause the death of, or to do grievous harm to any person, whether such person is the person actually killed or not,

and

(2) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or a wish that it may not be caused.

A.

In the case of Republic v. Frank Joseph Sundstrom,<sup>1</sup> the two factors mentioned above were argued to be missing and thus a plea of 'guilty' to manslaughter was accepted. The facts of the case were stated in the judgment. On September 30, 1980 HARRIS J., read the following judgment of the Court:



"The accused, Frank Joseph Sundstrom, having pleaded 'guilty' to the offence of manslaughter of one, Monica Njeri, on 3rd August, 1980, was convicted of the offence and comes up now for sentence.

The facts as disclosed to this court are taken principally from some evidence given in the Magistrate's Court on a Preliminary Inquiry and from a statement made voluntarily by the accused who is 19 years of age, to a superintendent of police in Mombasa. The accused has been a member of the United States Navy since July 1979 and, while serving as a fireman apprentice on board the U.S.S. La Salle, arrived as a member of the crew on 3rd August 1980. Within a few hours of his arrival, never having been in this country before, he found himself in a night club known as the Florida Club where he purchased some beer and made the acquaintance of a girl named Mwangi who agreed to sleep with him for a sum of Shs.100/-. This she did in a room to which she brought him in another building some distance away named 'Florida House'. They then returned to the night club after which Mwangi brought another man to Florida House and slept with him.

On his return to the club the accused met Njeri, who was a friend of Mwangi, and with whom he drank some beer and partook of some marijuana or bhang. Njeri also agreed to sleep with the accused in return for a consideration of Shs.300/- and together they went to another room in Florida House, purchasing a further supply of beer on the way. Having had intercourse together the accused and Njeri consumed more beer after which they came to blows, he apparently having taken money from her purse, and so violent was this drunken fracas that he smashed a bottle on her head and jabbed her with the broken bottle inflicting the wound from which she died. He was also slightly injured.

I have no doubt that Njeri was a prostitute and that her association with the accused arose in the course of her trade as such. It appears that she had had regular health examination a few days before she met the accused. Nevertheless she was entitled to live her life as she saw it and to be protected against violence at the hands of her customers.

The matter was from the outset treated very seriously by the United States Naval authorities who, together with the accused himself, have given every assistance to the police in their investigations.

In view of the somewhat unusual nature of the case and of the fact that the accused is not a resident of this country and in order to ensure that, as the expression goes, justice shall not only be done but be manifestly seen to have been done, I will set out very shortly some of the principles applicable to the sentencing of accused persons and relevant to this matter.

The first principle is the condemnation of breaches of the criminal law in general, in particular of any breach which is established before the court. In the present case we have a conviction on a charge of manslaughter contrary to the provisions of section 202 of the Penal Code. This is one of the most serious offences known to the law. It ranks next to murder and carries a possible sentence of imprisonment for life. Nothing that I say in this judgment is to be taken to indicate a lessening in any way of the measure of disapproval with which such an offence is regarded.

The second principle is to try and ensure so far as possible by the imposition if necessary a deterrent sentence or otherwise, that a crime duly established and brought home to the accused will not again be committed by him.



The third principle is to endeavour to bring about the reform of an accused person who has been convicted, and his restoration to that path of proper behaviour in public and private from which, in commission of his offence he has strayed.

Immediately before the trial opened on Friday last I convicted another young man of a similar offence of manslaughter. He was a young lad from this Coast Province of Kenya who brutally killed his acquaintance by stabbing him with a knife during or following a struggle. He pleaded 'not guilty' to a charge of murder and, on the prosecution agreeing with the approval of the court to accept, if offered, a plea of 'guilty' to a reduced charge of manslaughter, he admitted that offence and was convicted on his plea.

A dominant feature of that case was that both the accused and his victim had been together in the house of one of them drinking alcohol in some form or other until apparently both of them became intoxicated that all self-control was lost and a fight began between them in the course of which one, the accused, killed the other.

The accused in that case was 20 years of age, had no previous convictions of any kind against him, was deeply and genuinely repentant and ashamed of what he had done. In these circumstances, bearing in mind the second and third of the principles to which I referred, I considered that the appropriate course to follow was to seek the assistance of the court's probation service in Mombasa.

I have therefore referred that matter to the probation officer and I await his report as to whether, after visiting the accused in prison and also writing his family at home, he feels that the accused in that case would be a suitable person to be placed on probation and be under the vigilance of the

As will be seen there is a measure of similarity between that case and the present. In each the offence was committed during a state of extreme intoxication, induced by alcohol in the first case and by alcohol and possibly drugs in the present case. Neither of the accused has had any previous convictions so far as is known; the accused in the present case is even younger than the accused in the earlier case, and I treat him as genuine and sincere the feeling of sorrow and regret to which each has given expression.

The present accused, however, is not a resident in this country and also has no home. No proper use could be made in his case of the probation service if I were minded to seek its assistance. In endeavouring to follow the second and third principles to which I have referred I must have regard to the fact that Counsel for the prosecution indicated that his readiness to accept the plea to manslaughter was based upon the circumstances that, so far as could be seen, the offence was committed while the accused was in such a state of intoxication as to be out of control of his actions and presumably unaware of what he was doing. I am prepared to accept that assessment.

I bear in mind also the evidence, both oral and written tendered in Court and not challenged as to the history of the accused, and I have reached the conclusion that in committing this offence he was acting in a manner contrary to his general character. In so doing I have been strongly influenced by the letter dated 22 September 1980 from Captain Barnsen, the commanding officer of U.S.S. 'La Salle', which I am grateful.

After a careful consideration of the matter I am satisfied that the correct order to make is to direct the accused, as I now do, to enter into his own recognisance without sureties in the sum of Shs.500/00 conditioned that he shall keep peace<sup>2</sup> and be of good behaviour for the next two years while in this country. Upon the execution of this recognisance he may be released and



discharged and, so far as this court is concerned this matter will be brought to an end."

