

1931.

Kenya

No. 17206.

SUBJECT

C0533/412

Whipping of an Indian Boy.

Previous

See 17269/31 (Crimes  
Dept Report)

Subsequent

See 17358/31 (Banings Report)  
18306/32 (General Offenders  
Order)  
3192/33 (General Order)





but in the present case there  
appears to have been no  
A / illegality & the fact that  
the punishment was vigorously  
administered does not impress  
me. I really cannot see  
that there is anything at all  
to complain about. ~~The~~  
Canning's just a name - do  
without any of the elaborate  
precautions <sup>take</sup> in this case -  
we administered ~~it~~ in  
public schools in England - the  
statute of this is a  
justification of its practice.

I do think might be  
that in the evidence given the  
punishment appears to have  
been perfectly legally carried out  
& that he doesn't think any  
useful object could be served  
by further enquiry.

It would perhaps have  
been preferable had a further  
report not been promised for Mans.

*Edwards*  
20.4.31

I am not clear as to  
as to actual improvement of cases in  
in this case in default of payment  
of a fine - as Mr. Alison Russell  
will advise.

It will also be well to have  
Dr. Hartley's view as to the severity  
of the sentence as indicated in the  
medical certificate.

St. Allen 20/4/31

S. 27 (3) of the Kenya Penal  
Code provides that a male  
person of under 16 who is  
convicted of any offence for which  
he is liable to imprisonment  
may be whipped.

The sections under which  
this boy was convicted provide  
for a fine & in default of  
payment for imprisonment.

In any opinion the boy  
would not be liable to imprison

written separately was written  
in part of a fine, & therefore  
the sentence of Shipping  
was illegal.

I think this matter  
has been ruled upon by  
the High Court: but I am  
not able to find the  
writing in the library.

I think that this case  
should be referred to the  
Governor for his comments  
& the Chief Justice &  
in his meantime  
Honorable might be  
informed that that was  
his done. R. Russell  
11.5.31

The doctor certifies that  
the coming was "impetuously"  
carried out and with "a  
considerable amount of energy".  
This does not imply undue  
severity but energy upon it.

By Stanton  
11.5.31

Then a copy of the letter  
should sent to the Gov: keeping a true  
copy of the same & the  
dealing of the contents of the C. J.:  
[a his medical part observes as in the  
Mentari report & ask of obtain:]

? Over  
copy

Uniform to Honorable (810 J  
to this operation) that expense has been  
made to the Gov: return the  
presented (copying a copy of record)

10/11/31

1/17/31

word.

If we are advised that there is  
illegality, enquiry must  
certainly be made: but I agree  
with Mr. Eastwood's minute  
generally apart from that point.  
There is no object in a coming,  
assuming that punishment to  
be admitted, if it does not  
hurt: I think it wd. be a  
mistake to include L. J.

With more? as proposed by Walker.

all Parliament

to L. J. I should draw 2.5.31  
attention to the certificate, my  
copy may be read to a coming that  
the punishment was excessive in that

be paid to have the form  
shown, & that he may  
consider it advisable to  
get a report from the  
medical officer present at  
the whipping.

W.S.S.

24/5/31

Yes. I think so!  
I have had further representations  
about this. I think it a bad case  
as there was no real bad only a  
very technical offence.  
As Sir Cecil Biddisley  
proposes, but a little more  
definitely than he expresses  
it. W.S.S. 6-5-31.

Ift. has. I am afraid I have  
delayed this badly. It is not buried.  
I must apologise.

Papers did? be required  
after letter & def. have gone.

Jarvis  
16-5-31

J.H. (Baker).

accp

18-5-31

atone

DESTROYED

J. J. Morrison  
to Whipping of Indian boy. 5 May 31

DESTROYED

J. J. Morrison (3 and)

21 May '31

To Gov. 352 (7c. ind. in 1) cons. 26 May '31

6. In letter for Gov. 353  
enclosed Mr. Justice's observations on legality of  
inflicting corporal punishment in this case, in  
which he states boy's father refused to pay the  
fine imposed upon the father, and comments  
on the manner in which it was served.

There would appear to be no doubt that  
the sentence was illegal in this connection  
to (4) on 16387/30 - but on the other hand it  
is equally clear that the punishment awarded was  
suitable and just. Amendment to existing  
legislation seems indicated and this could be  
done by deleting the words "for which he is  
liable to imprisonment" in section 27(3) of the  
Penal Code.

It is interesting to note that  
in the present case if the boy had been charged  
under sec. 270 of the Penal Code - as he  
apparently would have been - he would have  
been whipped without consideration of the law.  
Mr. Morrison did not however

This would fit in  
with good best  
practice

twice the legal aspect of the case so  
we might? write to him <sup>reference</sup> (4)  
saying that a report on the case has now  
been received from the Gov. Say that it  
appears that the newspaper report was untrue  
in that the punishment was only awarded  
after the boy's father had twice refused to  
pay a fine. So as to say that from the  
report it appears that the caning which was  
inflicted in the presence of the J.A.S. of  
the Prison, was not administered in a more  
severe manner than in normal cases were  
the after effects in any way abnormal, and  
that ~~the boy~~ <sup>we are</sup> is satisfied that there is no  
evidence of any brutality. Add that  
there is <sup>no</sup> ~~any~~ suspicion of racial  
discrimination. The boy's complaints in the  
case inflicted a similar sentence in a  
European boy for an identical offence.

and also saying that the boy's  
complaint was just and that his  
application was used in its application.  
reference to 1/1387/30 and to  
say that in fact remains that although  
the sentence may have been just it was

was it?  
1/1387

contrary to law, and that the J.A.S. consider  
that no time should be lost in reviewing  
the position. Request that the Gov. should  
look into the matter and submit at an early  
date his recommendation as to amendment of  
the relevant section of the Penal Code, taking  
steps in the meantime to ensure that  
no similar sentences are inflicted.

Bothamby 24/5

The object of § 27(s) is to  
avoid the necessity of ever granting to persons, the  
detention proposed by The Chamberlain would tend in  
the opposite direction by empowering the court to  
substitute whipping for a fine. Clearly  
the sub-section needs amendment, but the  
exact form can be left to the local Govt.

No need for a further letter to The  
Honourable, unless he writes again. To  
Governor as proposed.

1/1387/30

to Secy

We should be glad to hear

of your views.

W. H. Allen

1/9/31



No. 6

do not apply where the statutory penalty is a fine with imprisonment only in the case of default: but the Chief Justice naturally will not commit himself to a definite ruling and the Governor's despatch suggests that in the event of a future ruling of the Supreme Court shewing the sentence to have been illegal it will be necessary to consider amending the Penal Code to avoid sending juveniles to prison.

Mr. Duncan and Mr. MacGregor the A.G. of Kenya who have been consulted have no doubt that the sentence was illegal: we have found in the coming returns several similar instances and they have been noted for consideration with this.

The difficulties are (1) if the Penal Code were amended to regularise such a sentence it would create a new series of whipping offences and that is out of the question, and (2) if imprisonment is the only alternative to whipping such as those in question and if whipping is abolished imprisonment is the only alternative and (3) the juvenile offenders are more than 1000 to be passed and even then there will still be the question of the establishment of reformatories and industrial schools and the appointment of probation officers and of other persons in large towns and the better districts.

The result of the discussion of the matter with Mr. Duncan and Mr. MacGregor is recorded in the memo registered as No. 10 and reference is invited and it is now proposed to write to the Governor on the legal aspect

*The matter of New Strakes and 7 other courts... is a different matter... the Magistrate... This is... but... any... of the... 1911.*

aspect of the matter as in the draft herewith.

B. Severity of punishment

The Governor sends reports to shew that the punishment was <sup>not</sup> unduly severe. He points out that it has its parallel in the Public Schools and that the same Magistrate has inflicted a similar punishment on a European boy for a similar offence. These arguments are not convincing. Dr. Stanton considered that the doctor's report originally received did not imply undue severity but verged upon it; and the Governor's view is that <sup>no</sup> undue severity was used. The memo <sup>10</sup> suggests that no further action is necessary on this point and I see no practical reason for dissenting.

The Code also exists in Uganda, N.T. and Nyasaland but I think any action might wait till we see how the correspondence with Kenya develops. I was inclined to think that the whole thing might have been left for the Law Officers' Conference and I am not sure that that is not what it will come to in the end.

No further communication to Mr. Hornbin was promised or is called for.

*Mr. Duncan (sent on 2/6 after redraft & further consultation with the Law Officers in the hands.)  
7/5/32  
7/6/32*

*Sir R. Hamilton  
You should see the draft. There may be room for two strikes as to the severity of corporal punishment for boys, but to cause a boy because his father will not pay a fine is not*

Not satisfactory.

Wed. 6.6.32

Both unsatisfactory & illegal.

I agree to refer

HHH

7.6.32

11 Let printing press

12 To Gov H 31 (w/ list. no 11) - 8 JUN 1932

6 Answer

13 Gov — Feb 1926 — 12/17/32  
(Copy)

Requests arrangements be made for the  
to continue to study juvenile correction methods  
at one or more representative institutions.

Action taken on

P.F. 3035 E.A.

ind

See on 18301/32 for subsequent stuff

This can be

Put by

J

22.3.33

done

not satisfactory.

Wed. 6-6-32

Both unsatisfactory & illegal.

I agree to diff.

H.H.

7.6.32

11 List of names

12 To Gen 431 (w/ list. 8011) - 8 JUN 1932

6 Annod

13. Gen — Feb 26 — 12/17/32  
(Copy)

Requests arrangements be made for Dr  
G. Fontaine to study juvenile correction methods  
at one or more representative institutions.

Action taken on  
PF 3035 EA

list

see on 18301/32 for subsequent stuff

his can be

Put by

J

22 3 33

stone

Deputy  
TELEGRAM from the ~~acting~~ Governor of Kenya to the  
Secretary of State for the Colonies.

Dated 13th. July.

(Received Colonial Office 11. 8 a.m. 13th July 1932)

No. 122.

Your despatch of 6th June No. 431. This  
concerns the proposed 1st Juvenile Offenders  
Bill, copy of which follows by air mail, is anxious  
to be furnished information as to juvenile corrective  
methods in various institutions & reformatory etc.  
with a view to ascertaining applicability of their  
principles in the proposed Bill. There is a good therefore I  
propose to assign Mr. La Fontaine now on leave to  
receive facilities to visit one or more representative  
institutions & literature on the subject and  
submit report with pertinent reference to proposed  
Bill. He should be given usual travelling allowances  
and some small extension of leave if you consider  
time expended on his warrants such a concession. He  
is being communicated with direct by air mail.

Copy

18  
Origin 303514 (La Fontaine)  
9

Deputy  
TELEGRAM from the ~~acting~~ Governor of Kenya to the  
Secretary of State for the Colonies.

Dated 13th. July.

(Received Colonial Office 11. 8 a.m. 13th July 1932)

No. 126.

*To 2*  
Your despatch of 8th June No. 431. This Government before proceeding with Juvenile Offenders Bill, copy of which follows by air mail, is anxious to obtain more information as to juvenile corrective methods at Borstal Institutions Reformatory etc. with a view to ascertaining practicability of their local application here. Should be glad therefore if you would arrange for La Fontaine now on leave to be given facilities to visit one or more representative institutions study literature on the subject and furnish report with particular reference to proposed Bill. He should be given usual travelling allowances and some small extension of leave if you consider time expended by him warrants such a concession. He is being communicated with direct by air mail.

C. O.

- Mr. Allen 16/32
- Mr. Duncan 2/6/32
- Mr.
- Mr. Parkinson.
- Mr. Tomlinson.
- Sir C. Bottomley, 6.6.32.
- Sir I. Shuckburgh.
- Permt. U.S. of S.
- + Parly. U.S. of S. (No. 6 17206/31)
- Secretary of State.

Amend No 1 3192/35

8 June 1932

Sir,

I have etc. to refer to your despatch No. 453 of the 7th August 1931 regarding the case of caning an Indian boy as a result of a judgment in the Court of the Resident Magistrate at Nairobi.

2. This case was recorded in the return of canings for the half year ended 30th June 1931 which accompanied your despatch 636 of the 11th Sept. 1931. That return included five other instances of the imposition of the sentence of caning in cases in which the law provides for imprisonment only on default of payment of a fine. A list of these cases is enclosed for convenience of reference.

3. I informed you in my despatch No. 852 of the 9th December 1931

**DRAFT** for conson.

(see minutes)

KENYA

No. 431

SECRET

(No. 3 17358/31)

List (No. 11)

(No. 4 17358/31)

that I should address you later regard-  
ing the interpretation of section 27(3)  
of the Penal Code in relation to these  
cases. My legal advisers concur in the  
view that the provisions of that section  
do not apply where the statutory penalty  
for an offence is a fine with imprison-  
ment only in the case of default of payment.

In para. 2 of your despatch No. 453 of 7th  
August 1931 it is suggested that the  
question of amending ~~the~~ <sup>e</sup> section ~~of the~~  
~~code~~ should await <sup>a</sup> future rulings ~~of~~ <sup>of</sup>  
the Supreme Court, but I am of opinion  
that steps should be taken as soon as  
possible to prevent the imposition of  
imprisonment on default of payment

(No. 6  
17200/31)

of ~~the~~ <sup>thing</sup> ~~code~~ that there is no  
reasonable doubt as to their legality,  
and there is no certainty that the matter  
will in fact come before the Supreme

Court for a ruling, *the only*  
~~there appears to be no possibility~~  
~~of departmental action with the~~

that I should address you later regard-  
ing the interpretation of section 27(3)  
of the Penal Code in relation to these  
cases. My Legal Advisers concur in the  
view that the provisions of that section  
do not apply where the statutory penalty  
for an offence is a fine with imprison-  
ment only in the case of default of payment.

In para. 2 of your despatch No. 455 of 7th  
August 1931 it is suggested that the

(No. 6  
17266/31)

question of amending this section of the  
Code should await the future ruling of

the Supreme Court, but I am of opinion

that steps should be taken as soon as  
possible to prevent the imposition of  
sentences of baning in default of payment

of fines <sup>being</sup> ~~to be~~ that there is no

reasonable doubt as to their illegality,

and there is no certainty that the matter

will in fact come before the Supreme

Court for a ruling. *the only*

~~4. There appears to be no possibility~~

~~of any departmental action with the~~

Judicial Dept. of Kenya in view of the decision of the Chief Justice to await a ruling of the Supreme Court and the alternative therefore is to proceed by way of amending legislation.

4. I am aware that it has not been proposed to consider any further amendment of the Penal and Criminal Procedure Codes until they have been reviewed at the forthcoming Law Officers' Conference. As, however, it is now unlikely that that Conference can assemble before the beginning of next year, I think it desirable that these sentences of caning should be dealt with exceptionally especially as the question of the action to be taken is one of policy rather than of law.

5. Advantage has been taken of the presence of Mr. Macgregor, Attorney General, to discuss the matter with him and I have been advised to suggest, for

your

11  
~~Judicial Dept. of Kenya in view of the  
decision of the Chief Justice to await  
a ruling of the Supreme Court and the  
alternative therefore is to proceed  
by way of amending legislation.~~

4 B. I am aware that it has not been  
proposed to consider any further  
amendment of the Penal and Criminal  
Procedure Codes until they have been  
reviewed at the forthcoming Law  
Officers' Conference. As, however, it is  
now unlikely that that Conference can  
assemble before the beginning of next  
year, I think it desirable that these  
sentences of caving should be dealt with  
exceptionally especially as the question  
of the action to be taken is one of  
policy rather than of law.

5 B. Advantage has been taken of the  
presence of Mr. MacGregor, Attorney  
General, to discuss the matter with him,  
and I have been advised to suggest, for

your

your opinion, that action should be taken on the following lines:-

a/ Section 27(d) of the Penal Code should be amended by the <sup>insertion</sup> provision of a proviso to the effect that no sentence of corporal punishment may be imposed in default of payment of a fine. ~~This~~

<sup>is direct</sup> amendment would not meet the case because in default of payment of a fine the only alternative would be imprisonment, which it is desired, if possible, to avoid.

The further alternative of making such canings legal is obviously out of the question since it would extend in the most undesirable manner the list of offences for which corporal punishment may be inflicted.

It <sup>was</sup> ~~is~~ therefore necessary at the same time to ~~insert~~ <sup>insert with</sup>

b/ a Juvenile Offenders Ordinance which would ensure that, before a sentence of imprisonment is <sup>passed, every possible</sup> ~~passed~~ alternative should ~~be~~ <sup>first</sup> have been explored.

6/ The question of treatment of <sup>the</sup> juvenile offenders ~~of~~ probationary

(No. 8 on 1728/31)

12  
As far as applicable to them was <sup>referred</sup> raised by Lord Pasfield's despatch of 11th September 1934 and I note from your despatch No. 83 of 4.10.34 <sup>to hope that it</sup> that it will be possible to introduce a bill on the subject at an early session of the Legislative Council.

7/ I understand, however, that there are <sup>two</sup> difficulties. <sup>(a)</sup> The <sup>proposed</sup> bill, which I gather follows the <sup>provisions of the bill on</sup> ~~provisions of the bill on~~ <sup>model, cannot take</sup> the establishment of reformatories and industrial schools, and the appointment of probation officers; and there is at present only one reformatory <sup>in the</sup> ~~in the~~ <sup>at Khabeeo</sup> ~~at Khabeeo~~ <sup>at Khabeeo</sup> probation officers might possibly be found without difficulty in the large towns and districts, but in the native reserves it might be difficult to find suitable persons who would be willing and able to do so. I understand, however, ~~that~~ <sup>that</sup> the suggestion has been

been made that the legislation

~~shall~~ might contain a ~~provision~~ clause

enabling the various parts to be

introduced in different districts

as circumstances permitted, and that

it might therefore be possible to deal

with the problem ~~in~~ <sup>immediately</sup> some areas in which

it is most likely to arise.

have etc.

(Sgd) H. CUNLIFFE-LISTER

been made that the legislation

~~might~~ *shall* contain a suspending clause

enabling the various parts to be

introduced in different districts

as circumstances permitted, and that

it might therefore be possible to deal

with the problem *immediately* in the areas in which

it is most likely to arise.

have etc.

WILFRED WILFRED-LISTER.

LIST OF INSTANCES OF THE IMPOSITION OF A SENTENCE OF CANING AWARDED BY COURTS  
ON JUVENILES FOR THE SIX MONTHS ENDED 30TH JUNE, 1931.

<u>District &amp; Name of Prisoner.</u>	<u>Offence for which caning awarded.</u>	<u>Age of Prisoner.</u>	<u>Number of Strokes.</u>	<u>Date of Infliction.</u>
<u>Musina Prison.</u>				
Gweni s/o Ondiek	Throwing stones on other man's premises (sec. 189(2) Cap. 82 of the Subsidiary Legislation, Laws of Kenya)	12.	10.	1.2.31.
Lhundi s/o Orogalo	Throwing stones on other man's premises (sec. 189(2) Cap. 82 of the Subsidiary Legislation, Laws of Kenya)	14	6	20.2.31.
Nyawaru s/o Omolo	Causing disturbance, (sec. 189(1) Cap. 82 of the Subsidiary Legislation, Laws of Kenya)	15.	4.	6.31.
<u>Eldoret Prison.</u>				
Sukanda s/o Awbaya	Throwing stones in public places (Sec. 189(2) Cap. 82 of the Subsidiary Legislation, Laws of Kenya)	11	8.	15.5.31.
<u>Malindi Prison.</u>				
Arise wa Otondo	Committing nuisance in public places (Section 189(4) Cap. 82 of the Subsidiary Legislation, Laws of Kenya)	12	5.	9.3.31.

No. 10/19/3  
M. Duncan

A discussion was held at the Colonial Office at 3 p.m., on the 16th of March, at which the following were present:—

- Mr. H.H. Duncan
- Mr. A.D.A. MacGregor *(Kenya)*
- Mr. H.E. Prideman.

The Memoranda at 7a and 7b were considered.

As regards the individual case mentioned in 7a, it was felt that <sup>in the circumstances</sup> no further action is necessary. As regards 7b, it was agreed that steps should be taken as soon as possible to prevent the imposition of sentences of whipping in default of payment of fines, in view of the <sup>existing</sup> ~~fact~~ that such sentences are illegal.

*(This result cannot be achieved by means of any departmental action within the Judicial Department in Kenya, in view of the decision of the Chief Justice (enclosures 1 to 6), to wait until such time as the point has been decided by a ruling of the Supreme Court. No case to elicit such ruling may arise.*

The alternative is therefore to proceed by way of amending legislation.

Mr. MacGregor pointed out that <sup>having regard to</sup> ~~with the sailing of the Secretary of State's conference~~ <sup>despatch of</sup>

7/2/31

No. 6 in 1619/30, it had not been proposed to consider further amendment of the Penal and Criminal Procedure Codes <sup>in the light of the views of the Law Officers</sup> ~~in the light of the views of the Law Officers~~ <sup>as the Law Officers had examined the proposed</sup> ~~as the Law Officers had examined the proposed~~ their amendment. As it seemed doubtful, however, if this Conference could be held before the beginning

of 1933 (see Mr. Bushe's minute on 15 in 16191/30),  
~~it was~~ <sup>it was</sup> suggested that, in order to prevent the  
 further infliction of illegal sentences of whipping,  
 this case should be regarded as exceptional; and  
~~that amending legislation should be introduced as~~  
~~soon as possible, and that action should~~

~~If this is approved,~~ <sup>It was</sup> suggested that  
 action ~~might~~ <sup>should</sup> be taken on the following lines:-

- (a) Section 27(3) of the Penal Code should be amended by the addition of a proviso to the effect that no sentence of corporal punishment may be imposed in default of payment of a fine.

This amendment by itself would not meet the case because in default of payment of a fine the only alternative would be imprisonment, which it is desired, if possible, to avoid.

It ~~was~~ <sup>is</sup> therefore necessary at the same time to proceed with -

- (b) A Juvenile Offenders' Ordinance which ~~will~~ <sup>should</sup> ensure that before a sentence of imprisonment is passed, every possible alternative ~~shall~~ <sup>should</sup> have been first explored.

It was understood from Mr. MacGregor that such an Ordinance is already in draft, and has been approved by a Conference of Provincial Commissioners. There ~~was~~ <sup>was</sup> the difficulty, <sup>the Bill</sup> that the provisions of this Ordinance necessitated the ~~appointment of probation officers, but this has been overcome by insertion of provision for the application of the Ordinance by Districts, and there was already the requisite machinery so far as Nairobi was concerned.~~

*Establishment of probation officers in Nairobi and other districts. There is no present machinery for the appointment of probation officers in Nairobi. The Legislature should be asked to provide for the appointment of probation officers in Nairobi and other districts.*

*It is suggested that the Bill should be introduced in the next session of the Legislature. It is suggested that the Bill should be introduced in the next session of the Legislature.*

Position in Kenya Uganda and  
T.T. regarding legislation on  
financial matters suggested  
in circular despatch of 11<sup>th</sup> Sept. 1930

Kenya. Bill has been prepared  
and is under consideration by a C.M.S.  
vide S in 17209/31 Kenya.

Uganda. Has issued a circular  
on the financial position presents  
the introduction of legislation in its effort to the circular  
vide 3, 8, 14 in 71357/30 file.

T.T. has appointed a C.M.S. which  
remain for the question which are  
under consideration locally. 13 in 71357/30

71357/30 file (5)(7)

Nyasaland does not propose to take action

.. (2)(4)(6)

Mr. R. Lodge has submitted a draft  
order.

(9)(10)(11)

Somaliland ditto

(12)

Zanzibar has drafted a Bill but  
financial position presents the  
S. 100/30/31 in also trial school  
H. S. P. 10/31

9

~~Mr. Allen~~

Can you say whether there is anything parallel to 27(3) in the family, if so how it is interpreted? Or does the law in the family allow of something more as an alternative to imprisonment in the case of children who are imprisoned? Or may a default of payment be for?

Mr. Allen

Mr. Allen

15/1/29

I know of no such provision. As to the general power of the courts to whip children and young persons to be whipped, see

Summary Jurisdiction Act 1879 Ch. 49 s. 4  
 Children Act 1908 Ch. 67 s. 107 and see s. 102).

Theoretically I believe a young male person may at Common Law be whipped for any misdemeanour, in practice such punishment

Mr. Allen  
 16/1/29 taken by  
 Mr. Allen by  
 2/9

is usually only ordered under express  
statutory provision eg.

Larceny in certain cases 24-25 Vic. ch. 76.  
Ratification injury to property 24-26 Vic. ch. 97.  
Certain offences against the person 24-25 Vic. ch. 100.

It will be seen from  
Children's Act 1902 H.H. Fisher's ed.  
a child and normally 229.  
a young person cannot be  
committed to prison in regard of payment  
of a fine I think it must follow that  
they could not be whipped for such default,  
although I can find no provision to that effect

Allen

Please put up a copy of this  
Children's Act 1902 ch. 67

J.H. Allen  
3/10

Allen

A copy of the above  
is annexed

Allen  
Liberal  
6/10/31

to Duncan

I shall be much obliged if  
you could kindly look at this  
let be discussed with you J.H. Allen  
28/9/31

Mr. Allen

I am ready to discuss this case with you.  
Shall we say some time on Monday morning  
November 2 if that will be convenient?

30/10/31 H. Duncan

Allen

I have had some discussion  
with Mr. Duncan but before carrying  
the matter I should be glad to  
know what is the practice in  
other Courts which <sup>have</sup> ~~allow~~ of a general  
provision that in the case of  
juvenile a offender may be  
substituted for a sentence of  
imprisonment or whether any  
provision is made for such  
mitigation in case of imprisonment  
to be an alternative to a fine &  
if not how such cases are  
dealt with. Also will you

Please set out the relevant sections

The Indian Shipping Act

1864 refers to the penultimate  
para of the preamble to do so.

St Allen

7/11/31

The following are the relevant  
provisions in the legislation of  
certain other Colonies, viz the  
Indian Shipping Act of 1864

Jamaica

Under sec 4 of Law No. 25  
of 1904 the court may substitute  
or add a whipping where a  
young offender has been  
convicted of an offence  
normally punishable with a  
fine not exceeding £10 or  
imprisonment not exceeding a  
month.

Sec 5 of the same law  
provides alternative procedure  
in the case of a child under  
14 who has been sentenced  
to be fined.

Trinidad

Sec 83 of the Children Ordinance  
(Law 31) provides that where a  
child is convicted of an offence  
punishable, in the case of an  
adult, with imprisonment, or  
would, if an adult be liable to  
be imprisoned in default of  
payment of any sum, the  
Court may commit him to  
custody.

Sec 84 of the Ordinance gives  
the Court wide powers of  
dealing with juvenile offenders.

7/11

Sec 3 of the Children's Punishment  
Ordinance, No 8 of 1913 gives the  
Court power to vary the  
sentence in the case of children  
who have been convicted of an  
offence the penalty for which  
is punishment by imprisonment  
or imprisonment in default of  
payment of a fine.

Colombia

Sec 4 of the Colonial Offences Law  
No 1 of 1922 provides that

of passing the sentences prescribed by law, the Court may, in the case of persons up to 16 years of age, order them either to be whipped, or handed over to their parents on the latter standing surety for their children's good behaviour.

Under sec 9, fines imposed on children under 16 years of age may be passed on to the parents.

Sierra Leone

Under sec 4(2) of the Flogging Regulation Ordinance (Cap 40 R.E.) the Court may order a young person to be flogged in substitution for any other punishment.

India

Sec 5 of the Indian Whipping Act No 4 of 1904 is similar to the corresponding provision in the Sierra Leone Ordinance except that the Indian Act does not take cognizance of fines.

As this boy was a first offender apparently, I should have thought he could have been dealt with under Section 326 of the Criminal Procedure Code. Vide also section 319(3) of the Code with regard to payment of fines by thompents.

(Signed) J. H. THOMPSON.  
11/11.

I have had some discussion with Mr. Duncan about this - but it is mixed up with the <sup>Commissioner's</sup> Returns and Prisons Report for 1930, and must wait till these papers are disposed of and available.

(Signed) H. T. ALLEN,  
20/11/31.

(Room 207)  
Please speak  
about this in  
3 days time  
1931  
1932  
must tell  
1-1-1932

x to backlogs has  
been included  
also but the  
H. H. Thompson  
discuss with him  
10/11/31

Mr Duncan has a sick leave  
this next week. Also I think it  
would be desirable to seek an  
opportunity of discussion with the  
backlogs the local A.P. also 5  
days a week

H. T. Allen  
20/11/31

I attach 2 memoranda & a order with  
Mr. Allen's instructions (7<sup>a</sup>) one on the  
case in this file and the other (7<sup>b</sup>) on the  
general question of the whipping of  
Jumiles. The latter might be  
attached later to a new file

Shankar  
They discuss a note have  
if possible then not be able  
to arrange a full statement  
his boy. 10/11/31  
1931

10/11/31  
I regret my delay in doing this but the  
material obtained themselves 14/11.  
H. T. Allen  
20/11/31

7 it sep.

7c

I attach a record of the discussion on the record. It would be desirable that the substance of the summary of the officer's advice, if it can be well applicable at present only to the Nairobi area will not accord to any extent in meeting the objectives as regards information. The source suggested that it would be desirable to assist for Mr. Macpherson if the record 7c fully states the position as regards that area.

Draft submitted to Mr. Macpherson.

J.S. Poirichie  
24/3/32  
30 MAR 1932

8 J. Macpherson - cons - 7c

7c.

Saw Mr. Macpherson this morning. Subject to certain alterations (see the last paragraph on p. 2 of the rough draft of the record marked 7c), he agreed that 7c is substantially accurate. A few copies embodying these alterations might be made.

18/4/32 A. Ormean

10

Two copies of record 7c. Containing amendments suggested by Mr. Macpherson.

As regards the individual case which was raised at 1 there is a remark at 7a. In view of the opinion above of the need for the action is necessary and this may be dropped.

2. 7b with the agreed record at 8a should now be restricted to a file entitled "Whipping of Juvenile Offenders" on which a despatch to the Home Office suggesting the introduction of amending legislation on the lines proposed is ~~to be~~ It should also be considered what should issue to Uganda and 77.

J.S. Poirichie  
19/4/32

WHIPPING OF JUVENILES.

An examination of the canings returns for the first six months of 1931 (enclosure to 3 in 17358/31) shows that in addition to the whipping of the Indian boy mentioned in 17206/31 there were 5 other cases (flagged) in which sentences of whipping were imposed in default of payment of fines.

May A

B

1. It will be observed from Sir A. Russell's minute of 1.5.31 in 17206/31 that such sentences which are governed by Section 27(3) of the Penal Code are illegal.

May J

3. As pointed out by the Chief Justice of Kenya in that file (enclosure to b) the effect of this ruling will be to cause juvenile to be sent to prison in default of payment of a fine - whereas Section 27(3) of the Penal Code was enacted to avoid this by providing corporal punishment as an alternative.

4. The undesirability of sending boys and girls to prison in such cases is indicated in Lord Passfield's Circular of the 11th September, 1930, copy attached.

B

5. It would perhaps be possible to avoid the difficulty by arranging for magistrates to pass a sentence of imprisonment until the rising of the Court. This would not, however, be satisfactory, and would no doubt lead to abuse, as parents would be unwilling to pay fines if they knew that merely pra forma sentences only would be passed.

6. Another possibility would be to amend

amend section 27(3) of the Penal Code so as to admit of whipping being administered to juveniles in default of payment of a fine. Although Section 4 of the Jamaica Ordinance (No.4 of 1904) permits of whipping in such cases, it is hardly practicable to go back to a 1904 Ordinance for a precedent of this kind, seeing that public opinion has altered considerably in the last few years. Amendment of the relevant section of the Penal Code does not therefore seem desirable. The remaining method would be to expedite the enactment in Kenya of a Juvenile Offenders Ordinance on the lines of that mentioned in Lord Passfield's Circular (see also pages 167-180 of Cmd. 5... which contains a model ordinance setting out the necessary machinery for dealing with juveniles apart from ordinary courts and prisons.

lay 2

slae 2

E

7. The difficulty in the way of this is that the model ordinance necessitates the provision of reformatories and industrial schools which is rendered quite impossible by the present financial position in Kenya.

8. It may, however, be possible to avoid this difficulty by enacting sufficient of the ordinance separately in order to cover such points as the whipping of juvenile offenders, and it is therefore suggested that the views of the Attorney-General, Kenya, who is at present in this country, should be obtained as to whether this course would be practicable.

