

1936

Kenya

No. 38007

SUBJECT

C0533/462

Death Sentences

Executions and Commutations

Previous

1935

Subsequent *See 7199/37*

1937

Death Sentences.

1. Gov. No. 121.

4th, March, 1936.

Trs. return of sentences and executions during 1935 together with relative medical certs.

2. Gov. No. 115.

2nd, March, 1936.

Reports circs. in which sentence of death passed on Lokaigut were Churale in Criminal case No. 138 of 1935 was commuted to a sentence of imprisonment with hard labour for seven years.

3. Gov. No. 116.

2nd, March, 1936.

Reports commutation of sentence of death in the case of Mathias wa Kirungi (Criminal case No. 145 of 1935) to one of imprisonment with hard labour for ten years.

4. Gov. No. 117.

2nd, March, 1936.

States that in Criminal case No. 131 of 1935 the sentence of death passed on Awango s/o Manas has been commuted to one of imprisonment with hard labour for ten years.

No. 1. In 5 cases the accused who were hanged. (Case 123/34 in which 7 natives were hanged in the "Lemini" case)

We have had the Judge's Reports & judgments in the 7 cases in which sentences of death were commuted (See Nos. 7-12 in the 1935 file)

One conviction quashed by the Court of Appeal, & six cases shown as pending. Of these

six cases, appeals have been allowed & the accused acquitted in 2 cases & sentences of death have been commuted in two cases.

No. 2. A witchcraft case. The accused, at 17-16, killed a witch doctor.

Sentence of death commuted.
(This is shown in the pending list
in No 1.)

No 3. Sentence of death
Commuted. - Absence of
Premeditation, & the accused
was drunk at the time of
the murder.

Now Sentence of death
Commuted - See the
Comment of the Appeal
Court. (This is one
of the cases shown as pending in
No 1.) Subject to legal opinion
? Put by

A. J. [unclear]
30/5/36

in this
your etc. see No 4.

99. [unclear]
3/3

This reached me to-day!

20/5/36 A.D.

1936

22/5/36 A. J. Duncan

A. J. [unclear]
22. above

of a [unclear] time
[unclear]
[unclear]

5. Governor No. 285.----- 3 June, 1936.
Reports commutation of the death sentence on Ndune wa
Mruu to imprisonment for life in the circumstances set
out.

Mr. Duncan

Sir G. Buxle

It seems to my untutored mind that there
is something wrong in the summing-up of the Appeal Court.

The law ~~the~~ here is, I believe, - following Woolington's case -
that the fact of A having caused B's death even with a
fatal weapon does not raise a presumption of murder which
the defence has to rebut. Kenya has been told to use its
law conformably. Yet the appeal court states the doctrine
independently and dismisses the appeal on it.

The assessors are rather ~~to~~ "pleasure you say"

Mr. Flood.

Section 190 of the Kenya Penal Code, to
which reference was made in the summing
up, is, of course, inconsistent with the
decision of the House of Lords in Woolington's
case; and in one circular despatch of
December 3 1935 we ~~had~~ ~~strong~~ ~~views~~
~~on~~ ~~the~~ ~~subject~~ ~~in~~ ~~which~~ ~~the~~ ~~then~~
Section should be repealed. It appears
that this has not yet been done.

8/7/36 A. J. Duncan.

Yes - the law in Kenya being statutory - it needs
a statute to amend it.

A. J. [unclear] 15/7

Sir C. Buxton

What bothers me is the attitude of the
Appellate Court. They must know of the Lords'
judgment: they must know that if the case were
taken to the Judicial Committee, that body would follow
the Lords. Yet they take refuge behind the Kenya
statute. I suppose they must but it seems odd
to me. Surely they could have referred to the Woodington
case or said something.

Also please see the foot of p. 3 of the Lord's
summons up & my pencil remark.

~~W.D. & H.O. Wills~~

Do you think we could remind Kenya of the
circumstances taking this as a test? If the presumption
does exist there are grounds for the complete
re-opening of the whole case.

J. J. Baskin

16.7.

I think to refer to the case

J. J. Baskin

I am not sure whether in preparing
a reference to the case of 3/10/35,
the House (now on bench) had in mind
the subsequent cases, at Nos 15 & 18
on 7/17/36 & 1/1/36; or whether
in view of that case, the proposed
comment is not necessary. If so,
it be suitable to comment as
suggested in pencil - in Mr. Baskin's?

J. J. Baskin

22/7

To Kenya 572 (5 August) 30 JUL 1936

11/1

I think they would be
bound to follow the
Judicial Committee
of Kenya, but
I am not sure
I am not sure

11/1

4/13

7. Dep. Gov. No. 294

6 June, 1936.

Reports commutation of death sentence on Alual to Kongo to imprisonment for life, in circumstances indicated.

Subject to legal advice

? Paddy

C. J. Guinness

20/7/36

J. J. Bassett
21/7

Seen.

File 38007 does not appear to be among the papers on us take.

10/8/36

A. Duncan.

8. Governor No. 433.----- 21.8.36.
Reports commutation of the death sentence passed on Mangangi wa Nauki to imprisonment for 7 years.

? subject to legal

advice, Paddy.

P. J. Evans

14.9.36

J. J. Bassett

14/9

Seen.

8/10/36 A. Duncan.

10. Deputy Governor No.484.----- 15.9.36.
Reports commutation of death sentence passed on
M'Kiambati s/o M'Mwitari to imprisonment for 10
years.

11. Deputy Governor No.485.----- 15.9.36.
Reports commutation of death sentences on Wesonga
s/o Moya and Ndiwa s/o Kimaget to imprisonment for
7 years.

Subject to legal views

*? Putty
C.A. Rossini
12/10/36.*

*J.P. Rossini
12/7*

Secu.

As regards No.11, have there on 30/6/36.

*No. Law referred to Section 190 of the
Penal Code which, in circular despatch
of 3/12/35, ^{is} said should be repealed.*

*In this connection please see the
minutes under No.5 above, and also No.6.*

11/11/36 A.H. Duncan.

*Bills have now been published
(Gazette No.50 of 6/11/36 - Notices
Nos 612 & 613) to amend the
Penal Code with Indian Evidence
Act, as applied to the Colony, in
conformity with the decision in
the Woolington case. It seems*

*necessary therefore to consult further
with the
12/x1*

12. GOV. KENYA. 1114 CONF. 16.10.36.
At request of Dr. Gordon, Visiting Physician to Matnari
Mental Hospital, the copies of various documents relative
to death sentences imposed on Juma bin Abdulla, Mwacharia
wa Mbutia & Nyarugembe Nyaranga and comments on the
cases at some length recommending that he be authorised
to inform Dr. Gordon that his letter has been read by
the S. of S.

12a I submit a note on the Governor's despatch
and Dr. Gordon's report.

Dr. Gordon has been at pains to prove that
insufficient steps are taken to investigate the
mental history of natives convicted of murder, and
that this admission can lead to miscarriages of
justice. In two of the three cases which he
investigated, he was unable to assist with an opinion
on the sanity of the prisoners in view of the
"blanks (legal and medical)" in the cases. He is
now disturbed to find that what advice he was able to
offer the Executive Council has been rejected and the
two men are to die. He has asked, therefore, that
his letter and reports be submitted to the Secretary
of State. The third case, i.e., in which the death
sentence has been commuted, he considers that there
were no grounds for clemency.

In criticizing the legal conduct of cases
Dr. Gordon has, I suggest, over-stepped his function
of advising on the sanity of the prisoners. His
attack on the competence of Dr. Henderson as a
mental specialist will no doubt be examined by
Sir F. Stanton.

The Governor considers that the procedure at present in use is adequate to ensure that the possibility of a miscarriage of justice occurring is reduced to a minimum.

As regards the last paragraph of the despatch it will be seen from 38256/36 that, with a view to placing a check on the increasing rate of recidivism, the Governor proposed that two medical officers "trained to investigate psychological problems and with actual experience of prison administration" should be seconded to Kenya for a period of three to four years, the cost to be met from the Colonial Development Fund. The Home Office cannot spare two officers, but suggest that two Kenya Medical Officers should be sent home for a period of training in the Home Service.

Subject to legal and medical observations I acknowledge and request the Governor to inform Dr. Gordon that the Secretary of State has received his letter. Note the Governor's views in paragraph 7 of the despatch and request that he will take steps to ensure that every effort is made to investigate the medical history of all accused persons in capital cases where a defence of insanity has been raised. Take the opportunity to tell the Governor of the decision of the Home Office regarding X above and invite his further observations.

C. G. Crosswith
2nd. 11. 36

Dr Gordon's representations can be considered under two heads.

A. He says that in each of these three cases the decisions of the Gov. Council were "opposed to the Expert evidence (i.e. his evidence) given for and given."

As to this I can only say that I can find nothing in his report on any one given case which would have caused me, had I been a member of the Ex. Co., to form a different opinion to that of the Ex. Co. actually formed.

In cases (1) & (2) (i.e. those in which the decisions were that the law should take its course) he said quite definitely that he was unable to assent with an opinion. It is true that, earlier in each report, he had pointed to circumstances which had made it impossible for him to form a definite opinion; but in neither of these reports did he go so far as to give a warning that, in the circumstances, there was a danger of a serious miscarriage of justice if the law were allowed to take its course. Not having done so, he is surely going too far now in saying that the decisions were

opposed to his expert opinion.

In case (3), he advanced an alternative theory as to how the crime came to be committed, & ~~was~~ submitted that, even if the opinion of the judge was the right one, there was no just ground for the exercise of ~~discretion~~ since tribal custom in such a case ~~is~~ not. He has required the woman to have been beaten to death by the unincarcerated ~~gangs~~ of the tribe instead of being killed by the aggrieved victims of the witchcraft.

Surely it can not be said to be a miscarriage of justice if the Ex. Co., after considering Dr Gordon's theory & observations, nevertheless recommended the commutation of the death sentence.

~~Nevertheless~~

as regards Dr Gordon's share in the opinions formed by the judges, it is surely sufficient to answer that they tried the cases, & heard the witnesses, whereas Dr Gordon has merely perused the records of the cases.

B. He says that in some of these cases were adequate arrangements made to ascertain the mental condition of the accused after arrest, and that his conclusion is expressed in the fact that Dr Henderson has seen Dr ~~...~~ to be quite incapable of giving evidence.

On this aspect of the matter I do not feel at all sure that the Govt. comments, in para 7 of the report are adequate. One can readily agree with him that, in Kenya, ~~any~~ suggestion that such cases should be committed to a mental specialist would be an ~~impracticable~~ ^{impracticable} ~~statement~~ of perfection. On the other hand, the ~~fact~~ that "all prisoners are kept under medical observation in prison & that in capital cases where a defence of insanity has been raised & where there is any doubt ~~...~~ the case is referred to Dr Gordon ~~...~~ looks very well on paper, but in the light of Dr Gordon's representations on matters where it amounts to very much in practice. The absence of a report by Dr Patterson containing an assurance that it is a standing instruction to prison M.O.'s to pay particular attention to the mental condition of prisoners

detailed on capital charges and
have been much more reassuring,
& I (subject to Sir T. Stanton's views)
I shd. be inclined to put this to
the Gov.

J.P. Bowen
23/11

[I note that in his letter of the 27th of
August that Dr. Gordon refers to these
men as "to be executed", but in
his despatch of 16th Oct. the Gov. does not
say that they have been. The
assumption seems to be however that
they have been.

J.P. Bowen

Even from the medical point
of view I am not impressed
by Dr. Gordon's arguments.
And having given his advice
from the medical point of
view, Dr. Gordon should leave
the administration of the law
to lawyers.

S. Stanton
28.11.36

Seen.

In view of the minutes on No. 9 Sir S. Bushe
may be interested to see the psychiatric view of
the Nyarugumba wa Nyaranga case - and
possibly of the other two cases dealt with in No. 12
and its enclosures.

30/11/36

H. Duncan

I am interested in this, and papers which
raise general questions as to the administration
of justice should come to me. I cannot follow
Dr. Gordon, because he seems to have advised
on ^{so many} ~~many~~ points ^{besides} ~~except~~ the one on which his advice
was sought. Of course, everybody knows that the
law of insanity as applied to crime is hopelessly
out of date: it corresponds, I believe, to no
medical opinion, and is kept in force apparently
by the prejudices of some elderly Judges. The
courts in Kenya as elsewhere have got to
administer the law, and there is nothing in these
cases that came anywhere near insanity as the
law knows it.

Incidentally, I have read with great
interest the despatch and enclosures on 38256. It
is like a breath of fresh air in the ordinary
inertia of the average Colonial Government
towards prison reform. Psychology and, I believe,
pathology, plays an important part in crime,
and it is refreshing to find some one prepared to
consider it from that aspect. I see no mention
of the prison at Nairobi which is a disgrace.

H.P. 1.12.36

There may be a good deal of trouble over
this, especially if Dr. Gordon starts making a case
out of it. As Sir Grattan Bushe points out, legal
insanity and medical insanity are two quite different
things and Judges have to administer the law as it
stands.

I think I am right in saying that the modern
tend of psychiatry is towards the view that
everyone is mad when he commits a crime so that
it is only in the rarest possible cases that
anyone can properly be found guilty. ~~But~~
refinements of thought and reasoning ~~which~~ may
be suited for civilised countries, (though they
have not been adopted in any civilised country
that I know of except possibly the U.S.A.) are
not altogether suitable for dealing with
primitive conditions and more primitive people.