It is this sentence that raised a lot of public criticism. The string of criticism in the Sundstrom's case could have been of less intensity if the learned judge had not asserted that it was imperative that justice was not only done, but was to be seen to be manifestly done.

The immediate reaction was: If justice was done, for whose benefit? The country's legal system or Sundstrom?

The public in Kenya have never been so critical of a judicial decision in the history of independent Kenya to the best of my knowledge. In analysing the reasons as to why the judge was so lenient in the Sundstrom case one cannot, but have recourse to the reasons given by the learned judge in his judgment and the established precedents.

Some judges seem to be aware of the utility of expressing their reasons and, even as far as passing sentence is concerned, they follow this advice given by the Master of Rolls, Lord Denning.

"I say to all judges: give reasons for your decisions, for if you give no reasons it will be construed as judgment given without reason and an unreasonable one.

We must give our reasons not only so that if we are wrong a higher court can upset us but so that the public can learn of the basis on which our decisions, are based and that upholds the standard of justice."

However, this is so in theory, (for it is one thing to state some rules and principles that should be adhered to and a different thing to ensure their observance) experience has shown that the so called principles of sentencing are flagrantly flouted.

In his judgment, Harris, J. stated that:

"I must have regard to the fact that Counsel for the prosecution indicated that his readiness to accept the plea to manslaughter was based upon the circumstance, that so far as could be seen, the offence was committed while the accused was in such a state of intoxication as to be out of control of his actions and presumably unaware of what he was doing. I am prepared to accept that assessment."

With due respect to the learned judge, it is submitted that he based his judgment of an erroneous interpretation of the law. This can easily be deduced from the mitigating factors which influenced the judge in arriving at this judgment. These are:

B. INTOXICATION

The most important mitigating factor in the case was intoxication. The judge, admitted that he was influenced by the State Counsel's indication that he readily accepted a plea of manslaughter because he believed the intoxication factor. There was however, according to the writer enough evidence to indicate to a reasonable person that the accused was not too drunk as to lose his awareness as the judge so readily found. This can be gathered from the mind of the accused at the time of commission of the crime.



The accused had by then easily:

- (a) realised he had been given a raw deal;
- (b) stolen the money from the deceased's handbag while she slept;
- (c) dressed up while the deceased slept;
- (d) told the deceased he was leaving;
- (e) remembered exactly how he inflicted the fatal injuries;
- (f) realised he had killed her and determined that the best option was to run;
- (g) Got a taxi and returned to the club;
- (h) concealed the blood stains on his shirt by applying dirt to those stains and;
- (i) told a perfectly reasonable lie about being mugged.

This must be a fortunate coincidence that would enable a man 'too drunk to know what he was doing' to systematically do or remember all those things without a flaw.

With due respect to the learned judge it is submitted that the assessment which he readily accepted from the state counsel, was based on an erroneous interpretation of the law. S. 13(1) of the Penal Code (Cap. 63, Laws of Kenya) provides that intoxication shall not be a defence to any criminal charge except as provided in that section. By sub-section (2) the defence is available to a person who, at the time of the act or omission in question did not know such act or omission was wrong or did not know what he was doing and either:

- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person or
- (b) the person charged was by reason of intoxication insane, at the time temporarily or otherwise, at the time of such action.

Where it is established that the, accused owing to intoxication, did not know that what he was doing was wrong or did not know what he was doing, then if the intoxication was caused without his consent as per the provisions of S. 13(2) (a) it is mandatory to discharge him.

S. 13(3) Penal Code provides that if on the other hand the defence is that the accused was temporarily insane as per S. 13(2) (b) the provisions of the Penal Code and the Criminal Procedure Code<sup>4</sup> would apply.

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From the conduct of the accused in the Sundstrom's case the provisions referred to above apply and therefore deprive the accused the defence because from the facts of the case he was neither forced to get intoxicated either through beer or bhang nor did he claim to have been temporarily insane and if he did, he did not prove insanity on a balance of probability as required by law.

The judge may have had in mind the provisions of S. 13(4) Penal Code which reads:

"intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

Under this sub-section, it would have been perfectly lawful for the state counsel and the court to accept a plea of manslaughter if the provisions of S. 13(2) were satisfied, in that the mental element of malice aforethought required in murder offences would have been lacking. But as I have endeavoured to show the provisions of S. 13(2) were not met and by S. 13(1) the defence of intoxication was not applicable in the case and therefore the prosecution, it is submitted, erred in law in basing its ready acceptance of the plea of manslaughter on the grounds of intoxication contrary to S. 13(1) Penal Code. In so far as the judge was prepared to accept that assessment he must too be taken to have erred.

C. SELF-DEFENCE

The judge seems to have believed the accused's story that the deceased attacked him first. He seems to have accepted the implied defence of self-defence for in his judgment he makes the point that the accused was slightly injured. This defence cannot hold in this case as it was the deceased who was in defence of her property, the accused having already stolen her money. This it is submitted she was perfectly entitled to do under the principles of English Common Law which apply in Kenya by virtue of S. 17 of the Penal Code. More to that can it be self-defence to retaliate with a bottle against the fists of a weaker assailant. And if so is it not excessive force, and therefore does not the defence disappear?

D. AGE

The factor of age seems to have weighed heavily on the mind of the judge for in his judgment he emphasised that the accused in this case was younger than in the earlier case which he chose to use as precedent yet it was still undecided. It should however, be noted at the outset that our law classifies nineteen year olds as adults.<sup>5</sup> Therefore if reform and deterrence were factors to consider in this case then it would be that the best age to deter and reform an offender is an early age according to the views shared by various penologists. On this point the relevant case which would have had special application here is the case of R. v. Steward (Supra) in which a custodial sentence was awarded.



The judge in this case set himself high standards to fulfil. He correctly directed himself as to the principles of sentencing applicable to the case. However, he did not follow those principles. It does not take a lot of imagination to see that the sentence he awarded could neither help deter the killer or others nor could it contribute to his reformation. For instance even if we were to accept the drunken theory, was it enough to let the accused free?