There is a separate  
 Corporal Punishment  
 Ordinance in T.F.)

9. In the meantime, it seems desirable that pending enactment of some such Ordinance steps should be taken locally to notify magistrates of the position. This may not be possible until a ruling of

of the Supreme Court has been obtained on the point. A further point to note in regard to Section 27(3) of the Penal Code is that no provision at present appears for a maximum number of strokes, although it was laid down in Sir Joseph Chamberlain's Circular of the 13th August, 1902, that every sentence exceeding 12 strokes requires confirmation by the Governor before being carried out, and paragraph 2 of the Circular contemplated limiting the flogging of juveniles to 12 strokes.

Slag F

10. It may be held, however, that Section 27(1) governs Sub-section (3). Apart from the Penal Code the question of whipping of juveniles arises under

- (a) The Prisons Ordinance,
- (b) The Employment of Natives Ordinance.

Slag G

11. As regards (a), the question has already been taken up in (13) in 1b281/30 where the Governor's attention has been invited to the omission of the limiting provision contained in the original Ordinance (12 strokes with a light cane) and has been informed that similar limiting provisions are required in the new Prisons Ordinance.

Slag F

12. As regards (b), Section 4b of the Employment of Natives Ordinance, Chapter 139, provides for a maximum of 16 strokes in the case of a male person under sixteen. This maximum number should presumably be reduced to 12 in accordance with the Circular of 1902.

13. It would be of great advantage if the opportunity could be taken to consult Mr. Macgregor as to whether the new Juvenile Offenders Ordinance will meet the above points, and also as to whether sufficient of it could be enacted, without causing additional expenditure, to cover the whipping of juveniles.

H. O. S. Kumar  
20/1/32

74 15

MEMORANDUM.

In this Kenya case an Indian boy of 13 years of age pleaded guilty and was convicted of three offences under the Traffic Ordinance, 1928, which can be punished by fine and in default of payment by imprisonment.

On the refusal of the boy's father to pay the fine on behalf of his son the magistrate who tried the case sentenced the boy to 4 strokes with a cane on each of the three charges.

The affair was brought to the notice of Mr. Shiels <sup>by</sup> and Mr. Harrabin (1-4), and the Legal Adviser ruled that on the facts as stated the sentence of whipping was illegal seeing that Section 27(3) of the Kenya Penal Code admits of an alternative sentence of whipping only in regard to offences conviction of which would render a person liable to imprisonment (see Sir A. Russell's minute of 1.5.31).

The views of the Chief Justice, Kenya, were invited on the question of the legality of the sentence. (5) The Governor's views were also sought on the question whether the punishment was unduly severe. (5)

On the question of the legality of the sentence the Chief Justice reported (enclosure 1 to No. 5) that no ruling of the High Court exists on the point, but proposed to obtain a ruling when occasion offered. He was, however, inclined to agree with the Legal Adviser's opinion, and the Attorney General supported this view. There seems no doubt that Sir A. Russell's opinion is correct. In so far as this particular case is concerned no further action seems necessary unless the illegal sentence

sentence can be considered to be excessive. On this point there is the opinion of the doctor who saw the boy, which Dr. Stanton in his minute of 1.5.31 considers does not imply undue severity, but verges upon it.

The reports enclosed with (6) appear to support Dr. Stanton's view. The Governor and the Chief Justice consider that the sentence was not excessive. It may be mentioned here that Section 27(3) of the Penal Code does not lay down a maximum although it may be considered to be limited by Section 27(1) to 12 strokes unless a greater number is approved by the Supreme Court.

An examination of the canings returns for the first six months of 1931 shows that whipping was illegally administered in five other cases.

In the circumstances, as the boy does not appear to have suffered any harm, and Mr. Horrabin has presumably ceased to interest himself in the case, I suggest that no further action is necessary in regard to the individual case, but that steps be taken to prevent similar cases from arising in the future. I attach a separate minute on this question of the whipping of juveniles.

7b

W. P. Misra  
22/2/32

27  
6

KENYA.

NO. 203



GOVERNMENT HOUSE,  
NAIROBI,  
KENYA.

RECEIVED  
24 AUG 1931  
COL. OFFICE

7<sup>th</sup> August, 1931.

My Lord,

With reference to Your Lordship's despatch No. 352 of the 26th May last, regarding representations which have reached Your Lordship in connection with a whipping of an Indian boy as the result of a judgment in the Court of the Resident Magistrate at Nairobi, I have the honour to transmit a copy of the observations of the Chief Justice in regard to the questions raised in the second paragraph of Your Lordship's despatch.

The Attorney General is in general agreement with the Chief Justice's observations; but he feels that there is little doubt that the provisions of Section 27(3) of the Penal Code do not apply where the Statutory penalty for an offence is a fine with imprisonment only in default of payment.

2. I desire strongly to endorse the Chief Justice's opinion on the general question as expressed in the fourth paragraph of his letter, and, in the event of a future ruling of the Supreme Court showing the sentence in question to have been illegal, it will be necessary to consider the advisability of an amendment of the relative section of the Penal Code to avoid sending juveniles to prison.

13. With

THE RIGHT HONOURABLE LORD PASSFIELD, P.C.  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W. 1

RECEIVED 24 AUG 1931

- 2 -

3. With reference to the third paragraph of Your Lordship's despatch regarding the manner in which the sentence was inflicted, I enclose for Your Lordship's information copies of the record of the case with the comments of the Magistrate and of the Chief Justice, together with a copy of a report by the Commissioner of Prisons upon the circumstances in which the sentence was carried out. Your Lordship will agree that the chastisement inflicted has its parallel in English schools and observe that this form of punishment has been inflicted by the trying Magistrate upon a European boy for an identical offence.

It will also be noticed that the whipping was administered with a light cane, and, in view of the enclosures to this despatch, Your Lordship will, I am sure, agree that no undue severity was used in its application and that its award was just.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble  
servant,

*H. T. Martin*

*H. T. Martin*  
Brigadier-General,  
GOVERNOR.

C O P Y

No. K.C.1163/43/13/II.

LAW COURTS,  
NAIROBI,  
P.O. BOX 41.

21st July, 1931.

The Honourable  
The Colonial Secretary,  
Nairobi.

Sir,

Caring of an Indian Boy.

R.M.Nairobi Criminal Case No.1688/1931.

With reference to your S/A.Pri.3/5/29 of 19th ultimo and its enclosure, I have the honour to state for the information of the Secretary of State that there is no Supreme Court ruling on the construction to be applied to section 27(3) of the Penal Code in cases where the punishment prescribed is a fine with imprisonment in default.

The construction of such section is not altogether free from difficulty and it is undesirable to express an opinion on a matter which may be left up for judicial interpretation. But at first sight I am inclined to agree with the construction placed on the sub-section by the Secretary of State, that is, that to empower a Court to sentence a juvenile to corporal punishment the punishment prescribed for the offence must include imprisonment other than imprisonment in default of payment of a fine. It might be argued that the accused convicted of an offence under the Motor Traffic Ordinance 1928 is liable to imprisonment within the terms of section 27(3) of the Penal Code, in that the Traffic Ordinance prescribes imprisonment in default of payment of the fine, but as at present advised I do not think there is such force in such an argument.

When opportunity presents itself a ruling of this Court will be obtained.

2.

If the Secretary of State's view is sound then a hardship arises for if a juvenile convicted of an offence punishable with fine or imprisonment in default of payment cannot pay the only alternative is imprisonment and it was precisely to avoid sending juveniles to prison that the provision for the corporal punishment of juveniles in section 27(3) of the Penal Code was enacted.

Apart from the legal aspect of the Magistrate's sentence under discussion, I am of opinion that there is little merit on the facts in the case presented by the convict's father. He was given an opportunity to pay a fine if inflicted, but refused, hence the sentence of corporal punishment which was given to avoid sending the convict to prison, vide the Resident Magistrate's letter No. 272/31 of 24th March last, copy of which I enclose.

Please see  
(a) of 2nd  
enclosure  
to despatch.

In conclusion I should like to direct attention to the fact that, so far as I am aware, the application to this territory of the Indian Whipping Act, 1864, has not been specifically repealed, although in my opinion the provisions regarding corporal punishment in the Penal Code have the effect of repealing the applied Act by implication.

I regret that absence on the Court of Appeal has delayed an earlier answer to your memorandum.

I am, Sir,

Your obedient servant,

(Sd.) J.W. Barth.  
CHIEF JUSTICE.

C O P Y

No. J.C. 454/43-13 Vol. II.

LAW COURTS,  
NAIROBI,  
P.O. BOX 41.

25th March, 1931.

The Honourable the Colonial Secretary,  
The Secretariat,  
NAIROBI.Resident Magistrate's (Nairobi) Criminal Case  
No. 1698 of 1931.  
Reference your S/A.FRI. 5/1/1/IV/6 of 21st inst.

I am directed by His Honour the Chief Justice to enclose herewith a copy of the record together with a copy of Mr. Gamble's observations on the case.

The memorandum of the Indian Association, in His Honour's view, appears to attempt to make out a case of racial discrimination. Such attempt is not justified. The father had an opportunity of saying if he were prepared to pay a fine but refused.

His Honour has expressed the opinion

- (1) that twelve strokes for a boy of 13 years of age does not seem an excessive punishment.
- (2) that the administration of the punishment is a matter for the Prison Medical Authorities, as Mr. Gamble observes.
- (3) that caning is of little effect unless it is administered with some vigour and that 12 gentle taps would hardly be termed punishment or act as a deterrent, and that the aim of corporal punishment is to inflict pain.

(Sd.,) Murray M. Jack.

REGISTRAR,  
SUPREME COURT OF KENYA.

C O P Y

No.R.M.272/31.

RESIDENT MAGISTRATE'S COURT,

NAIROBI,

24th March, 1931.

The Registrar,  
Supreme Court of Kenya,  
NAIROBI.

Your J.C.477/43-13 of 24.3.31.  
Resident Magistrate's Criminal Case No.1698/31.

I would preface my remarks by stating that the account of this case published in the press is untrue.

On the case being called I found that no relative of the accused boy was in Court. I accordingly stood the case over for the boy's father to be called. When the father arrived he was twice asked if he was prepared to pay a fine on behalf of his son, if such was imposed; the father twice refused. As there was no object in imposing a fine which the accused could not pay I considered that caning was a suitable punishment. The age of the boy was one of the reasons for inflicting corporal punishment, the build of the boy a matter for the Prison doctor to consider.

The allegation of racial discrimination on my part hardly calls for comment, but it may be interesting to observe that I ordered a European child to be caned for an identical offence committed in respect of a motor car.

It is I consider out of my province to comment upon the method of administering the caning. Copy of the file is enclosed herewith.

(Sd.) Fred. C. Gamble.

RESIDENT MAGISTRATE.

C O P Y

COLONY AND PROTECTORATE OF KENYA.

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI.

CRIMINAL CASE NO. 1698 of 1931.

Rex ..... Complainant.  
 Amritlal s/o Harji Monji ..... Accused.

Charge:- (1) Section 3 T.O. 1928, Driving unlicensed  
 motor cycle.  
 (2) Section 12/1 T.O. 1928, No driving licence.  
 (3) Section 18/3 T.O. 1928 Inefficient silencer.

1st Charge (Accused) It is true.  
 2nd Charge (Accused) It is true.  
 3rd Charge (Accused) It is true.

Accused is guilty on plea to each charge. His  
 father informs me that accused is 13 years of age and took  
 out the m/cycle without parental permission.

Sentence:- 4 strokes with a cane. (2) 4 strokes with  
 a cane. (3) 4 strokes with a cane.

(Sd.) Fred. C. Gamble.

16/3/31

Encl. no 3. 34

C O P Y

Office of the Commissioner of Prisons,  
Kenya Prisons,  
Nairobi.

No. Prisons  
23/2/3/31.

25th March, 1931.

The Hon'ble the Colonial Secretary,  
NAIROBI.

CANINGS.

Ref. Sec. A. PRI. 3/1/1/IV/6 of 21.3.31.

I enclose copy of a report from the Acting Superintendent of Nairobi Prison in regard to the caning administered to an Indian boy by order of the Resident Magistrate on the 16th March. A copy of the report by the Medical Officer of the Prison is also attached.

2. From these reports it does not appear that the caning was administered in a more severe manner than is usual, nor that the after effects were in any way abnormal. It is natural that a caning should cause bruises, but the boy's skin was not broken. The Sub-Assistant Surgeon of the Prison was present whilst the caning was administered, and no doubt would have exercised the prerogative conferred by Section 61(5) of the Prisons Ordinance, 1930, had he felt it necessary to do so.

(Sd.) G.E. Spencer.  
COMMISSIONER OF PRISONS.

C O P Y

Office of the Superintendent  
of Prisons, Nairobi,  
23rd March, 1931.

No.N.P.7/8/31.

The Commissioner of Prisons,  
NAIROBI.

Sir,

Ref. attached two cuttings from "Fairplay" of  
21st March, 1931, and cutting of E.A. Stan-  
dard of 24th March, 1931.

I have the honour to submit the following com-  
ments on the above subject for your information please:-

- (1) The boy in question was caned, and released at 4.50 p.m. on the 16th instant.
- (2) Present - the S.A.S.  
Chief Officer Partridge.  
A.W.Gher No.135.
- (3) Certified fit for caning by the S.A.S.
- (4) The caning was carried out by A.C.W. Gher, and my personal experience of the S.A.S. and A.C.W.Gher is that they are both very lenient where young offenders are subjected to caning.
- (5) the lightest cane was used in this instance and can be produced.
- (6) The boy refused to take down his trousers, or lie down to receive the caning.
- (7) He was laid on the caning form and not on the ground.
- (8) He was held on the caning form to prevent any injury to himself by rolling off. The boy himself was very violent.
- (9) A damp cloth is used to prevent such injuries as bruising.
- (10) The boy was not flogged - he was caned with a light cane.

I have, etc.,

(Sd.) A. Harris Marshall.

AGSUPERINTENDENT OF PRISONS.

(6)  
36  
C O P Y

PRISON HOSPITAL,  
NAIROBI.

March 24th, 1931.

The Hon. Director of Medical  
and Sanitary Services,  
NAIROBI.

RE. ATTACHED CUTTINGS FROM "FAIRPLAY" OF  
MARCH 21ST.

Sir,

Sub-Assistant Surgeon Siriram Thind wishes me  
to state in connection with the above that:-

- (a) The boy was examined by him before punishment,  
and was found fit to receive same.
- (b) The caning was no more severe than is usual  
on these occasions.
- (c) The boy was certainly not bleeding after the  
caning.
- (d) The S.A.S. was himself present at the caning.

I have, etc.,

(Sd.) F.L.R. Miller.  
M.O. NAIROBI PRISON.

O. O.

*Rafter 12/15*

93

Mr. Eastwood 16/5

Mr. Allen 18/5

Mr. Parkinson

Mr. Tomlinson

Sir C. Bannister

Sir J. Shackleton

Sir G. Grindle

Permt. U.S. of S.

Partly. U.S. of S.

Secretary of State.

*Wm. Ho. 6*

Downing Street,

26 May, 1931.

Sir,

I have the honour to inform you that representations have reached me regarding a recent ~~conviction~~ <sup>charging</sup> of an Indian boy as the result of a judgment in the court of the Resident Magistrate at Nairobi. A copy of an extract from the "Kenya Daily Mail" of the 25th March 1931, which <sup>refers to</sup> gives full particulars of the case is enclosed.

**DRAFT.**

KENYA

NO. 352

Gov.

*Enclosed Kenya Daily Mail 25th March '31  
 (see marked copy also to be)  
 [Let the [unclear] see the copy to [unclear] same [unclear] are [unclear] 1931]*

2. Section 27(3) of the Kenya Penal Code

provides that a male person of under 16 years of age convicted of any offence for which he is liable to imprisonment may suffer corporal punishment. The sections ~~of the Kenya Traffic Ordinance 1928,~~ under which this boy was convicted provide

for a fine and only for imprisonment in default of payment. In the circumstances it would appear that the boy ought not to be regarded as liable to imprisonment in default

2 drafts.

default was made in payment of the fine. It therefore seems doubtful whether the sentences of whipping <sup>were</sup> strictly legal: But I understand that there may be inexistence <sup>of</sup> a High Court ruling on the point. I should therefore be glad if the case could be referred to the Chief Justice for his observations, and if you would furnish me with a copy of them together with any comments that you may have to make.

3. I would also invite your attention to the ~~doctor's~~ <sup>marcal</sup> certificate reproduced in the extract.

~~It has been suggested that it might be inferred from this certificate that the punishment was inflicted with undue severity,~~

should be glad to have your observations on this point also. Before forming any opinion,

you may think it advisable to <sup>return</sup> get a report from the ~~Medical~~ <sup>Surgeon</sup> Officer present at the ~~camping~~ <sup>camping</sup>.

I have, etc.

Signed PASSFIELD.

Museum 0385

38

72, Gower Street  
W.C. 1.

April 23/31

Dear Shields

I enclose entry of  
what seems to be a rather  
trivial case. I haven't  
had anything on the order of business  
as you said you were  
anxious for us to keep  
quiet about Kenya. But  
I do think — in view of  
the doctor's certificate —  
that there ought to be  
some enquiry as to

H. H. H. H. H.  
H. H. H. H. H.

EXTRACT FROM THE KENYA DAILY MAIL

Dated 20th March, 1951.

X X X X

CHILD PUNISHMENT.

A NAIROBI COURT CASE.

To THE EDITOR, "Kenya Daily Mail."

Sir, - I am a father who has suffered through the pain inflicted on a son, and by the information I am giving to other fathers like myself I think I shall be doing some good to the public.

I have a son by name Amritlal, who is studying in the Indian school. He is 13 years of age, not yet complete. He was caught by the police on Sunday, the 10th instant, riding a motor cycle which he took without my permission. He was taken to the police station but was released by my signing a bond, till the next day, Monday, when he was taken before the Town Magistrate and sentenced about midday to 12 strokes with a cane. I asked the Court Clerk to tell the Magistrate that I would pay any fine for my son, instead of this coming. No notice was taken

of

40

of my request. The child was then sent to the lock-up in the Court House. At about 4 p.m. he was taken in a motor van to the prison, where he was examined by a doctor. He was then stripped by African askaris and laid flat on the ground. A wet cloth was placed on his buttocks and four askaris held him tight, one of them holding his head firmly down. He was then beaten by an African askari with a cane. One European was standing by, but the doctor was not there. Beating finished, my son was turned out of the prison premises and one of the askaris told him to run away quickly, otherwise he would get five more strokes. The boy ran home and reached my house at about 6.30. p.m. in a fainting condition. I am living on Canal Road.

This is the first time that my son had been to Court.

Yours etc.,

(Signed) HIRJI MOMJI.

P.S.: I am enclosing for publication copies of the Magistrate's order and of the Doctor's certificate.  
Motor repairer, Swamp Road, Nairobi,  
March 18th, 1931.

-----

**ENCLOSURE:**

Colony and Protectorate of Kenya, in the  
Resident Magistrate's Court at Nairobi - Criminal Case  
No. J 688 of 1931. - Rex. Complainant: Anritlal  
S/o Harji Harji Assand.

Charge: (1) Section 3. T.O. 1928: Driving  
unlicensed motor cycle. (2). Section 12/1 T.O. 1928:  
No driving licence. (3). Section 12/2 T.O. 1928:  
Insufficient silencer.

1st Charge.

1st Charge (Accused): It is true.

2nd Charge (Accused): It is true.

3rd Charge (Accused): It is true.

Accused is guilty on plea to each charge. His father informs me that accused is 13 years of age and took out the motor cycle without parents' permission.

Sentence:- 4 strokes with a cane.

(2) 4 strokes with a cane. (3) 4 strokes with a cane.

16.3.31.

(Signed) FRED. C. GAMBLE.

-----  
NAIROBI,

17th March, 1931.

THIS IS TO CERTIFY that I was called last night to see Amirul Hirji who I understood was ordered by the Resident Magistrate to receive 12 strokes with a light cane. I examined the buttocks and found evidence of a considerable amount of energy having been applied in administering the 12 strokes - long linear scars with severe subcutaneous haemorrhages on both buttocks. He is to-day in considerable degree of pain and is unable to sit down or lie on his back.

I am not prepared to say whether the flogging was strictly in accordance with the Magistrate's orders, but I can certify that these orders must have been vigorously administered.

(Signed) H. MACKENZIE.

1951

Kenya

No. 17207

SUBJECT

C0533/412

Bagishu Murder Trial.

Report of Commission of Enquiry.

(Four enclosures in two separate covers.)

Previous

15875/29.

Subsequent

26138/31 2nd.

(Enquiry into matters of justice - criminal matters affecting natives)

1 / Gov. Byrnes. No 69. (Conf) — 8<sup>th</sup> May.  
 Forwards copies of report of Commission with  
 copy of Appendices to the report. Comments on  
 report and states that it has not been  
 published in view of the question as to whether  
 terms of reference have been exceeded. States  
 he is not taking following report and requests  
sanction by telegram for payments of compensation

The Governor forwards the Report of the  
 Commission of Inquiry arising out of the conviction  
 of four employees of Mrs Bentley of the murder of  
 another native. The Report makes gloomy reading.  
 From the beginning to the end everything seems  
 to have gone wrong and it was only the extraordinary  
 perseverance of Mr. Bentley which prevented the  
 most appalling miscarriage of justice. Even as it  
 was four innocent men were kept under sentence of  
 death for 226 days and in custody for over 500 days.

1. So far as the police were concerned,  
 the report shows that both the askaris and Mr. Dale  
 did many things which they should not have done  
 and omitted to do many things which they should  
 have done. The askaris and Mr. Dale have  
 already been punished. A further enquiry is  
 being held as to the degree of blame attaching  
 to the Assistant Superintendent, Mr. Midway, and it  
 is, I think, fair to assume that he will not be  
 entirely exonerated.

The Secretary of State may perhaps agree  
 with the opinion of the Governor and his  
 Executive Council as recorded in paragraph 6 of  
 the despatch that it was not the system but the  
 administration of it which was at fault. We should  
 also ask to be informed of the result of the further  
 enquiry regarding Mr. Midway.

*Think, unless the  
 Govt. is asked to order  
 enquiry (over)*

2. As regards Mr. G. G. G. G. the Magistrate  
 the Attorney General considers the remarks made  
 in

1  
 Ser. Byrne. No 69. (Conf) — 8<sup>th</sup> May,  
 Forwards copies of Report of Commission with  
 copy of Appendices to the Report. Comments on  
 report and states that it has not been  
 published in view of the question as to whether  
 terms of reference have been exceeded. States as  
 to action being following report and requests  
 sanction by telegram for payment of compensation.

The Governor forwards the Report of the  
 Commission of Inquiry arising out of the conviction  
 of some employees of Mr. Justice of the murder of  
 another native. The Report makes gloomy reading.  
 From the beginning to the end everything seems  
 to have gone wrong and it was only the extraordinary  
 perseverance of Mr. Justice which prevented the  
 most appalling miscarriage of justice. Even so it  
 was four innocent men were kept under sentence of  
 death for 226 days and in custody for over 500 days.

1. So far as the police were concerned,  
 the report shows that both the askaris and Mr. Dale  
 did many things which they should not have done  
 and omitted to do many things which they should  
 have done. The askaris and Mr. Dale have  
 already been punished. A further enquiry is  
 being held as to the degree of blame attaching  
 to the Assistant Superintendent, Mr. Ridgway and it  
 is, I think, fair to assume that he will not be  
 entirely exonerated.

The Secretary of State may perhaps agree  
 with the opinion of the Governor and his  
 Executive Council as recorded in paragraph b of  
 the despatch that it was not the system but the  
 administration of it which was at fault. We should  
 also ask to be informed of the result of the further  
 enquiry regarding Mr. Ridgway.

*the  
 think, under the  
 to be at 12 for his  
 enquiry 1913*

2. As regards Mr. Glaspie, the Magistrate,  
 the attorney General considers the remarks made

in paragraph 41 is too strong. Far more serious however are the remarks in paragraphs 42 and 53. Apparently he was not bound to hold an inquest (old Criminal Procedure Ordinance § 143 - s.f. new Ordinance § 371) and merely he ought to have noted in the preliminary enquiry he is only concerned to consider whether there is sufficient case against the accused to warrant committal to the Supreme Court. Why at that enquiry did he not ask for Mr. Dale's report? Why did he allow many doubtful points to pass without comment? The Commission have left with the impression that the Magistrate who accepted the police case without any active participation in the investigation and on whom the case was supposed to be conducted by the Commissioner is not definitely bound to give notice of the Government's intent on the point, but, if justice is to be done, every one of the preliminary enquiries conducted here should be treated as if they were as well as against of course.

3. The law officers are involved in the Commission of all crimes. The Secretary should be able to deal with pleasure.

4. The system No doubt the report of the Commission is a valuable document.

5. The system cannot help being left with a feeling of disgust and indignation that the existing individual

not to admit that there is at least something in the most interesting Memorandum by Mr. Bentley at the end of Appendix I, in which he criticises the system.

I think that the report shows that under the present system everything depends on the proper handling of the preliminary enquiry by the police and the magistrate and that the court, even if the prisoner had the benefit of skilled defence, is not able to get to the bottom of things.

Without radical alteration of the system it should be possible to introduce one or two improvements:-

1. The Magistrate should always hold inquests when there is any obscurity about a death.

2. A preliminary enquiry on a charge is not enough.

3. It would be possible to make the holding of inquests compulsory by law.

4. The appointment of a lawyer thoroughly well-versed in native matters who should receive from Government a retaining fee to defend natives who provide the adequate defence of natives charged with serious offences - compare paragraph 4 of the report and last paragraph of Bentley's Memorandum in which the Governor was asked for his views on this suggestion. These views have not been received but in the last paragraph of his memorandum the Attorney General says that the suggestion is under consideration.

(An alternative to the appointment of a lawyer with a retaining fee would be the

*There is a  
salaries  
- depending on  
low in  
Malta  
P*

training. He would be more likely to be able to appreciate the native point of view and to check interpretation.)

(c) The empowering of district officers to try serious cases against natives under sections 14 and 15 of the new Criminal Procedure Code. Whether this would be an improvement I do not know but I believe that Administrative Officers are so empowered in parts of Tanganyika and Uganda to which the High Court does not come.

But Mr. Bentley would press for a far more comprehensive alteration of the law than this - see his memoranda of criticisms at the end of Appendix A. What he wants is a system more adapted to the native mentality than one copied from the British system. If this is to be done there must be another and a wider enquiry and I think there are at least grounds for it: the Secretary of State had anticipated that it might be necessary - see Nos. 19 and 20 of 15875/34. In No. 19 on that paper the then Governor said that he thought that the wider enquiry should cover Uganda and Tanganyika as well as Kenya, and that there should be an independent chairman.

As a first step the Governor should be informed that the Secretary of State considers that there are grounds for a wider enquiry into the whole system, ask him to consult the Governments of Uganda and

Tanganyika Territory as to their participating

in the enquiry after reference to them to suggest

and the personnel of the Commission. The chairman should presumably be neither a lawyer nor an Administrative Officer.

#### 5. Publication.

I think it was necessary for the Committee to consider the system to a certain extent in order to decide how far blame attached to individuals and how far to the system. But certain of their remarks can by no stretch of the imagination be brought within their terms of reference. I do not know however, that that would matter much, were it not that some of the remarks do not have a proper basis in fact. For this reason it would be a little awkward to publish the report and nothing more.

On the other hand it would be still more awkward were the Government accused of trying to hush up a report such as this, and on the whole I would suggest that the report should be published but should be accompanied by a statement by Government,

(1) summarizing the comments on his report contained in the memoranda by the Acting Commissioner of Police and the Attorney General, stating the action taken upon the report and the result of the further enquiry regarding Mr. Ridgway.

(2) announcing a wider enquiry as suggested above.

Publication would have to be deferred until the terms of reference and the personnel for this enquiry have been settled. It is for consideration

whether the criticisms of the system set out by Mr. Bentley which appear at the end of Appendix A.

*Sagre kindly - see  
6.1.1954*

*6.1.1954*



I agree generally with Mr. Roberts Wray, and I only want to add a few words about the terms of reference on publication. It may be that the expression "the circumstances in which four men were charged" is capable of a wide interpretation, but there was very precise correspondence between the Secretary of State and the Governor which left no doubt as to the interpretation which was to be put upon the words, and we are told that the Chairman of the Commission was aware of the correspondence. I am constrained therefore to agree with the Governor that the Commission has deliberately gone outside its terms of reference. I always had misgivings about allowing Mr. Bentley to put in memoranda which were irrelevant and outside the subject matter of the enquiry. Those who prepared the case for the Commission were not concerned with the system. The Attorney General did not direct attention to it. There was no proper material before the Commission about it, and, in my view, the Commission was not a competent body to rule upon it. For those reasons I think that publication of the report would give a false impression of the position, and would also, on the face of it, pre-judge the very matter which it might be necessary to refer to another Commission.

It is all very unfortunate, but I fear that Mr. Maxwell, the Chief Native Commissioner, with very definite views about native administration, has been too much for Mr. Maxwell, the unbiassed Commissioner, with limited terms of reference. The Commission argued throughout from the particular

abused, the system is wrong.

The injustice in this case - if <sup>as</sup> we must assume, there has been an injustice - was due to the intimidation of the witnesses and to their subsequent perjury. No system is proof against the abuse of itself, and no court is proof against organised perjury. The alternative system recommended by Mr. Bentley, which evidently attracts the Commission, is one which, in the view of many people, would result in more innocent people being convicted than under the existing system, and would, as far as I can gather from the view of Mr. Bentley and the Commission, probably result in the conviction in this case of the Nandi, although it is <sup>stated</sup> admitted by the police that they have not sufficient evidence to put ~~forward at the hearing~~ <sup>forward at the hearing</sup> trial.

The Magistrate, upon the evidence before him in this case, could not, in my view, have done anything but commit the accused for trial, and, despite the uninstructed comment of the Commission in paragraph 49, the duty of the Magistrate is simply to see whether there is a prima facie case. It is by no means always to the advantage of an accused person to raise his defence in the Magistrate's court.

There was ample evidence before the High Court to justify conviction: indeed, there was evidence that is seldom to be found in a murder case - an eye witness.

A pathetic picture is drawn of natives in a dock, ignorant and bewildered, but the same difficulty obtains here, and to any uneducated person in a dock, who is not defended, a trial must seem a most bewildering affair. No solution has yet been found, and the only safeguard is the care which is taken by

the Judge and Prosecuting Counsel.

Wherever in this report the Commission have departed from their duty in order to arraign the system, they give what I think to be an unfair picture, but what is certainly not a picture which should be given to the world as a result of an investigation which was not directed to that issue at all.

10.7.31.

The Commission have set out the position in the memorandum attached to the file as No. 2. I see especially paragraphs (d), (e) and (f) which specify the points for consideration. There is a good deal of material in this file and I will make my own notes as far as possible.

Action already taken by Government in Kenya.  
This can be approved?

3. Law Officers in Kenya.

The Secretary of State should note with pleasure that the Commission entirely exonerates the Law Officers and does not touch the subject of the case?

THE PUBLIC DEFENDER.

The Commission have taken up as a matter of course the subject at 'Y'. I think it is probable that the Secretary of State will be interested in the fact that outside East Africa there are no public defenders. I think the Commission's suggestions as to the need for a public defender in Kenya should be approved for the time being?

(I am not sure how a Commission which would concern itself with more than one East African Territory can be constituted: presumably no one Governor can do it. But we need not go into this at the moment.)

Criticisms of procedure and suggestions for modification of procedure should be reviewed in connection with the wider enquiry. (cf. Mr. Roberts-Tray's memorandum at 'Y') and no action need now be directed?

5. Public Defender.

The appointment of a Public Defender as suggested by Sir Robert Maxwellton is said to be under consideration. I thought at first that this might be taken up now in advance of the further enquiry, but on the whole I think it would be better to wait, and in the meantime the Governor should make a specific recommendation.

6. Compensation.

(a) We cannot do anything against anything which might be done in the country the recommendation in paragraph 8 of the despatch as regards the natives, but grants of £1 to each native for each month of custody hardly seem adequate, and, after speaking to Mr. Mashe, I would suggest the lump sum of £50 to each, to be issued in suitable instalments through the Administration. At first I rather liked Mr. Eastwood's suggestion of life exemption from hut or poll tax, but this is not so simple as it sounds, as presumably the four natives being Bagishu come from Uganda and on the whole it seems better now to give larger

lump sums as proposed above, and leave it at that.