To look at what happened. There
were these three cases of murder. Dr. Gordon
was asked to pronounce his opinion as to the
sanity or otherwise of the convicted persons.
In two cases he said "I am unable to assist you
with an opinion" and "I find it impossible to
assist you with an opinion". He discussed at
considerable length the evidence given, the
defence, the proceedings in Court, the views of
Dr. Henderson and other irrelevant matters on
which his opinion was not asked. He cannot
then really be surprised that since he refused
to give an opinion, the Governor-in-Council had
to do the best he could. As Mr. Paakin says,
if I had been on Council I should have taken
the same view. There is no miscarriage of
justice because it cannot be denied that the
accused actually did commit the murders and
the only question which arose was whether they
were sane or not. That they were sane in the

legal

legal sense is, I think, obvious. Yet Dr. Gordon
now says that his reports showed serious doubts as to
the sanity of the men in the two cases. If he had
serious doubts it was his job to say so and he didn't
do it, and the statement that the reasons which
prevented him from expressing a definite opinion
increased his doubt, reads very oddly. In the third
case he has gone out of his way to evolve a new theory
which he was not asked to do, and expressed the
opinion that the man was very sane. In that case
I do not think that sanity was a point at issue. The
question was, "Did the man honestly believe that by
witchcraft he was being turned into a woman?" If he
did, then the exercise of clemency was abundantly
justified. The Courts all thought that he did honestly
believe it and the fact that such a thing is
impossible does not really come into the matter. On
this latter point Dr. Gordon's attitude of mind is
illuminating. He proceeds to attack the Judge for
saying that such a change of sex would be a miracle
saying that the facts are against the Judge, since
there are well authenticated cases of conversion and
biology sees no miracle in it. He goes on to say
"Indeed, a great authority describes the male
biologically as only an improved female and
intersexuality is a well established condition".
This is all very well, but the cases to which Dr.
Gordon refers are very peculiar and do not occur in
normal life. I think it would be right to assert
that there is no case on record of any sex conversion
among the higher animals in the case of a being which
could be definitely and obviously classed as either

fully developed male

There are no medical cases
you can't be sure of the
any and mistakes have
made but that isn't the
point here

(fully developed)
male or female. * Oysters do change their sex
and I am informed that you can work curious
changes in chickens, ^(and animals) but that is a very far cry
from criticising a Judge because he says that
such a change would be a miracle, meaning that
in the case of a normal human being such a
change is outside human experience as we know
it. There is a Greek legend on the subject
and I wonder that Dr. Gordon did not quote that.

The whole thing to my mind shows that
Dr. Gordon is unbalanced himself. He takes no
account of the practical legal difficulties.
He does not take into consideration the fact
that Judges and Governors have to administer
the law. When he is asked for his opinion he
declines to give it. Then he complains because
his vaguely expressed doubts - with some of
which an ordinary person would not agree - are
not taken by those who administer the law as
proof of insanity. What the Governor says at
the end of paragraph 5 is quite sound from the
practical, though ^{maybe} not from the psychiatric,
point of view.

The real trouble comes up in
paragraph 7 of the despatch. In every case
where insanity may possibly be raised - and to
be really logical one ought to go further and
say every case without exception - to be
referred to Dr. Gordon immediately? The
result will be that nobody would ever be
brought to trial because the medical
investigations could be made to last for an
indefinite

indefinite time and sooner or later something would
be found in every case which would justify the mental
specialist in stating that there was something funny
in the make-up of the accused person's mind.

In view of the possibility of trouble about
this not only in Kenya but everywhere else, I think
we shall have to be pretty careful as to what we
reply and I suggest that while asking the Governor
to return a suitable acknowledgment to Dr. Gordon and
to thank him for having brought the matter to notice,
we should also point out that, in any case where the
mental condition of the accused may become an issue
at the trial or may be called in question apart from
the trial, it should be a standing instruction to
Prison Medical Officers to pay particular attention
to the mental condition of the prisoner, which means,
of course, that in all cases of capital charges the
accused's mind ought to be the subject of examination.
Draft herewith on 38256.

(This is really a
matter of general
application & all
Colonies might be
asked about their
practice)

J. G. D.

8.12.36.

(I signed this memo to Sir F. Steiner
who has added a further note)

126

Sir J. Moffat

The enclosed memorandum is
Dr. Gordon's note attached.
In the two cases where the law goes
to take its course Dr. Gordon bases his
inability to advise (go on the state of
mind at the time of the crime) to
medical & legal blanks in the record. That

is reasonable; but too just
because Ex. Co. does not advise
merely either because of his
inability to advise or because
of his review of the trials is not
reasonable.

D. Henderson (formerly in the
regular Govt. service) has a very
long experience of the Kenya native
even if his very long experience is
a little out of date.

I agree with his second
proposal for reply.

Went 3.12.36

I agree and concur with the
proposed reply but the
note of general advice - the
relevant clause is also about the practice.

[Signature]
4/12/36
atna

To Kenya. Conf(2) (12 lines) - 10 DEC 1936

38007/14
to 43
11/12

GOV. KENYA.....557.....27.10.36.
Tra. copies of transcript of shorthand notes taken at
trial of Kabal Singh charged with manslaughter and
states that the accused was found not guilty and
acquitted.

This is a case of an Indian boy
drown running down and
killing an African. The
accused was found not
guilty of a charge of
manslaughter and acquitted.

The transcript of the shorthand
notes is sent home in
accordance with the instruction
of the Duke of Devonshire's
despatch No 1753 of the 20th
November 1928.

I do
not think, however, that the
instructions in question were
intended to apply to a case
of this sort. But unless
it is considered that the
instructions may now be applied
entirely, it is not worth
raising the point.

Coffron with
2.12.36.

5-5-36 2/23
cc/14

I like not
Hls

I agree that we should not alter the
instructions. They enable the legal advisors
to see what happens & to form some idea
of the difficulties of things in Kenya.

JJ Bower
23/11

In his summing up Mr. Lane
was dealing with involuntary manslaughter
where a man by culpable neglect of a
duty imposed upon him is the cause
of the death of another. In such a
case mere negligence will not do. There
must be wicked negligence, that is,
negligence so great as to satisfy a
jury that the prisoner had a wicked
mind in the sense that he was
reckless and careless. (See "Manslaughter"
in Archbold; and also Section 185 of
the Kenya Penal Code).

Generally speaking, I think that
Mr. Lane's statement of the law on the
subject was accurate and adequate.

18/1/37

A. H. Duncan.

M.B.
28/1

Per by

J. G. R. 20.1.

20.1.

In his summing up Mr. Lane was dealing with involuntary manslaughter where a man by culpable neglect of a duty imposed upon him is the cause of the death of another. In such a case mere negligence will not do. There must be wicked negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless. (See "Manslaughter" in Archbold; and also Section 185 of the Krupa Penal Code).

Generally speaking, I think that Mr. Lane's statement of the law on the subject was accurate and adequate.

28/1/37

M. Duncan.

M.B.
28/1

Put by

J.S. 28/1

30-1-

about

KENYA

No. 557



14
GOVERNMENT HOUSE
NAIROBI
KENYA

27 October, 1936

Sir,

In accordance with the instructions contained in Mr. Thomas's despatch No. 762 of the 18th July, 1924, I have the honour to transmit two copies of the transcript of the shorthand notes taken at the trial of one Kabal Singh who was charged before the Supreme Court of Kenya in Criminal Case No. 106 of 1936 with the offence of the manslaughter of Polo Obaiyedo, contrary to Section 185 of the Penal Code.

2. The accused was found not guilty and acquitted.

I have the honour to be,

Sir,

Your most obedient, humble servant,



BRIGADIER GENERAL
GOVERNOR,

THE RIGHT HONOURABLE
W. GEMSBY GORE, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S.W. 1.

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1st P. . LESLIE GUYON THOMAS. Assistant Inspector of Police in charge of Traffic Branch, Nairobi.

I received on 8/4/36 a report of an accident from Parklands Police Station. Accident alleged on Limuru Road about 2 miles away. Nairobi. Going along Limuru Road towards Limuru and about a quarter of a mile from entrance of City Park I saw a motor lorry No. T 3212 in water-way on right hand side of Limuru Road, looking towards Limuru. Lorry was on angle in water-way (ditch) with radiator facing towards Limuru. I examined road which was tar-macadam, level and dry and I saw two skidmarks. I prepared a sketch of the scene from measurements made at the time. This is the sketch Ex. 1. I measured by paces and measurements are therefore approximate. The sketch represents those measurements and the position of the lorry. Waterway on offside of road leaving Nairobi is 9' broad (approximately) and about 5' deep. Sloping sides: there is a drop from centre of road: tar-macadam. Carriage way is about 18 feet: fairly uniform width in both directions. I didn't notice if there are footpaths. There is room to walk between tar-macadam and edge of ditch, single file. Culvert in plan is 41 paces from where I found lorry, in direction of Nairobi. Culvert marks corner: road is straight from culvert onwards in direction of Limuru: it is a sharp corner; bend of about 45 degrees: not very sharp: it is approximately as shown in sketch.

Sketch shows 2 dotted lines: these are skidmarks of lorry: I paced them: the offside one was 16 paces from right edge of road going towards Limuru. Distance from point where right hand skidmark begins to right side of tar-macadam was 5 paces. The other skidmark went from near side rear wheel of lorry towards

direction of Nairobi (direction in which lorry had come) for a distance of 8 paces.

Ditch is 9 feet wide i.e. from its edge to edge not from edge of tar macadam. Plan is not to scale. Whole of lorry was not in ditch; only part of lorry. In fact there is a small space of about one foot between edge of tar macadam and edge of ditch. I didn't measure width of lorry. Approximate width of lorry is 5 feet 6 inches to 6 feet 6 inches.

Near side wheel of lorry to near side of road at point where first skidmark seen was about 2 feet 6 inches; assuming lorry is 6 feet 6 inches broad. Skid marks were curving to right as shown on plan.

No other marks on road; these were definitely skid marks and not ordinary tyre impressions; very plain impression in road. I saw no blood marks or anything to suggest a person had been injured. Some Indians, among them accused, were there. I don't know who others were; also some natives. No other vehicles. I examined lorry. It was not damaged. I was there when it was taken out of ditch. It was able to drive away. Wings not buckled that I saw - no marks on radiator or wings. Apparently it had not gone into ditch with great force. Ditch is fairly steep. Nothing buckled or broken on front of lorry. No bloodstains. I tested lorry; found handbrakes and footbrake efficient; steering was efficient.

I have been in Police in this country for over 8 years; this tour Traffic Officer for about 8 months; I had been Traffic Officer before for about 2 years.

Q. Assuming that lorry with efficient brakes takes 16 paces to pull up can you form estimate of minimum speed at which it was going?

A. About 30 miles per hour. This is according to scale in Traffic Ordinance. We have occasionally

to make these calculations. This is assuming there was nothing except brakes to have a retarding effect. Supposing man was knocked down at beginning of skidmarks and was dragged along, I should say this would slow lorry up. I didn't see injured man. I think front part, radiator part, would have dragged him along. Possible that front wheels if he was knocked down by them and fallen under them, would push him along for a short distance: a yard or two. Likely that front axle or similar part if person were knocked down would drag him along for 3 paces. In such a case I would have expected to find blood marks. If lorry had come from Nairobi and taken corner at excessive speed, say at 80 miles per hour, it would have gone off road altogether to right, 3 or 4 paces from culvert.

Safe speed for lorry round corner would be 30 miles per hour. 30 miles per hour for lorry on corner would be excessive. If it were doing this speed, it would depend on driver what course it took: it could remain on left side with a good driver; with a careless driver it would swing out about 12 paces. The course I found it had taken is the course I would have expected to find if lorry had gone round the corner at excessive speed and with careless driver. I consider that would be negligent driving.

Q. Would this amount to gross negligence from your experience?

KHANNA: I object. This is question for Court.

PHILLIPS: Police have to consider this in their work in framing charges. Hypothetical case.

ORDER: I allow it. This witness is called as an expert.

A. I should call it careless driving.

Q. A.

Lorry was partly off road. Can't give exact measurements of amount of lorry in ditch. My sketch is not exact.

width of tar macadam described as 6 paces, I could not say definitely was 18 feet: I say about 18 feet.

Assuming lorry 6 feet 6 inches broad, near side of lorry would be about 2 feet 6 inches from edge: not 1" from where off side skid marks began, there was no trace of near side wheels for about 8 paces. I didn't measure distance between back wheels of lorry.

I've had experience of accidents and motor vehicles. As to when a car takes a sudden turn to left passenger or driver is thrown towards right: I ^{was} not aware of this. I did not know that in case of sharp turn to left the outside wheels make more accentuated than inside ones.

Brakes were in perfect order when taken out of ditch: in accordance with section 13 Traffic Ordinance, i.e. that if vehicle travelling at 15 miles per hour on dry level road it should pull up in 25 feet. If a vehicle does not pull up in this distance, brakes not efficient. I didn't drive lorry. I didn't notice any definite sign of braking at any point. Whether brake marks are seen or not depends on condition of road.

From point of near side skid marks starting, 8 paces from offside ditch, I would not be prepared to say that that is the place where brakes were applied. I think that the brakes were first applied at the spot where offside skid marks begin, i.e. 18 paces from culvert.

I could not say why no skid marks made by near side wheels. It is possible that brakes were applied at 16 pace skid mark.

In saying lorry was going at 50 miles per hour I assumed that brakes were applied at that spot 18 paces from culvert and that brakes were in accordance with Traffic Ordinance. No definite brake marks seen.

Kd. Ct. I don't know if lorry had two-wheel brakes or four-wheel brakes.

If my estimate of speed of lorry is correct, I could not say if at point where near side skid mark appears, the speed had fallen to 15 miles per hour. If lorry took corner at 30 miles per hour it could still keep to its correct side if it had a good enough driver. At 60 miles per hour I don't think it could; it would go off.

I don't say that because it took corner at 30 miles per hour it would necessarily go off to right. It depends on driver.

XXX.

This driver did not drive with inefficient brakes. I examined it for this and tried the brakes. I was satisfied that brakes complied with Traffic Ordinance. Otherwise I should have taken action against driver. Standard demanded by Traffic Ordinance is very fair. It is a minimum requirement. Some cars have more efficient brakes than standard requires. Standard is lowest pass consistent with safety. These brakes complied with it.

Skid mark of offside wheel could not be caused by any other cause except application of brake. A freely revolving wheel would not cause such a mark. I can think of no other cause than the brake to cause it.

Assuming person knocked down and being dragged under near side wheel, this might possibly cause offside wheel to be locked and skid.

I had considered the fact that vehicle was a lorry and not a car. Safer to drive car at speeds indicated than lorry.

Adjourn till 2.15.

C.A.G. Lane.

C.A.G.L.

Khanna asks that Court and Assessors visit scene.

ORDER. Court will visit scene at 2 p.m.

12.10.1946.

Resumed. Court and Assessors have visited scene with Counsel and Accused.

Court resumes. Assessors present.

Counsel.

Phillips wishes to call Dr. Vint.

Khanna objects to his being called at this stage.

ORDER. Dr. Vint to be called subject to his being liable to be recalled for cross-examination.

2nd P.W. FRANCIS WILLIAM VINT Sworn. M.D. B.Sc. Govt. Bacteriologist

I held a post mortem examination on 9.4.36 on body of native whose body was identified by Sub-Inspector Chanan Ram as of Polo Obaiyodo. Found diffuse bruising of face and head; scalp and top of head was partially torn off. Generalised bruising over chest^{and} ^{wall} on right side ribs 1 to 9 were fractured: On left side 3rd, 4th and 5th ribs fractured: Right thigh was broken; compound fracture of left ankle joint: right lung liver and spleen were all ruptured: No fracture of skull or injury to brain: Cause of death was shock and hemorrhage following multiple injuries described.