On judicial precedent, the answer is a resounding NO. In Odongo Onegi v. R<sup>6</sup> the appellant who had been drinking changaa from morning to evening, was convicted of manslaughter on his own plea by the High Court. The Court rejecting the defence of drunkenness, sentenced him to life-imprisonment. On appeal to the Court of Appeal the court held that the High Court rightly rejected the defence of drunkenness. However, they reduced the sentence to eight years.

In David Mwaura s/o Kamau Mushack v. R, the High Court sentenced the appellant to nine years imprisonment. On appeal, the court said drunkenness was not an excuse, but considered it. They reduced the sentence to five years. There were numerous cases that the judge could have referred to<sup>7</sup>. However, the judge chose to ignore them and instead quoted his own ~~unreported~~ <sup>unreported</sup> case to support an action he seems to have been determined to carry out - set the accused free.

The judgment also shows that the judge readily treated "as genuine and sincere the feeling of sorrow and regret to which each has given expression." He gave no reason except his belief in the accused. The reason why he felt so sure the regret and sorrow was genuine in this particular case was not set out. Be it as it may, that was no excuse to let the accused free.

In Benson Mbugua Kariuki<sup>8</sup> the accused was sentenced to death by the High Court. On appeal, the Court of Appeal quashed the conviction for murder and found him guilty of manslaughter and sentenced him to ten years imprisonment. The court accepted the accused's defence of provocation. The Court also found that the accused's "statement gives us the impression of being a full confession of a thoroughly repentant man ...". Nevertheless, this did not deter them from sentencing him to ten years. It is submitted that repentance alone is not and should not be a bar to a deserved sentence; it is only a mitigating factor.

Mr. Justice Harris, also readily reached the conclusion that "in committing this offence the accused, was acting in a manner contrary to his general character." In doing so, he was strongly influenced by a letter from the captain of the killer's ship. It is submitted that the fact that the killing was a deviation from the accused's normal character is and has not been a bar to a deserved sentence, for after all the whole of criminal law is based on penalising those who deviate from the norm of innocence.

But in fact the learned judge ignored the evidence of one of the witnesses at the Preliminary Inquiry to the effect that the same night the accused had also tried to steal her money, evidence which was not contradicted or denied; that the accused was a confessed thief having stolen Njeri's money and later killed her when she tried to recover it; that the killer was also facilitating prostitution and finally the accused had admitted to lying twice to his superior officer.



After considering all aspects of this case and the reasons advanced to justify this decision, it is my humble submission that the learned judge's sentence did not come even near the pedestal of justice he had laid down himself in setting out the principles of sentencing. Worst of all, the sentence never met the principle that justice must not only be done, but manifestly be seen to have been done..

Judging by the public outcry against the judgment, one cannot but conclude that injustice was not only done, but was manifestly seen to have been done.

After demystifying the reasons and principles set out by Mr. Justice Harris in his judgment in the Sundstrom case and subsequently letting him scot-free, the question to be posed at this junction is why was this case decided that way? The answer to this question is the subject of the next chapter.

CHAPTER IV

*have you shifted to a new dissertation?*

THE DEMYSTIFICATION OF THE INDEPENDENCE  
OF THE JUDICIARY IN KENYA

The cardinal word in this chapter is 'Demystification' and at the outset we must demystify the word. The demystification of law is not a new idea. Bentham sought to demystify his bourgeois law.<sup>1</sup> The meaning of the word was given to mean simply the tearing aside of the veil of mystery so as to exhibit these claims about the nature of social institutions as an illusion if not fraud; and such 'demystification' is according to radical thought, a necessary step for any serious critic of society and an indispensable preliminary to reform.<sup>2</sup> Undeniably this meaning tends to suggest reforms within existing society and hence, the social institutions which stand as illusions are to be reformed within that society. In demystifying the law we seek to lay bare the essence or substance of our society. We attempt to achieve this object by highlighting the role of our law and state institutions such as the courts in maintaining the status quo.

Therefore after ascertaining the reasons purportedly relied on by Mr. Justice L.G.E. Harris in the chapter preceding this one under the guise of wide discretionary powers accorded to judges in setting the accused scot-free by ordering him to sign a bond of Shs.500/- promising to be of good behaviour for a period of two years, the question that arises is whether the judiciary was independent in this particular case?



Much was said on the matter and it was very clear that the Kenyan people openly condemned the unjust decision of the Court. As has already been pointed out in the press, that the issue was of greater national importance than the way it was being shown, the writer's concern in this chapter is to argue that the issue was not that of Mr. Justice Harris making an unjust decision but the present conditions that allow him to arrive at such decisions. These conditions are reflected in the structure of our socio-economic set up and the choice of personnel within the judiciary of Kenya and other state institutions. The writer will therefore be concerned with precisely what is meant by an 'independent judiciary' in a class society like Kenya.

But before we can understand the decision in the Sundstrom's case and whether the judiciary was independent or not we must be aware of the function of the law and related social institutions in a class society like Kenya and it is only against such a background that we can draw real conclusions.

Law in Kenya should be read and analysed within its historical and socio-economic context. Such analysis should help lawyers and laymen alike to know their society and its enemies, immediate and potential. This is because one way by which makers of bourgeois societies strive to maintain themselves in power is through the legacy of mystification of the laws that they enact from time to time to 'regulate' the conduct of societies they control. These laws are both its property and an instrument for maintaining it in power. This is so because in the final analysis bourgeois laws are made to protect the bourgeoisie. Mystification of the law is therefore a necessary weapon with which the bourgeoisie can 'handle' or deal with the non-bourgeois majority.

The present Kenya state is part of the imperialist states. The 'state' is the dictatorship of the bourgeoisie and its political arm. The content of the state and its role in imperialist domination has to be understood to avoid usual deviations. Such deviations see the state either as a reconciliator or mediator of class struggles in the society or its apparatus performing different roles. The birth of the state also gives birth to law.

Law can thus be defined as 'a system of juridical standards and prescriptions expressing the will of the ruling class and protected by the coercive powers of the state.'<sup>3</sup> The state is therefore the dictatorship of the ruling class.