(b) The recommendation of £150 for Mr. Bentley should be approved, but we should say that it is assumed that this sum will in fact cover all his expenses and will be acceptable to him?

I have discussed with Mr. Rushe the question whether it would be reasonable for the Government to do anything further for Mr. Bentley to mark appreciation of his public spirited ~~and~~ action as suggested by Mr. Eastwood. It occurred to me that possibly the thanks of B.I. Government might be conveyed formally to Mr. Bentley through the Government of Kenya, but Mr. Rushe was very doubtful as to the propriety of this, and he pointed out that there have been cases in that country, e.g. when a man has spent literally years of his own time and hundreds of pounds of money to secure the receipt of a sentence, and so far as he knows, the thanks of the Government have not been conveyed to him. I am content therefore to leave the matter as it is, although, personally, I should like to see some recognition of this kind.

#### 7. Publication

I am in favour of the report and evidence being published, but I agree with Mr. Rushe that publication now might be prejudicial to the further enquiry contemplated.

I suggest that the Governor should be instructed to announce that the report has been received and considered by his Government in

consultation

consultation with the Secretary of State: the findings upon the issues submitted to the Commission and the action taken by the Government upon those findings should be detailed: at the same time the Governor should announce that it is proposed to institute a further enquiry into the whole question of the administration of criminal justice in relation to natives: that he is in communication with the Secretary of State and the Governors of Uganda and Tanganyika in regard to this, and cannot yet make a definite statement on the subject: that pending this further enquiry it would not, in the opinion of the Secretary of State and the Government of Kenya, be desirable to publish the present report, and that that report will be published in due time with the evidence when the report of the further enquiry is itself published.

8. If the proposals in this minute are approved I think that the whole matter could <sup>conveniently</sup> ~~immediately~~ be taken by telegram.

see Parkman  
13.7.51

I agree. The passage at the end of 348 is in itself enough to justify hesitation on publication.

13.7.51

Secy of State  
(through Dr. Shields)

See 1911  
If letter from  
15/7 through the Govt  
re: Bentley  
7/8/51 read  
13/7

Proposed

J.M.B.

16731

I agree I think that a personal letter from the S. of S. to Mr Bentley would be in order and be desirable. In any further enquiry, I hope it will be part of the terms of reference to consider of the conditions and pay of the native police are such as to get the best available personnel. I have a feeling that both in Uganda and Kenya the police are under paid and the best class of men is not obtained. It is foolish to economise on police pay. Mr Justice Stephens has been unfortunate in certain of his recent judicial efforts and I hope he goes soon. I consider we should complain of the delay in dealing with the report which was presented last December.

29.9.31

It was definitely a case for promptness and I can see no reason for spinning it out like this. It is not fair to those concerned!

I agree I should be glad to sign a letter to Mr Bentley if that is deemed permissible.

P. 307

W.M. 11/10/31

I submit drafts for return. I refer to Mr Parkinson & he agreed that since a draft must now go in any case with the S. of S.'s letter, the whole action had better be completed in one despatch which it is possible to make by air mail. To make this possible the letter for the S. of S. ought to be sent to him in the country tomorrow at the latest.

I have included in the draft despatch (b) the possible attention of the law which have been asked here - without any suggestion that the law should be amended at once prior to the further enquiry. I hope this carries out the intention of previous minutes. A further case can be no more in just working on the points.

I think it would be best to send it by air mail.

Continued

4-8-31

As the law is not a law of Kenya but the law of Kenya, I am afraid I am afraid I am afraid.

Approved P. 308

Accepted

W.M. 11/10/31

W.M. 11/10/31

To Mr. Bentley (U.S. to you) - s.o. 7 AUG 1931  
5 V. Gov. Conf. (North America) - 7 AUG 1931 (By Air Mail)  
(No. 1. Revised)

Receipt for  
copy of  
questionnaire  
further inquiry

To Gov Kenya Tel no 238 Conf. 7/8/31

DESTROYED UNDER STATUTE

Not to be used  
in part page

DESTROYED UNDER STATUTE

How many Conf 108 \_\_\_\_\_ 14 August

Signify reply to no. 1

in backward

Part by

thous

12/9/31

Franklin

12/9

P. C. C. Bentley for Kenya Civil Statute  
7 11 Sept. 1931

Rep. to read.

This statement was in accordance  
with the 1931 instructions.

Dispute as to the wider  
inquiry have been sent on  
12/9/31

Franklin  
9/11/31

Whitman

? further action - reference  
Paragraph 3 of No. 5.

27/7/31

Revised

Mr. P. M. S. M. S.

27/7/31

It appears from his P.E. (1930) that the Ridgway  
went on leave to S. Africa on 1st Oct 30  
No. 5 however still have reached Nairobi two  
months previously.

At. of. para 3 of 5, whether for  
now in a position to report the result of  
the departmental enquiry for and in para  
of.

28 June

9 To Gov Conf (3) - comes 10 AUG 1932

10

Kenya - 16 Conf - 27/7/31  
This copy of the record of the departmental  
enquiry arising from the Report of the  
Commission. Considered it sufficient that  
an expression of the severe displeasure  
should be conveyed to the Ridgway

P.F. Notice  
24/7/31

20 note in P.F. copy to see, the  
partly

2/10/32

Mr. P. M. S. M. S.  
7/10/32

U.S. Bank

Mr. Freeston<sup>x</sup>

Mr. Bushe, when he goes to East Africa, proposes to take with him from these papers the following : - Appendices "A", "B", "C" and "D", together with the Report of the Commission of Enquiry. He therefore suggests that the Government of Kenya be requested to forward, by the earliest possible mail, duplicates of the above papers, for possible reference in the Department.

*E. White*

28.1.33.

*Imagined to this*  
*HLB*

*By Air mail*  
*31/1/33*

*To Col. Sec. Cook - 3/Jan 31 JAN 1933*

DESTROYED UNDER STATUTE

*✓* *As Secretary (Conf)* \_\_\_\_\_ *10 Feb 33.*  
*States that until action contemplated in Nov. is taken,*  
*no spare copy of the Appendices to Report will be available.*

DESTROYED UNDER STATUTE

*I discussed with Mr. Bushe, & agreed that the need for the documents was greater than mine. He has taken them*

*P. H. G.*

*4/5*

*(Handwritten mark)*

Mr. Freeston. <sup>X</sup>

<sup>X</sup>  
I'm agreed to this  
HLS

Mr. Bushe, when he goes to East Africa, proposes to take with him from these papers the following: - Appendices "A", "B", "C" and "D", together with the Report of the Commission of Enquiry. He therefore suggests that the Government of Kenya be requested to forward, by the earliest possible mail, duplicates of the above papers, for possible reference in the Department.

*E. White*

28.1.33.

*By air mail  
31/1/33*

To Col. Sec. Conf. - 3pm 31 JAN 1933

DESTROYED UNDER STATUTE

*6th Secretary Gen (Conf) 10 Feb 33.*

*States that until action contemplated in Nov is taken, no spare copy of the Appendices to Report will be available*

DESTROYED UNDER STATUTE

*I discussed with Mr. Bushe, & agreed that his need for the documents was greater than mine. He has taken them*

*Partly*

*BA*

*4/5*

*AW*



KENYA.

NO. //6

CONFIDENTIAL.

RE. D  
3 OCT 1932  
CO. ICE

GOVERNMENT HOUSE,  
NAIROBI,  
KENYA.

12<sup>th</sup> September, 1932.

Sir,

With reference to Lord Passfield's Confidential despatch of the 7th August, 1931, I have the honour to transmit to you, for your information, a copy of the record of the departmental enquiry arising from the Report of the Commission appointed to enquire into the circumstances surrounding the trial for murder of certain Bagishu employed by Mr. Oswald Bentley, together with a memorandum. Captain R.G.B. Spicer, M.C., then Commissioner of Police.

2. I agree generally with Captain Spicer's view of Mr. Ridgway's conduct and, having taken into consideration the fact of his being unwell at the time and his good record both before and after the occurrence, I considered it sufficient that an expression of my severe displeasure should be conveyed to this officer.

3. I regret that the necessity of furnishing you with a record of this enquiry was previously overlooked.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*H. G. G.*  
Brigadier-General,  
GOVERNOR.

THE RIGHT HONOURABLE  
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET  
LONDON, S.W.



11  
10  
GOVERNMENT HOUSE,  
NAIROBI,  
KENYA  
12<sup>th</sup> September, 1932.

KENYA.

NO 116

CONFIDENTIAL.

RE. D  
3 OCT 1932  
COL. POLICE

Sir,

11.5  
With reference to Lord Passfield's Confidential despatch of the 7th August, 1931, I have the honour to transmit to you, for your information, a copy of the record of the departmental enquiry arising from the Report of the Commission appointed to enquire into the circumstances surrounding the trial for murder of certain Bagishu employed by Mr. Oswald Bentley, together with a memorandum by Captain R.G.B. Spicer, M.C., then Commissioner of Police.

2. I agree generally with Captain Spicer's view of Mr. Ridgway's conduct and, having taken into consideration the fact of his being unwell at the time and his good record both before and after the occurrence, I considered it sufficient that an expression of my severe displeasure should be conveyed to this officer.

3. I regret that the necessity of furnishing you with a record of this enquiry was previously overlooked.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*H. D. Jones*  
Brigadier-General,  
GOVERNOR.

THE RIGHT HONOURABLE  
MAJOR SIR PHILIP CHILIFFE-LISTER, P.C., G.B.S., M.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W. 1.

COPY

P.40/30A/162/28

CONFIDENTIAL.

7th May, 1931.

The Hon ble  
The Colonial Secretary,  
Nairobi.

DAGISHU MURDER TRIAL.  
REPORT OF COMMISSION OF ENQUIRY.

With reference to your letter No.S/A.JCL. 24/1/II/53 of 30th April and further to my letter P.40/30A/159/28 of 1st May, paragraph 12, I have the honour to state that I conducted this enquiry with regard to Mr. T.R.J. Ridgway, Assistant Superintendent of Police, yesterday, May 6th. Assistant Inspector Dale was also in attendance.

2. I beg to submit a copy of the enquiry which I held in question and answer form.
3. As will be seen Mr. Ridgway frankly admits that he failed to give the case his immediate, close personal supervision and direction as he knew very well it was his duty to do.
4. Apart from general detail I submit this is the whole crux of the case as far as Mr. Ridgway is concerned, who definitely failed, which he frankly admits, to maintain this close personal supervision, and although there are definitely mitigating circumstances I am of opinion this was undoubtedly in many ways largely responsible for the Police irregularities and improper procedure that were brought to light as a result of subsequent investigations.

2.

5. Mr. Ridgway is an officer who has done very well in this force, and I submit herewith entries of misconduct and commendation as appearing in his Record of Service in order that you may satisfy yourself:-

MISCONDUCT.

August 1918, Nairobi. Reprimanded when European Constable for gross carelessness in investigation Nairobi Case file No. 936/18.

COMMENDATION.

June 1921. Specially commended by Inspector General of Police in Annual Report 1920.

March 1926. Specially commended by Governor's Deputy in connection with Commissioner of Police's Inspection Report of Kitale Unit.

October 1927. Mentioned in Commissioner of Police's Annual Report 1926.

September 1928. Mentioned in Commissioner of Police's Annual Report 1927.

August 1930. Mentioned in Commissioner's Annual Report for 1929.

October 1930. Commended by Ag. Commr. of Police in his inspection report for the efficient state of his Unit (Thika).

February 1931. Commended for exceptionally good work in stock theft cases. No. Thika 65/30 and Machakos 50/30 and 111/30.

6. I would further point out that it is a fact that Mr. Ridgway was not well at the time and also was to my certain knowledge concentrating on the prevention and detection of stock thefts in his district.

7. Mr. Ridgway is now an Assistant Superintendent of Police on the top increment of his grade, c. £300 a year.

8.

3.

8. I beg to suggest therefore that Mr. Ridgway be awarded a severe censure for his neglect of duty and his failure to have given the case under review proper, immediate, and close personal supervision and direction as laid down by Police orders.

9. In suggesting this punishment which in my opinion is a very severe one for an officer of Commissioned Rank, I think it right to point out that such an entry in his Service Sheet must possibly affect in the future his promotion and possibly his pension. On the other hand I would state that I consider that Mr. Ridgway has made a most frank and manly admission of his faults and personally, as Commissioner of Police, I have very much appreciated the truthful and frank manner in which he has conducted himself in so far as this enquiry is concerned.

R.G.B. Spicer.

COMMISSIONER OF POLICE.

Copy 1st -

The Hon'ble the Attorney General,  
MADRAS.

COPY

BAGISHU MURDER TRIAL.

MAY 6TH - MR. T. R. J. RIDGWAY, ASST. SUPT.  
THE KENYA POLICE, AT COMMISSIONER OF  
POLICE'S OFFICE.

Present: Captain G. Pritchard Brown, Staff Officer.

-----  
Letter No.S/A.JCL.24/1/II/33 or 30th April,  
1931, from the Hon ble the Colonial Secretary  
read over to Mr.Ridgway.  
-----

Questions to Mr.  
Ridgway by Commr.  
of Police and  
answers thereto.

1. Q. In view of the fact that this case was one of murder and occurred in the Police District, Kitale, of which you were in charge and more particularly that the investigation was conducted from Kitale Police Station, which is immediately contiguous to your own Headquarters, should you not have given the case your immediate, close personal supervision and direction?  
A. Yes, Sir, I admit that.
2. Q. Are you personally responsible to me as Commissioner of Police for all matters of investigation held in your District?  
A. Yes Sir.
3. Q. Are you aware that serious points of Police irregularity and incorrect procedure which were contrary to Police Standing Orders and Instructions occurred in this case?  
A. I am aware of it now, but I did not realise it at the time, that is to say, at the time when I was Asst. Supt. of Police, Kitale, when the murder occurred and when the investigation was being held.
4. Q. Were you ill on the 14th April, 1928, e.g. the day on which the case was reported?  
A. Yes, I was. I was ill in bed.
5. Q. Did you proceed to the scene of the crime on the 15th April?  
A. Yes, I did.

6. Q. Were you met by Asst. Inspector Dale?
- A. Asst. Inspector Dale had returned on the evening of the 14th April and had reported the rough facts of the case to me; and I took Asst. Inspector Dale with me to the scene on the next day, e.g. the 15th.
7. Q. Are you aware that the Law and Police Standing Orders direct that a first information report (Police form P.16) must be sent to the Magistrate immediately a murder is reported to you as having been committed within your jurisdiction?
- A. Yes, I am aware of that, but in this case the matter was reported immediately verbally to the Magistrate on the Saturday, but the written report was not submitted until the following Monday when I had proceeded to the scene and acquainted myself with the facts of the case. It has been my almost invariable custom since I have been in the Police to adopt this procedure.
- I do realize now that it would have been more correct and more in accordance with Standing Orders if a written report on Police form 16 had been supplied to the Magistrate containing what in creation I was already in possession of. That on returning from the scene I should amplify that first information report by a further and fuller report.
8. Q. Can you explain why the detention of accused No. 1 and 2 in this murder charge in Police custody at Kitale Police Station from the 16.4.28 to the 20.4.28 without proper magisterial remand and without a notification or arrest being rendered to the Magistrate was permitted? This, as you know, is illegal and definitely contrary to Police Orders.
- A. I agree that Asst. Inspector Dale should have applied for a remand warrant for these prisoners in Police custody in order that they might be interrogated. I submit that this remand was applied for and sanctioned by the Magistrate, but agree that there is no record of that in Police Case file, and that is where the fault lies.
9. Q. Do you not admit that in this case, your close personal supervision of the Police case file would have enabled you to see these essential entries made and that therefore you would have been able to prove that these irregularities did not occur?
- A. Yes Sir, I do admit that.
10. Q. Are you aware that Police Orders were not carried out in that the subsequent remand to Police custody was not notified to the Commissioner of Police as required by Police Orders 17/1926, para 3?
- A. Yes, I admit that.

11. Q. With regard to the detention illegally of accused Nos. 3 and 4 on the same murder charge without remand for some 48 hours and also after their remand to Police custody without similar notification as in the preceding case to the Commissioner of Police, do you admit that this is entirely wrong and contrary to Orders?
- A. Yes, I do admit that, but I submit that the necessary action was taken and that a remand was formally obtained, but as I have said before, the inadequate supervision of the case file, which I admit is not able to prove what I have stated, is responsible.
12. Q. Do you admit that 2 Mandi suspects were detained in Police custody from the 17.4.28 to 1.5.28 without remand and therefore illegally?
- A. Yes, I admit that. They were detained in Police custody in order that they should be kept separate from the Magishu accused. Unfortunately owing to neglect, for which I accept responsibility, the Police Case file and the Occurrence Book do not contain relative proof of the fact that I had obtained permission to remand these suspects in Police custody from the Magistrate. I swear on oath that I did obtain Magistrate's permission to remand these suspects in Police custody, but owing to what I consider to be a faulty system, remand warrants in such cases are returned to Court on the expiration of the period for which such remandees are in Police custody, and are more often than not destroyed instantly by the Court. If the Police file had retained a copy of these warrants, I should have been able to establish definite proof of what I allege to be true on my solemn oath.

Asst. Inspector Dale present.

Asst. Inspector Dale having read the previous question and answer read over to him states:-

"To the best of my memory and knowledge what Mr. Ridgway has stated is correct. I was not with him at the time when he made the application for the remand of these two Mandi suspects, but it would have immediately occurred either to him or to me if a remand warrant had not been in the Police Station that we were dealing with them in an entirely illegal manner, but it is obvious that had these remand warrants not been in possession of the Police we should not have detained these men in Police custody."

13. Q. Are you aware of the fact that as Asst. Supt. of Police in charge of Aitale you are in supreme charge of the District Headquarters, barracks and lines?
- A. Yes Sir, I am.

4.

14.

Q. Are you aware that Police Constables under your command were convicted magisterially and within the force of threats and violence to the witnesses in this case, such actions having taken place within the lines which are directly under your command?

A. I was not aware that anything of the sort had occurred before I left the District when I proceeded on leave. It is, I submit, impossible for an Officer i/c Police, unless he lives in the lines himself, to guarantee that such occurrences do not occur despite the closest supervision. The Officer i/c has, I submit, to trust his Sergeant Major.

15.

Q. Do you not agree that remands to Police custody under any circumstances lead to abuse and are a most dangerous procedure from a viewpoint of Police organisation?

A. I do agree, and in my future work I propose to eliminate such remands entirely from my procedure.

16.

Q. Do you admit that in the light of the experience of this case and all that has arisen from it you failed to keep a really close grip on the Police conduct and general investigation of the case under review which you now realise should be much more close, much more thorough and much more personal as far as you are concerned?

A. I do admit that, but I ask you as my Commissioner to take the following into consideration:-

In the first place on the day the murder was reported I was ill in bed with fever. Although not fit the following day I visited the scene of crime, from there I carried on and visited Mount Elgon to obtain the services of an ex-Police tracker, but having put Asst. Inspector Dale on what I considered to be the right lines of investigation, I trusted this Non-Commissioned Officer more than I should have done.

The points raised, I admit, are caused by the Case file not being correctly written up, which I again trusted Asst. Inspector Dale to perform.

I do realise that serious mistakes have been made in the recording of the necessary details in this case, and I do regret very much that I did not give this case far stricter and more personal supervision than I did.

Although I do not wish to labour the point I would like to be allowed to mention that at this period I was very much concerned with stock theft cases and was paying these very great attention, and therefore admittedly left the control of this murder case unfortunately too much in the hands of Asst. Inspector Dale.

Enquiry ends.

R. G. R. Spicer.

COMMISSIONER OF POLICE.

9

C. O.

**C.D.**  
R 5-AUC  
D 6

Mr. Priestman. 5/8

Mr. *Davidson* 5/8/31

Mr.

Mr. Parkinson.

Mr. Tomlinson.

Sir C. Bottenley.

Sir J. Shackburgh.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

DOWNING STREET,

10 August, 1931.

Sir,

I have, etc., to refer to para. 3 of Lord Bessfield's confidential

(5) despatch of the 7th August, 1931,

relating to the Report of the

Commission appointed to enquire into

the circumstances surrounding the trial

for murder of certain British employees

by Mr. Oswald P. Kelly.

I shall ~~be~~ glad to learn

whether you are prepared to refer

to the result of the judicial

enquiry referred to in the above

(1) of your confidential despatch of

of the 6th August, 1931.

I have, etc.,

**DRAFT.**

KENYA

CONFIDENTIAL (3)

Gov.

Secretary of State  
Downing Street

ORAL ANSWERS TO QUESTIONS.

WAGUHO MURDER: REPORT OF COMMISSION OF INQUIRY.  
THE HON. J. O'SHEA asked:—

1. When was the Report of the Commission of Inquiry into the Waguhu Murder trial presented to Government?

2. What is the explanation of the delay in giving the Report publication?

3. When may publication be expected?

THE HON. THE ATTORNEY GENERAL (MR. A. D. A. MACGREGOR, F. C.): The Report of the Commission of Inquiry into the Baguishi Murder Trial was presented to Government at the end of November, 1930.

The Report has since been under consideration by Government in consultation with the Secretary of State.

4. The Commission's terms of reference were:—

(1) To enquire into the circumstances in which four men—Okubo, Othoro, Mafuabi & Wuseiwa, Matanda & Wanduka and Kaitos & Maruse—were charged with the murder of one Kiumangich near Lake Naivasha in April 1928, and the conduct of the police officers who were charged with the investigation of the murder and the preparation of the case against the four accused, and to report whether any of the said police officers were guilty of conduct prejudicial to the proper administration of justice.

(2) To enquire into the conduct of the law officers of the Crown in the various stages of the trial, their presentation of the case before the Supreme Court, and the Court of Appeal for Eastern Africa, and otherwise in the prosecution of the four men above-mentioned, and to report whether in any respect the conduct of any of the law officers is deserving of censure or in any way inconsistent with the traditions of the profession and the duty they owe to the public.

In regard to the first term of reference the Commission found that certain of the Police Officers concerned in the preliminary enquiry and the conduct of the case were guilty of grave irregularities, and that prisoners and witnesses were intimidated and ill-treated by native Police resulting in false evidence being given in Court and the accused being committed for trial on a charge of murder. Moreover, the Commission found that the Assistant Inspector who conducted the

FRIDAY, 11th SEPTEMBER, 1931

The Council assembled at 11 a.m. at the Memorial Hall, Nairobi, on Friday the 11th September, 1931. His EXCELLENCY THE GOVERNOR (BRIGADIER-GENERAL SIR JOSEPH ALBERTUS BRYNE, K.C.M.G., K.B.E., C.B.), presiding.

His Excellency opened the Council with prayer.

The Proclamation summoning the Council was read.

#### ADMINISTRATION OF THE OATH

The Oath of Allegiance was administered to:

##### *Annointed Official Member*

SAMUEL ELLIOTT DECK, Provincial Commissioner, Masai.

##### *Temporary Nominated Official Members*

CYRIL OWEN GILBERT, Surveyor General.

#### MINUTES

The minutes of the meeting of the 28th August, 1931, were confirmed.

#### PAPERS LAIN ON THE TABLE

The following papers were laid on the Table:

BY THE HON. THE ACTING COLONIAL SECRETARY (MR. H. T. MARCUS)

Report on the work of H. M. Eastern African Dependencies Trade and Information Office, London, from 1st January, 1930, to 31st December, 1930.

BY THE HON. THE DIRECTOR OF MEDICAL AND SANITARY SERVICES (DR. J. L. GILKRY)

Report of Committee on Grants in aid of African Hospitals.

BY THE HON. THE GENERAL MANAGER, KENYA AND UGANDA RAILWAYS AND HARBOURS (BRIGADIER-GENERAL G. DE RHODOS)

Report on the Audit of the Kenya and Uganda Railways and Harbours Accounts, 1930.

Police enquiry was deserving of censure in regard to his failure to comply with essential provisions of the law in regard to the conduct of such enquiries, his failure to preserve an essential exhibit in the case in order to allow of analytical examination and his unlawful detention of suspects.

In regard to the second term of reference, the Commissioner's Report entirely exculpated the Law Officers of the Crown who were charged with the conduct of the case.

3. The findings of the Commission were subsequently reviewed by the Governor in Council where the opinion was recorded that the Inquiry revealed no inherent defect in the system of administration or the regulations governing the conduct of the Police Force, and that any blame that there was attached to the actions of individuals in interpreting general instructions. A further departmental enquiry was directed with a view to establishing the degree of responsibility, if any, devolving upon Assistant Superintendent of Police at Kitale, who had been required to give evidence before the Commission.

4. At the departmental enquiry held by the Commissioner of Police it was clear that the Assistant Superintendent of Police at Kitale had failed to give the conduct of the case the personal supervision and direction required of him by Police Orders and a severe censure was awarded by the Governor to the officer concerned.

The Assistant Inspector responsible for the conduct of the enquiry has left the service.

An independent Police enquiry showed two members only of the native Police to be at fault in regard to the intimidation and ill-treatment of witnesses, and these were punished, one by imprisonment and the other by reduction in grade.

5. The Commission expressed dissatisfaction with the conduct of the case by the Committing Magistrate at Kitale. The Governor in Council was, however, of opinion that there were no grounds for the allegations made by the Commission against this Magistrate and the matter was outside the Commission's terms of reference.

6. It is proposed to institute a further enquiry into the question of the administration of criminal justice in relation to natives. Government is in communication with the Secretary of State for the Colonies and with the Governments of Uganda and the Tanganyika Territory in regard to this further enquiry, and is not yet in a position to make a definite statement on the subject.

FRIDAY, 11th SEPTEMBER, 1931

The Council assembled at 11 a.m. at the Memorial Hall, Nairobi, on Friday, the 11th September, 1931. His EXCELLENCY THE GOVERNOR (BRIGADIER-GENERAL SIR JOSEPH ALEXIS BYRNE, K.C.M.G., K.B.E., C.B.), presiding.

His Excellency opened the Council with prayer.

The Proclamation summoning the Council was read.

#### ADMINISTRATION OF THE OATH.

The Oath of Allegiance was administered to:

#### Nominated Official Member.

SAMUEL ERDMAN DECK, Provincial Commissioner, Masai.

#### Temporary Nominated Official Members.

CERIC OWEN GILBERT, Surveyor General.

#### MINUTES.

The minutes of the meeting of the 23th August, 1931, were confirmed.

#### PAPERS LAID ON THE TABLE.

The following papers were laid on the Table—

By THE HON. THE ACTING COLONIAL SECRETARY (MR. H. F. MARSH):

Report on the work of H.M. Eastern African Dependencies' Trade and Information Office, London, from 1st January, 1930, to 31st December, 1930.

By THE HON. THE DIRECTOR OF MEDICAL AND SANITARY SERVICES (DR. J. L. GULKEY):

Report of Committee on Grants in aid of African Hospitals.

By THE HON. THE GENERAL MANAGER KENYA AND UGANDA RAILWAYS AND HARBOURS (BRIGADIER G. L. RHODES):

Report on the Audit of the Kenya and Uganda Railways and Harbours Accounts, 1930.

Police enquiry was deserving of censure in regard to his failure to comply with essential provisions of the law in regard to the conduct of such enquiries, his failure to preserve an essential exhibit in the case in order to allow of analytical examination and his unlawful detention of suspects.

In regard to the second term of reference, the Commission's Report entirely exculpated the Law Officers of the Crown who were charged with the conduct of the case.

3. The findings of the Commission were subsequently reviewed by the Governor in Council where the opinion was recorded that the Inquiry revealed no inherent defect in the system of administration or the regulations governing the conduct of the Police Force, and that any blame that there was attached to the actions of individuals in interpreting general instructions. A further departmental enquiry was directed with a view to establishing the degree of responsibility, if any, devolving upon the Assistant Superintendent of Police at Kitale, who had not been required to give evidence before the Commission.

4. At the departmental enquiry held by the Commissioner of Police it was clear that the Assistant Superintendent of Police at Kitale had failed to give the conduct of the case the personal supervision and direction required of him by Police Orders and a severe censure was awarded by the Governor to the officer concerned.

The Assistant Inspector responsible for the conduct of the enquiry has left the service.

An independent Police enquiry showed two members only of the native Police to be at fault in regard to the intimidation and ill-treatment of witnesses, and these were punished, one by imprisonment and the other by reduction in grade.

5. The Commission expressed dissatisfaction with the conduct of the case by the Committing Magistrate at Kitale. The Governor in Council was, however, of opinion that there were no grounds for the allegations made by the Commission against this Magistrate and the matter was outside the Commission's terms of reference.

6. It is proposed to institute a further enquiry into the question of the administration of criminal justice in relation to natives. Government is in communication with the Secretary of State for the Colonies and with the Governments of Uganda and the Tanganyika Territory in regard to this further enquiry, and is not yet in a position to make a definite statement on the subject.

Pending this further enquiry it is the opinion of the Secretary of State, and of this Government, that it would not be desirable to publish the present Report. The Report will, however, be published in full with the evidence when the report of the further enquiry is itself published.

THE HON. T. J. O'SHEA: Your Excellency, arising out of that answer, may I ask whether it is Government's intention to get on with this second enquiry in the immediate future and to hasten its conclusions?

THE HON. THE ATTORNEY GENERAL: I would only repeat, Sir, what occurs in the last paragraph but one of this very lengthy answer, that "Government is in communication with the Secretary of State for the Colonies and with the Governments of Uganda and the Tanganyika Territory in regard to this further enquiry." If the co-operation which is so essential in a matter such as this is undertaken by the adjacent territories there will be no avoidable delays, Sir.

THE HON. J. O'SHEA: Arising out of that answer, Your Excellency, in view of the fact that the scope of the enquiry has now been extended to two other territories, may I ask that every possible effort will be made by Government to hasten the conclusion of their negotiations to that end?

HIS EXCELLENCY: I can give the hon. Member that assurance. I am as anxious as the hon. Member to see that it should be carried out as quickly as possible.

#### AFRICAN CLERKS.

THE HON. F. A. BEMISTER asked:—

"Are there any Africans employed as clerks in Government Service who are on the same scale of salary and emoluments as are attached to the non-European Clerical Staff as set out on page 4 of the Draft Estimates, 1932? If so, how many?"

THE HON. THE ACTING COLONIAL SECRETARY: There are twenty-four Arab and African clerks in the Service who are serving under the terms in force for the Asian Clerical Staff.

THE RT. HON. LORD DELAMERE: On a point of order, Your Excellency, I did put three questions to the Clerk of Council which would take five minutes for the hon. Member to answer and I am rather upset that they are not on the Order of the Day.

THE HON. THE ACTING COLONIAL SECRETARY: Your Excellency, I think the answer is that they have been put in at rather short notice.

Pending this further enquiry it is the opinion of the Secretary of State, and of this Government, that it would not be desirable to publish the present Report. The Report will, however, be published in full with the evidence when the report of the further enquiry is itself published.

THE HON. T. J. O'SHEA: Your Excellency, arising out of that answer, may I ask whether it is Government's intention to get out with this second enquiry in the immediate future and to hasten its conclusions?

THE HON. THE ATTORNEY GENERAL: I would only repeat, Sir, what occurs in the last paragraph but one of this very lengthy answer, that "Government is in communication with the Secretary of State for the Colonies and with the Governments of Uganda and the Tanganyika Territory in regard to this further enquiry." If the co-operation which is so essential in a matter such as this is undertaken by the adjacent territories there will be no avoidable delays, Sir.

THE HON. T. J. O'SHEA: Arising out of that answer, Your Excellency, in view of the fact that the scope of the enquiry has now been extended to two other territories, may I ask that every possible effort will be made by Government to hasten the conclusion of their negotiations to that end?

HIS EXCELLENCY: I can give the hon. Member that assurance. I am as anxious as the hon. Member to see that it should be carried out as quickly as possible.

#### AFRICAN CLERKS.

THE HON. F. A. BEMISTER asked:—

"Are there any Africans employed as clerks in Government Service who are on the same scale of salary and emoluments as are attached to the non-European Clerical Staff as set out on page 4 of the Draft Estimates, 1932? If so, how many?"

THE HON. THE ACTING COLONIAL SECRETARY: There are twenty-four Arab and African clerks in the Service who are serving under the terms in force for the Arab Clerical Staff.

THE RT. HON. LORD DELAMBERE: On a point of order, Your Excellency, I did put three questions to the Clerk of Council which would take five minutes for the hon. Member to answer and I am rather upset that they are not on the Order of the Day.