Assuming these injuries were caused by accident with motor lorry, multiple nature of injuries and the way they were distributed, suggest that he was knocked down and dragged. If he had been knocked down and wheel had simply passed over him, injuries would have been more localised.

Injuries found were consistent with his having been knocked down and dragged: only possible solution: a wheel passing over body might have caused any of the injuries but no evidence that wheel did pass over him. If he had been knocked down and fallen clear I should not have

expected to find such extensive injuries.

10d. Looking at plan, seeing lorry shown in ditch, assuming deceased was standing about 1 foot away from edge where lorry rested, and then knocked down and came to rest under lorry, this could explain his injuries but position of deceased in relation to lorry would be important as he was found: i.e. his being pushed or dragged only about 4 paces. If it were suggested that he was struck at the place where dotted lines begin and dragged from there, I should think this much more likely to have happened.

Re-Mem. Nil.

C.A.G. Lane.

5rd P.M. MOHAMED SARDAR ALI KHAN Sworn. Mohamedan.

{Assessors ask to recall 1st P.M. to question him.

Inspector Thomas: Sworn. I received message at 8/15 and I arrived at scene: the body was not there.

(C.A.G. Lane.)

I work for Maulidah and Rose as Manager. I remember 8th April. That afternoon I was at Nairobi. I passed along Limuru Road that day: I was coming back from Limuru about 6 p.m. On the road I saw nothing unusual. I was in car, box-body Ford, with native driver Gitau, car belonged to my employers: Gitau worked for them: Some boys employed by Maulidah and Rose were returning from their work at Nuthaiga. I passed the boys, they were on left hand side of road, at place beyond Khoja boarding House, on the Limuru side of a corner; walking on their left hand side: about 10 or 11 boys; they were on edge of road: walking in. Some were at a little distance, some walking side by side; they were close to edge of road. I didn't notice anybody else walking. Boys were walking from their work towards Nairobi. Our car came up behind them and passed them. I didn't stop to speak to them: I went on past them about 40 feet. I heard a noise from natives, a loud

voice calling, ho! ho! We stopped car and left it on left edge of road and got out and walked back to place where accident had happened. A native was under lorry and lorry was in right hand ditch. We walked back 40-50 feet. I didn't measure it and can't say exactly. I don't remember which side of bend we were when we stopped car. Gitan was driving. Native was underneath the lorry; perhaps in the middle. I don't remember: I saw him under the lorry.

Accused and another man was there: I don't know the other man who had been sitting in lorry with him; an Indian I had seen the lorry before the accident going towards Limuru; when I saw it it was on its own side and we on our side. We were going in opposite directions. We passed each other; we passed the lorry on the Limuru side of bend. I can't say how far from where lorry went into ditch. I passed the natives, then the lorry on its right side, then I heard the shouting. From where our car stopped I could see the lorry. I didn't notice speed lorry was going at when it passed us.

The injured native was one of Maulidad's boys: I recognised him after accident: name I can't remember. We reported to Parklands Police Station. Sub-Inspector Chanan Ram came with us to scene. We put injured man in our car and took him to native Hospital: he was breathing a little when we put him in car; when we took him out of car he was dead. I didn't see any other pedestrians. Accused, another Indian and 2 boys were in lorry. We had to turn out to our right to pass the boys. We hooted and passed them. We had to go out a little way to our right to do this. Not to go into middle of road. Nobody on other side of road. I only saw boys on left side. If there had been boys on other side I would have seen them.

Xld.

I have driven much in cars; for 5 or 6 years. I did not notice speed of lorry as it passed us. I can't say anything

about it; as I had no knowledge there was going to be accident. I didn't notice its speed. When we hooted boys were on left side of road: they were not in middle of road. Our car was stationary at a point just after we passed lorry. After we heard shouts of natives. Our car was not stationary when lorry passed it. All I know is that after hearing about we stopped and got out and went to scene. I as passenger was looking in front of me and did not see the accident which was behind us. I saw lorry come round bend; it came round on its right side; it passed us on its right side. We were on our proper side when we passed lorry; we had to go to left edge to pass it. I didn't think lorry was going to hit us.

A.G. Lane.

4th P.W. CHANAR RAM SAINI Sworn. Hindu.

Assistant Sub-Inspector Police, stationed at present at Railway Police Station. This year on 8/4/36 I was stationed at Parklands; that day about 5 o'clock I received report of accident from last witness. I went with him to place on Limuru Road. I found that a lorry was partly in ditch - several natives - and injured native was lying on grass beyond the ditch. I didn't notice position of lorry very carefully. I think the two front wheels and right rear wheels were in ditch and left rear wheel on road. Native lying on grass on far side of ditch. Smearred with mud and had many injuries; all over body. I saw marks of blood on nose and mouth. I didn't notice marks of blood on ground. I didn't look. I wanted to take him quickly to hospital. I went there to investigate accident but in view of native's serious condition I did not do so. Injured native was lying to right rear of lorry: on a line with back wheels of car. I should think he had been moved because he had mud on

his body: mud appeared to be due to his falling in the ditch: I didn't look to see where he had first fallen: he was lying face upwards. Accused, another Indian and several natives were there. I took injured man in last witness's car to hospital - he died on the way. Next day I identified body to Dr. Vint and was present at post mortem. We reached accident at 5/30.

Ad. There were 7 to 9 natives. Injured man had apparently been moved - not under my direction.

C.A.G. Lane.

Adjourn till 9 A.M. on 9th.

Accused remanded on same bail - released.

C.A.G. Lane.

Witness Mohamed Sardar Ali Khan is released and allowed to go Kisumu.

C.A.G. Lane. 8/10/36.

9/10/36

Accused

Court as before

Rhanna applies to call an expert witness to examine spot Rule of Court No.1 of 1933. Costs of witness to be paid by Crown.

ORDER If the evidence when called is relevant and helpful I will order costs of same to be paid by Govt.

C.A.G. Lane.

5th P.W. SANJA & O WATSEKHA. affirmed. page 8.

(PHILLIPS. Crown is not intending to call all the Prosecution witnesses who appeared at Preliminary Inquiry. Some do not help Crown case. Rex v Harneman & Richards English Authority. Law Journal July 27th 1935. The witnesses whom we are not calling are here and can be called by Defence. Similar decision recently in R.A. Court of Appeal - not granted. Archbold p.867 1932 Edition p.875 and 4. 29th Edn. p.494.)

I work for Maulidad: have worked for him for 5 years as headman. Remember one Polo who is dead. Remember when he died, killed by a motor car: was present when accident occurred, nearly 5 months ago, at 4 o'clock, near City Park, on road going to Limuru. He was on side of drain of road. Road has a bend there; accident was on left hand side of road: on Nairobi side of bend. Men were walking in single file - we had come from a Doctor's place where we had worked - 11 men, approaching the bend. Polo was one. Walking in single file at side of road: on the tar macadam at the edge of road. There is a ditch: we were between ditch and road: about a foot from drain. All of us were in that line about a foot from drain. None of us were further out on road. The men were each carrying something; we had jemies, karais and pickaxes: I saw no one else on the other side of the road: I am sure of that. That other side was empty. Polo was fifth in order: Four men were in front of him: I was right at back. A car passed us from Limuru. I did not realise what car it was but afterwards discovered it was "ours". It passed us slowly. We didn't notice whose car it was as it passed. Another car came from Nairobi with a Sikh, a big lorry. I first saw it: it was going very fast: the other car passed: the lorry approached at high speed and left the road and came towards our men. It passed the car, and came round behind it and to where the men were. The other men were all walking in front of me: in a line. Obuako was in front: "our" car passed him about 6 yards: the car was going on: the cars passed each other as "our" car was just approaching the bend; they passed each other just at the beginning of the bend: "our" car had passed the culvert when they met. After the accident we shouted out and "our" car stopped and the Indian Mohamed Sardar came, leaving "our" car where it stopped, and took number of lorry. There was also a driver Gitau in the car who

with Mohamed Sardar Ali works for Mauladad. Two
passed the culvert and the lorry had passed them,
turned to its right and came towards the men behind
Polo was on the other side of the culvert; there
about 6 men in front of him. Lorry left its side
went amongst the people: we called out and Mohamed
came and asked what had happened: we told him a man
killed and was under the lorry: i.e. Polo. Accused
driving lorry. Polo was right under lorry and was
end of ditch, which had water in it, he was right
ditch: under the front wheels. Two front wheels
ditch and one of back wheels ditched, i.e. off back
and other back wheel on road. He was between the
and front wheels which were in drain: underneath
seat. Mohamed Sardar went to call police. Indian
Inspector came and ordered us to take the man out
took him out and put him on grass. We had not touched
Polo or touched him before Sub-Inspector came.
Inspector came he was still under lorry: lorry had
not been moved. We didn't move him as we were waiting
for Police to come and see him.

Lorry was going very fast: we heard it coming
making a great noise. When he was struck Polo was
left side of road. I saw lorry turn to its right
people. Some fell on side and some the other (the
demonstrators with model cars and shows that after
passing Mauladad's car the lorry turned almost
to its right side and ran into the men). Polo was
and taken by lorry into ditch. "Our" car heated
did not heat. In lorry with accused there was a
Indian and two natives behind. No other cars on
on road: no other people. We all helped to take
from under lorry when Sub-Inspector came. We took
out and put him in car.

XXd. No pedestrians on the other side of road: We were walking in single file; if Mohamed Bardar says that some of us were walking abreast, he hooted because he saw men in single file and to warn them not to walk out on road. My story is that immediately after passing car lorry turned to right at full speed and crashed into men and into ditch. It did not hoot nor were its brakes applied. It went into drain and failed to move any further. The two men immediately in front and behind escaped by falling they jumped, one fell backwards and the other to his front. The people at back fell into drain at back and the people in front into drain in front. Lorry was going at high speed missed its road and crashed into men. Lorry did not hit the others because of distance behind the men which was 3 or 4 paces in each case. Its head (radiator) hit the man and he fell down.

Pole was near ditch between ditch and road: he was just pushed into drain. There are trees on bend on right side from Nairobi: Car coming from Nairobi can be seen as it reaches corner; it can't be seen at distance because of trees but as you approach trees you can see it. Lorry I didn't see till after it had passed our car.

Xd. Ct. I had not heard it before. After its passing our car and when it was near the men we heard its noise.

Con. Contd. When I first saw lorry it was about to pass our car and was about 12 to 14 yards from me. It then left its side and came towards the men. Coming round the bend it had not been on its proper side. The car and lorry did not pass each other on the Limuru side of bend. They passed each other on the Nairobi side of the bend. It's correct that lorry rounded the bend on its right side: after that it went to the wrong side and went towards the men and left the road: there was not a stationary car on right side of road. Not correct that

4 or 5 men crossed from right side of road going towards Nairobi to left side: or that 4 men succeeded in crossing that fifth hesitated and did not get across, or that to avoid that fifth man put on his brakes and swerved; or that the man was struck near middle of road and dragged by lorry 5 to 6 paces. He was hit near the drain, only a foot away.

XXXX.

We were going to Nairobi, after work, going home; we had gone along that road every day, with the gang; we always walked on left side of road, at edge, in single file: we were carrying karais, jembsie and pickaxes: Polo was carrying a karai on his head and jembsie and pickaxe on shoulder: each had karai; some were carrying them on head and others in hand. We always walk on left of road: I was in charge of gang. I tell them to walk in single file, because bad to walk on the road used by cars. Accident happened quickly. I didn't realise that there was going to be an accident before it happened, no warning. We all fell back and scattered and called out when the man was knocked down. I made no mistake ^{about} ~~them~~ saying that Polo was on left of road. If a witness came and said Polo was on right side of road and crossed to left in front of lorry that would be wrong. My story is quite true I am sure.

Xd.Assessor No.1 (Dave) The doctor's house is at Mathaiga. Polo was in the single file in the middle of the file, at the time. When Mohamed Sardar passed in the car, we did not recognise him: he did not make any signs. He had not come to where we had walked. He came from other work at Limuru Polo was one of the workmen, not a particular friend of mine; he used not to take any intoxicant. Mohamed Sardar's car passed us slowly. Boys were not walking on both sides of road. All were on left side.

Xd.Ct.

None of the boys recognized Mauladad's car: no one called out and asked for a lift.

6th P.W. GITAU WA IGERIA affirmed, pagan.