This now brings us to the place and role of the judiciary in such a state.

#### A. THE JUDICIARY WITHIN A CLASS SOCIETY

An independent judiciary is a judiciary that is free from the whims of either the executive or the legislature. If the judiciary is not independent of these two powers, the individual's rights and liberties would be encroached on and suppressed with impudence with no fear for intervention from the judiciary.

An independent judiciary is deemed to be one which bases its 'decision on a predetermined normative premises' (and not because of pressure being exerted on it).<sup>4</sup>



The Presidential Commission on the establishment of a Democratic One Party State in Tanzania offered a definition and functions of an independent judiciary. It was stated that:

"What is essential for maintenance of the rule of law is that judges, and magistrates should decide cases that come before them in accordance with the evidence. They should not be influenced by extraneous factors. In criminal cases they should not convict or acquit because they believe that a particular verdict will please the government. In civil cases they should not consider the relative importance of the parties or the political consequences of their decisions. Their job is to find the facts and apply the relevant principles of law."<sup>5</sup>

But the independence of the judiciary is not an abstract concept. The judiciary in fact cannot be abstracted from the Kenyan peoples' traditions and history that have evolved the present thoughts and aspirations of the people for a national life-style free from foreign domination. The concept of justice is central to the achievement of these national aspirations and it has always been the concept of freedom and justice that has led the peoples' struggles against oppression.

Therefore what we must also ask is whether the whole concept of an independent judiciary is illusory?

It is a well known fact that judges are members of the ruling class by birth or assimilation (regardless of what class that may be) and hired employees of the state who depend on the coercive power of the executive for enforcement of their decisions.<sup>6</sup>

To disregard these conditions ~~is~~<sup>in</sup> an attempt to be totally independent would make the judges' function meaningless and further mystified.

It is therefore submitted that the doctrine of separation of powers into legislative, judicial and executive parts as accepted by Western Societies and in African countries where it has been exported serves little purpose since the three organs are manned by members of the same economic class with the same thinking, and therefore the same fundamental interests.

Since therefore, the law does not operate in a vacuum, but in society state institutions such as the courts, legislature, etc. should be analysed on the ground in order to understand their proper role in our society. The institution we are discussing in this paper clearly also shows the class content which it represents for it too does not exist in vacuum.

It is therefore not sad to note that in certain instances in practice courts do uphold convictions or disregard the law where irregularities have been effected. The fact that courts convict or acquit persons despite the irregularities raises one general assumption. This assumption is that there is pressure from some quarter to convict or acquit the persons on political or other reasons, regardless of the breach of procedure or disregard to the relevant law. This is effected through wide discretionary powers accorded to judges under institutions of such societies.



Every now and then members of the judiciary and parliament keep on stating in press interviews that they are not aware of cases where the judiciary was influenced by the executive or the legislature in giving certain judgments.

It is submitted that nowhere in the course of reported and unreported cases alike does the judiciary state expressly that there has been influence on it to secure a particular conviction or make a particular judgment. Any exercise geared towards proving allegations of executive influence on the judiciary necessitates one to 'read between' the lines' and come to a conclusion as to whether the same facts in a different case, in the absence of any influence the judiciary would have come to the same conclusion.

Despite the contention of the members of the judiciary, the legislature and those of the executive that Kenya's judiciary is the most independent and the most shining example in Africa, past and recent cases have arisen where it has been felt that extraneous factors may have played a part in the decision of those cases. Although criminal in nature the circumstances surrounding such cases involved some politics. It is the intention of the writer to briefly examine them and make some observations on them as to the likelihood of the influence of such extraneous factors on their outcome and also examine the case of Republic v. Frank Joseph Sundstrom<sup>7</sup>.

#### B. CASE ANALYSES

It should be noted at the outset that in order to understand the atmosphere surrounding these cases or trials, one must have the then political situation in the country in mind.

On 2 March, 1975 the Member of Parliament for Nyandarua North, Mr. Josiah Nwangi Kariuki, popularly known as 'J.M.', an outspoken critic of government, was murdered by unknown persons at Ngong Hills, near Nairobi. His murder was not revealed until almost a week later on when the matter was raised in the National Assembly.

The feeling at the time in Parliament and out of it was that the persons in authority were behind the alleged murder. Members of Parliament openly criticised and heaped the blame of the murder and the subsequent attempt to cover it up on the government. The political atmosphere both in Nairobi and in the countryside became very tense. Students at the University of Nairobi defied the Presidential decree banning boycotts and went on a boycott-cum-demonstration for days carrying placards and slogans that were evidently anti-government.

After the funeral, a unanimous resolution was passed by Parliament for the formation of a select-committee comprising mostly of members of parliament and some legal advisers to investigate and prove the movements of the deceased prior to his death in an attempt to discover his killers.

The case of Republic v. Robert I. Martin<sup>8</sup> arose as a result of rioting at the University of Nairobi that led to the arrest of 94 students and the closure of the university on 28 May 1975. The riots were a result of a student-police confrontation arising from a scuffle between two plain clothes policemen and students which resulted in the formers documents being confiscated by the students and the two students being arrested. An exchange had allegedly been agreed to, that the police produce and release the two students in exchange for their documents: It is important to note that the political climate in the country at this time was very tense, following the outcry over the murder of J.M. Kariuki.



The 94 students arrested were charged with rioting after proclamation an offence that carried life imprisonment.<sup>9</sup> These were however later released by a Presidential order.

The accused in Republic v. Martin was a constitutional law lecturer in the Faculty of Law at the University of Nairobi. He was arrested on the day following the riots and charged with creating a disturbance likely to cause breach of the peace.<sup>10</sup> It was alleged that on 26 May, 1975 at the University of Nairobi, he behaved in a manner likely to cause a breach of peace by uttering to Sergeant Musyoka of the Police the words 'You Police are as stupid like your father Kenyatta' which was later amended to read 'You Police are as stupid like your father.'

He pleaded not guilty. An application for bail was refused on the grounds that the situation was still serious at the University and that it would be unsafe to grant it.