THE HON. THE ACTING COLONIAL SECRETARY: Your Excellency, I think the answer is that they have been put in at rather short notice.

522  
/

O. O.

X. 17207/31.

Mr. Eastwood 4/8

Mr. Allen 4/8

Mr. Parkinson 5/10/21

Mr. Tomlinson 5/10

X Mr. C. Bottomley 5.8/8

Mr. J. Shuckburgh

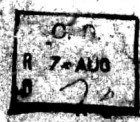
Mr. G. Grindle

Permt. U.S. of S.

Partly. U.S. of S.

Secretary of State.

By air-mail of Friday 7th August.



Downing Street,

7 August, 1931.

Sir,

3 DRAFTS

Kenya.

(9)

Confidential.

Gov.

To Mr. Bentley  
letter herewith signed  
by the Sec. of S.  
(in orig.)

Opis 2 A.

Handwritten signature and the number '10' with a diagonal slash.

I have the honour to acknowledge the receipt of your confidential despatch No. 69 of the 3th May in which you forwarded copies of the report of the Commission which was appointed to enquire into the circumstances surrounding the trial for murder of certain Bagishu employed by Mr. Oswald Bentley.

The Colony must congratulate itself that through the perseverance of Mr. Bentley a grave miscarriage of justice was avoided. I note that in paragraph 65 of their report the Commission expressed the opinion that Mr. Bentley had shown the highest sense of government for his public-spirited action and

I assume that you agree with this opinion and that  
~~steps will be taken formally to communicate an expres-  
sion of appreciation on behalf of your government~~

~~to Mr. Bentley. I should like to associate myself~~

~~with any such expression. For this purpose I~~  
~~enclose a letter to Mr. Bentley and <sup>with the object of</sup> ~~praying~~ you have~~

~~no objection, I should be glad if it could be forwarded~~  
~~to him. *Insert this into letter for local record*~~

3. I have noted with pleasure that the Commission  
entirely exculpate the Law Officers from any blame  
in the conduct of the case. As regards the conduct  
of the police, I approve the action which has  
already been taken, and I shall be glad to learn  
in due course the result of the further enquiry  
into the degree of responsibility, if any, devolving  
upon Assistant Superintendent T.R.J. Ridgway.

4. As regards compensation, I approve  
the payment of £100 to Mr. Bentley on the  
assumption that the sum will in fact cover

all his expenses and will be

acceptable to him. ~~I fear~~ <sup>but</sup> I do not

feel

however that I am unable to ~~view~~ <sup>regard</sup>

~~the~~ <sup>regard</sup> compensation at the rate

~~in your report for the year~~ <sup>of £100 each month of their</sup>

~~imprisonment as adequate com-~~

~~ensation to the natives~~

~~requested, and I have to request~~ <sup>should wish</sup>

that instead a lump sum payment

of £50 <sup>10</sup> may be made to each, the

sum to be issued in suitable

instalments through the

Administrative authorities.

I consider that the report

discloses grounds for a wider

enquiry into the ~~whole judicial~~ <sup>administrative</sup>  
Justice - ~~Central Justice system~~  
~~system~~ and I agree with the opinion

expressed by Sir Edward Grier in

his telegram No. 113 of the 3rd

April 1930 that any such enquiry

~~must~~ <sup>shall</sup> apply equally to Uganda and

the Tanganyika Territory. I ~~will~~

should

Communicate

19 on 19875/22.



should therefore be glad if you will  
consult the Governors of those

territories on the subject and after  
reference to them submit to me the

terms of reference and personnel  
which you would propose for the

Commission of enquiry. <sup>Chairman</sup>  
~~Whom I have proposed should~~  
~~presumably be neither a~~  
~~lawyer nor an administrative officer.~~

Various possible amendments  
of the judicial system which could  
be introduced without radical  
alteration of the whole system

suggest themselves for consideration  
as the result of the present report.

I do not need to say that  
action should be taken

to meet immediately the  
requirements here by the

W. B. C. C.  
be better than I had feared  
I omit the para - it looks  
like judgement in some  
matters

Will you please  
consider this para  
on the whole I think  
it should be omitted,  
in the case we  
must be reasonable  
later on.

Respectfully,  
A. C. C.  
P. P. C.

see the police Diary when  
holding preliminary enquiries.

(2) Inquests to be compulsory  
in certain cases as in England  
(see section 1 of the Coroners' Act  
1887).

(3) A lawyer thoroughly well  
versed in native matters to be  
appointed, with a retainer fee from  
Government, to defend or provide  
the adequate defence of natives  
charged with serious offences.

In connection with this last  
suggestion I would invite reference  
to the 2nd paragraph of my

(3 on 18875)

despatch No. 11 of the 3rd January 1920  
in which I asked Sir Edward Grieg  
for his views on this question.

No reply was ever received on this  
point, but I note that the  
paragraph of the Memorandum of the

Attorney General enclosed in your  
despatch under reply that the



26 4

for the signature

Mr. A. ... } 4/18  
Mr. ...  
Sir J. ...  
Sir G. ...  
Parl. U.S. of S.  
Party U.S. of S.  
Secretary of State

Downing Street,  
7<sup>th</sup> August, 1931.

A. J. ...  
October 8 1931

3  
X DRAFTs

Oswald Bentley, Esq.

7 AUG 1931

Living - Cas. Conf.

Dear Mr Bentley,

I have recently received from the Governor of Kenya the report of the Commission appointed to enquire into the circumstances surrounding the trial for murder of four Bagishu employed by you.

The Commission record the opinion that the thanks of Government are due to you for your intervention, whereby a grave miscarriage of justice was avoided. I am now writing this letter in order that you may see what

(State of the association  
not be led to the left  
no ...  
your ...  
in ...)

Yours faithfully,  
J. G.

the public spirit which prompted your action.

Yours very truly,

(Signed) PASSFIELD.

MEMORANDUM.

The facts of this case are, very briefly, as follows:-

The body of a murdered man was found buried in mud on the farm of a Mr. Bentley. Four of Mr. Bentley's employees (Basishu) were charged with the crime, committed for trial, tried by Mr. Justice Stephens, found guilty, and sentenced to death. Subsequently, Mr. Bentley returned from England, and as a result of enquiries and efforts made by him, the four men were acquitted without the defence being called upon at a trial ordered by the Court of Appeal for East Africa.

A Commission was appointed to enquire into the matter, and the question at issue now concerns the action to be taken as a result of their report.

The outstanding disclosures are -

(1) The evidence against the accused consisted mainly of the testimony of a man named Busiku, a woman of defective intellect named Wenge, who is the wife of one of the accused, and a child, Mandutu, aged five years. At the trial before Mr. Justice Stephens the two last-mentioned refused to give the same evidence as they gave before the Magistrate, and it now transpires that the testimony of all three was entirely false and the outcome of threats and ill-treatment by native police. After the first trial, Busiku made a statement before a Magistrate to this effect.

(2) The police from the first had evidence pointing to the guilt of two other men (Nandi), and these men were arrested, but subsequently released. The evidence against them consisted of

(a) a blood-stained spear found in a hut belonging to one of them. The blood was washed off in the rain through the negligence of Assistant Inspector Dale, who was in charge of the case. It appears, however, that it is unlikely that the injuries to the dead man were inflicted with this weapon.

(b) The fact that the floor of the same hut had recently been re-covered.

(c) The fact that the owner of the hut was on bad terms with the deceased, and that the latter had expressed the intention of visiting the former on the day of the crime.

(d) The reluctance of one of the two Nandi to approach the body of the murdered man at an "identification parade" held for the purpose of identifying it.

(e) The extension of tracks which formed part of the evidence against the accused beyond their huts towards the hut occupied by the Nandi.

The points (a), (b) and (c) were never mentioned in the proceedings, and (e) was brought out only at the trial, and then apparently not with emphasis or detail. The latter part of (c) would, of course, not be admissible in evidence except at an inquest.

(f) Assistant Inspector Dale failed to send a report of the case in accordance with his statutory duty, and the Magistrate took no steps to obtain it. The Magistrate did not (a) see the police diary, or (b) hold an inquest, as he is entitled, but not bound, to do. *It is held that the Magistrate was not bound to hold an inquest in this case.*

(g) Neither the accused nor anyone on their behalf conducted any cross-examination of the unsatisfactory evidence adduced against them before the Magistrate. In this connection, evidence gives regarding the eating of a cockerel by the accused after the murder (said to be a customary rite

*Yes, but I don't  
think that was  
affair - this case  
is a different  
case to the  
H/S*

*Sayer. but  
the trial was  
paid that attention  
to it!  
H/S*

after a man has been killed) is criticised in the report of the Commission, and I do not think the evidence was very satisfactory. The Attorney-General states, on page 2 of his comments on the report, that it was primarily for the defence to disprove the alleged custom. Unless he has omitted the words "after the custom had been proved", I find it difficult to understand this contention.

No doubt the root cause of the trouble was the conduct of the native police, in consequence of whose intimidation three persons committed perjury, but the result of that conduct might have been avoided, and the matters which appear to me to call for consideration in this connection are as follows:-

(a) Assistant Inspector Bates The Commission finds fault with the Assistant Inspector on three grounds, set out on page 17 of the report. In addition, there is the question whether he should have brought out before the Magistrate the facts which pointed to the guilt of the two Mandi. The Prosecution should put up all the facts before the Jury (the report of R.v.Guerin in the attached copy of "The Times" of June 10th, 1931, is interesting in this connection). It is difficult to say how far that principle has to be carried. The Attorney-General maintained at the enquiry that evidence implicating other persons would not have been relevant in a prosecution of the four Bagishu, and since this is arguable in relation to points (a), (b) and (c) mentioned in paragraph (2) above, it is difficult to blame the Assistant Inspector. There are, however, other facts in favour of the accused which were not, and certainly might have been, mentioned before the Magistrate (see paragraph 27 on the ninth page)

page of Appendix A). On the other hand, the Assistant Inspector mentioned at the trial that one of the accused was, at the time of his arrest, wearing a vest stained with blood, whereas the blood, which was never analysed, appears to have been the blood of an animal. In short, my own impression is that he was actuated by some, perhaps unconscious, bias.

Assistant Inspector Dale stated in his evidence before the Commission that it is the practice to question persons arrested on suspicion. This, however, is not the authorised procedure (see enclosure H. to the comments on the report of the Commissioner of Police.)

(b) The Magistrate: I think it would have been wiser for Mr. Gillespie to have asked for the police report, which ought to have been furnished to him.

It is difficult to tell from reading the papers whether Mr. Bentley's criticism of the <sup>permission</sup> ~~permission~~ given to Mr. Dale to cross-examine his own witnesses is justified, but I am inclined to think that it is.

(c) The Two Hoes. The property of the accused and ~~the~~ were produced in evidence, and the presence of mud on them corresponding with that in which the deceased was found, was brought out for the first time at the trial. (As a matter of fact, the mud was accounted for by the fact that the hoes were used for disinterring the body.) So also was the fact that the vest of one of the accused was blood-stained. Mr. Bentley complains of this, and if no notice of the new evidence was given to the defence before the trial, it should have been, and if there is no rule to that effect in Kenya, should not one be introduced?

(d) Allegation of Counsel: The conduct of the defence at the trial before Mr. Justice Stephens seems unfortunately

x  
I gather that he says he does not know who saw the blood - because the Commission says which for his part he may be misled and told

40  
4/10

34

to have been badly conducted, and comments are made in the report on the system of allocation of Counsel. The Attorney-General states that Counsel are briefed in rotation, but I do not think that a rota should be strictly adhered to in the case of a capital charge.

Counsel are, as is frequently the case in England, briefed just before the trial. I suggest, however, that the accused should be represented from the first ~~at~~, at least, a capital charge, by someone capable of acting as both Counsel and Solicitor - one who is capable and willing to make his own enquiries and collect his own evidence. A similar suggestion has already been made <sup>officially</sup> and is referred to in the preceding minutes.

(a) System of investigation by a Magistrate: I also suggest that the following reforms might be considered:-

(1) whether the Magistrate should always see the police diary; and

(2) whether an inquest should be compulsory in certain cases as it is in England (see section 1 of the Coroners Act, 1887.)

Y

These no doubt are questions which should await the report of the further Commission which it is proposed to set up to enquire into the whole system. It is said that in commenting upon the existing system the Commission went beyond the terms of reference set out on page 1 of the report. I feel, however, that it is by no means clear how far they did so. The words "to enquire into the circumstances in which four men were charged with the murder" are capable of being interpreted very narrowly or very widely.

(c) Publication: For this reason I feel some difficulty in regard to the question of publication, since

a statement accompanying the report, pointing out that it exceeds the terms of reference, might be questioned. I certainly think the evidence given before the Commission should be published at the same time as the report, though no doubt it will not be nearly so widely read, and that the appointment of the new Commission of Enquiry should be announced simultaneously.

*J. A. Roberts*

7.7.31.

2

MEMORANDUM

A. Terms of Reference.

The terms originally proposed by the Colonial Government merely asked the Commission to report on the preparation and conduct of the case by the Police.

As a result of complaints by Mr. Bentley of obstruction by the Attorney General's Department it was decided to extend the terms of reference to include the conduct of the Law Officers.

The Governor later proposed to add a further term of reference, i.e. whether anything occurred during the court proceedings which would tend to show that the existing judicial system of the Colony is in any way unsuitable for the trial of natives.

This addition was not approved by the Secretary of State for the reasons given below.

B. Administration of Criminal Justice in Native Cases.

Mr. Bentley expressed the view that the whole machinery of administration required revision, and the Secretary of State asked the Governor for his observations on this point. Subsequently Mr. Bentley made further representations, and, in fact, said that it was the whole system of administration rather than the conduct of a particular case which he wished to raise. The Secretary of State communicated this to the Governor and said he thought it most desirable that

15075/30  
No. 3

No. 4

No. 25

No. 6.

No. 6.

No. 18.

No. 18.

that every latitude should be given to Mr. Bentley by the Commission of enquiry and even though the terms of reference do not cover a report on the administration of criminal justice, he should be allowed to make any statement that he wishes to make and that a full note of his evidence should be taken so that it can be put on record and available for future use. The Secretary of State asked the Governor to arrange accordingly. In reply the Governor expressed the opinion that this was an entirely separate issue and that while the Government would welcome enquiry on the larger issue it was felt that as it affects equally Uganda and Tanganyika, the enquiry should embrace all three Territories and be <sup>conducted</sup> ~~conducted~~ <sup>by</sup> ~~by~~ an independent Chairman from outside those Territories.

12  
15875/30

15875/30  
No. 20.

In reply the Secretary of State said that he entirely agreed that a special separate enquiry would be necessary if the wider question were to be reviewed. He thought that the enquiry into this case might well lead up to an enquiry of wider scope, and he pressed the suggestion from this point of view as well as from that of the undesirability of the Government appearing to put any obstacle in Mr. Bentley's way. In reply the Governor said that he would make no further objection provided that the Secretary of State was satisfied that his proposal involved no unfairness to the Judiciary and that the Executive in the Colony <sup>was not</sup> ~~was not~~ <sup>responsible</sup> ~~responsible~~ for any reflection which the

No. 21.

proceedings of the Commission might elicit upon the conduct or competency of the Judges.

● 15875/30  
No. 24.

Later the Governor proposed to add the further term of reference already referred to i.e. whether anything occurred during the Court proceedings which would tend to show that the existing judicial <sup>system</sup> of the Colony is in any way unsuitable for the trial of natives. The

No. 25

Secretary of State, however, replied that it would be undesirable to add this additional term of reference as this would practically include a general enquiry as to the whole system of administration of native criminal justice, which could not be conveniently or satisfactorily investigated and reported upon by this particular commission. He therefore preferred that the proposed term of reference should not be included but that Mr. Bentley should be allowed to make his statement, which ~~was~~ <sup>was to be</sup> appended to the Report, but upon which the Commission would not comment as not being strictly within the terms of reference.

C. Conclusions of the Commission.

These may be summarised under two heads:

- (a) Those which come within the terms of reference and
- (b) Those which are outside it.

The conclusions under (a) relate

to the conduct of police and law officers and to those the Commission found:

paras. 56.

- (1) that the circumstances in which the four natives were charged with murder was not justified by evidence in the possession of the police, that certain members of the police

57.

Force were guilty of grave irregularities; and that the Assistant Inspector is deserving of censure.

para. 56.

" 65

(ii) There is nothing in the conduct of the case by the Law Officer concerned deserving of censure, or inconsistent with the tradition of the legal profession, and the duty which its members owe to the public.

As regards (b) the Commission appear to have gone beyond their terms of reference in recording:

paras. 41-46.

" 51-53.

(i) Severe criticism of the Magistrate. A Magistrate is not a Law Officer, and the enquiry was limited to the conduct of the Law Officers, also, as has already been pointed out the local Government viewed with apprehension possible comments on the judiciary. It may also be pointed out the Attorney General considers that the comment on the conduct of the Magistrate in paragraph 41 is unjustifiably strong.

*the Commission seem to have done the job of a Law Officer  
para 3 2 his memo!*

paras. 67-70.

(ii) That there is urgent need for revision of the whole system of administration of criminal justice as affecting natives.

*Para 2 of his memo.*

Here it may be noted that the Attorney General expresses the view that with the exception of these last four paragraphs the report is in his opinion a good and fair one, the conclusions drawn being amply justified by the evidence before the Commission. It also seems possible that even if the Commission had not included these paragraphs the wider issue would have been raised.

raised merely as a result of:

(i) the following remark in paragraph 55:

"We find in effect that there are serious faults in the system, both as it is framed, and as it is interpreted, which do not give the native on trial for his life a fighting chance, and it is to this rather than to individual misconduct that we attribute the undoubted miscarriage of justice," and

(ii) The suggestions in paragraph 44-50 and 54 for the betterment of the system.

Further the raising of this wider question was, it seems have been recognised in correspondence, almost inevitable as a result of the statement which Mr. Bentley was to be allowed to make, and which, it was suggested, should be appended to the report, although the Commission were not to comment upon it.

It will be seen, however, that no such statement is in fact appended to the report, although his representations are included in the typed appendix A. It may also be noted that the

Chairman of the Commission explained to the Attorney General <sup>that</sup> what prompted the writing of the final paragraphs was no more than this:

"that an examination of this case left in the minds of the commission a profound feeling of disquiet and the conviction that the existing judicial system is not the best that could be devised for the trial of natives."

D.

15875/30  
No. 25.

~~see enclosure to~~  
Para 137 AF's memo

D. Points Arising out of the Conclusions of the Committee.

The Government has

- (i) already taken certain action; and  
(ii) recommends further action.

The question arise whether (a) the action taken ~~is proper~~ should be approved; and (b) what further action is necessary.

I. Police.

(i) The Governor's view is that the enquiry revealed no inherent defect in the system of administration or the regulations governing the conduct of the police force and that such undesirable features as had been disclosed were attributable not to the system itself, but to the action of individuals in interpreting general instructions. The local adviser will, no doubt, have comments to make on this.

(ii) The only police irregularities calling for disciplinary action were held to be those committed by ex-constable Hamisi who has been sentenced to six months R.I. for assaulting a witness and ex-constable Okuma who was reduced in grade for assaulting the same witness, and subsequently resigned.

(iii) Assistant Inspector Dale has been reattached.

(iv) a departmental enquiry is being held into the case of Assistant Inspector Ridgway.

II.

Para 1 of report.

Pages 2 and 3  
of enclosure 2

Report.

Para 6 of report.

Para 3 of report.

## II. Magistrate.

The Government holds that there is no ground for the stricture on the Magistrate, or on the existing procedure as regards allocation of Counsel. These are questions on which the Legal Advisers may have views.

## III. Public Defender.

Sir Robert Hamilton suggested to Sir J. Risley that there should be a lawyer thoroughly versed in native matters who should receive from the Government a retaining fee to defend, or provide the adequate defence of natives charged with serious offences. This suggestion was put to the Governor in the Secretary of State's despatch of the 3rd January and the Governor was asked for his views. The observations in paragraph 46 of the Commission's report seem to be directed to a similar conclusion and on this point the Attorney General says that "one of the Commission's suggestions 'the provision of a Public Defender' is already under consideration by the Government". No comment on the matter is, however, included in the Governor's despatch.

## IV. General.

If there is to be a wider enquiry into the whole system of administration of criminal justice as affecting natives, the various criticisms in the Commission's report as to procedure and the system generally will naturally come up for review, and need hardly be gone into in detail here.

*Para 7 of despatch*

See minutes of  
10/12/29 on  
No.3 of 15875/29.

15875/30.  
No.8.

*Para  
imp 13 of his memo*

V. Compensation.

Para.6.

The Commission commend the favourable consideration of Mr. Bentley's claim for compensation for the accused and for his own expenditure of time and money. The Government recommend the payment of:

- (i) £150 for Mr. Bentley - but the basis of compensation is not explained; and
- (ii) £16.12s. for each of the four natives i.e. £1 a month each for the period of imprisonment.

As to (i), one would like to have evidence that the amount is fair and proper and likely to be acceptable to Mr. Bentley.

As to (ii), the amount (which in terms of "pay" might be regarded as weekly time and a half!) certainly seems derisory, but it must of course not be finally judged by standards in this country - the accused are stated by the Commission to be "ignorant natives of a backward tribe". Nevertheless one would like to know on what principles compensation in a similar case would be computed if given here, and the Home Office could no doubt advise, but the Governor asks for a telegraphic reply on these two points. This is a little unreasonable seeing that the Commission's report was rendered as long ago as November last; also a hasty decision is to be deprecated as there seems to me to be a distinct possibility that the proposals as they stand when they become known will be severely criticised.

Para.44

4. Publication of Report.

The Governor proposes in paragraph 5 to withhold publication of the report and to deal with

PUBLIC RECORD OFFICE	
1	2
3	4
5	6
Reference -	
C.O. 533 / 412	
PUBLISHED BY THE PUBLIC RECORD OFFICE LONDON	

with the matter by a statement in reply to a question in the Legislative Council. His proposal is made on the ground that publication of the Report without the evidence would create a wrong impression and be highly undesirable. This seems to me to be an impossible proposition. Publication will undoubtedly be pressed for and have ultimately to be conceded and the initial withholding of the Report would create the worst impression of all. It would be better to publish the evidence with the Report rather than withhold the latter. And the Report and evidence might be accompanied by a summary of the observations of the Commissioner of Police, the Attorney General, and comments by the Governor on points of fact, as Mr. Eastwood suggests. On the other hand, I am very doubtful as to the wisdom in the Government attempting to indulge in any special pleading *in advance*.

F. Further Enquiry into the Administration of Criminal Justice as affecting Natives.

Such an enquiry would now appear to be inevitable and the suggestion of including Uganda and the Tanganyika Territory referred to under Section B. above will apparently have to be considered. If a statement that such an enquiry is to be held accompanied the publication of the Report it would no doubt have a good effect in re-assuring public opinion and forestalling premature criticisms.

\* In spite of its length  
- after all it is an  
important matter  
J.W.D.

Miller  
26/1/31

1	2	3	4	5	6	7	8	9	10
Reference -									
C.O. 533 / 412									
REPRODUCED, PUBLISHED, OR ALY WITHOUT PERMISSION OF THE PUBLIC RECORD OFFICE, LONDON									



KENYA

No.

CONFIDENTIAL.

GOVERNMENT HOUSE,  
NAIROBI,  
KENYA

3<sup>th</sup> May, 1931.

RECEIVED  
20 MAY 1931  
COL. OFFICE

My Lord

I have the honour to refer to correspondence terminating with Your Lordship's telegram No. 54 of the 21st May, 1930, and to transmit six copies of the Report of the Commission which was appointed to enquire into the Bagishu Murder Trial under the terms of reference specifically approved by Your Lordship in the telegram quoted above. I also attach a copy of the Appendix to the Report and I may mention that Mr. T.A. Wood, C.M.G., M.B.E., has now returned to the Colony and has signed the original manuscript of the Report.

2. Although the Commission's sittings concluded on the 16th of September last, the Report itself was not presented till December. It was then necessary to submit it for comment to the Attorney General and the Commissioner of Police, copies of whose replies also accompany this despatch.

3. Your Lordship will observe that, despite the communications which passed on the subject of the terms of reference, the substance of which was

well

THE RIGHT HONOURABLE LORD PASSFIELD, P.C.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W. 1

No 13  
(15871/19)

AUG 1931

*Edward Long*

well known to the Chairman, the Commission saw fit (vide paragraphs 46, 69 and 70) to reflect adversely upon "the whole system of administration of Criminal Justice in so far as natives are concerned", a subject which was expressly excluded from the questions submitted for their examination, and in regard to which they were hardly competent to investigate, as they themselves appear to have admitted.

4. I cannot but regard these paragraphs as an unnecessary addition to the Report, and I further stated with surprise that in other respects also the Commissioners have exceeded their terms of reference in the body of their Report. I felt reluctant, in the circumstances, to authorise its publication without consulting the Members of my Executive Council in the first instance, and I found that opinion in Executive Council was divided on this question. In the event I concurred with the opinion of the majority, that in the public interest no steps should be taken to publish the Report until Your Lordship had had an opportunity to consider it in detail together with my observations and the departmental comments submitted.

5. I may state that, in principle, I am opposed to withholding from publication the results of such an inquiry, but I share the view of the majority of my Executive Council that in this instance, as the Commissioners have deliberately gone beyond their terms of reference, the publication of the

44

- 3 -

the Report in its present form without publication of the evidence on which it is based, is likely to create a quite wrong impression on the public mind and is, therefore, highly undesirable. It is true, of course, that the circumstances under investigation evoked considerable interest and formed the subject of questions in the Legislative Council, but in view of the lapse of time since the matters under review occurred, it would appear to be sufficient if an announcement were made in Legislative Council in reply to a Question from the Unofficial side of the House, intimating that the Report had been received, [that it exceeded the terms of reference prescribed,] but detailing the findings of the Commission upon the issues entrusted to their investigation and the action taken by Government in regard to these recommendations. I should be glad to learn at the earliest opportunity whether Your Lordship, in the circumstances, is prepared to acquiesce in my proposal, or considers that the Report should be published in toto.

No need

X

6. Turning now to the main issues dealt with by the Commission, Your Lordship will observe that the Report entirely exculpates the law officers of the Crown who were charged with the conduct of the case and the negotiations with Mr. Bentley prior to the hearing of the appeal and the retrial, but finds that certain of the Police officers concerned in the inquiry were guilty of grave irregularities. My Executive Council carefully considered the findings of the Commission under this head and recorded the opinion that the inquiry revealed no inherent defect

in

in the system of administration or the regulations governing the conduct of the Police force, and that such undesirable features as had been disclosed were attributable not to the system itself, but to the action of individuals in interpreting general instructions. I have caused this opinion, with which I am in agreement, to be conveyed to the Commissioner of Police together with an additional direction, on the advice of my Executive Council, that a further departmental inquiry should be held forthwith in order to establish the degree of responsibility, if any, devolving upon Assistant Superintendent T.R.J. Ridgway in view of the fact that the Commission had failed to call this officer to give evidence.

*re H 3-4 of ...  
Case of Police*

Your Lordship will be aware from my Confidential telegram No. 113 of the 1st April that Assistant Inspector J. Dale is under notice of termination of his appointment as a result of the necessary reductions being effected in the Police establishment. The report of the Commissioner of Police describes the other disciplinary measures which have already been taken in respect of such other derelictions of duty as occurred during this case.

*No 4  
CONFIDENTIAL*

7. In addition to the specific terms of reference, the Commission have recorded certain strictures on the conduct of the Magistrate and the Trial Judge (vide paragraphs 41-46 and 51-55) as well as on the existing procedure with regard to the allocation of Counsel for the defence in murder trials (paragraphs 48-50). This aspect is fully covered by the

the

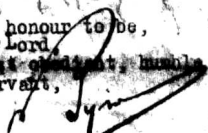
the Attorney General's minute of the 29th January. I endorse the unanimous opinion of my Executive Council that no grounds exist for the allegations made by the Commission. I may add in this connection that, besides the Attorney General, my advisers in Executive Council on this question included Captain Schwartze, a member of the legal profession, who expressed the wish that a specific record be made of the fact that he desired to associate himself completely with the recommendations made.

8. My Executive Council also fully considered requests for compensation tendered by Mr. Bentley both on behalf of himself and the four natives concerned. It was agreed to accept the views of the Commission (paragraph 68) that awards in both cases were justified on the understanding that Mr. Bentley's compensation should be fixed at a figure of £150 and that the awards to the natives should be assessed at £16.12.0 each (i.e. £1 per month each for the period of their imprisonment). It is suggested, however, that payments to the natives should be issued in suitable instalments by the District Commissioner and not as a lump sum. I should be glad to receive approval of these payments in accordance with the directions contained in Your Lordship's despatch No. 46 of the 14th January, 1930, and in view of the unfortunate delay which has already occurred in this case a reply by telegraph in regard to this point would be appreciated.

No. 17  
(1888/1914)

*Handwritten notes:*  
 General Council  
 with that  
 the case  
 should be  
 done  
 1/10  
 2/10

I have the honour to be,  
 My Lord,  
 Your Lordship's most obedient, humble  
 servant,



Brigadier-General,

GOVERNOR



COLONY AND PROTECTORATE OF KENYA.

---

**BAGISHU MURDER TRIAL**

---

**REPORT OF COMMISSION  
OF ENQUIRY**

---

Price Sh. 1/-

NAIROBI  
PRINTED BY THE GOVERNMENT PRINTER,  
1961.

Report of Commission of Enquiry into Bagishu  
Murder Trial.

Report of Commission of Enquiry into Bagishu  
Murder Trial.

49

## Report of Commission of Enquiry into Bagishu Murder Trial.

---

YOUR EXCELLENCY,

The terms of reference to the Commission were as follows:—

- (1) To enquire into the circumstances in which four men—Okube s/o Uboro, Mafuabi s/o Waselwa, Matanda s/o Wanduka and Kutosi s/o Maratse—were charged with the murder of one Kimangich near Kitale in April 1928, and the conduct of the police officers who were charged with the investigation of the murder and the preparation of the case against the four accused, and to report whether any of the said police officers were guilty of conduct prejudicial to the proper administration of justice.
- (2) To enquire into the conduct of the law officers of the Crown in the various stages of the trial, their presentation of the case before the Supreme Court, and the Court of Appeal for Eastern Africa, and otherwise in the prosecution of the four men above mentioned, and to report whether in any respect the conduct of any of the law officers is deserving of censure or in any way inconsistent with the traditions of the profession and the duty they owe to the public.

2. The Commission sat at Nairobi on 21st, 22nd and 25th August, 1930, and at Kitale on the 15th and 16th September, 1930.

Mr. Bentley presented a number of documents to the Commission, and in addition gave verbal evidence. The names of the other witnesses who gave evidence will be found in Appendix I. The Attorney General appeared on behalf of his Department and of the Police, and with the exception of about two hours was present throughout the enquiry. The Commissioner of Police was also represented.

4. We propose first to recapitulate the story as we have been able to reconstruct it.

49

## Report of Commission of Enquiry into Bagishu Murder Trial.

---

YOUR EXCELLENCY,

The terms of reference to the Commission were as follows:—

(1) To enquire into the circumstances in which four men—Okube s/o Uboro, Mafuabi s/o Waselwa, Matanda s/o Wanduka and Kutosi s/o Maratse—were charged with the murder of one Kimangich near Kitale in April 1928, and the conduct of the police officers who were charged with the investigation of the murder and the preparation of the case against the four accused, and to report whether any of the said police officers were guilty of conduct prejudicial to the proper administration of justice.

(2) To enquire into the conduct of the law officers of the Crown in the various stages of the trial, their presentation of the case before the Supreme Court, and the Court of Appeal for Eastern Africa, and otherwise in the prosecution of the four men above mentioned, and to report whether in any respect the conduct of any of the law officers is deserving of censure or in any way inconsistent with the traditions of the profession and the duty they owe to the public.

2. The Commission sat at Nairobi on 21st, 22nd and 25th August 1930 and at Kitale on the 15th and 16th September 1930.

3. Mr. Bentley presented a number of documents to the Commission, and in addition gave verbal evidence. The names of the other witnesses who gave evidence will be found in Appendix D. The Attorney General appeared on behalf of his Department and of the Police, and with the exception of about two hours was present throughout the enquiry. The Commissioner of Police was also represented.