Work as motor driver for Hunter & Co. formerly for Mauladad & Rose. I remember when a labourer employed by Mauladad was killed. I don't know his name. It was over 3 months ago. I was present at accident. Don't remember date. It was at 4 o'clock; at Parklands on Limuru Road beyond City Park. There is a small bend but it is straight at place where man was killed. I was driving car of employer coming from Limuru, Mohamed Sardar, Indian clerk was with me; nobody else: I passed some labourers of Mauladad on road: I recognised them afterwards: about 10 men: walking home behind each other towards Nairobi, in single file, at left edge of road, carrying karais, jemles and tools. I came up behind them and passed them. I saw no other people on road except these men and their headman. I passed them at about 20 miles per hour. I hooted and they moved towards the bush. They had been on left side of road before. I could see another lorry coming towards me from Nairobi; I hooted as I approached bend and could see it coming fast, so that we should not meet at corner. I hooted as signal to men on road so that they should move off in case I had to go right to edge of road. I expected to meet at corner. I was about 50 feet from corner where the man was hit and killed. I passed them quite at edge of road; I didn't go to centre as I was afraid of the lorry; before I reached corner lorry passed me: I saw it go behind me and it went towards the people. I had already passed all the men when I passed the lorry. I saw culvert after lorry passed me: I hadn't reached it: I saw the white stones of the culvert. When I passed lorry I had seen it veering over my side so I kept more to left. I think it was going at 40 miles per hour. I had impression it was going fast. I should say too

fast and I think driver could not control it; that's why he left his side and went to right. When lorry passed me it was near my side of road: he could not control it to keep it on his proper side. He would have hit me if I had not moved further over to my side. My car was quite close to grass at side of road but not touching the grass. Very little room between my car and lorry. I was going very slowly; he passed me quite close. Going round corner lorry driver was on wrong side; if I had been going fast we should have collided; when he finished going round corner he was on my side. I went a little further on and heard people calling out, the boys. I stopped my car and pulled up near the corner, before reaching it; I had turned a little bit but not gone round corner. I got out; leaving car standing where I had stopped. Mohamed Sardar got out. I found lorry had gone into ditch and a person was under it. Both front wheels in drain and one rear wheel also; other rear wheel was on grass at side of road. Injured man was under front axle right in the water in the ditch. I told Mohamed Sardar we must go and report accident to Police. I went to the Police Station and reported to Sub-Inspector of Police. He came with us with box of medicine back to scene. The injured man was as we had left him. Lorry had not been moved. I called the labourers and asked them to take him from under the lorry; he was put in car and I took him to Native Civil Hospital. The man died while we were going getting the European in charge of Hospital. At scene of accident at the time of accident I did not see any other people. They were on left edge of road as I passed; I didn't see anyone else on the other side. I am sure of that. I saw no other vehicle on road. From where I left car to where I saw lorry in ditch, was about 50 feet. I heard the shouting throughout after I passed

fast and I think driver could not control it; that's why he left his side and went to right. When lorry passed me it was near my side of road: he could not control it to keep it on his proper side. He would have hit me if I had not moved further over to my side. My car was quite close to grass at side of road but not touching the grass. Very little room between my car and lorry. I was going very slowly: he passed me quite close. Going round corner lorry driver was on wrong side; if I had been going fast we should have collided; when he finished going round corner he was on my side. I went a little further on and heard people calling out, the boys. I stopped my car and pulled up near the corner, before reaching it; I had turned a little bit but not gone round corner. I got out; leaving car standing where I had stopped. Mohamed Sardar got out. I found lorry had gone into ditch and a parson was under it. Both front wheels in drain and one rear wheel also; other rear wheel was on grass at side of road. Injured man was under front axle: right in the water in the ditch. I told Mohamed Sardar we must go and report accident to Police. I went to the Police Station and reported to Sub-Inspector of Police. He came with me with box of medicine back to scene. The injured man was as we had left him. Lorry had not been moved. I called the labourers and asked them to take him from under the lorry: he was put in car and I took him to Native Civil Hospital. The man died while we were going getting the European in charge of Hospital. At scene of accident at the time of accident I did not see any other people. They were on left edge of road as I passed: I didn't see anyone else on the other side. I am sure of that. I saw no other vehicle on road. From where I left car to where I saw lorry in ditch, was about 50 feet. I heard the shouting the moment after I passed lorry: I travelled only about 10 yards when I heard the

noise and stopped. I only saw lorry driver, the accused, after the accident.

XXd.

I don't remember saying in lower Court that I was travelling at 15 miles per hour. I was going slowly because I saw lorry coming from Nairobi. I had been going faster when coming up hill from Limuru.

I first saw lorry after passing the men; a short distance: I decreased my speed. I had passed the men when I saw lorry coming very fast: I was just passing the men. Lorry was then on Nairobi side of bend when I saw it. It had come round the corner a little way and had come over to my side, when I passed it. As he finished the corner he came to my side, then he swerved to left and passed me; he had not control and he swerved back to right after passing me and ran into men. He swerved to right as soon as he passed me. I had slowed down because I thought he would hit me in front: if I had not slowed down we should have collided. I stopped before I reached the corner: I did not go round corner before stopping. Accused departed from his proper side at the bend because of his speed: his offside wheels were over the white line; I had not got as far as the white line; we passed each other before I reached the bend: when he swerved to right the lorry had completely passed my car.

I drove Mohamed Sardar to Police Station. We did not move the deceased from under lorry before I went. When I came back with Sub-Inspector of Police he was still under lorry, when I got out I noticed wheel tracks of lorry, caused by braking on the tar-macadam: one wheel mark: the marks didn't go as far as the ditch. I only saw marks of one wheel, the right wheel. I didn't see marks of the other wheel. I did not look carefully. If there had been marks made by other wheels I would have seen them. I only saw marks of wheels on one side. If

noise and stopped. I only saw lorry driver, the accused, after the accident.

XId.

I don't remember saying in lower court that I was travelling at 15 miles per hour. I was going slowly because I saw lorry coming from Nairobi. I had been going faster when coming up hill from Limuru. I first saw lorry after passing the men; a short distance. I decreased my speed. I had passed the men when I saw lorry coming very fast: I was just passing the men. Lorry was then on Nairobi side of bend when I saw it. It had come round the corner a little way and had come over to my side, when I passed it. As he finished the corner he came to my side, then he swerved to left and passed me; he had not control and he swerved back to right after passing me and ran into men. He swerved to right as soon as he passed me. I had slowed down because I thought he would hit me in front: if I had not slowed down we should have collided. I stopped before I reached the corner: I did not go round corner before stopping. Accused departed from his proper side at the bend because of his speed: his offside wheels were over the white line; I had not got as far as the white line; we passed each other before I reached the bend: when he swerved to right the lorry had completely passed my car.

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it were said there were pedestrians on other side of road I couldn't say because I was looking in front as I was driving.

XXXd. I didn't stop till after accident. Didn't know accused in this case. I don't know him apart from this case. I didn't know deceased except that I had seen him at work as a labourer. I don't know their tribe. Mauladad has many labourers of different tribes. Not my tribe. I don't know his name.

Xd. Assessor Dave. The day was sunny. I had gone above 90 miles per hour on road. I sometimes go 50 miles per hour when travelling. When we passed the natives Mohamed Bardar and I were not talking. We did not say to each other that they were our gang that we were passing.

Xd.Ct. I had a mirror on car and I looked into it and saw the lorry go to right just close to rear of my car. I only knew he could not control of lorry. I had seen this as he came towards me. I think he simply swerved to right because he lost control of lorry.

C.A.O. Lane.

7th P.C. OLADO S/O SAKAYA affirmed, pagan.

Working for Mauladad, was working for him in April; remember day when Pale died: he was killed by lorry: was present at accident: we were coming from Muthaiga, 10 labourers and nyapara - 11, (Senya) at 4 o'clock. We were all walking along towards Nairobi on left side of road: all at side: none in middle of road: all in single file; I was carrying nothing: none of men carrying anything: didn't see anyone else on road. We saw a car coming from Limuru direction, it passed us and went on: a Sikh came from Nairobi towards Limuru, in a lorry, going very fast: Accused, it was: driving lorry. The car passed us and went on: The Sikh's lorry immediately came along going very fast: it hit a man and knocked him in driving: Pale: head of lorry hit him: Pale was walking

it were said there were pedestrians on other side of road I couldn't say because I was looking in front as I was driving.

XXXd. I didn't stop till after accident. Didn't know accused in this case. I don't know him apart from this case. I didn't know deceased except that I had seen him at work as a labourer. I don't know their tribe. Mauladad has many labourers of different tribes. Not my tribe. I don't know his name.

Xd. Assessor Dave. The day was sunny. I had gone above 30 miles per hour on road. I sometimes go 50 miles per hour when travelling. When we passed the natives Mohamed Sardar and I were not talking. We did not say to each other that they were our gang that we were passing.

Xd.Ct. I had a mirror on car and I looked into it and saw the lorry go to right just close to rear of my car. I only knew he could not control of lorry. I had seen this as he came towards me. I think he simply swerved to right because he lost control of lorry.

C.A.G. Lane.

7th P.C. OLADO S/O SAKAYA affirmed, pagan.

Working for Mauladad; was working for him in April; remember day when Pele died: he was killed by lorry; was present at accident: we were coming from Muthaiga, 10 labourers and nyapara - 11, (Sanya) at 4 o'clock. We were all walking along towards Nairobi on left side of road: all at side: none in middle of road: all in single file; I was carrying nothing: none of men carrying anything: didn't see anyone else on road. We saw a car coming from Limuru direction, it passed us and went on: a Sikh came from Nairobi towards Limuru, in a lorry, going very fast: Accused, it was: driving lorry. The car passed us and went on: The Sikh's lorry immediately came along going very fast: it hit a man and knocked him

in the file of men when hit, close to edge of ditch. Polo in centre of file. I was in centre: Polo was behind me. Lorry was going very fast, knocked him in drain; some of us others fell at back and others in front, it nearly hit me: I jumped and I fell down. Lorry went right into drain - offside front wheels in drain and nearside wheel was on the edge. Radiator hit Polo. Polo was under the front axle (witness shows with model). Our master went and fetched Police. Police arrived and we were told to take him from under car: he was put in car to take him to hospital and died on way. Car which passed us from Limuru went on but when we shouted the car ~~was~~ stopped and our master came and took the ~~car~~ lorry's number. The car did not stop before the accident. I am sure that Polo was on his left side of road when struck. I was walking with him. If it is said that he was on the other side of road and tried to run across road it would not be true.

Xkd. When lorry crashed into us some of us fell in front and some at back. I fell on Nairobi side. In lower Court as to my saying that when we saw lorry swerve towards us, some ran forwards and some backwards, we all jumped and fell, some backwards and some forwards; (he explains that he means they jumped to either side and that lorry hit Polo directly with radiator). Driver did not put on brakes. Perhaps he had had tembo. Polo was hit by middle of radiator, and was 1 foot from edge of drain, before any of the wheels of lorry entered drain. Front wheel went over him and dragged him into drain; he was 2 or 3 yards, then pushed into drain.

I first saw lorry when it came at us. When Police came we took him from under lorry: not sooner because we waited for Police to see him. None of us tried to cross in front of lorry. It came straight at us.

Assessor Basant Singh. That day I was working with tools, we left our tools at the European's place.

Ct. I thought he had had tembo because he came along making a great noise.

Adjourn till 2/15.

A.G. Lane.

resumed. Court as above.

in the file of men when hit, close to edge of ditch. Polo in centre of file. I was in centre; Polo was behind me. Lorry was going very fast, knocked him in drain; some of us others fell at back and others in front, it nearly hit me: I jumped and I fell down. Lorry went right into drain - offside front wheels in drain and nearside wheel was on the edge. Radiator hit Polo. Polo was under the front axle (witness shows with model). Our master went and fetched Police. Police arrived and we were told to take him from under car: he was put in car to take him to hospital and died on way. Car which passed us from Limuru went on but when we shouted the car ~~stopped~~ ^{stopped} and our master came and took the ~~car's~~ ^{lorry's} number. The car did not stop before the accident. I am sure that Polo was on his left side of road when struck. I was walking with him. If it is said that he was on the other side of road and tried to run across road it would not be true.

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Assessor Basant Singh. That day I was working with tools, we left our tools at the European's place.

Ct. I thought he had had tembo because he came along making a great noise.

S.A.G. Lane.

Adjourn till 2/15.

ONGANIA s/o IGIRIA, affirmed, pagan:

Employed at Mathaiga for a doctor. I am working for Maula Dad for 20 days. I knew ole, deceased. Killed in accident. I was then working for Maula Dad. That was 4 months ago. That day I had been working with a gang of men employed by Maula Dad at Mathaiga and began to return with them to Nairobi, 11 of us; Polo was one. We were carrying karais, jombies and pickaxes; walked together in a line; we were walking in single file on edge of road by side of ditch leaving the road for the cars to pass; on edge of ditch we were walking; all the 11 men were on that side of the road. Polo was killed by a lorry; I saw it; place was in Parklands on Limuru Road. No one else was on road at that time; I can say that; no vehicles on the road at the time; Our motor car came from Limuru direction, passed us slowly and went on; it didn't stop; our driver and an Indian were in it. We did not recognise him as they passed; then the Sikh came fast from Nairobi direction, left his side and crossed road and hit the man; We shouted out; our Indian came and took his number; Polo was hit while he was in line with us. He did not run across the road; or cross it; the lorry came across the road and hit him; I don't know why it did so. It was going very fast. I did not see it pass "our" car. Lorry came at us not long after our car had passed. Our car had gone and we could not see it. We shouted and our clerk came back. Lorry struck Polo and went into the ditch with him and stayed there. Polo lay there under motor car. An iron part of the car was holding his upper left arm; the front axle (witness demonstrates with model car). Polo was lying in ditch in water. I was in the middle, towards the back, of the line of men; Polo was in the middle; just in front of me; I saw him struck; I am quite sure he was

ONGANIA s/o IBILIA, affirmed, pagan:

Employed at Mathaiga for a doctor. I am working for Maula Dad for 20 days. I knew ole, deceased. Killed in accident. I was then working for Maula Dad. That was 4 months ago. That day I had been working with a gang of men employed by Maula Dad at Mathaiga and began to return with them to Nairobi, 11 of us; Polo was one. We were carrying karais, jembsies and pickaxes; walked together in a line: we were walking in single file on edge of road by side of ditch leaving the road for the cars to pass; on edge of ditch we were walking; all the 11 men were on that side of the road. Polo was killed by a lorry: I saw it; place was in Parklands on Limuru Road. No one else was on road at that time; I can say that; no vehicles on the road at the time: Our motor car came from Limuru direction, passed us slowly and went on; it didn't stop; our driver and an Indian were in it. We did not recognise him as they passed; then the Sikh came fast from Nairobi direction, left his side and crossed road and hit the man: We shouted out; our Indian came and took his number; Polo was hit while he was in line with us. He did not run across the road; or cross it; the lorry came across the road and hit him: I don't know why it did so. It was going very fast. I did not see it pass "our" car. Lorry came at us not long after our car had passed. Our car had gone and we could not see it. We shouted and our clerk came back. Lorry struck Polo and went into the ditch with him and stayed there. Polo lay there under motor car. An iron part of the car was holding his upper left arm; the front axle (witness demonstrates with model car). Polo was lying in ditch in water. I was in the middle, towards the back, of the line of men: Polo was in the middle; just in front of me: I saw him struck; I am quite sure he was

on left side of road.

I was just behind Polo; when lorry came into us, I fell in the grass. Some fell in the grass and others in the drain. I fell near the drain, on the Limuru side. I saw lorry at 4 o'clock; I first saw it when it was right on us; coming very fast. We were walking between the road and drain, close to drain. Deceased was struck on edge of drain and was dragged and fell into drain with it. He was dragged about 8 or 9 paces (witness demonstrates). Accused left his side and went to middle of road, knocked down Polo and twisted into ditch. (Witness demonstrates with model). Polo was not in middle of road, he was not crossing road; Accused did not swerve to right to try to avoid him.

While Polo was being dragged along I was in the grass; I got up; I had fallen down. When I heard the noise of lorry, I fell down, in the grass. I missed my footing in the ditch (witness demonstrates). I could see what was happening; he was dragged under lorry. Polo was on edge of ditch when struck; he was far from ditch, about 4 paces away (witness demonstrates). He was on edge of road on left edge facing Nairobi when struck. Polo was under the lorry in the ditch after being struck; in the water. He was dragged from the place where struck to the ditch.

Mahomed Jarvar took down lorry number. He did not say anything; to us, except to say he was going to Police and we were to remain there. We had not heard lorry ho t.