The importance of Martin's case is the insight it gives into the independence of the judiciary in Kenya. On the face of it, it would seem to be a usual case or a mere change of plea from not guilty to guilty. But as he himself later indicates,<sup>11</sup> the change of plea was not a voluntary action but was a result of pressure brought upon him in what he terms as 'plea-bargaining.' In other words, he was advised that if he pleaded guilty, he would only be fined and later released but if he did not plead guilty he would surely be convicted.

In Republic v. Chelugat Mutai<sup>12</sup>, the accused was charged with incitement to violence and disobedience to law.<sup>13</sup> It must be noted that her case was viewed by many people as having had political motivations behind it.<sup>14</sup> This was thought to be so because her arrest and subsequent trial leading to conviction came soon after she had questioned the government tactics which preceded the detention of former deputy speaker, Mr. Jean Marie



Seroney and the former and present member for Butere, Mr. Martin Shikuku."<sup>15</sup> It was alleged that on 12 September 1975, at Keroroti Primary School, in Uasin Gishu District, during a Harambee meeting she incited a number of people who as a result of this incitement, proceeded to uproot sisal on the estate of a Mr. Shah. The case came before Mr. Dhir, Senior Resident Magistrate, Nakuru. The prosecution stated quite clearly that the case was purely criminal and that it had no political connotations whatsoever.

It was held on the facts so established, that she was guilty of the charge and subsequently so convicted and sentenced. An appeal to the High Court was filed. The main ground for the appeal was that the trial Magistrate erred in admitting evidence of the character of the accused person as per S. 57 of the Evidence Act.<sup>16</sup>

The prosecution had sought to show her past character in an attempt to prove that she was both anti-authority and a radical. Defence counsel submitted that such evidence had a 'prejudicial effect on the accused person' and that it outweighed its probative value and that in the interests of justice it should have been excluded. The court in considering whether the admission of this evidence did in fact cause a failure of justice stated that:

"after a careful consideration we agree with Counsel for the Republic that the admission of evidence in question, while improper, did not in fact prejudice or cloud the mind of the Magistrate, since he was at pains to correct the matter in his judgment.<sup>17</sup> We are satisfied again after due and careful consideration that the admission of the evidence did not occasion a failure of justice."

The appeal was dismissed.



Similarly in yet another case in Republic v. Mark Mwithaga<sup>18</sup> the accused was charged on three counts. The first was that of assault causing actual bodily harm.<sup>19</sup> The second and third counts were wilful and unlawful damage to property.<sup>20</sup> Almost twenty months later after this offence, the accused was arrested while attending a passing out parade at the Nakuru Army Training School.

The prosecution contended that the police force had been 'pressed' by the complainant to dispose of the case since she had been awaiting for twenty months to get justice. The defence counsel submitted that the case was a simple assault case. He tried to see the accused whilst in remand so that he could prepare his defence but had been repeatedly refused access. He therefore sought to be allowed sufficient time for preparation of the defence and also so that the accused be allowed to contest the by-elections due that approaching weekend.<sup>21</sup> In any case he contended, since the case took the prosecution twenty months to prepare, he did not see why the accused should not be given adequate time for the preparation of his defence, since this was a constitutional right.<sup>22</sup>

The Court ruled that since 'justice must be done in all cases and it must be done promptly and swiftly, and "that justice delayed is justice denied", the case must proceed to be heard the same day.' In fact, it continued to be heard that afternoon despite an appeal against this ruling to the High Court at Nakuru.

Counsel's attempt to have the case transferred to another Magistrate was held to be delaying tactics and consequently refused.

Request for bail was turned down because the trial Magistrate felt it unsafe to grant it under the circumstances.

In his judgment the learned trial Magistrate<sup>23</sup> rejected the contention that the case against the accused was politically motivated with a view to barring up his chances of getting re-elected at the by-election. He did not however, address himself to the issue of the alleged confinement but was convinced after considering the evidence 'very carefully' that the accused was guilty of the offence so charged. He was accordingly sentenced.<sup>24</sup>

Nevertheless the accused won the by-election while in prison just as the late Bobby Sands won a seat while also in prison in Northern Ireland.

An appeal to the High Court<sup>25</sup> listed 23 grounds, including inter alia, that there was an error in law in denying the appellant sufficient time to prepare his defence and the refusal to transfer the case to the appellant's request.

In dealing with the ground of sufficient time for the preparation of defence, the High Court noted that:

"We are unable to say that the manner in which this trial was brought on, though it might in circumstances have resulted in prejudice, prevented the appellant from having a fair trial, and we are satisfied that, in all circumstances, he did have adequate time and facilities to prepare and make his defence to these charges ... Accordingly, as we see it there was no infringement of the Constitutional provision which counsel for the appellant cited to us ..."<sup>26</sup>



Another appeal to the Court of Appeal for East Africa was made.<sup>27</sup> Holding that although the court does not condone acts of violence, the punishment of 2 years and 18 months respectively imposed on the appellant for the offences was out of proportion to the crimes committed. The 18 months imprisonment on counts two and three was quashed. But the appeal on other grounds was dismissed.

In this case, it is difficult to appreciate the dismissal of the appeal when from the judgment it can be seen that the judges were in considerable doubt as to whether the proper procedure was followed. Any benefit of doubt in criminal cases goes to the accused person and not to the prosecution.<sup>28</sup>

It is not possible, given the political atmosphere in the country at the time of the trials of Mwithaga, Chelugat and Robert Martin, to believe that the learned judges especially in the case of Mwithaga were so naive as to suggest that the fact that Mwithaga's trial came up during the week in which he was supposed to campaign for a by-election were mere 'coincidences.' It would not be true, and neither would we venture to suggest that judges, and those in Kenya are no exception, are unaware of both the political and social conditions of the society in which they operate.

I am unable to appreciate why the court which knows the appropriate laws all it does is either to hide behind the judicial discretion in the form of S. 361(5) of the Criminal Procedure Code, or states that in its consideration there was no miscarriage of justice occasioned.