4. We propose first to recapitulate the story as we have been able to reconstruct it.

5. On the 14th April 1926, the body of a native was found almost completely buried in the mud beside a stream on Mr. O'wain Bentley's farm near Kitala. The discovery was made by two Bagashi coolies who observed a human knee protruding above the surface. The men informed their comrades of what they had seen and the Bagasha headman of the farm ordered their investigation and on enquiring what was the matter, was led down to the place where the knee had been seen. The Bagasha, after following the coolies to the place where the body had been found, called for the Bagasha headman and reported the discovery to him. The Bagasha headman, Mr. Bentley, who was at the time at Kitala, immediately ordered a Mr. Dale, who was at the time at Kitala, to accompany him to the place and to examine the body and to take the necessary steps for the investigation. Mr. Bentley also reported the discovery to the Bagasha headman of the farm, Mr. Bentley, who was at the time at Kitala, to accompany him to the place and to examine the body and to take the necessary steps for the investigation.

6. On the 14th April 1926, the body of a native was found almost completely buried in the mud beside a stream on Mr. O'wain Bentley's farm near Kitala. The discovery was made by two Bagashi coolies who observed a human knee protruding above the surface. The men informed their comrades of what they had seen and the Bagasha headman of the farm ordered their investigation and on enquiring what was the matter, was led down to the place where the knee had been seen. The Bagasha, after following the coolies to the place where the body had been found, called for the Bagasha headman and reported the discovery to him. The Bagasha headman, Mr. Bentley, who was at the time at Kitala, immediately ordered a Mr. Dale, who was at the time at Kitala, to accompany him to the place and to examine the body and to take the necessary steps for the investigation.

7. On the 14th April 1926, the body of a native was found almost completely buried in the mud beside a stream on Mr. O'wain Bentley's farm near Kitala. The discovery was made by two Bagashi coolies who observed a human knee protruding above the surface. The men informed their comrades of what they had seen and the Bagasha headman of the farm ordered their investigation and on enquiring what was the matter, was led down to the place where the knee had been seen. The Bagasha, after following the coolies to the place where the body had been found, called for the Bagasha headman and reported the discovery to him. The Bagasha headman, Mr. Bentley, who was at the time at Kitala, immediately ordered a Mr. Dale, who was at the time at Kitala, to accompany him to the place and to examine the body and to take the necessary steps for the investigation.

8. On the 14th April 1926, the body of a native was found almost completely buried in the mud beside a stream on Mr. O'wain Bentley's farm near Kitala. The discovery was made by two Bagashi coolies who observed a human knee protruding above the surface. The men informed their comrades of what they had seen and the Bagasha headman of the farm ordered their investigation and on enquiring what was the matter, was led down to the place where the knee had been seen. The Bagasha, after following the coolies to the place where the body had been found, called for the Bagasha headman and reported the discovery to him. The Bagasha headman, Mr. Bentley, who was at the time at Kitala, immediately ordered a Mr. Dale, who was at the time at Kitala, to accompany him to the place and to examine the body and to take the necessary steps for the investigation.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the nearest magistrate empowered to hold inquests.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient so to do, he shall, subject to such rule as the Governor may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest medical officer or other person appointed by the Governor in this behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following magistrates are empowered to hold inquests, namely: any magistrate empowered to hold a subordinate court of the first or second class and any magistrate specially empowered in this behalf by the Governor.

According to his own evidence Mr. Dale proceeded to the farm, accompanied by a Mr. Townsend, but did not enlist the assistance of any other respectable inhabitant of the neighbourhood for the purpose of drawing up the report as required by law. No report setting out the details required by law was in fact ever drawn up.

8. The body on examination proved to be that of an adult male entirely nude. There were wounds on the head, and extensive bruising of the tissue. There was also a fracture of the skull. It is also stated by Mr. Dale that there were signs of injury to the arms from which he apparently suspected that a stick or other such weapon had been forcibly used against the body. The body was examined by a doctor who, on making the post mortem examination, certified that death was due to fracture of the skull.

9. The native labourers from Mr. Bentley's and neighbouring farms were called together and were required to file past the body. It is significant, however, that one native, belonging to the Nandi tribe, exhibited conspicuous reluctance to do so, and the body at all. It was established later by fingerprint identification that the body was that of a Nandi native named Kirangulu; it also transpired that the native who was so reluctant to approach the body, and who declared that he did not know who the dead man was, was a close relation of

2

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

134

135

136

137

138

139

140

141

142

143

144

145

146

147

148

149

150

151

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

209

210

211

212

213

214

215

216

217

218

219

220

221

222

223

224

225

226

227

228

229

230

231

232

233

234

235

236

237

238

239

240

241

242

243

244

245

246

247

248

249

250

251

252

253

254

255

256

257

258

259

260

261

262

263

264

265

266

267

268

269

270

271

272

273

274

275

276

277

278

279

280

281

282

283

284

285

286

287

288

289

290

291

292

293

294

295

296

297

298

299

300

301

302

303

304

305

306

307

308

309

310

311

312

313

314

315

316

317

318

319

320

321

322

323

324

325

326

327

328

329

330

331

332

333

334

335

336

337

338

339

340

341

342

343

344

345

346

347

348

349

350

351

352

353

354

355

356

357

358

359

360

361

362

363

364

365

366

367

368

369

370

371

372

373

374

375

376

377

378

379

380

381

382

383

384

385

386

387

388

389

390

391

392

393

394

395

396

397

398

399

400

401

402

403

404

405

406

407

408

409

410

411

412

413

414

415

416

417

418

419

420

421

422

423

424

425

426

427

428

429

430

431

432

433

434

435

436

437

438

439

440

441

442

443

444

445

446

447

448

449

450

451

452

453

454

455

456

457

458

459

460

461

462

463

464

465

466

467

468

469

470

471

472

473

474

475

476

477

478

479

480

481

482

483

484

485

486

487

488

489

490

491

492

493

494

495

496

497

498

499

500

501

502

503

504

505

506

507

508

509

510

511

512

513

514

515

516

517

518

519

520

521

522

523

524

525

526

527

528

529

530

531

532

533

534

535

536

537

538

539

540

541

542

543

544

545

546

547

548

549

550

551

552

553

554

555

556

557

558

559

560

561

562

563

564

565

566

567

568

569

570

571

572

573

574

575

576

577

578

579

580

581

582

583

584

585

586

587

588

589

590

591

592

593

594

595

596

597

598

599

600

601

602

603

604

605

606

607

608

609

610

611

612

613

614

615

616

617

618

619

620

621

622

623

624

625

626

627

628

629

630

631

632

633

634

635

636

637

638

639

640

641

642

643

644

645

646

647

648

649

650

651

652

653

654

655

656

657

658

659

660

661

662

663

664

665

666

667

668

669

670

671

672

673

674

675

676

677

678

679

680

681

682

683

684

685

686

687

688

689

690

691

692

693

694

695

696

697

698

699

700

701

702

703

704

705

706

707

708

709

710

711

712

713

714

715

716

717

718

719

720

721

722

723

724

725

726

727

728

729

730

731

732

733

734

735

736

737

738

739

740

741

742

743

744

745

746

747

748

749

750

751

752

753

754

755

756

757

758

759

760

761

762

763

764

765

766

767

768

769

770

771

772

773

774

775

776

777

778

779

780

781

782

783

784

785

786

787

788

789

790

791

792

793

794

795

796

797

798

799

800

801

802

803

804

805

806

807

808

809

810

811

812

813

814

815

816

817

818

819

820

821

822

823

824

825

826

827

828

829

830

831

832

833

834

835

836

837

838

839

840

841

842

843

844

845

846

847

848

849

850

851

852

853

854

855

856

857

858

859

860

861

862

863

864

865

866

867

868

869

870

871

872

873

874

875

876

877

878

879

880

881

882

883

884

885

886

887

888

889

890

891

892

893

894

895

896

897

898

899

900

901

902

903

904

905

906

907

908

909

910

911

912

913

914

915

916

917

918

919

920

921

922

923

924

925

926

927

928

929

930

931

932

933

934

935

936

937

938

939

940

941

942

943

944

945

946

947

948

949

950

951

952

953

954

955

956

957

958

959

960

961

962

963

964

965

966

967

968

969

970

971

972

973

974

975

976

977

978

979

980

981

982

983

984

985

986

987

988

989

990

991

992

993

994

995

996

997

998

999

1000

1001

1002

1003

1004

1005

1006

1007

1008

1009

1010

1011

1012

1013

1014

1015

1016

1017

1018

1019

1020

1021

1022

1023

1024

1025

1026

1027

1028

1029

1030

1031

1032

1033

1034

1035

1036

1037

1038

1039

1040

1041

1042

1043

1044

1045

1046

1047

1048

1049

1050

1051

1052

1053

1054

1055

1056

1057

1058

1059

1060

1061

1062

1063

1064

1065

1066

1067

1068

1069

1070

1071

1072

1073

1074

1075

1076

1077

1078

1079

1080

1081

1082

1083

1084

1085

1086

1087

1088

1089

1090

1091

1092

1093

1094

1095

1096

1097

1098

1099

1100

1101

1102

1103

1104

1105

1106

1107

1108

1109

1110

1111

1112

1113

1114

1115

1116

1117

1118

1119

1120

1121

1122

1123

1124

1125

1126

1127

1128

1129

1130

1131

1132

1133

1134

1135

1136

1137

1138

1139

1140

1141

1142

1143

1144

1145

1146

1147

1148

1149

1150

1151

1152

1153

1154

1155

1156

1157

1158

1159

1160

1161

1162

1163

1164

1165

1166

1167

1168

1169

1170

1171

1172

1173

1174

1175

1176

1177

1178

1179

1180

1181

1182

1183

1184

1185

1186

1187

1188

1189

1190

1191

1192

1193

1194

1195

1196

1197

1198

1199

1200

1201

1202

1203

1204

1205

1206

1207

1208

1209

1210

1211

1212

1213

1214

1215

1216

1217

1218

1219

1220

1221

1222

1223

1224

1225

1226

1227

1228

1229

1230

1231

1232

1233

1234

1235

1236

1237

1238

1239

1240

1241

1242

1243

1244

1245

1246

1247

1248

1249

1250

1251

1252

1253

1254

1255

1256

1257

1258

1259

1260

1261

1262

1263

1264

1265

1266

1267

1268

1269

1270

1271

1272

1273

1274

1275

1276

1277

1278

1279

1280

1281

1282

1283

1284

1285

1286

1287

1288

1289

1290

1291

1292

1293

1294

1295

1296

1297

1298

1299

1300

1301

1302

1303

1304

1305

1306

1307

1308

1309

1310

1311

1312

1313

1314

1315

1316

1317

1318

1319

1320

1321

1322

1323

1324

1325

1326

1327

1328

1329

1330

1331

1332

1333

1334

1335

1336

1337

1338

1339

1340

1341

1342

1343

1344

1345

1346

1347

1348

1349

1350

1351

1352

1353

1354

1355

1356

1357

1358

1359

1360

1361

1362

1363

1364

1365

1366

1367

1368

1369

1370

1371

1372

1373

1374

1375

1376

1377

1378

1379

1380

1381

1382

1383

1384

1385

1386

1387

1388

1389

1390

1391

1392

1393

1394

1395

1396

1397

1398

1399

1400

1401

1402

1403

1404

1405

1406

1407

1408

1409

1410

1411

1412

1413

1414

1415

1416

1417

1418

1419

1420

1421

1422

1423

1424

1425

1426

1427

1428

1429

1430

1431

1432

1433

1434

1435

1436

1437

1438

1439

1440

1441

1442

1443

1444

1445

1446

1447

1448

1449

1450

1451

1452

1453

1454

1455

1456

1457

1458

1459

1460

1461

1462

1463

1464

1465

1466

1467

1468

1469

1470

1471

1472

1473

1474

1475

1476

1477

1478

1479

1480

1481

1482

1483

1484

1485

1486

1487

1488

1489

1490

1491

1492

1493

1494

1495

1496

1497

the deceased, by name Kipketer, who was living close by; it was also asserted that Kimaangich had last left his hut announcing his intention to visit Kipketer.

10. From the place where the body was found there was a track as though something heavy had been dragged. This track led from the mud pool in the direction of the huts occupied by the Bagishu labourers on Mr. Bentley's farm, but as first the track could not be followed beyond a point about fifty yards from the centre of these huts where there was a pile of wood ash.

11. Assistant Inspector Dale returned to Kitale leaving two native constables—Wakuma and George—to make investigations. It is clear that they proceeded to extort evidence from the natives on the farm by means of intimidation and violence, and that their chief victims were a woman named Wenge and a man named Busiku.

12. On Sunday the 15th April, Mr. Dale returned to the farm, and the track referred to in paragraph 10 was followed to the wagon road on the border of Mr. Roberts' farm near two isolated huts belonging to the Nandi herdsman named Kipketer. Kipketer was the man who had been so reluctant to approach the corpse. In the absence of Kipketer, the permission of the occupier of the farm was obtained, and the huts, which were locked broken open. In one of the huts was found a native spear of a type similar to a Masai fighting spear, that is to say a weapon which has a long steel blade, and a long sharp steel butt, joined together by a short wooden handle. The spear was wrapped in rags, and on these rags being removed it was found that the steel butt was stained with blood. It appears from the evidence that the spear was given into the charge of a native constable by Assistant Inspector Dale, but neither the rags nor any other covering were placed upon it, and we are informed that on the way to Kitale the bloodstains were washed off in a heavy thunder-storm. An examination of the hut revealed that a considerable part of the floor space had been freshly plastered in native fashion with cow dung. It appears, however, that no steps were taken to remove this fresh covering and examine the floor underneath.

13. As a result of statements made to the European police officer by the two native constables who had been left at the farm, two Bagishu labourers named Okabé and Mafuabi who were in the employ of Mr. Bentley, were arrested on

16th April and two others, Matapa and Kutoi, were arrested on the 18th. These are the four men who were subsequently charged with the murder.

14. Section 46 of the Criminal Procedure Ordinance reads as follows:—

“Officers in charge of police stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.”

15. Section 45 directs that no police officer shall detain in custody a person arrested without warrant for a longer period than in all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a magistrate exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the magistrate's court.

16. Mr. Bentley's farm is only some seven miles from Kitale, but no notification of these arrests was made to the magistrate until the 19th April.

17. From the police records which have been placed at the disposal of the Commission, it appears that the Nandi herdsman Kipketer, together with another Nandi named Kiprotich, were arrested on the 16th April, placed in the cells at Kitale, and released again at 10 a.m. on the 17th April, but were re-arrested on the afternoon of the 17th April on Mr. Roberts' farm. It appears further that these two men were never taken before the magistrate, but were kept in police custody without a warrant, and without the knowledge of the magistrate, for a fortnight, and were only released on the morning of the 1st May; that is to say, the day following that upon which the four Bagishu were committed for trial.

18. It is also clear from the evidence that other natives from the farm, including the woman Wenge and the child Nandatu, were taken in police custody to Kitale where they were kept in the police lines under duress and subjected to intimidation and ill-treatment by the native constables to whom they were handed over by Assistant Inspector Dale. One of these—a male Mghiru native labourer named Masaba—was handcuffed on the farm, but the handcuffs were eventually taken off. He was, however, brought to the police lines where he was kept for a week and subjected to short rations, forced

the deceased, by name Kipketer, who was living close by; it was also asserted that Kifmangich had last left his hut announcing his intention to visit Kipketer.

10. From the place where the body was found there was a track as though something heavy had been dragged. This track led from the mud pool in the direction of the huts occupied by the Bagishu labourers on Mr. Bentley's farm, but at first the track could not be followed beyond a point about fifty yards from the centre of these huts where there was a pile of wood ash.

11. Assistant Inspector Dale returned to Kitale leaving two native constables—Wakuma and George—to make investigations. It is clear that they proceeded to endeavour to extort evidence from the natives on the farm by means of intimidation and violence, and that their chief victims were a woman named Wenge and a man named Busiki.

12. On Sunday, the 15th April, Mr. Dale returned to the farm, and the track referred to in paragraph 10 was followed to the wagon road on the border of Mr. Roberts' farm near two isolated huts belonging to the Nandi herdsmen named Kipketer. Kipketer was the man who had been so reluctant to approach the corpse. In the absence of Kipketer the permission of the occupier of the farm was obtained, and the huts, which were locked, broken open. In one of the huts was found a native spear of a type similar to a Masai fighting spear, that is to say a weapon which has a long steel blade and a long sharp steel butt joined together by a short wooden handle. The spear was wrapped in rags, and on these rags being removed it was found that the steel butt was stained with blood. It appears from the evidence that the spear was given into the charge of a native constable by Assistant Inspector Dale but neither the rags nor any other covering were placed upon it, and we are informed that on the way to Kitale the bloodstains were washed off in a heavy thunder-storm. An examination of the hut revealed that a considerable part of the roof space had been freshly plastered in native fashion with cow-dung. It appears, however, that no steps were taken to remove this fresh covering and examine the floor underneath.

13. As a result of statements made to the European police officer by the two native constables who had been left at the farm, two Bagishu labourers named Okabi and Mafuabi who were in the employ of Mr. Bentley, were arrested on the

16th April and two others, Matunda and Kutooi, were arrested on the 16th. These are the four men who were subsequently charged with the murder.

14. Section 46 of the Criminal Procedure Ordinance reads as follows:—

Officers in charge of police stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of the respective stations, whether such persons have been admitted to bail or otherwise.

15. Section 45 directs that no police officer shall detain in custody a person arrested without warrant for a longer period than in all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a magistrate exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the magistrate's court.

16. Mr. Bentley's farm is only some seven miles from Kitale, but no notification of these arrests was made to the magistrate until the 19th April.

17. From the police records which have been placed at the disposal of the Commission, it appears that the Nandi headsmen Kipketer, together with another Nandi named Kiprotich, were arrested on the 16th April, placed in the cells at Kitale, and released again at 10 a.m. on the 17th April, but were re-arrested on the afternoon of the 17th April on Mr. Roberts' farm. It appears further that these two men were never taken before the magistrate, but were kept in police custody without a warrant, and without the knowledge of the magistrate, for a fortnight, and were only released on the morning of the 1st May; that is to say, the day following that upon which the four Bagishu were committed for trial.

18. It is also clear from the evidence that other natives from the farm, including the woman Wenge and the child Nandutu, were taken in police custody to Kitale where they were kept in the police lines under duress and subjected to intimidation and ill-treatment by the native constables to whom they were handed over by Assistant Inspector Dale. One of these—a male Mginu native labourer named Masaba—was handcuffed on the farm, but the handcuffs were eventually taken off. He was, however, brought to the police lines where he was kept for a week and subjected to short rations, forced

labour and other ill-treatment by native police. Similar treatment was meted out to Wakidiari (*aka* Okiziang). It appears also that another labourer of the same tribe named Busiku, who was employed by Mr Bentley as tractor driver, had been intimidated by these native constables into making a statement which afterwards formed the chief basis of the charge framed against Okube, Mafuabi, Kutosi and Matanda.

19. From time to time the native witnesses who were kept in police custody at the Kitale police lines were brought before Assistant Inspector Dale who took down statements from them.

20. It appears that no request was held on the dead body of Kipunguabi, but that on the 24th April, the four men Okube, Mafuabi, Kutosi and Matanda were taken before Mr. I. B. Onkspe, 2nd Class Magistrate at Kitale and charged with the murder of the deceased Kimaugish.

21. Section 139 (2) of the Criminal Procedure Ordinance provides that—

Any criminal court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agent shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer the provisions of the Indian Evidence Act, 1872, section one hundred and sixty-one or section one hundred and forty-five, as the case may be, shall apply.

The police diaries were not called for at any time by Mr Gillespie.

22. The preliminary enquiry which commenced on the 24th April, 1928, was concluded on the 30th April. Evidence was given by Busiku, the woman Wenge and the child Nanduta, by Wakidiari and Mufuabi, also by Assistant Inspector Dale and by Dr. Cowen who had made the post-mortem examination.

23. Two hoes were produced as exhibits, the evidence in regard to them being that they belonged to two of the accused and that the dry mud on them was similar to that which was to be found at the place where the corpse was discovered.

24. The four accused were committed for trial.

25. At the criminal session of the Supreme Court at Kitale on the 20th July, 1928, the four accused were tried for murder by Mr. Justice Stephens. Mr. E. J. Davies, Crown Counsel, appeared on behalf of the Crown, and Mr. Martin, Advocate, of Kisumu, appeared for the Defence. The court was assisted by three native assessors. The main story for the prosecution was told by the witness Busiku. The hoes were again produced and the attention of the Court was drawn to the mud upon them. It was also stated in the evidence for the prosecution that a cockerel had been eaten by the accused after the alleged murder and that this was a Bagishu custom. It was implied that it was an act of purging guilt. Attention was also drawn in court to the fact that one of the accused had been wearing a vest which had bloodstains on it, but was at the time of the trial wearing a different vest. The four accused were found guilty of murder and sentenced to death, but were informed in the usual manner that they could appeal within 14 days.

26. At a subsequent date, on returning from England, Mr. Oswald Bentley found that these four native employees of his were in prison under sentence of death. From enquiries that he made, he became convinced that they were innocent of the crime with which they had been charged, and he took active steps to obtain a revision of the sentence. [Correspondence between Mr. Bentley and Government Departments will be found in Appendix A.]

27. Eventually, appeals were put down for hearing at the sitting of the Court of Appeal for Eastern Africa which was held at Dar es Salaam on the 3rd September, 1928, and following days. As Mr. Bentley found it impossible to attend that session the Judges adjourned the appeal to the December sittings.

28. The appeal came up for hearing at the December sittings in Nairobi and the following order was made:—

“Mr. Bentley undertakes to take Busiku to Kitale within fifteen days to lodge a complaint or withdraw his statement. Case adjourned to next sessions. (Uganda).

(Id.) C. J. G.

90-12-28.”

The order is initialed by Sir Charles Griffin, Chief Justice of Uganda.

labour and other ill-treatment by native police. Similar treatment was meted out to Wakidiari (alias Okimang). It appears also that another labourer of the same tribe named Bosiku, who was employed by Mr. Bentley as tractor driver, had been intimidated by these native constables into making a statement which afterwards formed the chief basis of the charge framed against Okube, Mafuabi, Kutosi and Matanda.

19. From time to time the native witnesses who were kept in police custody at the Kitale police lines were brought before Assistant Inspector Dale who took down statements from them.

20. It appears that no request was held on the dead body of Kimangish, but that on the 24th April, the four men Okube, Mafuabi, Kufost and Matanda were taken before Mr. I. R. Gillespie, 2nd Class Magistrate at Kitale, and charged with the murder of the deceased Kimangish.

21. Section 139 (2) of the Criminal Procedure Ordinance provides that—

Any criminal court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agent shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer who made them, to refresh his memory, or if the court uses them for the purpose of contradicting such police officer the provisions of the Indian Evidence Act, 1872, section one hundred and sixty-one or section one hundred and forty-five, as the case may be, shall apply.

The police diaries were not called for at any time by Mr. Gillespie.

22. The preliminary enquiry which commenced on the 24th April, 1923, was concluded on the 30th April. Evidence was given by Bosiku, the woman Wenge and the child Nandutu, by Wakidiari and Mufuabi, also by Assistant Inspector Dale and by Dr. Lawen who had made the post-mortem examination.

23. Two hoses were produced as exhibits, the evidence in regard to them being that they belonged to two of the accused and that the dry mud on them was similar to that which was to be found at the place where the corpse was discovered.

24. The four accused were committed for trial.

25. At the criminal session of the Supreme Court at Kitale on the 20th July, 1923, the four accused were tried for murder by Mr. Justice Stephens. Mr. E. J. Davies, Crown Counsel, appeared on behalf of the Crown, and Mr. Martin, Advocate, of Kitale, appeared for the Defence. The court was assisted by three native assessors. The main story for the prosecution was told by the witness Bosiku. The hoses were again produced and the attention of the Court was drawn to the mud upon them. It was also stated in the evidence for the prosecution that a cockerel had been eaten by the accused after the alleged murder and that this was a Bagisha custom. It was implied that it was an act of purging guilt. Attention was also drawn in court to the fact that one of the accused had been wearing a vest which had bloodstains on it, but was at the time of the trial wearing a different vest. The four accused were found guilty of murder and sentenced to death, but were informed in the usual manner that they could appeal within a month.

26. At a subsequent date, on returning from England, Mr. Oswald Bentley found that these four native employees of his were in prison under sentence of death. From enquiries that he made, he became convinced that they were innocent of the crime with which they had been charged, and he took active steps to obtain a revision of the sentence. [Correspondence between Mr. Bentley and Government Departments will be found in Appendix A.]

27. Eventually, appeals were put down for hearing at the sitting of the Court of Appeal for Eastern Africa which was held at Dar es Salaam on the 3rd September, 1923, and following days. As Mr. Bentley found it impossible to attend that session the Judges adjourned the appeal to the December sittings.

The appeal came up for hearing at the December sittings in Nairobi and the following order was made:—

Mr. Bentley undertakes to take Bosiku to Kitale within fifteen days to lodge a complaint or withdraw his statement. Case adjourned to next sessions. (Uganda).

(13) C.J.G.

30-12-23.

The order is initialed by Sir Charles Griffin, Chief Justice of Uganda.

29. On the 28th December, 1929, Mr. Bentley took Busuku to the magistrate at Kitale, but no complaint was lodged. All that happened was that the native was asked by Mr. Crampton, District Commissioner, whether he desired to make a voluntary statement about the alleged murder. Busuku said that he did not desire, and his statement was taken by Mr. Crampton, but no criminal proceedings were instituted. It appears that Mr. Crampton was completely in the dark as to why this statement was being taken.

30. The statement was forwarded by Mr. Crampton to the Registrar, Supreme Court, because he had been informed by the Assistant Superintendent of Police at Kitale that a sworn statement by Busuku was urgently required. [I vide Appendix I, S. 1.]

31. In a letter dated 27th February, 1929, Mr. E. J. Favers, Crown Counsel, intimated Mr. Bentley that he had not complied with the order of the Court of Appeal for Eastern Africa, and that Busuku had not lodged a complaint, that is to say, that he had not commenced proceedings against his alleged aggressors, but had merely made a sworn statement which would not put the Court of Appeal into any better position than before.

32. The appeal was finally heard at Kampala before three Justices, namely, Their Honours Sir Charles Griffin (Chief Justice of Uganda), Mr. Justice Sheridan of Kenya, and Mr. Justice Collins of the Supreme Court of Uganda. The Court ordered a new trial.

33. The Court of Appeal added the following note:

"I have been suggested that Mr. Bentley did not fulfil his undertaking to this Court in that he did not secure the conviction of the police ashari for extracting evidence by threats. This Court is not at present concerned with the result of the prosecution. All that was desired was a sworn statement of the facts, and so far from having failed to fulfil his undertaking Mr. Bentley did exactly what the Court wished him to do. We wish to add that he has gone to an immense amount of trouble over the case actuated by a public-spirited desire to prevent a possible miscarriage of justice."

(Sgd.) C. J. GRIFFIN.  
JOSEPH SHERIDAN,  
R. GUTHRIE SMITH.

34. On the 4th May, 1929, the native constable George Hamisi was convicted at Kitale before Mr. H. Izard, Magistrate, of having assaulted the woman Wenge on the day on which Okube and Mamboti were arrested, namely 16th April, 1929. At the time, Constable George was already serving a sentence of six months for assaulting witnesses in some other case.

35. In the course of his judgment the magistrate made the following remarks:

"I am entirely satisfied from the evidence of 1st, 2nd, and 3rd witness, and from the evidence of the witness called by accused in his defence that the complainant was in fact severely cuff'd by accused and struck by him with a stick. As regards a motive for the beating complainant herself alleges that she was beaten to make her say that her husband committed the murder. The other witnesses say she was beaten for making a scene when her husband was arrested and bound by the police. In either case I am satisfied there was no excuse whatever for such brutal treatment or abuse of authority on the part of the accused. I find accused guilty of the offence with which he has been charged under section 323, I.P.C. The Police ask for an exemplary sentence to be given. I sentence the accused to six months' R.I. this sentence to commence on completion of the sentence accused is now undergoing."

36. This constable had also assaulted one of the accused—Okube.

37. The constable Wokumu was dealt with departmentally by the Commissioner of Police for having assaulted the woman witness, Wenge, and was reduced in grade.

38. The trial took place at Nairobi on the 10th September, 1929, before Mr. Justice Thomas. The Judge decided that there was no evidence against the accused, and he did not even call upon the accused for the defence. He did not even sum up to the assessors but stopped the case and acquitted the four accused.

39. Under the first of our terms of reference, namely the circumstances in which these men were charged with murder, we propose to comment on (a) the events leading up to the point at which the four men were placed in the dock in the Magistrate's Court at Kitale; and (b) the environment in which the natives found themselves in the course of all the judicial proceedings which followed.

29. On the 28th December, 1929, Mr. Bentley took Busiku to the magistrate at Kitale, but no complaint was lodged. All that happened was that the native was asked by Mr. Crampton, District Commissioner, whether he desired to make a voluntary statement about the alleged murder. Busiku said that he did so desire, and his statement was taken by Mr. Crampton, but no criminal proceedings were instituted. It appears that Mr. Crampton was completely in the dark as to why this statement was being taken.

30. The statement was forwarded by Mr. Crampton to the Registrar, Supreme Court, because he had not been informed by the Assistant Superintendent of Police at Kitale that a sworn statement by Busiku was urgently required. [Vide Appendix B, S.]

31. In a letter dated 27th February, 1929, Mr. E. J. Davies, Crown Counsel, reminded Mr. Bentley that he had not complied with the order of the Court of Appeal for Eastern Africa, in that Busiku had not lodged a complaint, that is to say, had not instituted criminal proceedings against his alleged aggressor, but had merely made a sworn statement which would not put the Court of Appeal into any better position than before.

32. The appeal was finally heard at Kampala before three judges, namely Their Honours Sir Charles Griffin, Chief Justice of Uganda, Mr. Justice Sheridan of Kenya, and Mr. Justice Guthrie Smith of Uganda. The Court ordered a new trial.

33. The Court of Appeal added the following note:—

It has been suggested that Mr. Bentley did not fulfil his undertaking to this Court in that he did not secure the conviction of the police askari for extracting evidence by threats. This Court is not at present concerned with the result of the prosecution. All that was desired was a sworn statement of the facts and so far from having failed to fulfil his undertaking Mr. Bentley did exactly what the Court wished him to do. We wish to add that he has gone to an immense amount of trouble over the case actuated by a public-spirited desire to prevent a possible miscarriage of justice."

(Sgd) C. J. GRIFFIN.  
JOSEPH SHERIDAN.  
R. GUTHRIE SMITH.

34. On the 4th May, 1929, the native constable George Hamisi was convicted at Kitale before Mr. H. Izard, Magistrate, of having assaulted the woman Wenge on the day on which Okube and Mairaiti were arrested, namely 16th April, 1929. At the time, Constable Hamisi was already serving a sentence of six months for assaulting witnesses in some other case.

35. In the course of his judgment the magistrate made the following remarks:—

"I am entirely satisfied from the evidence of 1st, 2nd, and 3rd witnesses, and from the evidence of the witness called by accused in his defence that the complainant was in fact severely cuffed by accused and struck by him with a stick. As regards a motive for the beating complainant herself alleges that she was beaten to make her say that her husband committed the murder. The other witnesses say she was beaten for making a scene when her husband was arrested and bound by the police. In either case I am satisfied that there was no excuse whatever for such brutal treatment or abuse of authority on the part of the accused. I find accused guilty of the offence with which he has been charged under section 223, I.P.C. The Police ask for an exemplary sentence to be given. I sentence the accused to six months' P.I. This sentence to commence on completion of the sentence accused is now undergoing."

36. This constable had also assaulted one of the assessors—Okube.

37. The constable Wokumit was dealt with departmentally by the Commissioner of Police for having assaulted the woman witness, Wenge, and was reduced in grade.

38. The trial took place at Nairobi on the 10th September, 1929, before Mr. Justice Thomas. The Judge decided that there was no evidence against the accused, and he did not even call upon the accused for the defence. He did not even sum up to the assessors but stopped the case and acquitted the four accused.

39. Under the first of our terms of reference, namely the circumstances in which these men were charged with murder, we propose to comment on (a) the events leading up to the point at which the four men were placed in the dock in the Magistrate's Court at Kitale; and (b) the environment in which the natives found themselves in the course of all the judicial proceedings which followed.