C. E. G. LANE.

Phillips: 3 other witnesses who were called have not been served; they have not been traced - Obanku, Bari, Nyekenye; Others available for Defence.

Accused's statement in lower Court is read and put in.

Crown Case.

Khanna: Depositions of the 3 men who are not served should be read, section 287 C.P.C. I want them read to

on left side of road.

I was just behind Polo; when lorry came into us, I fell in the grass. Some fell in the grass and others in the drain. I fell near the drain, on the Limuru side. I saw lorry at 4 o'clock; I first saw it when it was right on us; coming very fast. We were walking between the road and drain, close to drain. Deceased was struck on edge of drain and was dragged and fell into drain with it. He was dragged about 8 or 9 paces (witness demonstrates). Accused left his side and went to middle of road, knocked down Polo and twisted into ditch. (witness demonstrates with model). Polo was not in middle of road, he was not crossing road; Accused did not swerve to right to try to avoid him.

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Accused's statement in lower Court is read and put in.

Crown Case.

Khanna: Depositions of the 3 men who are not served should be read, section 287 C.P.C. I want them read to

illustrate discrepancies in prosecution case.

Phillips: No evidence that witnesses have been kept out of way.

Court: The conditions are alternative "or" - To be read.

C. A. G. LANE.

Phillips reads deposition of Obuski a/o Ongaris.

Bari a/o Buroro.

Nyekenye a/o Maitosh.

C. A. G. LANE.

Khanra Calls.

AFLATOON SINGH, sworn, Sikh:

I do transport work. I know accused. I remember 8/4/56 at about 4 p.m. I was at Nairobi; with accused. I left Nairobi at 4 p.m. in a lorry along Limuru Road. Accused driving; I was sitting in front seat with him. 2 natives in lorry; they were sitting in back. I know entrance City Park on right of Limuru Road; gate on left is Aga Khan Club; beyond Club is a bend in road; before getting to bend I saw some natives, some on right and some on left of road on far side of bend. I saw them at distance of 200-400 ft. Difficult to see from lorry. I noticed them before we began to take the bend. We took bend at 15 m.p.h.; lorry began to take bend on left side, natives were on edge of road. Some were carrying karais, others jembees and pickaxes and shovels. Maula Dad's car was standing there: a box body. A little beyond bend, on Limuru side; bonnet of car facing Nairobi. In the car was a driver and Maula Dad's clerk. Before approaching we gave a signal. Completed bend on left side and passed the stationary car. As we did so 4 or 5 natives were standing on our left side of the road; as we approached 4 ran across road to put their things in the box body car; 4 got across; the 5th was left in middle of road and driver to avoid him swerved to right; he was caught by mudguard, left hand one, while lorry was still on its left

illustrate discrepancies in prosecution case.

Phillips: No evidence that witnesses have been kept out of way.

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C. A. G. L.A.S.

Phillips reads deposition of Obuski a/o Ongaria.

Bari a/o Burons

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C. A. G. L.A.S.

Khanra Calls.

AFLATOON SINGH, swears, Sikh:

I do transport work. I know accused. I remember 8/4/56 at about 4 p.m. I was at Nairobi; with accused. I left Nairobi at 4 p.m. in a lorry along Limuru Road. Accused driving; I was sitting in front seat with him. 2 natives in lorry; they were sitting in back. I know entrance City Park on right of Limuru Road; gate on left is Khan Club; beyond Club is a bend in road; before getting to bend I saw some natives, some on right and some on left of road on far side of bend. I saw them at distance of 200-400 ft. Difficult to see from lorry. I noticed them before we began to take the bend. We took bend at 15 m.p.h.; lorry began to take bend on left side, natives were on edge of road. Some were carrying karais, others jembees and pickaxes and shovels. Maula Dad's car was standing there: a box body. A little beyond bend, on Limuru side; bonnet of car facing Nairobi. In the car was a driver and Maula Dad's clerk. Before approaching we gave a signal. Completed bend on left side and passed the stationary car. As we did so 4 or 5 natives were standing on our left side of the road. As we approached 4 ran across road to put their things in the box body car; 4 got across; the 5th was left in middle of road and driver to avoid him swerved to right; he was caught by guard, left hand one, while lorry was still on its left

hand; driver tried to avoid him by swerving to right. It came to rest in ditch because as he swerved he came to ditch. Lorry travelled 6 paces before it came to rest in ditch. Marks of brakes being applied remained there for three months; there were marks on road. Wheels on both sides made skid marks. Marks were longer on one side than the other, because when he swerved one wheel travelled further than the other. Mark was longer on left side, my left side looking to Limuru. Boy was hit while 6 paces from left hand edge. Driver applied brakes when he found he had caught native in mudguard; he applied brakes then and swerved. We got out when lorry stopped. If lorry had been going very fast I should have fallen out when it was taking the curve. Injured man was under lorry; near the Crown wheel and rear axle. We tried to get the native out; other boys would not help us. Lorry was very heavy, we couldn't lift it. When Sub-Inspector of Police arrived he ordered boys to lift it and to get the deceased out. Boy was taken to hospital. I think that the boys were putting their things in the stationary car after finishing their work.

I was on left hand side of driver. I was looking in front; as one always does; not looking specially. I could see what was in front; particularly on left side. I saw what was on left side. I wasn't looking for anything particularly. Something may have happened without my noticing. I saw 4 or 5 on our left side of road. I can't exactly say how many. I say there were not more than 5 at that place; the 5 ran across road; nobody was left on left side. We had already passed the stationary car. I saw it as we passed; a driver and Maula Dad's clerk. I think the clerk was in front. I am sure both were in car when we passed it. If anyone says they were not in the car as we passed it, I think they were sitting in the car. I can't say definitely. It is so long ago. I can't remember.

hand; driver tried to avoid him by swerving to right. It came to rest in ditch because as he swerved he came to ditch. Lorry travelled 6 paces before it came to rest in ditch. Marks of brakes being applied remained there for three months; there were marks on road. Tires on both sides made skid marks. Marks were longer on one side than the other, because when he swerved one wheel travelled further than the other. Mark was longer on left side, my left side looking to Laura. Boy was hit while 5 paces from left hand edge. Driver applied brakes when he found he had caught native in mudguard; he applied brakes then and swerved, he got out when lorry stopped. If lorry had been going very fast I should have fallen out when it was taking the curve. Injured man was under lorry; near the Crown wheel and rear axle. We tried to get the native out; other boys would not help us. Lorry was very heavy, we couldn't lift it. When Sub-Inspector of Police arrived he ordered boys to lift it and to get the deceased out. Boy was taken to hospital. I think that the boys were putting their things in the stationary car after finishing their work.

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remember. I don't remember telling Magistrate in court below that no one was in car. Accused did not begin to swerve until he had seen that native had been hit by mudguard. I actually saw him struck; I noticed driver begin to swerve. The left hand front mudguard caught him; he would have escaped but his foot was caught in iron spokes of wheel. He then fell down in front of lorry. Up to time accused had begun to swerve he had been driving on left side of road; he was about 5ft. from edge of tar-macadam. When deceased struck by mudguard he was not standing by edge of road - he was trying to cross road; he was about 3 or 4 feet from edge. This would be the track which accused had been following near edge; he applied his brakes hard when he found native had been caught and swerved; he applied hand brake.

ADJOURNED till 9.30 a.m. tomorrow. Accused released on same bail.

C. A. G. LAL

8/10/56.

9.10.56. Accused.

Court as before.

APLATOON SINGH, on same oath:

cont. Driver of lorry began to apply brakes as soon as deceased was struck by lorry - both brakes - very hard; marks remained on outer (?) for 3 months; very hard indeed; I don't know anything about cars and lorries. Brakes appeared to be in good order; I saw skid marks after accident; I notice them carefully; skid marks began where as soon as he applied the brakes; one mark longer than the other; end of longer one was where he began to apply brakes; accused continued to apply brakes until lorry went into ditch. He applied brakes as soon as he started to turn; also the hand brake all this time. I am sure of this. He had

remember. I don't remember telling Magistrate in Court below that no one was in car. Accused did not begin to swerve until he had seen that native had been hit by mudguard. I actually saw him struck; I noticed driver begin to swerve. The left hand front mudguard caught him; he would have escaped but his foot was caught in iron spokes of wheel. He then fell down in front of lorry. At the time accused had begun to swerve he had been driving on left side of road; he was about 5ft. from edge of tar-macadam. When deceased struck by mudguard he was not standing by edge of road - he was trying to cross road; he was about 3 or 4 feet from edge. This would be the track which accused had been following near edge; he applied his brakes hard when he found native had been caught and swerved; he applied hand brake.

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only one hand on steering wheel. Boy was struck by left of lorry, between radiator and mudguard there is an iron ~~rod~~ ~~rod~~ rod which hit him. Up to that moment accused had not started to turn; he had not left the course he had followed round corner; his left wheel about 4ft. from edge of road; I hadn't a footrule to measure it. There was more room on the other side. I think I told the Magistrate that left wheel was about 4ft. from edge. I can't remember now if I said 8ft. It is 3 months since case started; it is six months since the accident. I can remember exactly about the accident but not the measurements. Lorry was at about 4ft. from left edge of road. Native came in about 2ft. further in towards centre and so was about 8ft. from left edge of road. Lorry had been keeping up to then a uniform distance from edge of road. I saw stationary car as we approached and some natives near it. Natives were on both sides; some in middle of road. Boys on right hand side had already put their tools in the car and those on left were putting theirs in it; they were standing near back of car, close to ditch; very near it; it's right hand wheels were in middle of road. This gave us plenty of room to pass. The 4ft. that I am talking about was after we had passed the car. I only noticed distance from left hand edge at point where native struck. When native was caught, to save him, accused began to turn to right. He didn't begin to turn to right before this point. I saw him turn when native was struck. I am sure he didn't start to do so before then. If someone said that accused swung out to right a considerable distance going round corner, I would say he was on left hand side; I say it was 4ft. from left edge. I can't say what distance was at corner. Deceased found lying under back axle when lorry stopped. He was taken from under the lorry, I can't say exactly from what place. If he had been under front axle he could easily have been taken out. If a witness says he was lying under front axle, he can say whatever he likes. He was under the chassis about under the driver's seat. That is where

only one hand on steering wheel. Boy was struck by left of lorry, between radiator and mudguard there is an iron ~~rod~~ ~~rod~~ rod which hit him. Up to that moment accused had not started to turn; he had not left the course he had followed round corner; his left wheel about 4ft. from edge of road; I hadn't a footrule to measure it. There was more room on the other side. I think I told the Magistrate that left wheel was about 4ft. from edge. I can't remember now if I said 6ft. It is 3 months since case started; it is six months since the accident. I can remember exactly about the accident but not the measurements. Lorry was at about 4ft. from left edge of road. Native came in about 2ft. further in towards centre and so was about 6ft. from left edge of road. Lorry had been keeping up to then a uniform distance from edge of road. I saw stationary car as we approached and some natives near it. Natives were on both sides; some in middle of road. Boys on right hand side had already put their tools in the car and those on left were putting theirs in it; they were standing near back of car, close to ditch; very near it; it's right hand wheels were in middle of road. This gave us plenty of room to pass. The 4ft. that I am talking about was after we had passed the car. I only noticed distance from left hand edge at point where native struck. When native was caught, to save him, accused began to turn to right. He didn't begin to turn to right before this point. I saw him turn when native was struck. I am sure he didn't start to do so before then. If someone said that accused swung out to right a considerable distance going round corner, I would say he was on left hand side; I say it was 4ft. from left edge. I can't say what distance was at corner. Deceased found lying under back axle when lorry stopped. He was taken from under the lorry, I can't say exactly from what place. If he had been under front axle he could easily have been taken out. If a witness says he was lying under front axle, he can say whatever he likes. He was under the chassis about under the driver's seat. That is where

I said he was yesterday. (Witness points to place on model car).

When we were passing the other car I recognised Maula Dad's clerk. I knew him before. We did not make any sign to each other in greeting. Very soon after we had passed the car accident happened; can't say how far in feet. 5 boys ran across from our left, straight across the road. I did not know accused before; he was merely giving me a lift. Maula Dad's clerk came up; accused told him not to move the car till police arrived. I did not speak to the clerk. When boys were running across road, accused did not say anything to me about the possibility of an accident.

Accused was not drunk.

G. A. G. LANE.

JAMES SCOTT, sworn, Christian;

Civil Engineer in practise in Nairobi. Formerly road engineer in Municipality. B.Sc. in Engineering. I have driven both cars and lorries and laid out roads; I laid out this road where accident was. Have driven cars and lorries since 1919. Previously given evidence as expert in judicial inquiries; I know the piece of road in question; it is rather defective; deceptive; 2 kinks on the bend; about 45 degrees; but bends are (?) at 2 points - one at junction of 6th Avenue Parklands and another at the culvert. There are (?) on left of corner coming from Nairobi; you can see through the trees but as you approach closer there is an obstruction in form of a hedge. For person coming in other direction it is the same; he can see in between the trees. I examined water-ways on both sides; about 5 paces or 9 feet in breadth. About 5ft. deep; about 1ft. and 1ft.6ins. Looking towards Limuru it becomes very shallow from scene of accident. International truck with new tyres has 12ins. clearance at front axle. Truck width is 5ft. - centre to centre of tyres. If centre

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G. A. G. LANE.