C. THE SUNDSTROM CASE

The Sundstrom case can only be understood if viewed against the aforementioned background. Although the racial bias cannot be totally ruled out, specifically it was neither the racial<sup>29</sup> nor the sexual bias in itself, that influenced the judge's and the state counsel's decisions.

In this infamous case Mr. Justice Leslie Gerald Eyre Harris was faced with two conflicting interests viz to protect the interests of his own class, and at the same time protect members of the public from murderous criminals such as the accused in this case. It is not hard to tell from the judgment which particular class he in fact did protect.

There is no doubt that Kenya's modern history is the history of domination of our country by imperialism. The essence of imperialism in Kenya is the total domination of our country by finance capital which capital is owned by industrial-financial groups in the countries in the enemy camp. These groups own the means of production in our country, exploit our people and monopolise our market.

To camouflage exploitation, domination and oppression these groups have set up industries as well as military bases in Kenya. Such developments, consequences and struggles are inevitable and have been analysed by renown<sup>30</sup> revolutionaries. Our people have learnt lessons from their struggles in the past<sup>31</sup> and will persist with iron-determination to liquidate foreign domination in Kenya.



One of such dominating imperial powers is the United States of America. There is no doubt that there was some U.S. Government influence in the general trend of the Sundstrom's case due to the American imperialist influence over Kenya. This conclusion can be drawn from the way the case was handled right from the beginning to the end.

The first inference can be drawn from the speed of the court proceedings. The court proceedings were speedy indeed considering that cases like this usually take an average of a year to conduct. Of course nobody would wish to advocate that cases of this nature should be prolonged especially taking into account the obvious psychological suffering experienced while awaiting trial in a remand prison.

Another peculiar feature of this case is that the killing took place on August 3, 1980 and yet it was only on August 9 that Sundstrom was actually handed over to the police by the American authorities. This could not have happened in case of an ordinary mwananchi.

A naval investigation team had to be specifically flown from the United States to talk to Sundstrom before our police could be allowed to interrogate him. The reasons for this are not clear as an ordinary mortal would have been arrested immediately once his whereabouts were known.

Mr. Justice Harris said in his judgment that:

"I bear in mind also the evidence, both oral and written, tendered in Court and not challenged as to the history of the accused, and I have reached to the conclusion that in committing this offence he was acting in a manner contrary to his general character. In so doing I have been strongly influenced by the letter dated 22 September, 1980 from Captain Barnsen, the commanding officer of U.S.S. 'La Salle', which he kindly sent to the Court and for which I am grateful." 32

The reason as to why the learned judge believed in the letter from the killer's ship about his character nobody knows and one wonders who was supposed to challenge the oral or written evidence tendered before the Court other than the State Counsel who already knew what was happening. Also if the accused was so good why was he not taken back on the ship later?

The most striking factor came when the trial judge let a self-confessed murderer go scot-free and to add insult to this injury The American Embassy spokesman Mr. Fordney stated that the U.S. government had no obligation to the welfare of Monica's children. He also made it clear that neither the U.S. navy nor Sundstrom himself had any obligation over the same.

It is therefore submitted that whereas it behoves our legal system to ensure that the machinery of justice is fast not only for Sundstrom but for all people it is clear now to know what extent of pressure was exerted by the U.S. Government in dealing with the Sundstrom case and therefore it seems safe enough to state that there were certain aspects of this case which made it quite special that read between the lines one cannot but conclude that the judiciary was not independent as in the other cases.

It is therefore submitted that there was pressure from the circumstances surrounding this case and the accused being an American subject was simply a beneficiary from the extreme imperialist control and foreign domination that his country exercises over Kenya. It was therefore easy for the American expectation that its national would be favourably dealt with to be realised in the type of sentence actually received.



Thanks therefore goes to the cases of Republic v. Frank Joseph Sundstrom (supra) and Republic v. Jackson Munyalo, Elliot Munyoki Kitheka, Simon Kivindiyo Makau, Paul Kiteme, Wario Karasa and Charles Misiyo<sup>33</sup> that show that law, courts and justice are concepts which are no longer mystified.

D. CONCLUSION

RECOMMENDATIONS AND SUGGESTIONS

We saw that much has been said on the Sundstrom case and it is now clear that the Kenyan people i.e. the wananchi, members of parliament and the Honourable Attorney-General, have condemned the decision of the Court. It was also submitted that the responses to the Sundstrom's case are only reflections at one level of the peoples' frustrations at the extent of foreign control of national institutions and through them the national life-style.

There has been always a body of opinion to the effect that of the three organs of the Kenya Government, the Executive the Legislature and the Judiciary, the Judiciary is the least Africanised today. That the racial composition of the judiciary with 6 Africans, 2 Asians and 11 Europeans in the High Court according to African lawyers and political observers is not wholly appropriate in serving the interests of an independent African government.

This uncomfortable feeling to the fact that the judiciary or bench is dominated by white judges has prompted lawyers and politicians to suggest that the judiciary must be totally Africanised for it is long over due.<sup>1</sup> Although Africanisation of the judiciary is not a bad recommendation or suggestion to pursue, it must be noted that in any system, whether traditional, colonial, neo-colonial or socialist, the most important crucial issue for those in power is how to preserve themselves in power, and perpetuate the prevailing socio-economic structure. To achieve this goal, the ruling class not only relies on its coercive powers, but also on its persuasive powers.<sup>2</sup>



Education is the major weapon in the battle of persuasion. The conservative as well as the liberal see in it a means of tailoring<sup>5</sup> the young generation to suit his own ends. Therefore it would be wrong for us to underestimate the extent to which our present education system (the legal training) remains a crucial battleground for the hearts and the minds of the future generations.<sup>4</sup>

Therefore the domination of our bench by foreign judges from colonial days to post independence days was calculated to bring up people who would fit into, and uphold that socio-economic pattern.