## COMMENTS ON FACTS.

40. The four accused owed their commitment for murder and their conviction in the court of first instance to the attitude of one of their own tribe, and to the evidence of a woman of low order of intellect who was living with one of the accused as his wife. These two witnesses subsequently stated that they had been cajoled and intimidated by the police into giving false evidence.

41. The admission of the evidence led by the police is a matter for the magistrate. We consider it within our competence under the first part of the terms of reference to record our surprise that the committing magistrate should have resorted without qualifying comment the evidence of an exceptionally unintelligent native woman, who was living with one of the accused as his wife, and of a very young child whose evidence is alleged to have been given by affirmative grunts in response to leading questions. The evidence of the woman was again accepted without comment by the trial Judge at Kitale.

42. As regards to an appreciation of native mentality is an understanding of native custom. It is for instance recorded both by the committing magistrate and by the trial judge, that a fowl was killed and eaten by the four accused, and that it is the custom of the Bagishu to kill and eat a fowl after a murder. No detailed evidence on point of custom was led, but it is now so obvious that there are many other occasions on which a fowl can be killed and eaten without the preliminary murder of a human being, and it is a commonplace that among many people from ancient Egypt to later Polynesian purification is necessary after the mere handling of a dead body. Yet the date of the alleged ceremonial is not given, no evidence of ritual is led, and the colour of the fowl, a matter of some significance is omitted.

43. While it is no part of our duty to adduce additional evidence for the defence, we feel that we should mention yet another point which in our opinion indicates a misapprehension of native mentality. Here we have a case in which a native of a neighbouring reserve announces his intention to visit his cousin on a farm. He never returns. We know, however, that he died a violent death, and if he had been properly buried he might have simply vanished, as natives often do leaving no trace to lead to an official enquiry. Yet we are asked to believe that he was suddenly killed without motive in a drunken brawl by strangers whose huts he visited at night by chance;

and that the murderers at once buried him most inefficiently in a stream; that next morning they visit the spot, find a knee exposed and that instead of throwing more earth on it, they proceed to give information which leads ultimately to their own arrest.

Surely this implies much too elaborate a scheme for the mentality of the accused. We feel that the passive credence which such a story received indicates a crying need for someone with appropriate experience and training to act as "prisoner's friend" in native cases and to bring out the obvious points for the defence.

44. It has to be remembered that the accused were ignorant natives of a backward tribe. They were not in the territory to which they belong, and were not in a position to enlist the help either of their own tribal elders or of the administrative officers who knew them. They were arrested without warrant on the word of native police who had been left on the farm to make enquiries, and who had promptly employed methods of intimidation and violence to frighten certain natives on the farm into making such statements as they told them to make. The accused or at least some of them, were subjected to violence in the course of arrest, and were taken to the police station which they must have reached in a state of bewildered terror. It appears, too, that while in custody, they were subjected to very improper treatment with a view to inducing confessions.

45. Nor must it be forgotten that the bewilderment of the accused must have extended largely to the native witnesses. Some of those for the prosecution had been subjected to unlawful arrest, detention in custody, assault, short rations, forced labour, intimidation and general ill-treatment at the hands of the police, and the state of their minds when called into court, under the supervision of the police who cannot have represented anything but terrorism to them, can easily be imagined. Such statements as any of them had made to the Assistant Inspector had been made to a man who was ignorant of their language and who was using as interpreter one or other of the very native constables in whose keeping they had been placed by him, and at whose hands they were suffering this ill-treatment. In the proceedings in the lower court, neither the Assistant Inspector who conducted the prosecution nor the magistrate who presided, was acquainted with their language. They had no one to show them how to defend themselves and they must have felt indeed friendless.

## COMMENTS ON FACTS.

40. The four accused owed their commitment for murder and their conviction in the court of first instance to the statement of one of their own tribe, and to the evidence of a woman of low order of intellect who was living with one of the accused as his wife. These two witnesses subsequently stated that they had been cajoled and intimidated by the police into giving false evidence.

41. The admission of the evidence led by the police is a matter for the magistrate. We consider it within our competence under the first part of the terms of reference to record our surprise that the committing magistrate should have recorded without qualifying comment the evidence of an exceptionally unintelligent native woman, who was living with one of the accused as his wife, and of a very young child whose evidence is alleged to have been given by affirmatory grunts in response to leading questions. The evidence of the woman was again accepted without comment by the trial Judge at Kitale.

42. Germane to an appreciation of native mentality is an understanding of native custom. It is for instance recorded both by the committing magistrate, and by the trial judge, that a fowl was killed and eaten by the four accused, and that it is the custom of the Tagishu to kill and eat a fowl after a murder. No detailed evidence on point of custom was led. It is however obvious that there are many other occasions on which a fowl can be killed and eaten without the preliminary murder of a human being, and it is a commonplace that among many people, from ancient Egypt to later Polynesia purification is necessary after the mere handling of a dead body. Yet the date of the alleged ceremonial is not given, no evidence of ritual is led, and the colour of the fowl, a matter of some significance, is omitted.

43. While it is no part of our duty to adduce additional evidence for the defence, we feel that we should mention yet another point which in our opinion indicates a misapprehension of native mentality. Here we have a case in which a native of a neighbouring reserve announces his intention to visit his cousin on a farm. He never returns. We know, however, that he died a violent death, and if he had been properly buried he might have simply vanished, as natives often do, leaving no trace to lead to an official enquiry. Yet we are asked to believe that he was suddenly killed without motive in a drunken brawl by strangers whose huts he visited at night by chance;

and that the murderers at once buried him most inefficiently in a stream; that next morning they visit the spot, find a knee exposed and that instead of throwing more earth on it, they proceed to give information which leads ultimately to their own arrest.

Surely this implies much too elaborate a scheme for the mentality of the accused. We feel that the passive credence which such a story received indicates a crying need for someone with appropriate experience and training to act as "prisoner's friend" in native cases and to bring out the obvious points for the defence.

44. It has to be remembered that the accused were ignorant natives of a backward tribe. They were not in the territory to which they belong, and were not in a position to enlist the help either of their own tribal elders or of the administrative officers who knew them. They were arrested without warrant on the word of native police who had been left on the farm to make enquiries, and who had promptly employed methods of intimidation and violence to frighten certain natives on the farm into making such statements as they told them to make. The accused or at least some of them, were subjected to violence in the course of arrest, and were taken to the police station which they must have reached in a state of bewildered terror. It appears, too, that while in custody, they were subjected to very improper treatment with a view to inducing confessions.

45. Nor must it be forgotten that the bewilderment of the accused must have extended largely to the native witnesses. Some of those for the prosecution had been subjected to unlawful arrest, detention in custody, assault, short rations, forced labour, intimidation and general ill-treatment at the hands of the police, and the state of their minds when called into court, under the supervision of the police who cannot have represented anything but terrorism to them, can easily be imagined. Such statements as any of them had made to the Assistant Inspector had been made to a man who was ignorant of their language and who was using as interpreter one or other of the very native constables in whose keeping they had been placed by him, and at whose hands they were suffering this ill-treatment. In the proceedings in the lower court, neither the Assistant Inspector who conducted the prosecution nor the magistrate who presided, was acquainted with their language. They had no one to show them how to defend themselves and they must have felt indeed friendless.

The magistrate knew nothing of the real circumstances. He did not know that witnesses had been kept in police-custody. He did not know that two other quite different suspects were actually at that time in custody on the very same charge. He had not received or demanded a proper detailed report as required by section 141 of the Criminal Procedure Ordinance, and he had not seen the police diaries of the case. He had heard nothing of the blood-stained spear found in the Nandi's hut.

45. We have gathered a strong impression that both in the magisterial enquiry and in the Supreme Court trials, there was probably nobody in court who was in a position to weigh the value of the evidence and so to interpret it as to obtain from the words a true picture of the facts. It is plain that people in England reading evidence recorded by an Englishman would picture their own kind of court, their own conception of native huts and African scenery, their own interpretation of each action and its motives which would be based on English village life and would approximate to the truth only in proportion to the reading and experience and the power of imagination and sympathy of the individual. But it appears to us that a judge and counsel, living in a British settlement under the European colonist conditions of to-day, even though they can, no doubt form a better picture of African scenery, are as remote as their brothers in England from any true appreciation of native thought or action. The native assessors, are in our opinion usually animated by motives having little relation to the evidence which only too often they are mentally incapable of weighing. The picture that we wish to present, and the injustice that calls for remedy, is the complete mental isolation of the unfortunate natives in the dock, bewildered by the processes of a foreign law hampered by the medium of a strange language, and intellectually lower in comprehension than an intelligent European child of twelve.

46. We desire to emphasize a point to which we have already referred, namely that it is the duty of the police to present all relevant evidence to the coroner or magistrate.

This duty was definitely not performed. There were at least two possible lines of enquiry, of which one was chosen by the Assistant Inspector of Police for presentation to the magistrate. We believe this to be the usual practice, and we hold that it is far too great a responsibility to be thrust upon the investigating police officers, often young and inexperienced men, who, under such a system, must prejudge the case and

suppress some of the evidence before it is presented to more highly trained analysis. We cannot stir over the very significant point that the police had another "suspect" in custody (without a warrant) until the day after the accused were committed for trial, and we are left with the impression that the police conceived it to be their duty not to investigate and report and to put the result of these investigations before a coroner, but to work up a case for the prosecution, eliminating the evidence for the defence. Some of the blame for this state of affairs may perhaps be attributable to the impression that a high ratio of convictions to cases is a mark of police efficiency. It should of course be immaterial to the police whether a conviction is secured or not, provided that they have fully reported all the material facts. Police work is only well done when it has left no point uninvestigated and unrecorded and has presented every point, whether for or against the accused, for investigation by a competent judicial authority. More especially is this incumbent upon the police when the accused are natives and undefended by counsel. We consider it proper to quote here some extracts from the Police Code by the late Colonel Sir H. Vincent—

Remember always what reliance is of necessity placed in Courts of Justice upon the testimony of policemen and bear constantly in mind that in many cases the fate of the accused man which means his life or his liberty depends upon that testimony. Remember also when you are giving evidence, that you are not the person appointed to determine the guilt or innocence of the person on his trial, nor have you any right to express an opinion on the subject. Your duty is a very simple and easy one, namely, to tell the Court all you know."

Again—

Police must not suppress or overstate the slightest circumstance, so as to favour the prosecution or prejudice the prisoner. They are under as clear an obligation to inform the Court of facts which tell in favour of the accused as of facts which tell against him.

They should endeavour as far as possible, to feel indifferent as to the results of cases, and they perform their duty best by stating accurately and without malice or favour all the particulars they know."

48. In this connexion too, we have to point out that the record of the preliminary investigation by the Police is regarded as a police diary, and as the private property of the Police

The magistrate knew nothing of the real circumstances. He did not know that witnesses had been kept in police custody. He did not know that two other quite different suspects were actually at that time in custody on the very same charge. He had not received or demanded a proper detailed report as required by section 141 of the Criminal Procedure Ordinance, and he had not seen the police diaries of the case. He had heard nothing of the blood-stained spear found in the Nandi's hut.

46. We have gathered a strong impression that both in the magisterial enquiry and in the Supreme Court trials, there was probably nobody in court who was in a position to weigh the value of the evidence and so to interpret it as to obtain from the words a true picture of the facts. It is plain that people in England, reading evidence recorded by an Englishman would picture their own kind of court, their own conception of native huts and African scenery, their own interpretation of each action and its motives which would be based on English village life and would approximate to the truth only in proportion to the reading and experience and the power of imagination and sympathy of the individual. But it appears to us that a judge and counsel, living in a British settlement under the European colonist conditions of to-day, even though they can no doubt form a better picture of African scenery, are as remote as their brothers in England from any true appreciation of native thought or action. The native assessors, are in our opinion, usually animated by motives having little relation to the evidence which only too often they are mentally incapable of weighing. The picture that we wish to present and the injustice that calls for remedy is the complete mental isolation of the unfortunate natives in the dock, bewildered by the processes of a foreign law, hampered by the medium of a strange language, and intellectually lower in comprehension than an intelligent European child of twelve.

47. We desire to emphasize a point to which we have already referred, namely that it is the duty of the police to present all relevant evidence to the coroner or magistrate.

This duty was definitely not performed. There were at least two possible lines of enquiry, of which one was chosen by the Assistant Inspector of Police for presentation to the magistrate. We believe this to be the usual practice, and we feel that it is far too great a responsibility to be thrust upon the investigating police officers, often young and inexperienced men, who, under such a system, must prejudge the case and

suppress some of the evidence before it is presented to more highly trained analysis. We cannot slur over the very significant point that the police had another "suspect" in custody (without a warrant) until the day after the accused were committed for trial, and we are left with the impression that the police conceived it to be their duty not to investigate and report and to put the result of these investigations before a coroner, but to work up a case for the prosecution, eliminating the evidence for the defence. Some of the blame for this state of affairs may perhaps be attributable to the impression that a high ratio of convictions to cases is a mark of police efficiency. It should of course be immaterial to the police whether a conviction is secured or not, provided that they have fully reported all the material facts. Police work is only well done when it has left no point uninvestigated and unrecorded and has presented every point whether for or against the accused, for investigation by a competent judicial authority. More especially is this incumbent upon the police when the accused are natives and undefended by counsel. We consider it proper to quote here some extracts from the Police Code by the late Colonel Sir H. Vincent:—

Remember always what reliance is of necessity placed in Courts of Justice upon the testimony of policemen and bear constantly in mind that in many cases the fate of the accused man which means his life or his liberty depends upon that testimony. Remember also when you are giving evidence, that you are not the person appointed to determine the guilt or innocence of the person on his trial; nor have you any right to express an opinion on the subject. Your duty is a very simple and easy one, namely, to tell the Court all you know.

Again:—

Police must not suppress or overstate the slightest circumstance, so as to favour the prosecution or prejudice the prisoner. They are under as clear an obligation to inform the Court of facts which tell in favour of the accused as of facts which tell against him.

They should endeavour as far as possible, to feel indifferent as to the results of cases, and they perform their duty best by stating accurately and without malice or favour all the particulars they know.

48. In this connexion too, we have to point out that the record of the preliminary investigation by the Police is regarded as a police diary, and as the private property of the Police

Department. It was therefore not accessible to the counsel for the defence (cf. section 139 2) of the Criminal Procedure Ordinance. Now counsel for the defence is not briefed till the case is committed for trial to the Supreme Court, and is more often than not in native cases a junior advocate, of little experience of the country or knowledge of the language, who would hardly know how to pick up any evidence or assistance to supplement the record in the magistrate's court. It is therefore of all the greater importance that the latter record should be as full as possible. In the circumstances as revealed in this case, it would seem that once an ignorant native has been committed by a careful magistrate for trial, he is practically condemned to death.

40. We would refer here also to what is very apt, as appears in this case, to become the attitude of a magistrate in a native court, namely that his function begins and ends with ascertaining whether there is a sufficient prima facie case against the accused to justify their committal for trial by the Supreme Court. The adequate presentation in the lower court of the case for the defence does not appear to be any one's business unless the accused are in a position to retain counsel. But the accused are often ignorant and primitive natives with no idea of the nature of evidence or of the procedure of our courts. In a native court held by their own tribal authorities everything would be different. Knowing that the witnesses on the other side would be actuated by tribal rivalries in giving or withholding true evidence, they would call around them their family and friends to support them. But to their bewilderment the testimony of these is ruled out by European laws of evidence as irrelevant, and they have no idea whom else to call. It is therefore of supreme importance that the whole record of a full investigation of every possible line of enquiry should be accessible to the defending counsel.

41. We desire to call particular attention to this point of the inherent weakness of the defence. There is usually no defence in the lower court, and in the Supreme Court the advocate assigned for the defence of the accused in the struggle for life with which they are suddenly confronted is not always the best obtainable. He is only too often the least experienced and therefore the least occupied of the practising advocates of the neighbourhood.

There is usually no inducement to take the case up and pressure has on occasions to be exercised to obtain any defence for the accused.

51. Although we are loth to criticize the judicial acts of magistrates or judges, we consider it our duty to draw attention to important acts or omissions which in our view have had a profound effect upon the course of events connected with this case.

52. We deem it regrettable that the magistrate at Kitalo did not hold an inquest before proceeding with the charge against specific persons. We think that had a full and proper report, as required by section 141 of the Criminal Procedure Ordinance been in his hands, he would have decided to hold an inquest, and we suggest that it was his duty to see to it that that report was presented him in the form required by law. We regret, too, that he did not call for the police diaries for the purpose contemplated by the legislature, namely to guide him in lines of investigation. He would have found much of that of which he was left in ignorance.

53. The Chief Magistrate has quite properly pointed out that evidence pointing to the possible guilt of another party would not have been relevant to the police case against the four accused when before the court on the charge of murder. But it would have been important evidence at an inquest where there is no one in the dock. We believe that had the magistrates read the police diaries and thereafter conducted an inquest in the first place the whole proceedings might have taken quite a different turn—and that these omissions have had serious consequences. We are left with the impression that the magistrate passively accepted the police case without any active participation in the investigation which he in fact was supposed to be conducting. For instance, there was a suggestion of a blood-stained vest, the inference presumably being that it was the blood of the deceased. This point was allowed to pass without comment or enquiry. Similarly there should have been further investigation in regard to the alleged injury to the anus in view of the suggestion that a stick had been inserted. It was not too late then to order examination of the body and further medical examination of the part. Again the testimony, which was admitted as relevant, relating to the killing of a fowl surely necessitated further evidence, as to native custom in that connexion, the details and significance of any such custom and precise information as to what tribes practise it. It should surely have been at least suggestive of a second line of enquiry that the Nandi, Kipketer failed to identify his own

Department. It was therefore not accessible to the counsel for the defence (cf. section 139 (2) of the Criminal Procedure Ordinance). Now counsel for the defence is not briefed till the case is committed for trial to the Supreme Court, and is more often than not in native cases a junior advocate, of little experience of the country or knowledge of the language, who would hardly know how to pick up any evidence or assistance to supplement the record in the magistrate's court. It is therefore of all the greater importance that the latter record should be as full as possible. In the circumstances as revealed in this case, it would seem that once an ignorant native has been committed by a careful magistrate for trial, he is practically condemned to death.

49. We would refer here also to what is very apt as apparently in this case, to become the attitude of a magistrate in the lower court, namely that his function begins and ends with ascertaining whether there is a sufficient prima facie case against the accused to justify their commitment for trial by the Supreme Court. The adequate presentation in the lower court of the case for the defence does not appear to be any one's business unless the accused are in a position to retain counsel. But the accused are often ignorant and primitive natives with no idea of the nature of evidence or of the procedure of our courts. In a native court held by their own tribal authorities everything would be different. Knowing that the witnesses on the other side would be actuated by tribal rivalries in giving or withholding true evidence, they would call around them their family and friends to support them. But to their bewilderment the testimony of these is ruled out by European laws of evidence as irrelevant, and they have no idea whom else to call. It is therefore of supreme importance that the whole record of a full investigation of every possible line of enquiry should be accessible to the defending counsel.

50. We desire to call particular attention to this point of the inherent weakness of the defence. There is usually no defence in the lower court, and in the Supreme Court the advocate assigned for the defence of the accused in the struggle for life with which they are suddenly confronted is not always the best obtainable. He is only too often the least experienced and therefore the least occupied of the practising advocates of the neighbourhood.

There is usually no inducement to take the case up and pressure has on occasions to be exercised to obtain any defence for the accused.

51. Although we are loth to criticize the judicial acts of magistrates or judges, we consider it our duty to draw attention to important acts or omissions which in our view have had a profound effect upon the course of events connected with this case.

52. We deem it regrettable that the magistrate at Kitale did not hold an inquest before proceeding with the charge against specific persons. We think that had a full and proper report, as required by section 141 of the Criminal Procedure Ordinance been in his hands, he would have decided to hold an inquest, and we suggest that it was his duty to see to it that that report was presented him in the form required by law. We regret, too, that he did not call for the police diaries for the purpose contemplated by the legislature, namely to guide him in lines of investigation. He would have found much of that of which he was left in ignorance.

53. The Attorney General has quite properly pointed out that evidence pointing to the possible guilt of another party would not have been relevant to the police case against the four accused when before the court on the charge of murder. But it would have been important evidence at an inquest where there is no one in the dock. We believe that had the magistrates read the police diaries and thereafter conducted an inquest in the first place the whole proceedings might have taken quite a different turn—and that these omissions have had serious consequences. We are left with the impression that the magistrate passively accepted the police case without any active participation in the investigation which he in fact was supposed to be conducting. For instance, there was a suggestion of a blood-stained vest, the inference presumably being that it was the blood of the deceased. This point was allowed to pass without comment or enquiry. Similarly there should have been further investigation in regard to the alleged injury to the anus in view of the suggestion that a stick had been inserted. It was not too late then to order exhumation of the body and further medical examination of the part. Again the testimony, which was admitted as relevant, relating to the killing of a fowl surely necessitated further evidence, as to native custom in that connexion, the details and significance of any such custom, and precise information as to what tribes practise it. It should surely have been at least suggestive of a second line of enquiry that the Nandi, Kipketer failed to identify his own

See page 14  
of A.L.C.  
Comments

cousin, and was reluctant to approach the body. The circumstances were never elicited in which voluntary information of the discovery of the body was given by the very persons who were later arrested and charged with the murder.

54. There is yet one more point in this connexion. Once prisoners are convicted and sentenced to death, the function of their counsel is discharged. If they wish to appeal, their appeal has to be framed by the officers of the prison, who have no knowledge of the facts. There is plainly scope here again for a prisoner's friend.

55. The foregoing represent our conclusions as to the general circumstances under which the four accused were charged with murder. We find in effect that there are serious faults in the system, both as it is framed and as it is interpreted, which do not give the native on trial for his life a fighting chance, and it is to this rather than to individual misconduct that we attribute the undoubted miscarriage of justice. Individual misconduct was however, an important contributory cause, and we turn now to more detailed observations on the conduct of the police.

#### THE CONDUCT OF THE POLICE

The conduct of the police enquiry was in the hands of an assistant inspector, since his senior officer was unwell. He was assisted by a number of native police, one of whom spoke the language of the accused, who are Bagielu. It is against these native police that the most serious allegations have been made. It is alleged that by intimidation of prisoners and witnesses they worked up the evidence that is recorded on the file of the committing magistrate, and which to any one reading it, consisting as it does of statements purporting to be those of eye-witnesses, is full justification for a conviction. We have already commented on the circumstances in which our system permits the obscuration of such points as the low mentality of some of the witnesses, the darkness of the night, contrasted with the full detail of the stories and so on. The fact remains that the case as presented by these men was accepted by their superior officers, by the magistrate, and by the Supreme Court, and in the result four men nearly lost their lives. One of the native police in question was prosecuted and convicted later for assaulting the woman witness, and has now left the Force. Another has been punished departmentally. There is no evidence to show that the assistant inspector was

in any way a party to their proceedings, and we exonerate him on this very grave head. But we consider him deserving of censure in respect of—

- (a) His failure to comply with the specific provisions of section 141 (1) and (2) of the Criminal Procedure Ordinance. We are satisfied that he could easily have done so.
- (b) Failing to wrap up carefully the blood-stained spear, in order to have the blood analysed.
- (c) His unlawful detention of the Nandi suspects in flagrant contravention of section 45 of the Criminal Procedure Ordinance.

57. An enquiry conducted at the instance of the Commissioner of Police has established that a number of breaches of law and of Police Orders occurred. This record is appended (Appendix C) and it is a grave discredit on the police officers responsible for the allegations of duty. The matter of the detention of witnesses is dealt with in the next paragraph.

58. We shall now refer to one outstanding matter which requires closer investigation than the terms of reference to this Commission would appear to contemplate on our part, as we are concerned with the prisoners rather than the witnesses. It has been established—indeed admitted—that not only suspects but witnesses were kept in custody by the police without warrant. We have gained the impression that this is the usual practice of the Force, and that if we treated it as an outstanding case of illegal action by one particular police officer we should be obscuring the real position as well as doing him an injustice. We recognize that in the peculiar circumstances of the Colony, where magistrates hold court in several places during the month, there may be occasions upon which the police cannot always get immediate access to one. We are fully aware how easy it is for essential native witnesses to disappear and thereby nullify hours of close and arduous work. We appreciate that the police are expected to enforce the law as an efficient instrument of criminal administration, but it is our duty to emphasize in the most unequivocal terms that the police have no right whatever to relegate witnesses to the police lines or elsewhere for detention or to detain suspects without due warrants, and that any relaxation of discipline in this respect is almost certain, as in this case, to lead to grave abuses.

cousin, and was reluctant to approach the body. The circumstances were never elicited in which voluntary information of the discovery of the body was given by the very persons who were later arrested and charged with the murder.

54. There is yet one more point in this connexion. Once prisoners are convicted and sentenced to death, the function of their counsel is discharged. If they wish to appeal, their appeal has to be framed by the officers of the prison, who have no knowledge of the facts. There is plainly scope here again for a "prisoner's friend."

55. The foregoing represent our conclusions as to the general circumstances under which the four accused were charged with murder. We find in effect that there are serious faults in the system, both as it is framed, and as it is interpreted, which do not give the native who trial for his life a fighting chance, and it is to this rather than to individual misconduct that we attribute the undoubted miscarriage of justice. Individual misconduct was however, an important contributory cause, and we turn now to more detached observations on the conduct of the police.

#### THE CONDUCT OF THE POLICE

56. The conduct of the police enquiry was in the hands of an assistant inspector since his senior officer was unwell. He was assisted by a number of native police, one of whom spoke the language of the accused, who are Bagishu. It is against these native police that the most serious allegations have been made. It is alleged that by intimidation of prisoners and witnesses they worked up the evidence that is recorded on the file of the committing magistrate, and which to any one reading it, consisting as it does of statements purporting to be those of eye witnesses, is full justification for committal. We have already commented on the circumstances in which our system permits the obscuring of such points as the low mentality of some of the witnesses, the darkness of the night, contrasted with the full detail of the stories and so on. The fact remains that the case as presented by these men was accepted by their superior officers, by the magistrate, and by the Supreme Court, and in the result four men nearly lost their lives. One of the native police in question was prosecuted and convicted later for assaulting the woman witness, and has now left the Force. Another has been punished departmentally. There is no evidence to show that the assistant inspector was

in any way a party to their proceedings, and we exonerate him on this very grave head. But we consider him deserving of censure in respect of—

- (a) His failure to comply with the specific provisions of section 141 (1) and (2) of the Criminal Procedure Ordinance. We are satisfied that he could easily have done so.
- (b) Failing to wrap up carefully the blood-stained spear, in order to have the blood analysed.
- (c) His unlawful detention of the Mandi suspects in flagrant contravention of section 45 of the Criminal Procedure Ordinance.

57. An enquiry conducted at the instance of the Commissioner of Police has established that a number of breaches of law and of Police Orders occurred. This record is appended (Appendix C) and reflects grave discredit on the police officers responsible for these derelictions of duty. The matter of the detention of witnesses is dealt with in the next paragraph.

58. We shall now refer to one outstanding matter which requires closer investigation than the terms of reference to this Commission would appear to contemplate on our part, as we are concerned with the prisoners rather than the witnesses. It has been established—indeed admitted—that not only suspects but witnesses were kept in custody by the police without warrant. We have gained the impression that this is the usual practice of the Force, and that if we treated it as an outstanding case of illegal action by one particular police officer we should be obscuring the real position as well as doing him an injustice. We recognize that in the peculiar circumstances of the Colony, where magistrates hold court in several places during the month, there may be occasions upon which the police cannot always get immediate access to one. We are fully aware how easy it is for essential native witnesses to disappear and thereby nullify hours of close and anxious work. We appreciate that the police are expected to enforce the law as an efficient instrument of criminal administration, but it is our duty to emphasize in the most unequivocal terms that the police have no right whatever, to relegate witnesses to the police lines or elsewhere for detention or to detain suspects without due warrants, and that any relaxation of discipline in this respect is almost certain, as in this case, to lead to grave abuse.

50. In this connexion, it is appropriate to quote from the Report of the Royal Commission on Police Powers and Procedure, 1929:

Para. 147. Frequent reference has been made before us to a practice known as detention which is differentiated from arrest, etc.

Para. 148. These sophistries are all swept away in a memorandum prepared for us by the Home Office—

The word detention is not a term of art. The technical term is imprisonment. Any form of restraint by a Police Officer, or indeed by any one, is in law an imprisonment, and if a police officer has acted wrongfully an action for false imprisonment will lie.

Para. 154. We have no hesitation in saying that any such practice of wholesale detention of a group of suspects, in order to incriminate one, is wrong both in law and principle and should not be employed.

60. It is difficult to assess how much weight should be attached to statements that no food was issued on some days to persons so detained, and how much should be attached to the fact of established. It seems probable that since there can be no regular arrangements for feeding irregularly detained persons, there would be some danger of omissions. There is, however, no question that the police have laid themselves open to allegations of starving witnesses into compliance, and we recommend it to the very close attention of the Commissioner.

#### THE CONDUCT OF THE LAW OFFICERS OF THE CROWN.

61. We have ruled as irrelevant any complaint against Mr. M. Curthy as it is clear that he was never at any stage officially connected with the case, nor did he have charge of it at any time. Mr. Bentley's main complaints were directed against Mr. Davies, whom he accused of a lack of sympathy and an interest amounting almost to hostility.

62. It appears to us that Mr. Bentley received considerable assistance from the Legal Department and chiefly from Mr. Davies, and that he was thereby enabled to get the appeal heard in the Court of Appeal for Eastern Africa.

63. There appears to have been genuine misunderstanding as to the order made by the Appeal Court in Nairobi. When Mr. Davies wrote his letter of 27th September, 1929, it is clear that he had in mind a very specific order of the Court

of Appeal which was to the effect that Mr. Bentley was to take Busiko, who had made allegations that his evidence was forced from him by the police by means of violence, to the magistrate at Kitale in order that he might "lodge a complaint." That expression has a definite legal connotation and means the institution of criminal proceedings. Mr. Davies, knowing from Mr. Bentley's own statement that he had had twenty years' magisterial experience in the Sudan, naturally concluded that the full meaning of the expression "lodge a complaint" would be quite clear to Mr. Bentley, and we are satisfied that in writing his letter he was, merely, in a friendly way, reminding Mr. Bentley of the caution that had been given in clear terms by Mr. Justice Pickering, namely, that unless Mr. Bentley complied with the specific directions of the Court of Appeal, the allegations of Busiko would be disregarded and the appeal would proceed on its merits. It appears, however, that Mr. Bentley merely took Busiko to the magistrate at Kitale to make an affidavit and did not institute any criminal proceedings. It is clear that Mr. Bentley had misunderstood what was required, and we cannot ascribe the blame for this to Mr. Davies. Moreover, we find it difficult to reconcile the observations made by the Court at Kampala on 8th March, 1929, with the terms of the specific order made on 20th December, 1928.

64. There appears further to be some confusion in Mr. Bentley's mind between the Judicial Department and the Legal Department, for he complains that no instruction was sent by the law officers of the Crown to the magistrate at Kitale as to the order of the Court of Appeal. In the first place, it would not of course be necessary to send any instruction to the magistrate at Kitale that he was to take a complaint, for that is a part of his normal duty, and would be done at any time, at the request of any person. In the second place, were it in any case necessary for the order of the court to be communicated to any person, that would doubtless be done by the registrar of the court. It would not be the function of the law officers of the Crown.

65. We can find nothing in Mr. Davies' conduct of the case, at any stage, or in its presentation before the Supreme Court or the Court of Appeal for Eastern Africa, that is deserving of censure, or in any way inconsistent with the tradition of the legal profession and the duty which its members owe to the public.

59. In this connexion, it is appropriate to quote from the Report of the Royal Commission on Police Powers and Procedures, 1929:—

Para. 147. Frequent reference has been made before us to a practice known as detention which is differentiated from arrest, etc."

Para. 148. These sophistries are all swept away in a memorandum prepared for us by the Home Office—

The word detention is not a term of art. The technical term is imprisonment. Any form of restraint by a Police Officer, or indeed by anyone, is in law an imprisonment, and if a police officer has acted wrongfully an action for false imprisonment will lie."

Para. 154. We have no hesitation in saying that any such practice of wholesale detention of a group of suspects, in order to incriminate one, is wrong both in law and principle and should not be employed."