JAMES SCOTT, sworn, Christian;

Civil Engineer in practise in Nairobi. Formerly road engineer in Municipality. B.Sc. in Engineering. I have driven both cars and lorries and laid out roads; I laid out this road where accident was. Have driven cars and lorries since 1919. Previously given evidence as expert in judicial inquiries; I know the piece of road in question; it is rather defective; deceptive; 2 kinks on the bend; about 45 degrees; but bends are (?) at 2 points - one at junction of 6th Avenue Parklands and another at the culvert. There are (?) on left of corner coming from Nairobi; you can see through the trees but as you approach closer there is an obstruction in form of a hedge. For person coming in other direction it is the same; he can see in between the trees. I examined water-ways on both sides; about 5 paces or 9 feet in breadth. About 5ft. deep; about 1ft. and 1ft. 6ins. Looking towards Limuru it becomes very shallow from scene of accident. International truck with new tyres has 12ins. clearance at front axle. Truck width is 5ft. - centre to centre of tyres. If centre

of radiator were to hit an object 1ft. from edge of ditch, (front bumper is 21ins. from centre of front wheels), right hand front wheel would be just on edge of ditch. If lorry was going at terrific speed at edge of ditch it would knock him over first and then go over him. He would be knocked over into ditch first. Apart from bump, if hit with middle of car..... If lorry were going slowly it would knock person over and go over him. If it were suggested that person were hit within a foot of ditch and yet dragged 12 paces before he found himself in ditch, that is quite impossible. He would have been right over his vest beyond. If suggested that lorry came round bend on its right side, you could get round on proper side at 50 m.p.h. If going at 40 he could only do it by widening radius of curvature i.e. by going ^{wrong} on side before bend, and again after it. If there were a stationary car standing at spot near woods "41 paces" facing towards Nair-shi, and if lorry had come round corner at excessive speed not on proper side if going at over 50 m.p.h. I don't think it could have got past the car safely. It might have managed it at 50 m.p.h. but not over. If car had once got round the bend, nothing to make it swerve off to right again. Skid marks at a corner an evidence of speed at which car is travelling, possibly you can see if they are longitudinal or transverse. If transverse difference in intensity of mark of inside and outside is a (?) to some extent of speed of car, i.e. the faster car is going, the more pronounced is the outer skid mark, because weight of car is thrown on outside wheel possibly both are travelling on equally ^{over} kind of surface. Centrifugal force. Difference between marks of inside and outside wheels is evidence of speed. Road is about 18ft. wide. The used part is not 18ft. wide. This road has a fairly high camber and people tend to drive in middle of road unless there is heavy traffic. The figures

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in the plan 41 paces straight and 12 and 16 paces on dotted lines, to the same point from the same point, must be a mistake. If I were asked to look at the dotted lines on plan and to give an opinion on the speed at which accused was driving I could not do so without a photograph of skid marks. A footpath crosses road exactly at point where lorry is shown in plan. If I were told that person were hit within 1ft. of ditch and knocked into ditch, I would expect person would be lying in ditch and would show marks of where he was hit. If told that person struck was dragged some 12 to 9 paces, and finished in ditch, he would have been hit on the right hand side of road. Plan is very unsatisfactory to work from. If the person were hit 12 paces where lorry ended in ditch, taking it from sketch, left hand wheel of lorry would be very nearly in centre of road. If he were struck by left mudguard, he would be 14ft. from right hand ditch looking towards Limuru and 4ft. from left hand ditch looking towards Limuru. Supposing he were struck by middle of radiator he would be 7ft. out from left hand ditch.

d. Transverse skid marks caused by vehicle going round corner at considerable speed and centrifugal force brought into play. These skid marks have slight right hand curve. These skid marks are more likely to have been transverse unless car going at excessive speed. More likely to be longitudinal skid marks, due to braking only. You can tell the 2; longitudinal marks are result of wheels being locked, or partially, as result of braking. If the marks were visible for 5 months it would depend largely on heat of sun that day on tar surface; but I would say that longitudinal ones would make a deeper mark. I am inclined to think these were longitudinal. If there were evidence that brakes had been applied firmly at point shown by dotted line that would confirm my opinion that they were longitudinal skid marks. Plan inaccurate not merely in scale. Assuming brakes were applied for 48ft. (18

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paces as stated in plan) and that figures in T.O. are correct i.e. that vehicle with ~~adequate~~ brakes at 15 m.p.h. should pull up in 25 ft., then this lorry which pulled up in 48ft., it was travelling at 21m.p.h. and assuming there were no other retarding factions. Fact of lorry going into ditch would not be a retarding effect. If a man were knocked down at beginning of the skid marks and dragged distance of skid marks this would not have much retarding effect, it would depend whether any part of the man or his clothing caught in any part of the car, whether he was likely to be dragged. Assuming deceased was near edge of road (right side looking towards Limuru) and that driver had applied his brakes as shown on plan, he would have lost most of his speed before he struck the man; the deceased would have been found lying in ditch; he would have fallen in ditch even though lorry travelling very slow, and his legs probably left in road. If he were within 2ft. of edge he would have been thrown direct in ditch; he would have been thrown in direction in which car was going, tilted in direction of Nairobi. Supposing he was struck while walking along in that direction. If there were a lot of injuries it is more likely the man had been dragged or rolled. If pinned over when lorry going slowly his body would be in ditch. Only about 1ft. from edge of drain to edge of road. Safe speed for lorry to go round that corner would be not in excess of 25 m.p.h., and if there were another car stationary just on Limuru side of bend and if there were a group of people near car, and a group on the other side, driver should have gone slower. He ought to have slowed to about 15 m.p.h. if he saw them. Suppose lorry coming from Nairobi approached turn at somewhat excessive speed, say 30 or more, and saw car approaching in crown of road, his natural reaction

would be to put on brakes and turn towards left. This would be difficult but not impossible by pulling steering wheel hard over. He would be able to straighten up easily and keep on his left side. Not likely that if he had come round corner rather too fast and swerved to left to avoid car suddenly, centrifugal force would cause him to swerve again to right. Almost impossible; knowing the curvature in bend too improbable to be worth considering. Steering is always constructed so that car will straighten itself.

Clearance of front axle. A person had been resting under front axle he could easily have been pulled out if not too close to other side of ditch. If he had been under flywheel it would be a little difficult, if front wheels were down in ditch and one back wheel on road. Body of International Truck is 6ft. wide. Overall length of lorry about 18ft; never measured it. If man's foot caught in spokes it would be taken off but if caught in brake rods he would be dragged. If caught between mudguard and tyre he would be dragged. If driver had turned bend a little too fast and swerved to left to avoid meeting car, if he did a very fierce swerve he might have gone into left ditch. If he had gone round corner much too fast he would have hit meeting car. Person who suddenly sees a vehicle coming at him always thinks it is going much faster than it is. If lorry not changed at all and if told driver came at them at terrific speed, that would be inconsistent.

C. H. G. LANE

. Court.

I say lorry was going at 21 m.p.h. worked out mathematically.

C. H. G. LANE.

d D.W.

KABAL SINGH, Sikh, sworn: (accused)

36 Kishen Singh. Motor driver. I have been driving about 10 years. I was in military in India for 4 years as driver. On 8/4/36 I was proceeding along Simuru Road about 4 p.m. in No. T5212 International Truck which had

been working for 6 or 7 months - new 6 or 7 months ago. Occupants of lorry were Aflatoon Singh, who was sitting in front seat, and 2 boys standing at back; I don't know in what position they were standing; I remember bend in road beyond Aga Khan Club curving to left towards Matbaiga. Before approaching the bend, 200 to 300 yards from it I sounded my horn; about 15ft. from bend I saw about 15 natives on one side of the road and 4 or 5 on the other; a stationary box-body car was on the road. Afterwards I came to know it belonged to Maula Dad. Maula Dad's clerk and native driver in car. Car facing Nairobi. Natives on right side were putting their karais, jembees and pick-axes in the car; those on the other side, as I was about to pass, tried to cross the road; one was left behind; he was held up in middle of road and to save him I swerved to right. I was travelling at 15 to 16 m.p.h. Coming round bend I was on left side. I completed bend on proper side. I passed stationary car on Limuru side of bend. Natives who tried to cross went from left to right side of road. 4 crossed and one was left. As far as I could see radiator struck deceased. In order to avoid him when I saw the boy in middle of road, before he was struck I swerved to right. When I swerved, he did not turn back and so radiator struck him. I applied my brakes when I saw he had not turned back, both brakes, hand and foot brakes, at same time. Deceased was dragged 4 or 5 feet and carried into drain with lorry as I swerved. I got out to see where deceased was. I found injured boy under differential. 2 wheels of lorry were outside drain and 2 in drain. I tried to get him out. I got the other boys to help me get him out but they did not help me. S.I. Police arrived on scene. Native had not been moved before his arrival. He was taken out at instance of S.I. Police. European Police Inspector arrived about half-an-hour afterwards.

Adjourned till 9.30 on 12th instant.

Accused released on same bail.

Order: - Mr Scott's witness costs to be paid by Government voted as expert witness.

J. L. M. L. L.

12.10.56.

Accused.

5 assessors present.

Phillips.

Khanna.

ACCUSED on same oath.

Xd I saw about 15 natives on side of road as I approached scene of accident, my left hand side - About 4 or 5 on the other side. I did not count them, might be 12 or 13 on left side. All together. Not in a line. Only a little distance from centre of the road; on roadway about 2ft. from drain. Standing. Stationary car on other side. Some facing me, some looking at stationary car; not exactly opposite stationary car; 2 or 3ft. behind it; car's right hand wheels about the centre of road; I kept on my left side and passed it very near. I went towards my right; if I had kept on left edge I should have knocked them down. Only just room to get past the natives. I had to go close to them. I sounded my horn from 200-300 yards away, 2 or 3 times. I only estimated this distance. When I did this I had seen the car and the natives. The natives simply stood there; they were looking towards me; 2 or 3 were looking towards me; of the rest some were looking towards Nairabi and some towards car. They could not get back because there was a drain at their back. When they were all standing together in a group difficult to say exactly distance they were from edge of ditch. I am an experienced driver. I drove on Bombasa-Nairobi road for 4 or 5 years and also in military in India. Road may be 16 ft. broad. I was approaching bend, on far side was a stationary car, and close to it were some natives on the right side and a group of natives, about 15,

Adjourned till 9.30 on 12th instant.

Accused released on same bail.

Order:- Mr Scott's witness costs to be paid by Government voted as expert witness.

3. 10. 36.

3.10.36. Accused.

3 assessors present.

Phillips.

Khanna.

ACCUSED on same oath.

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on the left side; they were in a group encroaching on roadway. Some looking in our direction and some in another; I don't know if they were aware I was approaching. I had sounded my horn 2 or 3 times; I can't say if they all heard it or not. I was going very slowly. I was conscious of the situation. I regarded it as dangerous. I was going slowly and whatever my intelligence permitted me to do I did, in driving to right. I didn't sound horn when close to natives. I was going 15-18 m.p.h. when I passed the natives. I considered it a safe speed in the circumstances. I applied my brakes as soon as man was struck. Before he was struck I had applied both foot and hand brake very hard and steered to right with my right hand; as hard as I could; they were good brakes; Police Inspector checked them; they could not check lorry till they reached other ditch; this would be 4 or 5 feet. It stopped at this distance in ditch after I had applied brakes and turned to right. I applied brakes and swerved simultaneously. I was then 4 or 5 feet from the ditch. I saw skid marks on road after accident. Their length was 4 or 5 feet. Beginning of the skid marks represented approximately the place where deceased was when struck. Skid marks were caused by the back wheels of lorry; beginning of skid marks was place where back wheels were when I began to apply brakes. Deceased was then in front of lorry and had not yet been struck. The skid marks were 4 or 5 feet long. This is strictly truthful account of what took place; I have quite understood the question. I demonstrate in Court what I understand by 4 or 5 ft. (Paced off 5 1/2 paces). This was approximate distance that I took to pull up lorry. When I started to apply brakes deceased was still in front of lorry and had not yet been hit. If I had gone on straight I would have hit the other people on left hand side, the group, and the deceased as well. About 15 men on left side of road; 5 began to run across; leaving about 10 on left side. They did not try to run across. If I

had gone straight on I would have hit them, in view of way they had blocked road. So that in any case whether 5 men had run across or not I would have had to swerve to right to avoid hitting them as they had blocked the way. The 5 men were 3 or 4 ft. in front of lorry, when they ran across road. (Witness demonstrates, a distance of 4 paces or about 12ft.). I continued to within about 4 paces of the people without sounding horn although they were standing in front of me and blocking way. I did not sound horn as I was anxious to avoid them. When I found them blocking the way I turned to right. I put on my hand and foot brakes. When 4 paces away they began to run across road. I was going at 15 or 16 m.p.h. If I had been travelling faster my lorry would have run across ditch. Going at this speed, having good brakes I stopped in 4 or 5 ft. If the boys had not run across road I should have had to keep a little to my right, after passing car. If I were standing on side of road and saw lorry coming straight towards me, at 4 paces, not having noticed it before, I would go back and get down. (N.B. This means apparently that he would step to the left). I would have to do it quickly to save my life. Boys who were in front of lorry did nothing to save themselves; they remained standing, the man who was killed ran forward. He ought to have ran to the ~~my~~ left instead of to the right. If so he would have saved his life. He himself had endangered his life, by going in front of lorry in order to put his tools in stationary car on right as others had done. That was why he had run across road; not to get away from my lorry. He knew my lorry was coming and in a hurry he tried to cross in front; how can I say if he knew? I don't know what was in his mind. I was satisfied as I thought he knew I was coming. He must have known as I was coming.

d. Court

He had a karkai in his hand. He did not look at my lorry. A person generally looks at vehicle if he is crossing road in front of vehicle knowingly. Possibly he did not

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d. Court

He had a karai in his hand. He did not look at my lorry. A person generally looks at vehicle if he is crossing road in front of vehicle knowingly. Possibly he did not

realise that my lorry was coming.

XXXd. Nil.

C. . G. LANE.

Assessor
p.

Donly know Urdu. I worked in military at Kirkle Cantonment. I know obligations imposed on driver by Traffic Ordinance . Fundamental point of driving is to see brakes are in order; to drive on left side of road. 4 boys who ran across were 4 paces in front of lorry. 5th boy began to run immediately after 4 had passed. I had no alternative but to turn to right. I had no room to take a curve to right. When I saw the situation I had not become nervous; I was nervous when boys began to run.

Assessor
Sat Singh.

After accident Gitu and Mohamed Siriar came to me; we had some talk; I said he had to explain why he had left his car in road as there had been accident; he said he was going to get Inspector and went.

G. A. G. LANE.

D.W.

MWANGI s/o MHEGIMA affirmed;

Working for Ram Kishen. I remember 8th April, 1956 when there was accident on Limuru road. I knew accused. He was proceeding towards Limuru in lorry; I was at back of lorry, with on Nguti, both standing up; I was on right side and he was on left side, leaning against the body. I remember place of accident; there is corner coming from Nairobi; we saw as we approached a box-body car standing near corner; stationary; I'm sure about that. Just before bend, driver sounded horn three times; because there are some trees near; in a garden on left side, blocking the corner; you can't see the road beyond very far. We sounded horn once before rounding corner; when we rounded corner I saw stationary car; we sounded it twice; it is a loud horn, and can be heard from far. If it were sounded very near a person it would not surprise that person; it is not like a car horn, it is like a lorry horn. I know about speed of

lorries; it was going at 15 m.p.h. Going round bend it was on its left side. There is white line on bend; off wheels were on left side of ~~mark~~ line. Completed bend on proper side; I was standing at back on right side; I could see white line quite well. While we were on the corner I saw the stationary car; it was near the inner on other side of road on ~~inner~~ side of corner. I saw some people in the road; crossing the road. I saw 4 people cross first; another group were left behind; of these one man came out and tried to cross. He ran across quickly; when he got to middle of road he turned back; when he began to turn back, lorry had swerved to right to avoid him but he had moved towards direction in which lorry was going. He was hit by lorry. There were about 6 people left where he had come from. They had crossed going to the box-body car to get into it. They had karais, shovels, pickaxes; karais on their heads, they were putting the karais in the car in a hurry so that they should not be left behind. Native was hit and fell into drain. Lorry went into drain. It hit man in middle of road. Afterward doing so lorry did not travel any distance. Brakes were applied. It travelled a few yards (Witness demonstrates) - about 5 paces. I don't know how many pedestrians there were on the road. They were many. Some of them were on the left side, many. The others had just crossed to the other side.