The fact that most of our judges and African lawyers who are aspiring for the bench are trained in U.K. and U.S.A., that most reading materials come from there, and the adherence of our courts to bourgeois standards, is a thinly veiled evidence of their underlying bourgeois ideology.<sup>5</sup>

It is therefore submitted that since the Africans who will occupy the bench have undergone similar legal training and education as their European counterparts they will only try to perpetuate the prevailing socio-economic structure and this will be yet another petty-bourgeois reform which will not achieve much.<sup>6</sup>

It should be noted here as stated elsewhere by the writer that questions of law and state institutions pertinent thereto should not be seen in the abstract as bourgeois jurists (scholars) would like us to believe. We should always ask ourselves before making any recommendations whose interests does the laws and state institutions represent? If they represent the minority like they do here in Kenya, then such laws are devoid of morality.

According to Claire Palley, "... a judiciary is prone to reflect the values of the mass of the people and to appeal to the same values."<sup>7</sup> This statement however, describes what is obviously an ideal situation and one desirable of achievement, but is it an accurate description of the judiciary in the present Africa, or for that matter, in any bourgeois state? One might comment that only when the courts and the law have been changed from the tools of the bourgeoisie into the instruments of the masses, can such a solution be realised.

Kenya is a neo-colonial state, and therefore it cannot have a communist justice machinery. This is because it is wrong to impose socialist laws over a capitalist mode of production.<sup>8</sup> The only remedy therefore is to change the whole mode of production from our capitalist mode to a socialist mode of production which is the direction towards a communist society. This can only be achieved by the rise and overthrow by the workers of this land of this decadent capitalist system, and by their establishment of the dictatorship of the proletariat. This will in turn pave the way for a good society - the socialist society for under the socialist society, the legislature, the executive and the judiciary will consist of the people of the same majority economic class and same thinking.

The courts and other state institutions will interpret laws made by the people's legislature.

It should however, be noted that it is always a fatal mistake to underestimate the forces of counter-revolution. We must avoid adventurism.



The neo-colonial state backed by imperialists, with their monopoly of the machinery of violence can very easily cut our throats. We should remember the old saying that a dying horse kicks the hardest.

It is wise to avoid reactionary forces when they are strong and full of vigour; for there is a danger that a contest of annihilation at that stage could only end with destruction of the progressive forces. In such a situation the Marxist should concentrate on less ambitious, less conspicuous projects.

Arrogant, vain and raving Marxist blabberings may serve to give imperialism and neo-colonialism a further lease of life.

FOOTNOTES

CHAPTER I

1. These are conveniently summarised, with extracts, in Russell on crime; 12th edition by J.W.C. Turner, 1964; pp 563 - 582.
2. See The Kenya Penal Code, Cap. 63, ss 203; 204; Tanzania Penal Code; Cap. 16; ss 196; 197; Uganda Penal Code; Cap. 22, ss 183; 184. The words used in these codes are the same indicating same origin or same authorship.
3. (1962) A.C. 188, P.C.; (1962) E.A. 13, P.C.
4. See ss 202; 205; Kenya Penal Code.
5. See All sub-sections of s. 206; Kenya Penal Code; Cap. 63.
6. See also Uganda Penal Code; S. 182(2); Tanzania Penal Code; S. 195.
7. Compensation was in the form of livestock but in certain cases the clan had to deliver a young girl to take the place of the deceased's future life - This was paid to the family or clan of the victims of homicide under customary criminal law - Jomo Kenyatta: Facing Mt. Kenya (1972, Heinemann, Nairobi) p. 228.



8. See J.H. Driberg: "The African Conception of Law,"  
Journal of Comparative legislation and International  
Law; Nov. 1934 Vol. 16; III series pg. 1.
9. See Holleman; J.F. Issues in African Law; The Hague  
Mouton (1974) p. 18.
10. S. 2: Operation of Code in lieu of Indian Penal Code.  
"From and after commencement of this code, the Indian  
Penal Code shall cease to be applied to the colony.  
Any reference to any provision in the Indian Penal  
Code in any ordinance in force at the date of such  
commencement shall, so far as is consistent with its  
context, be deemed to be a reference to the  
corresponding provision in this code."
11. See also James Read, Criminal Law in the Africa of  
Today and Tomorrow (1963) Journal of African Law,  
Vol.7 No.: 1 p. 5.
12. Dispatch No.: 58 of 10th May 1927.
13. See generally the Legislative Council Debates on the  
Bill in the 1930 volume of the Legislative Council  
Debates.
14. The Future of Law in Africa; edited by A.H. Allot  
(London, 1960) p. 37.
15. East African Law Today: published under the auspices  
of the British Institute of International and  
Comparative Law; (London, Stevens and Sons Limited,  
1966).

16. National Assembly Debates of 30.7.1963 C.I. 1479 - 80.
17. Report on Customary Criminal Law Offences in Kenya by Eugene Cotran. (1963) Govt. Printer, Nairobi.
18. Kenya Independent Constitution Article 21 (8) (1960) Govt. Printer Nairobi. The provision came into effect on 1.6.66 National Assembly Debates VXI 10.3.67, where members wanted abduction of women made a criminal offence. The Attorney-General ruled that this was a customary law offence which had been abolished.
19. THE BROKEN VESSEL OF TRADITIONAL LAWS - Customary Law in Kenya by Pheroze Nowrojee, (Faculty of Law, University of Nairobi).
20. See footnote 18 S.77(8) Kenya Constitution.
21. Chapter 75 Laws of Kenya.
22. S.3 of the Penal Code (Cap.63) former S.4 of Penal Code No.: 10/1930.
23. Capital Punishment was abolished save in exceptional cases in Britain. See The Report of the Royal Commission on Capital Punishment (1949 - 1953), Cmd 8932 at para. 53.