60. It is difficult to assess how much weight should be attached to statements that no food was issued on some days to persons so detained, and how much should be attached to the fact if established. It seems probable that since there can be no regular arrangements for feeding irregularly detained persons, there would be some danger of unconsciousness. There is, however, no question that the police have had themselves open to allegations of starving witnesses into compliance, and we recommend it to the very close attention of the Commissioner.

#### THE CONDUCT OF THE LAW OFFICERS OF THE CROWN

61. We have ruled as irrelevant any complaint against Mr. McCarthy as it is clear that he was never at any stage officially connected with the case, nor did he have charge of it at any time. Mr. Bentley's main complaints were directed against Mr. Davies, whom he accused of a lack of sympathy and interest amounting almost to hostility.

62. It appears to us that Mr. Bentley received considerable assistance from the Legal Department and chiefly from Mr. Davies, and that he was thereby enabled to get the appeal heard in the Court of Appeal for Eastern Africa.

63. There appears to have been genuine misunderstanding as to the order made by the Appeal Court in Nairobi. When Mr. Davies wrote his letter of 27th September, 1929, it is clear that he had in mind a very specific order of the Court

of Appeal which was to the effect that Mr. Bentley was to take Busiko, who had made allegations that his evidence was forced from him by the police by means of violence, to the magistrate at Kitale in order that he might "lodge a complaint." That expression has a definite legal connotation and means the institution of criminal proceedings. Mr. Davies, knowing from Mr. Bentley's own statement that he had had many years magisterial experience in the Sudan, naturally concluded that the full meaning of the expression "lodge a complaint" would be quite clear to Mr. Bentley, and we are satisfied that in writing his letter he was merely, in a friendly way, reminding Mr. Bentley of the caution that had been given in clear terms by Mr. Justice Pickering, namely, that unless Mr. Bentley complied with the specific directions of the Court of Appeal, the allegations of Busiko would be disregarded and the appeal would proceed on its merits. It appears, however, that Mr. Bentley merely took Busiko to the magistrate at Kitale to make an affidavit and did not institute any criminal proceedings. It is clear that Mr. Bentley had misunderstood what was required, but we cannot ascribe the blame for this to Mr. Davies. Moreover, we find it difficult to reconcile the observations made by the Court at Kampala on 8th March, 1929, with the terms of the specific order made on 20th December, 1928.

64. There appears further to be some confusion in Mr. Bentley's mind between the Judicial Department and the Legal Department, for he complains that no instruction was sent by the law officers of the Crown to the magistrate at Kitale as to the order of the Court of Appeal. In the first place, it would not of course be necessary to send any instruction to the magistrate at Kitale that he was to take a complaint, for that is a part of his normal duty, and would be done at any time, at the request of any person. In the second place, were it in any case necessary for the order of the court to be communicated to any person, that would doubtless be done by the registrar of the court. It would not be the function of the law officers of the Crown.

65. We can find nothing in Mr. Davies' conduct of the case, at any stage, or in its presentation before the Supreme Court or the Court of Appeal for Eastern Africa, that is deserving of censure, or in any way inconsistent with the tradition of the legal profession and the duty which its members owe to the public.

66. Assistant Inspector Dale proceeded on leave on the 19th of January, 1929, and returned to the Colony on the 3rd of August, 1929. The re-trial which was ordered in March, 1929, had to be deferred until his return as the Counsel who was undertaking the defence at the second trial had intimated that Mr. Dale would be required for cross-examination. As events turned out, we consider it to be most unfortunate that Mr. Dale was allowed to proceed on leave, but we do not consider that any censure has been merited either by the Police authorities or by the law officers of the Crown in this connexion. Mr. Dale had been suffering from malaria and it was considered at the time that his absence would not affect the case one way or another. There were two reasons for this belief. One was that Mr. Dale's evidence was partly formal and partly related to facts which were equally well known to others; the second was that it was anticipated that if the Court of Appeal believed Busiko's fresh statement it would quash the conviction.

#### CONCLUSION.

67. We have recorded our conclusions on the matters specifically referred to us, but we consider it to be a public duty to add two observations.

68. In the first place we feel that Mr. Bentley has earned the thanks of Government for his public-spirited action whereby four men, against whom the judge at the second trial found that there was no case whatever, were saved from the gallows. His claim for compensation both for the accused, and in respect of his own expenditure of time and money is not a matter for us, but we commend it to the favourable consideration of Government. Claims for expenses in connexion with the actual sittings of the Commission are being dealt with under section 12 of *Cap. 25*.

69. Secondly we desire to suggest that all the circumstances which have now come to light reveal an urgent need for a revision of the whole system of administration of criminal justice in so far as natives are concerned. Under the system as administered four natives, afterwards declared to be not guilty, were in custody for over 500 days. During that period they lay under sentence of death, with the constant possibility of execution for 226 days. Sections 61 and 62 of the Prisons Ordinance, *Cap. 37*, read as follows:—

61. Every prisoner under sentence of death shall be confined apart from other prisoners in a special cell and shall be under constant supervision by day and night."

62. Except on the written order of the superintendent, no one shall have access to a prisoner under sentence of death except prison officers, the medical officer or his assistant, visiting justices, and a minister of the religious denomination to which he belongs."

70. Article 7 of the Kenya Colony Order in Council, 1921, reads as follows:—

7. In all cases civil and criminal to which natives are parties, every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay."

The circumstances surrounding the arrest and trial of these four Bagishu natives appear to us to constitute a negation of the principle laid down in His Majesty's Order in Council.

We have the honour to be,

Your Excellency's obedient servants,

G. V. MAXWELL,  
Chief Native Commissioner  
(Chairman).

O. F. WATKINS.

20th November, 1930.

Mr. T. A. Wood was absent from the Colony at the time of the final drafting of the Report, but has expressed to the other Commissioners his agreement with the general conclusions which are elaborated in the Report.

G. V. MAXWELL.

66. Assistant Inspector Dale proceeded on leave on the 19th of January, 1929, and returned to the Colony on the 3rd of August, 1929. The re-trial which was ordered in March, 1929, had to be deferred until his return as the Counsel who was undertaking the defence at the second trial had intimated that Mr. Dale would be required for cross-examination. As events turned out, we consider it to be most unfortunate that Mr. Dale was allowed to proceed on leave, but we do not consider that any censure has been merited either by the Police authorities or by the law officers of the Crown in this connexion. Mr. Dale had been suffering from malaria and it was considered at the time that his absence would not affect the case one way or another. There were two reasons for this belief. One was that Mr. Dale's evidence was partly formal and partly related to facts which were equally well known to others; the second was that it was anticipated that if the Court of Appeal believed Busiko's fresh statement it would quash the conviction.

#### CONCLUSION

67. We have recorded our conclusions on the matters specifically referred to us, but we consider it to be a public duty to add two observations.

68. In the first place we feel that Mr. Bentley has earned the thanks of Government for his public-spirited action whereby four men, against whom the judge at the second trial found that there was no case whatever, were saved from the gallows. His claim for compensation both for the accused, and in respect of his own expenditure of time and money is not a matter for us, but we commend it to the favourable consideration of Government. Claims for expenses in connexion with the actual sittings of the Commission are being dealt with under section 12 of Cap. 25.

69. Secondly we desire to suggest that all the circumstances which have now come to light reveal an urgent need for a revision of the whole system of administration of criminal justice in so far as natives are concerned. Under the system as administered four natives, afterwards declared to be not guilty, were in custody for over 500 days. During that period they were under sentence of death, with the constant possibility of execution for 226 days. Sections 61 and 62 of the Prisons Ordinance, Cap. 37, read as follows:—

61. Every prisoner under sentence of death shall be confined apart from other prisoners in a special cell and shall be under constant supervision by day and night."

62. Except on the written order of the superintendent, no one shall have access to a prisoner under sentence of death except prison officers, the medical officer or his assistant, visiting justices, and a minister of the religious denomination to which he belongs."

70. Article 7 of the Kenya Colony Order in Council, 1921, orders as follows:—

7. In all cases civil and criminal which natives are parties, every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay."

The circumstances surrounding the arrest and trial of these four Bagishu natives appear to us to constitute a negation of the principles laid down in His Majesty's Order in Council

We have the honour to be,

Your Excellency's obedient servants,

G. V. MAXWELL,

*Chief Native Commissioner  
(Chairman).*

O. F. WATKINS.

20th November, 1930.

Mr. T. A. Wood was absent from the Colony at the time of the final drafting of the Report, but has expressed to the other Commissioners his agreement with the general conclusions which are elaborated in the Report.

G. V. MAXWELL.

61

BAGISHU MURDER TRIAL  
REPORT OF COMMISSION OF ENQUIRY.

Comments on Report submitted by the Acting  
Commissioner of Police on behalf of  
Commissioner of Police Absent  
from Colony.

\*\*\*\*\*

Page 6 of Report. Para 18. Ill-treatment  
of Witnesses.

The Commission's Report here states that witnesses in the Police Lines were there subjected to ill-treatment (in addition to intimidation). Exactly what is implied by the ill-treatment in question is not mentioned, but I submit <sup>that</sup> such does appear to be substantiated definitely by the evidence before the Commission of those witnesses.

Further, certain witnesses are reported to have been starved in the lines. An allegation not mentioned in statements previously made by any of those witnesses (vide Appendix C and Appendix D) and, I venture to state, not borne out before the Commission by the evidence of the woman witnesses, Abwenge, (Appendix D, page 99 - 100) and of Okiriang. The latter is, nevertheless, specifically referred to in the Report as having been kept on short rations (P.6).

Page 8. Para 25. Evidence in trial of  
Witness Basiku.

The main evidence against the four accused was given by the witness Basiku in July 1928 before the Supreme Court at Kitalo. It is difficult to believe Basiku's subsequent explanation that he adhered at that trial to the same story (but with fuller detail) as he had originally told in the Magistrate's Court in April 1928

through fear of the Police when he (Basiku) had not been in contact with the Police since the Magistrate's committal of the accused three months prior to this first Supreme Court trial.

Page 10. Para 34/6. Punishment of ex-Constable George Hamisi for Assaulting Witnesses, etc.

Ex-Constable 1536 George Hamisi was sentenced on 4.5.29 to six months' R.I. for assaulting the woman witness Abwenge (wife of accused No. 1. Okube). George Hamisi had already been similarly convicted and served a sentence of 6 months' R.I. for assaulting witnesses in another case.

Page 11. Para 37. Punishment of ex-Constable Okuma for assaulting Witnesses.

Ex-Constable Okuma Massawa also was punished in February 1929 by reduction in grade by the Commissioner of Police for assaulting the same witness Abwenge. Okuma subsequently resigned the Force on the stated grounds that this punishment was un-merited.

The enquiry conducted by Mr. Finch, Superintendent of Police, Kitale (in succession to Mr. Ridgway) in December 1928, by order of the Commissioner of Police, on the complaint made then for the first time by Mr. Bentley, showed no other Police than the above two Constables to be at fault in the intimidation and ill-treatment of prisoners and witnesses in this case, and they were punished as a result of that enquiry. No allegation as to witnesses having been starved or ill-treated when in the Police lines were made at this enquiry (Appendix C to Report) held by Mr. Finch. Mr. Bentley being personally present during part of that enquiry at which the witnesses in question received every facility and encouragement to detail any and every complaint as to Police

43-  
ill-treatment or irregularity.

After the conclusion in September 1929 of the Supreme Court re-trial in Nairobi, Mr. Bruce, Solicitor General, who conducted the case for the Crown at the re-trial, and Mr. Daly who then appeared for the defence, were both approached on 13.9.29, on behalf of the Commissioner of Police, and asked if the re-trial disclosed any further Police irregularities beyond those on the part of ex-constables George Hamisi and Okuma Massawa who had both already been punished therefor.

Both Mr. Bruce and Mr. Daly stated that they had seen no reason to suspect further Police irregularity.

Allegations as to starvation and subsequent ill-treatment of witnesses in the ice lines, Kitale, were not made prior to the sitting of the Commission, some 18 months after the Police investigation.

In so far as the Police are concerned the Commission in brief finds that :-

A. Report. Pages 6,21 to 24. Intimidation of Prisoners and Witnesses.

Prisoners and witnesses in the case were intimidated by Native Police resulting in false evidence being given in Court and the accused in the case being committed for trial on a charge of murder.

The Commission notes that these native Police have been punished accordingly and records that Assistant Inspector Dale was not in the opinion of the Commission in any way party to the proceedings of these native Police.

The Commission further states that the Police enquiry into the case was in the hands of Assistant Inspector Dale since his Senior Officer, [redacted] This I submit, was not exactly the case as set out in the Police Case File 55/28, page 8. The Senior Officer in

question, Mr Ridgway, Assistant Superintendent in Charge of that Police District, was ill only for one day at the outset of the case, but thereafter should accept his share of responsibility for the manner in which this case was conducted as he visited the scene of the crime with Asst. Inspector Dale on the 15th April 1928, the day after discovery of the body, and again on the 17th April. The Police enquiry commenced on 14th April and the Magistrate's committal was made on 30th April. Assistant Inspector Dale himself (Appendix D, page 81) drew the attention of the Commission to Mr. Ridgway's cognisance of the progress of the investigation, which, as the charge was murder, would be directly under the supervision of the Police Officer in charge of the District, in this instance Mr. Ridgway.

B. Assistant Inspector Dale.

The Commission proceeds to find Assistant Inspector Dale deserving of censure on the following heads:-

1. Pages 3 and 22 of Report. Police Enquiry on Discovery of Corpse.

The Commission's Report states that :-

- A. An "Inquest" Report was not drawn up by Asst. Inspector Dale.
- B. "Two respectable inhabitants of the neighbourhood" were not called on by Asst. Inspector Dale to assist or witness his enquiry into the circumstances of the death.  
(C.P.O. (Cap.) Sec. 41.)

A. A report detailing the circumstances of death was drawn up by Asst. Inspector Dale and signed by him on 14th April 1928 in the manner prescribed by this Section of Law and on the printed form provided for that purpose in this Force.

This signed report is contained on pages 25, 26 and 28 in the Kitale Police Investigation Case file No. 52/28.

together with the signed report of Dr. Cowan, Medical Officer, on his examination of the body (page 28 of file).

This Police file 55/28 was handed to, and left with, the Commission (see reference to Police Records in para. 17 of Report).

B. Assistant Inspector Dale's report on the death was undoubtedly not signed by "Two respectable inhabitants of the neighbourhood", a provision no longer prescribed in the new Criminal Procedure Code now in operation in this Colony, but two Europeans of the locality were present with Assistant Inspector Dale at the examination of the body, i.e., Messrs. Thorburn and Townsend (Appendix D, pages 92 to 95). Assistant Inspector Dale, however, neglected to have his "inquest" report signed by these witnesses, nor did he appear to have sent the report to the Magistrate as required by Section 141 (2).

II. Pages 5 and 22 of Report. Spear with Stains on butt.

Assistant Inspector Dale's failure to protect carefully for subsequent analytical examination the blood stained spear taken from a hut occupied by a Nandi and situated near the scene of crime.

There is no excuse for this, despite the fact that a subsequent independent investigation of the C.I.D. failed to discover any further evidence against the Nandi in question. The deceased from the medical evidence was killed by a heavy blow on the back of the head, whilst bruises were found all over the body (Appendix D, page 99).

It was most unlikely, if not quite impossible, for a spear to have been used to inflict these injuries. Presumably the Commission considered the alleged wound in

the anus of deceased might have been inflicted by the spear, but the doctor (Cowan) who examined the corpse stated he saw no wound in the anus although he examined the whole body (Appendix D, page 99).

Mr Thor burn on page 93 of Appendix D states he saw the doctor examine the anus.

III. Report, page 22.

Assistant Inspector Dale's unlawful detention of the Nandi suspects.

Here Asst. Inspector Dale acted in direct contradiction and defiance of Sections 45, 134, 136 and 137, C.P.O. as of all Police Orders on the subject.

C. Police Detention of Witnesses.

The Commission of page 23 (para 58) of the Report deals with the retention by the Kitale Police of both suspects and witnesses in this case.

This was a flagrant infringement of Law, as well as of the following Orders and Circulars of this Police Force which it has been found necessary to issue from time to time to check the inherent tendency in the African, whether he be a policeman or a civilian, to employ force or drastic measures when not carefully supervised.

Enclosure A.

Ill-treatment of Prisoners and Witnesses.

Commissioner's Confidential Circular 11/09 dated the 9th February 1909 and issued subsequently to all European Police on joining and on promotion. Again re-issued to the entire Force on 2nd August 1928.

Enclosure B.

Special Force Order. Issued on 28th December 1928 as the direct result of the Police irregularities disclosed in this present case.

Enclosure:-

Retention of Prisoners in Police Custody  
Forbidden.

- C. Force Order 38/21, para 5 dated 16th Sept. 1921.
- D. -do- 7/26, para 1, dated 19th Feb. 1926.
- E. -do- 17/26, para 3, dated 30th April. 1926.

In the last Order any remand of a prisoner to Police custody must be reported to the Commissioner of Police, which was not done in this case.

In the case under report Asst. Inspector Dale not only failed to bring accused and suspects before a Magistrate to obtain remands within the period prescribed by Law but continued to keep both accused and suspects in Police custody over a term of days without warrant (remand or otherwise) and without magisterial authority.

Rank and Responsibility in the Police.

The necessity for Police Officers and N.C.Os. to realise and carry out the responsibility and duties devolving on them is clearly pointed out in a Special Force Order issued on 30th November 1928 with Police Order 48/28. Further, by a Force Order (No.2/30, para 4 dated 10.1.1930) it has been now made essential that dates and times of arrivals and departures from Police Stations of witnesses and others connected with an investigation be entered in the Police Station Occurrence Book or diary.

Enclosure F

G

Statements from Accused and Suspects.

Attempts by Police to obtain statements from accused and suspects, a practice which Asst. Inspector Dale specifically states to the Commission (Appendix D, page 55) that from suspected persons "we try to obtain as much information as we can", is diametrically opposed to the Orders and practice of this Force (vide Commissioner's Circular No.76 dated 13th September 1927). In this connection I venture to point out that under the Indian Evidence Act no confession made by a person in Police

Enclosure H.

custody can be given in evidence unless it be made in the immediate presence of a Magistrate, neither can a confession made at any time by an accused to a Police Officer be proved.

By his own statement Asst. Inspector Dale admits infringements of Police practice and orders in this respect and has presumably led the Commission to gain the impression expressed in their report that both suspects and witnesses are kept in custody by this Force as a matter of customary procedure (Report page 23). Such is not the case and examples of such that have been brought to the notice of the Commissioner of Police have been dealt with severely.

Where exceptional instances do not permit witnesses who may attend a Police investigation to return to their homes by reason of distance or other factors such individuals should be sent to the Magistrate or his staff for food or shelter required.

In this case where it is clear that witnesses were relegated to the Police lines, which were under the supervision of the Assistant Superintendent himself, he must accept the responsibility for infringing both the Law and Police Orders as to placing restraint on these witnesses.

D. Report, Page 22, Para. 57.

Other minor breaches of legal procedure and of Police Orders committed in the investigation of this case which were brought by the Commissioner of Police to the notice of the Commission (page 22, para 27) are attributable to Asst. Inspector Dale who had charge of the investigation, but here again Mr. Ridgway, Assistant

Superintendent in charge of the Police District, must share the responsibility. Mr Ridgway was off duty ill for one day only at the commencement of the Police investigation on 14th April but on his recovery it was his duty to direct and supervise the investigation of a serious charge of this nature as it equally is to supervise the work of his District Headquarters Police Station situated, as it is, but a short distance from his own office. Force Order No.148 dated 2.11.28 now directly places on the Officer in charge of a Police Unit responsibility for personally supervising investigation of serious crime.

Enclosure I.

E. Investigation and Presentation of Case in Court.

That the Police investigation was carelessly conducted and in a manner equally contrary to the customary practice of the Force is evident, equally that the case was loosely presented in Court (pages 16 and 17 of Commission's Report). I attribute this not so much to any desire to prejudice the cause of the accused as to stupidity on the part of Asst. Inspector Dale in adhering to one line only of investigation, although it must be admitted that further evidence against the Nandi suggested as the perpetrator of the murder was subsequently found on a close investigation by the C.I.D. to be unobtainable.

The necessity for presenting before Court all the facts known as bearing on a crime is a fundamental principle of Police duty well-known to British Police of whatever rank or Force, is the subject of frequent instruction, and is followed in the Kenya Police.

The Police Code of the late Sir Howard Vincent from which an extract appears on page 17 of the Report

is a book issued to every Police Station in the Kenya Police for the guidance of station staffs.

That this particular investigation failed to maintain the practice and traditions of this Force is evident and for that both Asst. Inspector Dale and Mr. Ridgway must shoulder the responsibility.

Undue pressure to record convictions in Police cases is not exercised in this Force as indicated on page 16 of the Report, but on the contrary instruction and practice are directed to presenting to Courts fair, full and impartial facts relating to the charges and to the accused presented.

The bona fides of Police Officers of all ranks in this respect is referred to specifically in para 9 (a) of the Commissioner's Special Force Order dated 30.11.28 referred to above.

It seems most unfortunate that Mr. Ridgway, Assistant Superintendent in-charge of Kitale Police, was not called by the Commission to give evidence before them in view of the request made by Asst. Inspector Dale to the Commission (pages 90 and 91) that Mr. Ridgway be called on his (Dale's) behalf, a request acceded to by the Chairman but not carried out. Mr. Wolsley-Bourne, Asst. Commissioner of Police, also suggested to the Commission (Appendix D, pages 82 and 84) that Mr. Ridgway be called on to give evidence.

Enclosure  
F.

(sgd) JAMES M. LUMLEY.  
ATG. COMMISSIONER OF POLICE.

COPY.

CONFIDENTIAL CIRCULAR 11/09.

POLICE HEADQUARTERS,

Nairobi,

9th February, 1909.

It having brought to my notice that cases of illtreatment of prisoners and witnesses for the purpose of obtaining confessions and information are alleged to have occurred, I wish it to be clearly understood that any such practice will not be tolerated and that in the event of any case of alleged illtreatment being substantiated drastic action will be taken.

sd. W.K. NOTLEY.

COMMISSIONER OF POLICE.

---

Re-issued to whole force as  
Cir.No.8 of 2nd August, 1928.

---

12

KENYA POLICE.

SPECIAL FORCE ORDER.

---

It has been brought to the notice of the Commissioner of Police that cases have occurred lately in which African Police and followers have resorted to ill-treatment and assault of African suspected accused, and witnesses, in order to obtain evidence.

2. This must be stamped out of the Force at once and ruthlessly. Should any report in this connection be received by any superior officer the very fullest enquiry must immediately be held. Should the report of ill-treatment of a suspected accused or witness by African Police or followers be found in the opinion of the investigating officer to be true, immediate action will be taken to prosecute them before a Criminal Court.

3. In all cases the matter must be reported immediately to the Commissioner of Police.

4. I cannot impress upon officers the emphatically the need for immediate action and the fullest possible enquiry into any case of this nature. This is essential, if we are to retain the confidence of the public. We must stamp these unconstitutional methods completely out of the Kenya Police.

5. Wherever possible it is almost the first duty of a commissioned officer in charge of units to enquire into these complaints personally and to record the evidence of witnesses who wish to give evidence on matters of mal-treatment or assault by Police.

6. If prosecution is possible, in every case where the Police of their followers are found to be guilty of the offence alleged the prosecuting police officer will invariably press for deterrent punishment to the prosecuting Magistrate before whom the charge is laid and will invariably ask that the maximum punishment allowed by law is inflicted.

7. This order will be read out at every parade, lecture and school for a month following the receipt of this order and subsequent to that will be made a frequent subject of lectures. It will also be read over to every recruit on joining a unit.

8. Will all officers please note that these prosecutions if instituted will be laid under the Indian Penal Code and not under the Police Ordinance.

Kenya Police Headquarters,  
Nairobi,  
20th December, 1928.

R.G.B. SPICER.

COMMISSIONER OF POLICE.

EXTRACT FROM KENYA POLICE ORDERS NO. 38/21.

(15th September, 1921.)

5. Remand Prisoners in Police Custody.

The custom of Police applying for the remand of a prisoner to Police custody is to be, at once, discontinued. Prisoners should be taken before a Magistrate within 24 hours of arrest and remanded to Prison, not Police Cells. Should it however be necessary owing to unforeseen circumstances arising to detain a prisoner in Police cells for a longer period than 24 hours, the reasons must be clearly stated in the Case file, but this cannot be done without a remand Warrant, or Magistrate's authority.

74

D.

EXTRACT FROM KENYA POLICE ORDERS NO. 7/26.

(19. 2. 1926.)

1. (Standing Order) CUSTODY POLICE - REMAND TO.

The growing habit to remands to Police custody is an extremely bad principle in any Force.

2. It must cease, and no remand to Police custody must be applied for or accepted except under the most exceptional circumstances.

E.

EXTRACT FROM KENYA POLICE ORDERS NO. 17/26.

(30.4.1926.)

3. (Standing Order) REFRENDS TO POLICE CUSTODY.

These must only be applied for in very exceptional circumstances.

In such cases it will be reported to the Commissioner in writing showing just cause for such action.



# KENYA POLICE

## SPECIAL FORCE ORDER

### RANK AND RESPONSIBILITY IN THE POLICE.

1. The new system of pay provides for every officer and man getting from the date of joining the Force regular increments to his salary in the rank in which he is serving, provided his conduct and work are satisfactory and that he is an efficient policeman. A system of efficiency bars provides that at certain fixed stages an officer or man must show that, apart from his conduct being satisfactory, he is in every way fit for the responsibility and the duties of the rank to which he is to be promoted.

2. The strength of a chain is its weakest link. In the case of a Police Force scattered all over Kenya it necessarily follows that responsibility in varying degrees must be placed on every officer and man, for it is obviously not possible to centralize authority and responsibility completely.

3. In the case of a Police Force responsibility to a very high degree must necessarily be placed on every man from an askari upwards, e.g., an askari has exactly the same power of arrest as the Commissioner. He must be given that power, for at any time he may have to act on his own initiative in any emergency that may arise, and he must have the power to arrest and to take immediate action.

A policeman who, by temperament, lack of ability, or indifferent devotion to duty, will not take upon himself responsibility is clearly unfit for promotion which carries with it further responsibility. The question to be considered is whether such a man is even fit for the post which he already holds.

4. The strength and number of stations is consequent on the development of the Colony, together with the detribalization of the African. The extension of railways, roads, and means of communication, besides being a convenience to the public, provides facilities for the movement of criminals from one district to another and for the adoption of more skilful methods in committing crime. Such being the case, it is essential that as the Colony develops the Police Force should become more efficient.

5. The Government has provided a satisfactory means of encouraging the officer and man who is keen on his work and shows ability and promise in the execution of his duties. In the interests of the Colony and for the good name of the Force, it now becomes the duty of every officer and man to keep before him a standard of duty and efficiency which will not only result in his own advancement, but will enable the Force to maintain order and provide for the prevention and detection of crime.

6. The question now to be put is: Why is one rank granted a higher rate of pay than another? A man can only work a certain number of hours a day for any length of time and an honest service as many hours and probably more than any other Police Officer in the Force. Higher pay is not granted solely on account of physique. The answer is that the sole reason for one rank being granted more pay than another is the increased responsibility attached to the rank drawing the higher pay. In other words rank carries responsibility.

We have told Government that on reaching a certain rank a man is deserving of a certain rate of pay. It is up to us to prove it and to show that every man is pulling his weight.

7. As already stated, the Force has grown and it is scattered, and on the principle that the strength of a chain is its weakest link, there can be no room in the Force for a man who draws the pay of his rank, but does not accept or meet the responsibilities of it. In judging the fitness of an officer or man for promotion the one important question to be put by the officer recommending promotion (apart from satisfactory conduct which is presumed, or otherwise the name would never come up), is: "Is this man in every way fit for the responsibility of the rank above him?"

8. It becomes the duty, therefore, of every officer in the Force to see that every man is trained and exercised in facing and accepting responsibility, as it is the duty of the Commissioner to train and exercise the officers of the Force. If an officer or man in his daily work shows that he is reluctant to accept responsibility, or that on account of indifference or incompetence he evades responsibility, the fact must be definitely pointed out to him. If the officer or man accepts the advice given to him in the right spirit and corrects the fault, he may find himself taking the responsibility of his rank and gradually becoming fit for further responsibility. If, on the other hand, the officer or man fails to profit by the advice and instruction given to him he must be definitely informed, and it will be placed on record at the time by the officer dealing with the case, that he has not carried the responsibility of his rank, that he will not be recommended for promotion until he does, and that it is a question for consideration as to whether he is to remain in the post which he is inadequately filling.

9. In practice the claims of an officer or man for promotion will be judged as follows:

**ALL RANKS.**

*Bona fides.*—The first test of a Police Officer is his *bona fides*. A clever man who cannot be trusted is a danger to himself, his friends and to his employers in every walk of life. In a Police Force with such very wide powers of arrest a Police Officer who cannot be trusted is a danger to the public as well as to the Force and to Government. A person who cannot speak the truth is of little value in any business or service. In a Police Force an untruthful man may by giving false evidence in a Court be the cause of innocent persons being found guilty and punished, or of the discharge of a criminal who should have been convicted. It is our duty to the public to see that such a man is properly restrained and controlled and either made into an honest and reliable man or removed from a post in which he can do harm to innocent people.

*Activity and physical fitness.*—In every case every Police Officer and man must be physically fit for active police work and show activity in carrying out his duties. Police work cannot be done from a chair. Police Officers of every rank must be able to get to the scene of crime in any part of their area, however inaccessible the spot may be. Inspecting Officers must be able to visit and inspect stations frequently. Every Police Officer, whatever his rank, must be able to cover the ground on foot or on horse-back and

whenever necessary be prepared to do long hours of foot work. He must show in his daily work that he is active and energetic. He will, for example, go and see members of the public or other Departments when they make complaints or desire police assistance. Writing by itself is of little value, like as only of value in placing on record what has been done, but alone has never yet done anything in police work. We are all policemen, and every policeman must be active and energetic.

*(c) Inquiries and Investigation of Crime.*—It is as policeman that we shall be judged by Government, by the Courts, and by the public. A surveyor is tested by the accuracy of his plans, a road officer by his roads, a doctor by the accuracy of his diagnosis. A policeman will always be primarily judged by the way he sets about an inquiry. A bank clerk who failed to notice foot-prints, finger-prints, marks on the accused or on the scene of the crime, would not be blamed, but when the policeman trained and paid by Government to investigate, cases fails to take note of obvious facts or fails to draw deductions from them he is regarded in exactly the same light as the surveyor who has made an inaccurate plan, or the road officer whose roads are in bad order, and he is written down as no policeman. A Police Officer taking up an inquiry whether Departmental or criminal, must remember that by that inquiry he will be tested, and by the way he sets about it he will be known to the world as efficient or otherwise. If Government did not think it necessary to provide trained police to inquire into serious crime all that would be necessary would be for Government to provide a number of magistrates before whom a complainant would appear and state his case. It is the duty of the police to inquire first into the case to test the complainant's story and, if found to be true, to seek circumstantial and other evidence to support it. That is "police" work and that is why we exist.

These three main points are the first to be taken into consideration when a police officer of any rank is up for promotion.

*An Askari.*—It is the duty of the officer in charge of the station to know his men thoroughly. He sees them daily and should be in a position to estimate correctly each man's work and conduct, his fitness for his present post, and his fitness for further promotion. If, for instance, there is in a station an askari who is ignorant of his duties or cannot be relied on to carry them out, it is the responsibility of the officer in charge of the station to bring this fact definitely to the notice of his Superintendent or Assistant Superintendent at the first opportunity. It is not sufficient to say after something has gone wrong that he was let down by a subordinate who he always knew could not be relied on.

*A Corporal or Sergeant.*—Generally speaking an askari is not required to issue orders. His responsibilities begin and end with himself. A Corporal or Sergeant is definitely required to be able to control, move, train, instruct, and direct a body of askaris. A Corporal or Sergeant who cannot do so should go back to the ranks, from which it is clear that he should never have been promoted. It sometimes happens that when a Corporal or Sergeant is called out and required to move or instruct a body of men, his failure to do so is attributed to the fact that he loses his head. The answer is that a man who cannot keep his head under such circumstances will certainly not do so in time of trouble and he should go back to the ranks where such a strain will not be put upon him. Every Corporal or Sergeant must be capable of maintaining good order in his unit at all times and under all circumstances. A good Corporal or Sergeant will find himself happy in his efficiency and full of self-confidence, proud to be called out and asked to do things.