14. Deceased was in middle of road when hit - he was struck and fell into drain. He did not fall into drain; he fell down first and was pushed by radiator of lorry into drain. Lorry going at 15 m.p.h. because it was not going very fast. 20 m.p.h. is going fast. I first saw the car when we were on corner and had nearly finished it; we were only about 12-14ft. away (Witness demonstrates). I was standing facing in front. I had not been able to see it before was because there was a bend; after horn had been sounded; he had sounded horn once when we started the bend; horn was sounded twice when we were at middle of corner and before we had passed the trees. The man in middle of

read with karais had seen ³⁶ us; because we sounded horn.
After 4 had crossed one man ~~xxxx~~ signed the others to stop,
from the side where box body car was. When I saw the men
on left of road they were at edge, near the ditch; in a
group together; they were going to get in the car; when I
saw the car and the man, I was not afraid there was going to
be an accident. I did not think anyone would be run over. I
am telling truth. I am on oath. I know what is done to
people who tell lies in Court; they are locked up. Deceased
was on left side as we approached; I saw Gita the driver; I
didn't know him before that day; I saw him on ground as we
passed car; standing and counting karais which were being
put into car; on the side nearest right ditch looking towards
Lisuru; Indian was standing with him. I don't know why
Gitan should give false evidence. If he says he was driving
car, moving, when ~~xxxx~~ car passed lorry, it would be a lie.
If he said deceased and other natives were walking along
close to his car it would be a lie. It was standing at the
corner; he was doing wrong in leaving his car standing on
corner and he wants to hide the fact. By leaving car on
corner he was making it dangerous for lorry to pass because
space was too small. Man Kishes my employer is ^{owner} ~~grosser~~ of
the lorry; accused was working for him then - he has left.
XXXI. Nil.

G. A. G. LANE.

Khamra asks for adjournment till Thursday 15th as he is in a
case at Nakuru.

Witness Id. Assessor: Basant Singh: Some of the boys had put
their tools in the car but after accident they were taken out
again; 5 boys put in 5 karais and pickaxes. Our driver was
not drunk. I had been with him for 6 months and had not seen
him drink. People in the box-body and the driver spoke to
each other.

G. A. G. LANE.

Khamra asks for recollection of Dr. Vint on Thursday.

road with karais had seen ⁵⁶ us; because we sounded horn.
After 4 had crossed one man ~~named~~ signed the others to stop,
from the side where box body car was. When I saw the men
on left of road they were at edge, near the ditch; in a
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corner; he was doing wrong in leaving his car standing on
corner and he wants to hide the fact. By leaving car on
corner he was making it dangerous for lorry to pass because
space was too small. Ram Kishes my employer is ^{owner} ~~grosser~~ of
the lorry; accused was working for him then - he has left.
XXII. Nil.

G. A. G. LANE.

Khanna asks for adjournment till Thursday 15th as he is in a
case at Nakuru.

Witness Xd. Assessor: Basant Singh: Some of the boys had put
their tools in the car but after accident they were taken out
again; 5 boys put in 5 karais and picksaxes. Our driver was
not drunk. I had been with him for 6 months and had not seen
him drink. People in the box-body and the driver spoke to
each other.

G. A. G. LANE.

Khanna asks for recalling of Br. Vint on Thursday.

Order:- Adjourned till 15th at 10 o'clock. Dr Vint to be summoned to attend. Accused released on same bail.

C. A. G. LANA.

12.10.56.

Court as before.

witness: FRANCIS WILLIAM VINT, sworn

recalled by Khanna for A.N.

If it were said that deceased found under lorry between back axle and fly wheel and assuming he were hit and knocked down at edge of road, it would suggest that he was knocked down and that lorry passed over him and that deceased was not dragged by lorry. If it was said that he was found under front seat of lorry it would suggest that he had been dragged or that he had been struck and fell away from lorry and that lorry came to rest was position of body.

As to possibility that he was knocked down at edge of road by front of lorry - it was afterwards damaged by some part of the lorry underneath, it is very difficult to suggest that all these injuries were caused in this way. It is very difficult to answer. It is much easier to account for the injuries by being dragged a longer distance. This is much more feasible. I can't give any idea of the distance he was dragged. Part of scalp being severed. Faster lorry was going the shorter would be the distance. No remarks in my P.M. report of ~~distance~~ so I conclude that there was no sign of ~~it~~ other than that body had been in ditch; certainly no marks of wheel having passed over body.

C. A. G. LANA.

BOOTHI wa IT MI, affirmed, pagan.

I work for Dimal Singh. I worked for Man Disha previously. On 8/4 56 I was being towards Siaura in lorry; ~~accused~~ was driving lorry; I recognise him, Babal Singh. I was at back, standing; with other man; I was on left side. I remember scene of accident. Near there is a bend in road.

Just before approaching bend accused sounded horn. Accused was driving at approximately 15 m.p.h., bend taken on left side. Near side wheels were not quite near the near side ditch - (witness demonstrates a distance of about 9" from ditch). On road we saw a box body car standing on the bend facing Nairobi on left side facing towards Nairobi. In car were a native driver and Indian. We passed car and a little farther on some people began to cross road in front of our car; first 4 crossed; they crossed completely; 5th person ran across in front of our lorry; driver swerved lorry to avoid him. When he did so the man stopped in road. Then he ran on in front by the time the driver had moved on a little, the man was hit; the lorry stopped there and then where man was hit. Lorry stopped at place of distance indicated (about 8 paces) (by witness). The wheel turned into ditch. Driver was not going fast. He hooted before we came to bend. When about the bend he hooted again twice. Boys had kareis. Box body car was waiting for the men.

X1d.
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On the left there were many men; I don't know exactly how many; they were walking along towards Nairobi; in one line; close to edge of road; I saw them walking towards us; the headman put up a hand to stop them and they stopped. The headman was near the box body car. I don't know his tribe; he was standing there; he waited and so did the others, to get into the car; he was on side where box body car was. When I first saw the car we were near the curve. We could not see it round the corner because of the trees. It was stationary when I first saw it. No one in it; people were standing near it. I have been with cars for a long time; so I know the speed was 15m.p.h. Sure it was not 20 or 18; because I have been with cars for a long time. No one told me it was going 15m.p.h. I did not see the speedometer, because I was standing at back. When deceased was struck the lorry stopped there on that spot and did not move. I was hit and pushed forward; lorry went into ditch;

Just before approaching bend accused sounded horn. Accused was driving at approximately 15 a.p.h., bend taken on left side. Rear side wheels were not quite near the near side ditch - (witness demonstrates a distance of about 9" from ditch). On road we saw a box body car standing on the bend facing Nairobi on left side facing towards Nairobi. In car were a native driver and Indian. We passed car and a little farther on some people began to cross road in front of our car; first 4 crossed; they crossed completely; 5th person ran across in front of our lorry; driver swerved lorry to avoid him. When he did so the man stopped in road. Then he ran on in front by the time the driver had moved on a little, the man was hit; the lorry stopped there and then where man was hit. Lorry stopped at place of distance indicated (about 8 paces) (by witness). The wheel turned into ditch. Driver was not going fast. He hooted before we came to bend. When about the bend he hooted again twice. Boys had kareis. Box body car was waiting for the men.

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one wheel went into ditch and the other
when the 4 men started to run across road they were about
8 paces in front of lorry (Witness demonstrates). Deceased
was about 3-4 paces away when he began to cross -
(Demonstration). The men had seen the lorry before they
began to cross. They were in a hurry because they wanted to
get into the car. Driver applied brakes before he hit the
man. He began to apply after the 4 men crossed. After
accident deceased was under lorry near front axle; his
legs were in drain; body was on bank; bank near the road.
He was hit by radiator and was under the front part of lorry;
not under back part.
XXXn. Nil.

G. L. G. LANG.

Defence Case.

Khanna Addresses:

Emphasis: criminal responsibility principle claim;
application very difficult: divergence in different cases;
R. v. Brimman, vol. 19, Cr. App. p. 8, Terrell, p. 231. law
explained in Judgment. Amount and degree of negligence....
determining question. Civil - reasonable care - lack of -
Criminal - criminal neglect must be found - very difficult
to define. ^{Mines} ~~Mines~~ v. White X. Insurance, 1931. vol. 5
K.B.D. p. 597. "Gross or reckless negligence

..High degree of negligence - to make
offence manslaughter".

Rex. v. Bateman, p. 16. Mere mistake or error of judgment,
no liability. Any falling short of. Rex v. Elliott, 18
Cox, p. 710. "gross negligence - mere defect of judgment -
not sufficient". Culpable negligence - - gross or reckless
negligence. Certain moral quality to be carried into act;
mere intellectual defect not sufficient; mistake as to
application of brakes. Must judge prisoner's mind by
conduct; by external measures of reason. Negligence not
state of mind, his state of conduct.

Rex v. Tringer 1930 K.B.D. p. 704. Technical ground as to joinder of charge. p. 708 "if act itself unlawful it is manslaughter whether criminal negligence or not" - this argument not accepted - ct. Rex v. Franklin 15 Cox 163 - cannot be constructive manslaughter. Donoghue v. Stephenson Appeal Cases 1932 p. 562 It p. 618, 619. Lord McMillan. Duty to take care in both civil and criminal law. Lord Atkin p. 580 - must wrongdoer merely pay or be punished? In civil action absence of reasonable care which might give rise to acts and omissions (?)

Rex v. Senior - 1898 1 K.B. p. 290. "Person does something expressly forbidden by statute - wilful neglect - - manslaughter - wilful - intentionally. P. 292 - Lord Russell of Killoven. Must judge by conduct - by certain external factors. 3. 185 F.C. Unlawful omission - culpable negligence to discharge duty tending to preservation of life.... Rex v. Noakes 176, English Reports p. 849. Even some degree of culpable negligence not sufficient for manslaughter - as not sufficiently gross and reckless. Roberts v. Gibb p. 168. Presumption of malice in driving on when danger realised - such want of due circumspection as to go beyond mere question of damages - reckless ~~driving~~ disregard of life and safety of persons using highway. Terrall p. 253.

This case.

Prosecution: Accused must have taken bend at 30 m.p.h. or over - regarded as careless act. Expert evidence of Scott - going at 30 m.p.h. Safe speed for lorry is up to 25 m.p.h., anything over is risky. Therefore no negligence in taking bend. Prosecution witnesses say bend was taken on right side except Gitau's evidence which said accused's right wheel was over white line. Scott said no reason why lorry should have swerved to right: even if not right coming round bend. Prosecution witnesses say man hit at edge of road though dragged at least 10 paces. Medical evidence - he must have been

Rex v. Tringer 1900 A.B.D. p. 704. Technical ground as to joinder of charge. p. 708 "if act itself unlawful it is manslaughter whether criminal negligence or not" - this argument not accepted - ct. Rex v. Franklin 15 Cox 163 - cannot be constructive manslaughter. Donoghue v. Stephenson Appeal Cases 1932 p. 562 It p. 618, 619. Lord Macmillan. duty to take care in both civil and criminal law. Lord Atkin p. 580 - must wrongdoer merely pay or be punished? In civil action absence of reasonable care which might give rise to acts and omissions (?)

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dragged 10 or 12 paces. Weigh discrepancies in Crown case; position of the deceased under lorry; man not moved till S.I.P. came. S.I.P. says he had been moved. Proceeding on medical evidence and that of Scott, and bearing mind fact that accused applied brakes, we can discover state of facts. Police witness and Scott said skidmarks could only be made by brakes. Brakes applied instantly? This shown by plan. Aflatoon Singh says the lorry was about 4ft. from left edge. Lorry swerved to right to avoid native. Right wheel 14 ft. from right side and 4ft. from the other. Overall breadth 6ft. Man hit at that point and dragged from about 7ft. from left edge. (?) agree that natives walking along left edge near drain. Prosecution witnesses say body was under front seat. Only likely this is that person was hit in middle of road and dragged; 7ft. from left edge - near middle - ^{left} ~~top~~ wheel about 4ft. from left edge; this explained by 2ft. of road being occupied by natives standing near. Terrific speed at bend negatived. Positive evidence that driver displayed sufficient anxiety by braking and swerving; all he could do. No evidence of negligence - even civil. Death due to misadventure. No (?) negligence - no excessive or gross negligence. Phillips: Degree of negligence must be so gross as to amount to. R. v. Stringer, R. v. Franklin &c. Not alleged that accused was committing an unlawful act - i.e. no exceeding limit - no defective brakes. Not suggested this was an unlawful act in itself. If full degree of negligence as laid down in Bateman were not entertained - it is not likely; a finding of guilt on plea that act of careless driving s. 16 T.O. was committed. I base my plea on pure civil negligence. R. v. Bateman. Tin Mines v. White & Insurance Co. I say facts disclose the accused was guilty of the degree of criminal negligence amounting to gross negligence. Conflicting stories. accused said deceased lying under back axle.