CHAPTER II

1. Thus Courts have usually referred to murder, manslaughter, robbery with violence and stock theft as heinous crimes.
2. A particularly vivid example of this is the way justice is being meted out to African liberation movements guerrillas in South Africa; the recent objection by Zimbabwe's Edgar Tekere to demands that he be tried by a foreign judge, for here is a former well known guerrilla being prosecuted and tried by white men.
3. (1954) 21 C.A.L.R. 241.
4. Slattery, B.; A Handbook on Sentencing, with particular reference to Tanzania, E.A.L.B.; Chapter 3, p. 31.
5. (1961) Crim. Appl. L.R. 884.
6. 5 N.R.L.R. 87.
7. (1945) 12 E.A.C.A. 99.
8. See the similar case of E. v. Caphas s/o Simi (1967) H.C.D. No.: 156. Tanzania.
9. Criminal case No.: 21 of 1978 Kisumu High Court.

10. Criminal case No.: 32 of 1980. Kisumu High Court.
11. Children and Young Persons Act, Cap. 141 Laws of Kenya S. 16(1).
12. Ibid sub-section (3).
13. (1972) E.A. 50.
14. See: R. v. Ali bin Risasi (1969) H.C.D. No.: 125, R. v. Athumani Sulemani (1967) H.C.D.N. 210, Ball, (1951) 35 Cr. App. R. 164.
15. This is particularly true for decisions of High Court as shown by this statement made by Lord Widgry, G.J. "When the matter comes to the Court of Appeal against sentence, we always regard ourselves as being concerned with whether the sentence was the right one. One of the matters we look at is the judges reasons. We consider them part of the material for deciding whether or not the sentence was right." (H.L. Deb. Vol. 333, Col. 581 July 17, 1972).
16. See Table of cases of manslaughter charges 1979/1980 at pages 24 to 28.



CHAPTER III

1. High Court Criminal Case No.: 45 of 1980.
2. This is the first case to be decided this way in East Africa.
3. Quoted by the Law Society's Standing Committee on Criminal Law Memorandum on the Law and Practice on Appeal, from Criminal Jurisdiction of Magistrate's Courts (1971), p.3. and D. Napley, 'Should Magistrates Give Reasons.' The Magistrate (1972), p. 52.
4. Chapter 75 Laws of Kenya.
5. The Age of Majority Act, Cap. 33 Laws of Kenya.
6. Criminal Appeal no.: 15 of 1979, Kisumu.
7. Table of Manslaughter charges and their punishments compiled by the writer - see pgs. 24 to 28, Chapter II.
8. Criminal Appeal No.: 29 of 1978 Nairobi.

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CHAPTER IV

1. See Hart, "Bentham and the demystification of the Law" (1973) 36 M.L.R.
2. Ibid; p. 2.
3. Clemens Duff, Ed.; Fundamentals of Marxism - Leninism; 2nd Ed.; Moscow; (1968), p. 127.
4. James; R., Law and its Administration in a One Party State. (Dar-es-Salaam, TPU, 1971) p.6. The brackets are mine.
5. Quoted from P. Musekwa's speech entitled One Party State and Rule of Law. Daily News 28th September, 1976.
6. Martin, R, Personal Freedom and the Law in Tanzania; Oxf. University Press, Dar-es-Salaam (1974), p. 55.
7. High Court Criminal Case No.: 45 of 1980, Hombasa.
8. R.H.Cr. Case No.: 2230 of 1975 (Unreported).
9. S. 83 of the Penal Code.
10. S. 91(1) of the Penal Code.



11. Robert Martin. Teaching Law in Kenya: A personal Footnote; in Canadian Association of African Studies, Annual Conference 18 - 21 February, 1976.
12. Efforts to get citation and proceedings of this case were fruitless - The alternative source was to utilize the Weekly Review issue of February, March and October 1976.
13. Contrary to S.96(1) of the Penal Code.
14. See the Weekly Review 1st November 1976.
15. The two were arrested within the parliamentary precincts after Mr. Shikuku alleged that Kanu (which is the ruling party) was dead and Mr. Seroney, then the Speaker in the chair, ruling that there was no need to substantiate the obvious much to the protest of the front - benchers.
16. Chapter 80 Laws of Kenya.
17. In his judgment, the learned trial Magistrate said;

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

18. Criminal Case No.: 1135 of 1975.
19. S. 251 of the Penal Code, Cap. 63.
20. S. 339(1) *ibid*.
21. The High Court had earlier on in July nullified the accused's election.
22. S. 77(2) Constitution of Kenya.
23. This is the Magistrate who heard Chelugat's case Senior Resident Magistrate Mr. Dhir - Nakuru.
24. He was sentenced to 2 years imprisonment on the first count and a further 18 months on each of counts two and three all to run concurrently.
25. Criminal Appeal No.: 624 of 1975 (Unreported).
26. Page 9 of the judgment.
27. It came before Wambuzi, President, Musoke the Acting V.P. and Chanan Singh J.
28. The accused must be acquitted if there is a reasonable doubt as to his guilt.



29. H. Criminal Case No.: 55 of 1980 Nairobi, In this case of R. v. Agnes Nyambura Hintler Leither the accused who was the lawful wife of the deceased killed the deceased and was placed on two years probation period. The accused was an African and the deceased was a white. Similarly in another case before a Resident Magistrate Mr. Stephen Mwangi a British sailor assaulted an African using a knife soon after the Sundstrom's case and was only fined Shs.1,000/-.
  
30. Marx 3 Capital (Moscow) Ch. 17, Lenin, Imperialism, the Highest Stage of Capitalism in Lenin Selected Works Vol. 1 (Moscow) 1970; pp.667 - 763; E. Hoxna, Imperialism and the Revolution (Tirana) (1970).
  
31. See Maina Kinyatti, "Mau Mau: The Peak of African Nationalism in Kenya" in Kenya Historical Review Vol. 5 No.: 2; 1977 p. 287.
  
32. See full judgment, page 30 -34.
  
33. The Kenya Canner's Case - Resident Magistrate Criminal Case No.: 1646 of 1980, Nairobi.

CONCLUSION

1. Koigi wa Wamwere; Kasanga Mulwa in various debates in Parliament proceedings.
2. Louis Boudin. The Theoretical System of Karl Marx Modern Review Press, New York and London (1907).
3. K. Prewitt. 'Education and Social Equality in Kenya'. IDS DP/157 p.3.
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