It is the duty of officers immediately in charge of stations to exercise and train their Corporals or Sergeants in the realization of their responsibility and in every case of failure, to bring the fact to the notice of the Assistant Superintendent, Superintendent or Inspecting Officer at the first opportunity. It will then be the duty of the Assistant Superintendent, Superintendent or Inspecting Officer to examine the Corporal or Sergeant. If he finds that the report is correct, he must personally warn the Corporal or Sergeant and

place it on record that he has done so. If no improvement is then effected, the only course open to the Assistant Superintendent, Superintendent or Inspecting Officer is to recommend that the Corporal or Sergeant should revert to the ranks. (In the ordinary course, the fact that a man is not fit for the responsibility of a Corporal or Sergeant should be found out during his Depot Qualifying Examination.)

**Assistant Sub-Inspectors, Sub-Inspectors and Chief Sub-Inspectors.**—It is the duty of officers in charge of Town Police Areas, Districts and Provinces to sum up accurately the standard of work of each Sub-Inspector or Chief Sub-Inspector serving under him. The man has been appointed to this post on account of his superior education, up-bringing and general intelligence. In either case the man has distinct advantages which it is up to him to put to the best possible use for the good of the Force and he is paid an adequate salary accordingly. If through lack of ability or laziness he is found not to be zealous, efficient and accurate or not to be taking his profession seriously, then it is clear that his enlistment in that capacity was a mistake and his services must be dispensed with.

The foregoing applies principally to Assistant Sub-Inspectors in their probationary stage, but on no account must an Assistant Sub-Inspector be promoted in grade or from the rank of Assistant Sub-Inspector to that of Sub-Inspector unless the officer under whom he is serving can guarantee that his subordinate officer is doing his duty in a manner which compensates Government for the salary they are paying him. Efficiency, integrity, character and zeal are to be considered more particularly when an Assistant Sub-Inspector is recommended for promotion to the rank of Sub-Inspector.

The days when length of service accompanied only by good conduct and moderate efficiency counted have passed and it is essential now that more and more attention must be paid to police efficiency of a high order.

The rank of Chief Sub-Inspector has been especially created as a reward for those subordinate officers who have attained the rank of Sub-Inspector and have served Government for a lengthy period, proving themselves to be of a faultless good conduct and of a high standard of efficiency. At present there are three Chief Sub-Inspectors in the Force and when vacancies occur in these ranks special reports will be called for with regard to the filling of such vacancies.

The Commissioner cannot stress too emphatically upon officers that the Kenya Police has a shortage in the ranks for subordinate officers of the Sub-Inspector grade, and that not all their full weight in the work of the Force and that such Sub-Inspectors who do not show zeal and real ability in their work should not be recommended for further promotion by their superiors.

**Probationary European Police Constables.**—The probationary European Constable is generally made or trained in his first tour of service. His previous training in the Army, Navy or other Police Force has given him a practical knowledge which will be of great value to him as a Police Officer in Kenya, and it becomes his duty to adapt himself to the duties required of him and to show ability and progress in the performance of such duty before being recommended for confirmation. In addition to this it is essential for every European Police Constable to apply himself to the study of Swahili and to the Law of the Colony so as to fit himself to carry out his duties as a Police Officer. The acquisition of Swahili and the requisite knowledge of law and procedure appertaining in this Colony cannot be picked up in a haphazard fashion, but must be studied in a regular and systematic manner. The European Police Constable who does not apply himself to the study of Swahili and Law in the early stages of his probationership will get left behind in the race for promotion and handicaps himself for the whole of his career by being passed over by European Police Constables who are his juniors in joining the Force, but who have applied themselves with regularity and zeal to the study of the above subjects.

**European Police Constables (Confirmed).**—European Police Constables who have been confirmed in their rank have most responsible duties whether engaged in work in Townships or in Rural Areas, and it is essential for them to reach a high standard of work in the detection and prevention of crime and the maintenance of order. They must be capable of corresponding with the public and their superiors in a courteous and business-like manner, of attending to administrative routine, and must show organising ability in the control and maintenance of their stations. They must be good disciplinarians and be able to control the African Askaris who are placed under them. They must be just and impartial in their dealings with their Askaris, without which they will never get the best work out of them. They must set an example to their subordinates in activity and energy and in the correct attitude of the police towards the public. A European Police Constable must show initiative and zeal. He must be active in his patrolling, get round his district and see his residents without being ordered to do so. He must establish a reputation for courtesy in dealing with the public; the courteous policeman will find that the public will readily co-operate with him. The discourteous one will find they will not.

The European Police Constable in charge of a station must be proficient in prosecuting before a Court and must be able to prepare his cases in an efficient manner and not waste the time of a magistrate.

Finally, I would point out that no European Police Constable can maintain his position as a Police Officer if he is in debt. A Police Officer in debt is a paradox, he places himself in an entirely false position which is incompatible with his profession.

**Assistant Inspectors.**—The degree of responsibility expected of an Assistant Inspector is that of a European Police Constable in charge of a station but of an even higher standard.

Before a European Police Constable can be recommended for promotion to the rank of Assistant Inspector and thereby to pass that efficiency bar, the officer so recommending him for that promotion must definitely guarantee that he is fit for the independent control of an Outstation.

An Assistant Inspector must be capable of maintaining an Outstation in a completely efficient state to the satisfaction of an Inspecting Officer.

An Assistant Inspector's command is generally more important than that of a European Police Constable, and the higher rank carries with it a higher salary which calls for a higher degree of responsibility.

During the period of his Assistant Inspectorship such officer is expected to pass the requisite examinations qualifying him for further promotion and also to pass the next Lower Standard Swahili Examination.

An Assistant Inspector must also have a thorough knowledge of accounting so far as the Police Force is concerned and be capable of drilling and instructing drill and musketry instruction to a squad of African Police.

**Inspector.**—An Inspector of Police carries a very much greater measure of responsibility, and must be fully capable of maintaining and controlling the organisation of a Province or Town Headquarter Station for the efficiency of which he will be held solely responsible. He will also have to be definitely capable of commanding a unit which is not under the immediate executive control of a commissioned officer. His rank, therefore, carries a very large degree of responsibility of a high order. His integrity, which indeed applies to all Police Officers, must be beyond suspicion, whilst his organisative ability and initiative must be unquestionable. He must definitely possess the power of command over African, Asiatic and European ranks. An Inspector is placed in a position of trust and responsibility and must show himself capable of upholding his position for a length of time without supervision in any part of the Colony.

**Chief Inspector.**—These posts have been specially created for Inspectors of ability, long service and good conduct who have given satisfaction in their rank as Inspector.

**Cadet Assistant Superintendent.**—No probationary Assistant Superintendent will be granted an increment until he has passed the requisite examination. He must also in every way prove himself fit for the responsible rank of Assistant Superintendent.

In addition to the above, the Assistant Superintendent is expected to be in possession of marked initiative; as a commissioned officer he must not wait for an order before he carries out an obvious duty. He must be prepared to accept responsibility for his own actions and to stand or fall by them, relying on his own decision; but in that decision he is expected, by virtue of his commissioned rank, to be discreet as a Police Officer should. He must definitely possess the ability to command and to control subordinates of any race or rank. He must by his own personal endeavour obtain the confidence of the public with whom he is in contact, and to put the advancement of the Force before his own personal gain.

**Assistant Superintendent.**—An Assistant Superintendent must have proved himself to be a thoroughly efficient officer. It is not possible to define in detail all the duties that fall to the lot of an officer. There are certain obvious duties—the control of men; consideration of their welfare, placing the comfort of his men before his own; the maintenance of good order and good discipline in the branch of the Force or body of men over which he has been placed in charge; activity in supervision, personally inquiring into complaints against Police, intelligent investigation of crime, personal direction of serious and *modus operandi* crime, and when crime of the same *modus operandi* is reported from different places in his district he will personally take charge of the investigation and hold together the threads, which should lead to the detection of the offenders. Readiness to take the initiative in all matters that affect the welfare of his men or good order of his district. Ability to control expenditure and maintain a good office system; personal example, tact and sense in securing the co-operation of other Departments and in his attitude to the public. Personal example in setting a standard of duty, character, and conduct which his subordinates can see and follow; and seeing that the work and conduct of his subordinates reach this standard; candour in admitting a mistake or a fault, taking correction in the proper spirit, asking nothing of his men which he is not prepared to do himself, interesting himself in his men's recreation, and getting to know his men by taking part himself in their games.

An Assistant Superintendent will realise that whatever natural abilities he may have he will be judged for promotion by his practical ability as a Policeman.

**Superintendent.**—A Superintendent has greater powers of control generally, and as such must instruct and direct Police of all ranks serving under him. A Superintendent will realise that in his position he stands between his subordinates and the public, and the public look to him to see that his subordinates do not abuse their very large powers. A Superintendent is essentially a restraining and controlling officer. It is his duty to see that every complaint made to the Police or complaint made against the Police is promptly investigated and the facts elicited. He will realise and impress upon his Assistants that a "complaint" regarding the Police is not to be treated as a mere business service or Force there is matter which can be dealt with as routine, as, for example, in the Police, an application for a pair of scales, a complaint can never be classed as "routine," and the Superintendent must keep his sense of proportion alive and insist on all complaints being promptly and properly investigated and the person concerned being dealt with as the result of the inquiry made. He will by experience know what are the causes for correction and what matters require a special and extra record. Every case in which Police are at fault must be dealt with as for punishment. Men are human, and as such are

bound to make mistakes. Where Police are in the wrong, even though the mistake may be *bona fide*, the Superintendent must be prepared with his experience to point out where the Police went wrong and to correct the fault for the future guidance of the Police Officer concerned. A fault not corrected will be repeated. He will realise that he is directly responsible for the supervision of Assistant Superintendents serving under him. He will send back any reports submitted to him by an Assistant which is inaccurate, and return for further inquiry any investigation in which there are obvious omissions, before submitting any such report to a higher authority. He will secure for his subordinates the co-operation of other Government servants in the Province by himself working on cordial and friendly terms with them. It is his business to get on with these authorities and residents, for if he does not he makes the work of his subordinates extremely difficult. He will stop ungratifying correspondence going out of his office or any office or station in his Province. A Superintendent with his experience will be required to say "No" at once and quite definitely when "No" should be said at once to an application, whether from a member of the public or from one of his subordinates. There is no reason, though, why "No" should be said unpleasantly; it can be said quite politely and yet firmly, and the applicant would much sooner have "No" said to him at once than be left in doubt and have to apply again to someone else, or to come again for an answer. He will quarterly summarise the state of crime in his Province and place his finger on the weak spots which demand special attention. He will arrange for co-operation between the Police of his own Province and the Police in adjoining Districts or Provinces, and when *modus operandi* crime is reported he will personally satisfy himself that his Assistants or he himself is holding the threads, and by intelligent action drawing the net round the offenders. While his subordinates are busily engaged in their daily work, it is the Superintendent who must supply the imagination necessary for progress and the adoption of new methods to meet the increasing skill of the criminal or the increase in traffic and the preservation of order at large functions. Progress is essential, it is impossible to stand still, and the aim of a Superintendent must be to keep up-to-date, to move with the times, and hand over his Province in a better and more up-to-date order than that in which he found it.

Generally speaking, a Superintendent must show initiative in taking all necessary steps to deal with or prevent crime, and he will be required to show that he has organising ability and the ability to get work done, not only by himself, but by his Assistants. On the principle that the only justification for a higher rate of pay is greater responsibility, there will be a marked difference between the degree of initiative, ingenuity and imagination expected of a Superintendent and of a junior officer. A Superintendent must have a policy, and it is he who supplies the "tone" to the Police of the Province. He must be able to plan, to aim at and secure team-work, to insist on co-operation being the keynote of the work of his Assistants with other Departments and with members of the public. He must be able to realise that the Police can only afford to have one enemy, viz., the criminal, and that in trying to defeat the criminal the only chance the Police Officer has is to secure the co-operation of the Administration, the Courts, the Settlers' Associations and the law-abiding public. The Police cannot afford to work without any of these. He will impress on his subordinates of various grades their responsibility in seeing that every link in the chain is sound and every man is pulling the weight of his link. Without imagination a Superintendent will find it impossible to secure progress. He will read and study to enable himself to advance with the times and to keep himself professionally keen and ready to absorb and develop new ideas. He will be responsible for seeing that when a subordinate Police Officer is not fit for further promotion the fact and the reason is pointed out to him, and that in the case of Inspector, European Police Constable or Sub-Inspector, the fact is placed on record at the time. A Superintendent may at any time find himself in a position of great responsibility for which he must be in every way fit.

**Assistant Commissioner.**—Appointment by selection by the Secretary of State, solely on the ground of merit.

10. *Judging Fitness for Responsibility and Fitness for Rank held.*—Superintendents, Assistant Superintendents, Chief Inspectors, Inspectors, Assistant Inspectors, European Constables, Chief Sub-Inspectors, Sub-Inspectors, Sergeants and Corporals, can readily judge whether a man working under them in each case is pulling his weight or not. To put it briefly, that is the question which every supervising and inspecting Officer must put to himself on visiting or inspecting a station. A Superintendent or Assistant Superintendent visiting a station will judge the Inspector, Assistant Inspector, European Constable, Sub-Inspector, Sergeant or Corporal in charge by the condition in which he finds the station, the manner in which crime is being investigated, the steps taken to prevent and detect crime, and the steady good conduct, and tone of the men in the station. The question which the inspecting officer will ask himself is: "Is this Inspector, Assistant Inspector, European Constable, Sub-Inspector, Sergeant or Corporal (as the case may be) pulling his weight?" "Is he fit for the responsibility of the rank which he holds?" At the end of every Inspection Report of a station inspection this fact is to be briefly stated thus: "B.P.G. Brown working well and pulling his weight," or "Assistant Inspector Smith is a good and reliable Inspector and in every way fit for the rank he holds." If not fit, the fact is to be stated, so that there is thus a permanent record of the fact.

11. *Assistant Commissioner, Deputy Commissioner, or Commissioner* inspecting a station will judge the officer in charge by the condition of his station, the order of his office, his reports, the manner in which crime is being prevented and detected, and the display of the other qualities mentioned in paragraph 10 above. In judging, readiness to accept responsibility, every rank will receive consideration as to the realisation of the responsibilities of that rank, and it is not necessary to specialise.

12. *Examples of Responsibility.* As an example of the manner in which an Assistant Superintendent or Superintendent should meet responsibility, the following points are mentioned, not as indicating the limit of their duties, but as an example of what the word "responsibility" really means, etc.

(a) An Assistant Superintendent or Superintendent is expected to get to the bottom of an inquiry. It should be regarded as a reflection on an officer's work for his report to be sent back with a series of queries which would be sent on to any officer carefully reading through the papers. Two parts of this are better than one, and the officer reading the papers must not overlook a point which requires further investigation. That will be a reflection on the officer's different matter to the neglect or omission to take notice of a series of points which arise and which should obviously be looked into in the course of the inquiry.

(b) If a complaint is made against a subordinate, it is referred to him for report and he finds the subordinate in the wrong, his will take all necessary steps in the matter, and his report will state the action taken.

To return to papers merely showing that the subordinate was at fault, this is unsatisfactory, a reflection on the papers with orders to take action, merely causes local confusion, and correspondence, and shows that the officer was not interested in the matter, and his responsibility to take the action which he would be expected to take.

On a matter of a scheme or proposal, carefully considering the relative merits which can and should be dignified into locally.

(c) His reports on any subordinate or on serious crime should be accurate in fact and detail, and should be expressed in such a manner as to make it possible for a report thereon to be sent to any authority. The officer who puts up a report which is sent on to Government gets the credit for it, and his name is attached as its author. Such being the case, the report should not have to be completely revised to put it into a state fit for publication.

(c) Finding that the officer in charge of a station has failed to do his duty, and omitting to point out the fact to him.

(f) Writing for instructions in a matter which can be settled by seeing the local authority and thrashing the matter out on the spot.

(g) There are certain matters which must be reported and which regulations require to be reported, such as occurrences out of the ordinary, or Police offences which cannot be punished sufficiently in accordance with the powers granted to the officer sending up the case. But it will be admitted that there is a great difference between submitting a case where the officer has not the requisite power to inflict punishment or submitting matters of interest for information after all necessary action has been taken locally, and in sending up papers for orders at the first stage when action which could have been taken locally has not been taken.

(h) Encouragement of team-work. Police work depends very much on the "team" spirit, almost more so than in any other kind of work. In exactly the same way as in a game of football or in a tug-of-war, the effort of one or two individuals is of no value against a team well trained and playing or pulling together, so Police throughout the Force and in each Province, District or station must work together on the team principle. If the local criminal is to be defeated six heads are better than one, and this is the principle to be established in every station.

(i) Go and see a person who has a complaint to make instead of writing to him. In many cases files of correspondence have been avoided if in the first instance the officer to whom the complaint was first reported had gone to see the writer.

(k) Do not be defeated by an obstacle. A Police Officer who checks or stops taking action on reaching an obstacle will never go far. To a Police Officer an obstacle is as a rock to a river. The river, if it cannot go over the rock, goes round it. If it can neither go round nor over it, it goes under it. In any case the water gets past the rock.

These examples are not quoted in a critical spirit, or with any idea of magnifying shortcomings. We all have our faults, and the writer is very conscious of his own. They are examples of cases which have certainly come to the notice of the Commissioner, but every Police Officer must have had similar cases come up to him in the past. On how many occasions is it not the case that at the end of a departmental inquiry or inquiry into the manner in which a criminal investigation has been conducted, it has to be said: "Somebody at an early stage did not do his job and has let us down."

The Force has got to be administered, clothed, instructed and supervised, and as this cannot possibly be done by any one individual a chain of responsibility is formed, connecting the top to the bottom, in which every rank has a certain strain put upon it. If a link is weak the entire chain is weak, and so it becomes the duty of every rank in the Force to ensure that its part of the chain at any rate is fit and ready to bear the strain which may at any time be put upon it.

If every officer and man accepts the responsibility of his rank and competently deals with all matters within his sphere, the efficiency of the Force is not only increased, but unnecessary work is prevented.

If some officer or man is not accepting the responsibility of his rank it means that his superior officer, in addition to the work of his own job, is doing some of his subordinate's work for which his subordinate is paid. The point is that there is nobody else to do the superior's job, so important work suffers while A is doing what B should have done. If B is paid Sh. 200 suffers while A is doing what B should have done. If B is paid Sh. 200 per mensem and A is paid Sh. 300 per mensem and has to spend half his day doing B's work, the result is that B's work, which should be done for Sh. 200, is costing Government Sh. 600, and only Sh. 400 is being got by Government out of A. From the Government point of view B is not pulling his weight. By each pulling his weight, we shall get a happy Force and less work for all.

Real efficiency can only be obtained by fixing and insisting upon responsibility, and by ensuring that every link in the chain can bear the weight that is reasonably expected to stand, and when all has, as it were, got its own weight, fix the man behind it and in front of us, going on and doing his utmost.

Our aim therefore is that in the Kenya Police Force there will be no man not pulling his weight. Such a policy is not purely idealistic, and merely aims at a sound and proper spirit, and to secure, from the business point of view, a proper return for the money spent. This will not be achieved in a day, but this note is published to indicate the standard to aim at.

Kenya Police Headquarters,

Nairobi.

30th November, 1928.

R. G. B. SPICER,

Commissioner of Police.

Rank and Responsibility and Efficiency Bars.

A copy of Secretariat Circular No. 26 of 21-3-27 on this subject is attached for information.



## KENYA POLICE

(Copy.)

Secretariat Circular No. 26,  
dated 21st March, 1927.

### RANK AND RESPONSIBILITY AND EFFICIENCY BARS.

Reference is drawn to Section 72 of the Code of Regulations.

His Excellency desires to remind Heads of Departments that Efficiency Bars under the revised salary scheme are to be regarded not as automatic steps in an officer's advancement, but rather as limitation thereto unless the requisite standard of work, conduct and qualifications has been attained.

2. Heads of Departments are requested to consider the specific standard required for each grade commencing with an efficiency bar for their several establishments and, if necessary, to prescribe tests or qualifications which an officer must have passed or acquired before he can be eligible for passing the relative bar. Particulars of such tests and qualifications should be submitted to the Governor for approval.

3. In submitting recommendations for the passing of an efficiency bar, Heads of Departments should satisfy themselves that the officer so recommended is -

- (a) efficient and in possession of the requisite qualifications;
- (b) zealous in all branches of his work;
- (c) a credit to his Department in all respects;
- (d) deserving of the promotion.

0.2/30.  
10.1.30.4. OCCURRENCE BOOKS.

The Occurrence Book is one of the most important records in the Police Station and it should contain a complete account of the Police work of the Station during each twentyfour hours.

- (i) Entries should be made personally whenever possible by the Policemen concerned (if litigating) or as near as possible to, the actual time of the occurrence.
- (ii) The greatest care must be exercised to ensure the accuracy of entries in the O.B., any alterations must be initialled by the person responsible. It should be remembered that by Section 35 of the Evidence Act entries in the Occurrence Book made in the discharge of duty are in themselves relevant facts in a Court of Law.
- (iii) The Commissioner is not satisfied that full and proper use is being made in this Force of the Occurrence Book and Officers i/c of Units are expected to increase the scope of this record. For example, it has been noticed that in some Police Stations the attendance of witnesses to the stations in order to have statements recorded, etc., is not entered in the Occurrence Book. The date and time of arrival and departure of all witnesses, or other persons connected with an investigation, must invariably be entered in the Occurrence Book, the Occurrence Book number and date being quoted in the Case File concerned. If witnesses have been detained by the Police, the reason therefor must be entered in the Occurrence Book by the Officer i/c Police Station.
- (iv) Occurrence Book entries must be concise and refer only to the essential fact, or facts, that it is desired to record. The writing should be clearly legible. Assistant Sub-Inspectors are often found to scribble Occurrence Book entries illegibly and carelessly. This practice must be stopped.

PUBLIC RECORD OFFICE					
1	2	3	4	5	6
Reference —					
<b>C.O. 533</b>					
<b>412</b>					
COPYRIGHT PHOTOGRAPHY—NOT TO BE REPRODUCED PHOTOGRAPHICALLY WITHOUT PERMISSION OF THE PUBLIC RECORD OFFICE, LONDON					

COMMISSIONER'S CIRCULAR.  
NO: 76.

Kenya Police Headquarters,  
Nairobi,  
13th September, 1927.

POLICE TAKING STATEMENTS FROM  
ACCUSED - PROCEDURE OF

The present procedure of Police taking statements from persons accused or likely to be accused is to be discouraged.

2. The general habit of asking persons if they wish to be taken to Magistrates to record confessions is most irregular and must be discontinued. Police will take no action unless an accused person first approaches the Police with a special request; the exact wording of such applications will then be recorded in the case file.

James M. Lumley.  
ATG. COMMISSIONER OF POLICE.

To  
All Regular Police Officers.

(No. 148) GRAVE CRIME -- PER... INVESTIGATION BY OFFICERS  
IN CHARGE OF DISTRICTS (G.C.P.I.O.)

Commissioned officers in charge of provinces or districts will on information of grave crime as scheduled hereunder proceed personally with all possible despatch to the scene and will be held personally responsible for the investigation of such crime :-

1. Murder - Section 302 and 303, I.P.C.
2. Culpable Homicide.- Section 304, I.P.C. (Only when non-natives are concerned as victims or accused).
3. Rape and offences under Chapter 78 of Revised Laws of Kenya. (Only when Europeans are concerned as victim or accused).
4. Robbery. Section 392, I.P.C. (When amount exceeds Shs.1,000/-)
5. Dacoity. Section 395 and 396, I.P.C. (When amount exceeds Shs.200/-)
6. Housebreaking. (When amount exceeds Shs.500/-)
7. Theft. (When amount exceeds Shs.1,000/-).
8. Poisoning. (Only when non-natives are concerned as victim or accused).
9. Organised societies, mail robberies, serious riots, cases in which persons are charged with serious offences or in which persons are held whilst in Police custody or any case of a grave nature.

Kenya Police Headquarters  
Nairobi,  
2nd November, 1923.

J. E. WILSON-SOURNE,  
for COMMISSIONER OF POLICE.

LEGAL DEPARTMENT.

Attorney General's Office,

Nairobi,

29th January, 1931.

CONFIDENTIAL.

The Honourable  
The Acting Colonial Secretary,

BAGISHU MURDER TRIAL - REPORT OF THE  
COMMISSION OF ENQUIRY.

I have read the Report of the Commission of Enquiry on the Bagishu murder trial forwarded under cover of your confidential memo-No.S/P JCL.24/1/72 of 23rd December, 1930, with great interest.

2. With the exception of the last four paragraphs under the caption "Conclusion" the Report is, in my opinion, a good and fair one, the conclusions drawn being amply justified by the evidence given before the Commission, but there are a few points in the course of the Report on which I desire specifically to comment.

3. As regards paragraph 41 of the Report I consider that the comment on the conduct of the Magistrate and the trial Judge is unjustifiably strong. The woman was described by Mr. Justice Thomas at the second trial as "half-witted", but there is no evidence that either before the magistrate or before the learned Judge at Kitale she did not give her evidence in an averagely intelligent way. Section 292 of the Criminal Procedure Ordinance (Chapter 7) provides that:-

"When a magistrate has recorded the evidence of a witness he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination."

No question was put to Mr. Gillespie, the Magistrate, regarding the way in which the woman gave her evidence.

4. Similarly the allegation that the child gave her evidence by affirmatory grunts in response to leading questions is one made by Mr. Bentley, who was not present either at the preliminary enquiry or at the first trial. It is based presumably upon information given by Mohamed Malik as to the questioning of the child by an askari on the Monday after the murder, vide Appendix IV, page 20. It is, I think, not an unfair assumption that the Magistrate a qualified barrister, and the trial Judge observed the primary rules of procedure and would not have allowed leading questions. No question on this point was put to Mr. Gillespie or to Inspector Dale.

5. In paragraph 42 much is made of the evidence regarding the killing and eating of a fowl. On that point I would venture to make two comments: firstly, that it was primarily for the defence to disprove the alleged custom or to prove that the meal in this case was not ceremonial, and secondly that the assessors, Bagishu like the accused, all found the accused guilty, and one of them specifically mentions the killing and eating of a cockerel (Appendix "B" - Supreme Court proceedings, page 14).

6. Paragraphs 48 and 49 are, I think, deserving of some comment. Counsel for the defence in murder cases are assigned in rotation in Nairobi, and I have no reason to think that the position elsewhere is different, an accused person may have the benefit of the very ablest assistance just as he may possibly be defended by the junior member of the local bar.

If counsel for the defence, however, wants time to prepare his defence an application for the postponement of the trial would invariably be granted. It is I think a blot on an otherwise good report to include such a statement as "In the circumstances as revealed in this case it would seem that once an ignorant native has been committed by a careful magistrate for trial he is practically condemned to death." The statement is obviously incorrect, as the records of the Supreme Court show every month: I cannot see what point the statement is intended to drive home, and the whole paragraph overlooks the obvious conclusion to be drawn from all the circumstances of the case, that no court is proof against organised calculated perjury.

7. The functions of a magistrate holding a preliminary enquiry are laid down in sections 168-179 of the Criminal Procedure Ordinance (Chapter 7), and were obviously fully appreciated by Mr. Gillespie (vide Appendix "D" pages 73-74). It is often certainly not in the best interests of the accused to make any attempt to outline a defence in the court below. Such action frequently greatly hampers the defence in the Supreme Court. As a recent example I would recall how the line of defence taken by the solicitor for Kennedy at the police court proceedings against Brown and Kennedy for the murder of P.C. Gutteridge was used in the High Court trial by Counsel for Crown in an attempt to incriminate Kennedy and exculpate his client.

8. I cannot subscribe to the statement that it is of supreme importance that the whole record of a full investigation of every possible line of enquiry should be accessible to the defending counsel.

if that statement means that the police diary should in every case be made available to the defence. Section 139 (2) of the Criminal Procedure Ordinance (Chapter 7) was based on sound public policy, and though no such provision appears in the Criminal Procedure Code such a diary would still properly be privileged in many cases on the ground of public policy. It is a common place in the administration of criminal justice that police officers are not pressed to disclose the names of those on whose information they acted. The need for such a rule in the interests of public policy is manifest.

9. In paragraph 53 there occurs a curious non-sequitur. "For instance there was a suggestion of a blood-stained vest, the inference presumably being that it was the blood of the deceased". Surely the members of the Commission overlooked the fact that the enquiry was preliminary to a trial by a Judge of the Supreme Court, who would certainly draw no such inference. The Magistrate (Appendix "B" page 76) says on this matter:-

"Mr Bentley: When mention was made before you of this blood-stained shirt did you ask any question about it?"

"Witness: I cannot recollect, but I do not think it had any great weight after all it might have been his own blood!"

10. I find no evidence of any improper inference being drawn here. If the Crown had attached any importance to these blood-stains it would obviously have been necessary to send the garment to

the analyst for proof that the blood was human blood, and thereafter that the blood was not that of the accused himself.

11. As regards that portion of the Report (paragraphs 56-60) which deals with the conduct of the police I have dealt with it at some length in my minute on your file No. JCL.24/1/II/ of today's date.

12. As regards the conduct of the Law Officers of the Crown, dealt with in paragraphs 61-66 of the Report, I am in complete agreement with the conclusions reached and am naturally glad that the members of my Department connected with this case have been so fully vindicated.

13. When I first read the Report I was at a loss to understand the concluding paragraphs 69 & 70, which seemed to me to carry matters no further, I have since had an opportunity of discussing this part of the Report with the Chairman of the Commission, who informs me that what prompted the writing of these paragraphs was no more than this: that an examination of this case left in the minds of the members of the Commission a profound feeling of disquiet, and the conviction that the existing judicial system was not the best that could be devised for the trial of natives. The Commission have passim, e.g., in paragraphs 44-50 and 54, made suggestions for the betterment of the system, and one of their suggestions, the provision of a public defender, is already under consideration by Government, but the Commission feel that they are not competent to make detailed suggestions for a better system, and that that matter should be investigated by a more qualified tribunal.

14. I return the Report and its appendices herewith.

A. D. A. Macgregor  
ATTORNEY GENERAL

The Honourable  
The Asst. Colonial Secretary.

I understand that you desire to have my comments on the Acting Commissioner of Police's criticism of the Report of the Commission of Inquiry on the Bagishu murder trial.

2. Mr. Ridgway attended the first meeting of the Commission, but when Mr. Bentley in answer to me (Appendix "L", page 3) stated that he made absolutely no charge against Mr. Ridgway, Mr. Ridgway was allowed to return to Thika. When Mr. Dale was giving evidence Mr. Wolseley Bourne (Appendix "L", pages 33) said in answer to the Chairman -

"Mr. Ridgway would be able to give more definite information in regard to the detention of witnesses"

and later Mr. Dale at the conclusion of his evidence said (Appendix "L", pages 90-91) -

"Mr. Chairman, as the majority of the charges seem to be on me, may I ask that Mr. Ridgway, the Assistant Superintendent, be allowed to say something on my behalf, or at least to be examined by the Commission"

to which the Chairman replied -

"Certainly, he shall call Mr. Ridgway to say anything that is relevant to the enquiry".

3. In view of the criticism of police methods contained in the Report it is, I think, unfortunate that Mr. Ridgway was not in fact called.

4. Turning now to (1a) the Acting Commissioner's first point is covered by the evidence of Mohamed Lalik at pages 20 and 21 of Appendix "L" and by the evidence of native witnesses at pages 99, 100 and 101 of the same Appendix. Starvation is alleged by Masaba (page 101).

5. On page 5 of (1a) the Acting Commissioner takes what I think is rather a narrow view of the Commission's first complaint against Mr. Dale. The gravamen of the complaint is that he did not report in the prescribed manner to the magistrate, so that an inquest might be held. The fact that he did prepare a report which he filed in his own file is beside the point. An inquest in this case might have been of great assistance: it was in part at least Mr. Dale's failure to report that led to no inquest being held.

6. The really serious allegation against Mr. Dale is that he detained suspects in custody contrary to law and instructions. This conduct the Acting Commissioner does not attempt to justify, nor was it ever suggested that the police authorities knew of or connived at such a procedure.

7. Paragraph 57 of the Report does not attribute any specific dereliction of duty to Mr. Dale, but in view of this finding it is more than ever unfortunate that Mr. Ridgway was not invited to give evidence.

(Sd.) A.L.A. MacGregor.  
ATTORNEY GENERAL.

29th January, 1931.