Last witness said under front axle - - discrepancy in defence witnesses. Aftatoon Singh: unreliable - disregard it. One side must be telling a false story - which side has most motive for doing so? Why should Mahomed Ali Sirdar Khan tell a false story? Why should he perjure himself for sake of the native? Gitau - gave evidence very well - why should he give a false story; afraid that known that he had parked car on bend he might have got into trouble? Not suggested that Gitau in any way responsible for death. Prosecution witnesses have no fituma with accused. Medical evidence not conclusive (?) . Probably deceased (7) Evidence mostly shows that he was under front of lorry - ~~near~~ ^{now} Not suggested that accused driving too fast round corner. Police skidmarks probably right. (they may have been longer). Accused lorry's speed 21 m.p.h. at least. Longitudinal skid marks, caused by braking. Difficulties about how accident did happen? Are you satisfied that accused struck deceased on right side of road? If so guilty. Two Kar. witnesses not intelligent but intelligent enough to know which side of road the man was hit on and whether car standing or moving. Accused's story. Going along Limuru Road. Sounded horn from scene - 15 to 16 m.p.h. - at left. from left side of road. Saw stationary car - natives on each side - those on left in group - karais - occupying a part of road. Admitted dangerous situation. Continued at speed - 15-16? unlikely to be over 20 m.p.h. until brakes applied. He continued to within 4 paces of the people without slackening speed and without sounding horn. Very dangerous thing to do. He went to within 12ft. of them, without slowing up, when he wanted 25ft. to avoid them if they crossed. Carelessness of deceased? He found himself in dangerous position; move towards centre of road; karai on head. Pedestria entitled to use of road equally with car. Negligent driving. - reckless disregard

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for safety of public. Experience driver; knew it was dangerous; saw car on bend - did not sound horn - if not he ought to have slowed down. He did a most dangerous act in driving down at people at 15-21 (probably) m.p.h. Probably accused very sorry and did not intend to harm deceased. Sympathy with accused. Duty to consider; put aside sympathy and sentiment. Give opinion on evidence.

Adjourned till 2.15.

Resumed.

Court as before.

Court Sums Up (Shorthand notes taken).

Verdict of Assessors.

1. MANSUKHRAM DAVE: Evidence is conflicting. I am led to believe that Maula Dad's labourers were walking on both sides as it is likely that they were doing so. I believe the car was stationary. I think the driver or his manager might have stopped for the labourers. Lorry was probably travelling at 21 m.p.h. when it passed the car. I think inside the township this would not be too high a speed. I think the 5 boys on left side tried to cross to put tools in box-body car; 4 boys may have got across safely; 5th boy may have tried to do so and got caught. Skidmark shows where boy was hit and dragged i.e. from place where skid started. Brakes applied - driver did all he could. Accused experienced driver; tried to swerve to avoid native. No reason why he should have swerved to right. Not prepared to believe sudden swerve without reason as prosecution suggested. Accused swerved too late to avoid deceased. Further reasons I consider death by misadventure. Not amounting to criminal or culpable negligence.

2. BASANT SINGH: Prosecution statements differ from each other. Ditch said to be 5ft. deep - not even 2ft. Removal of body from under car. Some said boys walking in ~~side~~ single file. Manager said some side by side. Boys would

have recognised Maula Dad's car. Car must have stopped there. Accident took place at once after car passed. Deceased either was walking on motor way or tried to cross. If lorry going at excessive speed, road not broad - unsafe to cross road. Act of killing not done intentionally. Accused made every effort to save life of deceased. Not due to negligence of driver. Accused not guilty - accidental death.

5. GULAM HUSSEIN MEHJI: Accused not guilty. I don't believe story of prosecution. I believe the story of defence. I think the plan is in favour of accused. He tried to save native and swerved for this reason. 21 m.p.h. not excessive. Safe speed.

SUMMING UP

The accused is charged with manslaughter as you know, and in order to convict him of manslaughter it is necessary for you to find him guilty of wicked or culpable negligence. The degree of negligence must be so gross as to amount to recklessness. Inor negligence would not be sufficient in law to find him guilty of manslaughter. There is a difference, as you have been told, between civil and criminal liability for death by negligence. If this was a civil case and someone was suing this man for damages for knocking him over, it would be only necessary for that person to show that he was driving in a negligent way, but as he has been prosecuted for killing a person it is necessary to find him guilty of wicked and negligent driving; that he was doing something that amounted to extreme and gross negligence. It has not been suggested that he was doing anything inherently illegal. It has not been suggested that he was driving at an excessive speed; at a speed that was in excess of legal limits; or that he had defective brakes, or that he had defective steering. In fact you may take it that he was driving in a normally competent manner up to that point. but it is suggested by the Crown that in the circumstances, namely, in view of the fact that there was a bend and a narrow bend; that there was another motor car on the road; and that there were natives either on one side of the road or on both, the accused was recklessly negligent in the way he was driving when he hit the deceased. The prosecution story as you have heard, is that there was a line of boys walking along the left side of the road in single file in the direction of Nairobi carrying karais and pickaxes and that a box-body car passed them and went on and stopped; it is not

suggested that accused came round the corner at an excessive speed but it is suggested that he came round the corner passed this other motor car and then suddenly swerved to the right, hit the deceased man on the edge of the ditch and knocked him down, and dragged him a short distance. It has been shown I think that it is practically impossible that the accident could have occurred, as was suggested at one time, by the accused coming round the corner out of control, swerving to the left to avoid the other car, and then swinging suddenly to the right merely because he had lost control. That has been discredited by Mr. Scott's evidence. In any case I don't think it sounds a very probable thing. It was suggested that he was going a little faster than he ought to have been going in view of the fact that it was a very nasty bend, partially obscured by trees. I know that bend; I have gone over it many times myself and it actually looks easier in approaching it than it is. You find that you are still going round the corner when you think you are actually round it. You also have seen the bend. That is the story of the prosecution and it is supported by the labourers and by Mauladad's Manager and the native driver. The accused's story, as you know, is that he came round the corner at a very moderate speed. He saw the other motor car parked on the other side of the road (his right hand side). The boys were on each side of the road - there was a larger group on his left hand side who were projecting a few feet on to the roadway. It was a narrow roadway and in order to get past these boys and in order to pass the car he says that he had to swerve a little to his right; that four boys ran in front of him in order to get to the box body ^{car} where they wished to put their karais and pickaxes and that the fifth man ran a few feet into the road. The accused swerved a little to avoid him. The

man then dodged and lost his head, went a little further into the middle of the road and he accused hit him with the front of the lorry. That accused put on his brakes just before he hit the boy and pulled up on the edge of the ditch and dragged the boy into the ditch. That story is assisted and strengthened by the evidence of the plan put in by the police, I suggest, which shows that the accused braked and swerved at that point; because if the accused had been in fact driving along in a careless sort of way and had suddenly swerved into the right hand ditch and had happened to hit the deceased in his course there is no reason why he should suddenly apply the brakes hard at that particular place where he did apply them. He obviously applied the brakes when he was practically on his proper side of the road and when he was swerving at the same time. It was not a skid mark caused by a swerve but one caused by brakes which is a different thing. You have heard Dr. Scott say that in motor racing the expert driver skids round a corner in order to avoid putting on brakes and that the skid mark of a sudden swerve is different to a brake mark. That corroborates the accused's story. Then there is the evidence of Dr. Vint that, judging by the injuries to the boy, he must have been dragged under the lorry some little distance, and not knocked down on the edge of the ditch. That again strengthens the accused's story of what happened. If he had been simply knocked down at the edge of the ditch he might have been thrown clear altogether. You have heard conflicting accounts of the position of the body under the lorry after the accident and it is difficult to draw any conclusions from that as to the place where the knocking down occurred. As the evidence all points to the fact that he was dragged by some portion of the car after being knocked down, it would seem that he may have first been dragged by some part of the lorry such as the steering

arm and that as the lorry went on some portion of his clothes might have been caught in another part of the lorry which would cause his body to be found in another position under it when it came to rest. It must be remembered that the lorry came to rest on the edge of this ditch; if it had been going at any considerable speed it would not have pulled up there but would have carried on across the ditch which is shallow and not five feet deep as stated by the Police witness.

You have had pointed out to you the discrepancies in the Crown case in that the boys said the body was under the lorry when the Sub-Inspector came and that the Sub-Inspector said it had been taken out and laid on the bank. One of them must be right, it is difficult to say which. The Sub-Inspector might have made a mistake though he seemed to be quite definite. The point is that no one in authority, no one who could be called an expert, did see that body in any definite position and we cannot be certain where it was. If a policeman had seen it he probably would have made more exact deductions from it than the accused or the other witnesses who were not accustomed to having anything to do with accidents.

You have heard the accused say, and it is supported by the defence witnesses, that he came round the corner at a slow speed - 15 to 16 miles per hour - and sounded his horn before he got to the bend and also sounded it on the bend. That is at any rate deposed to by the accused and several witnesses, and the evidence of Mr. Scott, working out the distance mathematically, was, as you have heard, that the accused was going at approximately 21 miles per hour when he applied the brakes and swerved. That, I think, is very important indeed because if an expert had come and said he was driving at say 40 miles per hour he would have been driving in a dangerous and reckless way, but assuming

arm and that as the lorry went on some portion of his clothes might have been caught in another part of the lorry which would cause his body to be found in another position under it when it came to rest. It must be remembered that the lorry came to rest on the edge of this ditch; if it had been going at any considerable speed it would not have pulled up there but would have carried on across the ditch which is shallow and not five feet deep as stated by the Police witness.

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that 21 miles per hour is the correct figure (and I do not see how we can arrive at any other figure as we have an expert's evidence) then in order to find him guilty you have to say that (assuming you believe the accused's story) you think he was behaving in a grossly negligent manner in driving at 31 miles per hour past that stationary car and past the natives.

This is a difficult question to answer especially to a person without motoring experience. 21 miles per hour may sound fast to a person not accustomed to driving; on the other hand it may sound rather slow, but in any event that is the question that will be put to you.

Firstly do you believe the prosecution story as to the boys walking along the left side of the road, the accused suddenly swerving to his right and knocking the boy into the ditch? If that is believed then you would have to find - you must find - him guilty of a grossly negligent act and guilty of manslaughter.

If you do not believe that evidence but believe the accused's story, that Mauladad's car was stationary, that the boys were distributed on each side of the road and that they wanted to get to Mauladad's car; that four of them ran across the road and the fifth one was just doing so when he was killed, and that the accused's speed was 21 miles per hour when he had to swerve to try and avoid this man, then you have to say whether you consider that he was acting with gross negligence in those circumstances.

Of course it is easy to say "Oh yes, I should have pulled up if I had seen those boys" and actually it would have been a good thing to do, but that is not a proper criterion in a Criminal case. As I said before, you have to say if you find him guilty that (assuming you believe his story) he was really reckless and criminally negligent in his behaviour.

There is just one point about the stationary car. It is very difficult to understand why there is this direct conflict of evidence about it. It does sound a probable story that Mauladad's driver and his Manager recognised the labourers, pulled up and said "You may put your things in the back of the car". It sounds quite a probable story, but it is not quite obvious to me if they did so why they should strenuously deny it. The only reason I can suggest is that they were frightened that they would get into trouble with their employer, though I don't see why they should.

In any case I find it rather difficult to believe this story of the prosecution. Supposing Mauladad's car was going along the road towards Nairobi from Limuru at an ordinary pace, say 20 miles per hour, and met the other lorry coming at the same sort of pace in the opposite direction, and that Mauladad's car passed these boys and went on; that the lorry coming along the other way hit the boy and knocked him into the ditch, that the remaining labourers then cried out and the car then stopped - (That is the story of the prosecution) - in my opinion, though I may be wrong, Mauladad's car would have got further than the point where it is said to have stopped because even going at 15 miles per hour I think it would have gone round that bend by the time that the other labourers cried out. But that is a matter of opinion, we have no definite evidence.

The question is whether you believe the story that the car was travelling or had stopped.

Contributory negligence on the part of the deceased does not affect the liability of the accused if you find that he was culpably negligent.

I should say this, as Mr. Phillips has said, you no doubt feel rather sorry for the accused; you are

inclined to say it was bad luck and that no doubt he did not mean to kill anybody, but at the same time it is your duty to consider your duty to the Community and to put aside all questions of sentiment or sympathy.

You have to be convinced beyond all reasonable doubt that he was guilty of gross and criminal negligence. If you have any reasonable doubt you must acquit him.

IN HIS MAJESTY'S SUPREME COURT OF KENYA NAIROBI

CRIMINAL CASE NO. 106 OF 1956

THE PROSECUTOR

versus

KIBUKUJI ACCUSED.

DECLARATION VERIFYING TRANSCRIPT OF
SHORTHAND NOTES OF SUMMING UP.

I, JAMES STANLEY TEMPLETON, Official Shorthand Writer to His Majesty's Supreme Court of Kenya, do solemnly and sincerely declare that having been required by the Registrar of His Majesty's Supreme Court of Kenya to furnish to him a transcript of the shorthand notes relating to the Summing Up at the trial of the above case, to which Transcript this Declaration is annexed, I the said James Stanley Templeton certify that this is a correct record of the Summing Up at the said trial.

DECLARED at Nairobi this
21st day of October, 1956,
Before me,

James Stanley Templeton

Edward Small

REGISTRAR,
H.M. SUPREME COURT
OF KENYA.

Official Shorthand Writer
to His Majesty's Supreme
Court of Kenya.

J U D G M E N T.

In my opinion the version of the accident put forward by the prosecution is not established. There are discrepancies in it which have already been referred to; and the evidence of the plank as to the position ^{and nature} of the skid marks, as well as the evidence of Dr Vint as to the fact that deceased was dragged some distance, tend to weaken the prosecution's story and to strengthen that of the accused.

Accepting the facts as related by the accused, and the speed at which he was travelling at 21 m.p.h. when he applied the brake, I cannot hold that it is established beyond reasonable doubt that he was driving with gross or culpable negligence. I therefore acquit him.

I would congratulate counsel on either side on the fairness and painstaking manner with which they conducted their respective cases, and also I would thank the assessors for their patient attention at the lengthy hearing.

G. A. G. LANE.

15/10/36.

C. O.

Very much for woman

9/14

Mr. Flood. 7 12.36.

38007/36. Kenya.

Sir G. Buxton 8/12

Mr

Sir C. Parkinson

Sir G. Tomkinson

X Sir C. Bottomley 8/12

Sir J. Smuckburgh

Perm. U.S. of S.

Party, U.S. of S.

Secretary of State.

And (2) 1937 file

To go by Air Mail.

Downing Street.

December, 1936.

DRAFT.

KENYA.

CONFIDENTIAL. (2)

GOVERNMENT.

copy to you - (for 4002437)

Sir,

I have the honour to acknowledge the receipt of your confidential despatch No. 114 of the 15th of October in which you enclosed copies of a letter from Dr. H. L. Gordon and of reports which he had drawn up on the cases of three natives who had been found guilty of murder and sentenced to death.

As you ^{will} be aware, the question of the attitude to be adopted in regard to the mental condition of persons who have committed serious crime is a subject of very ^{cannot} serious discussion both in medical

FURTHER ACTION.

Recd. to Gen. Dept.

and legal circles at the present time.

It is not possible to reach any definite

decision ^{in present cases} and it will not be easy to do

^{in any case} but I am obliged to Dr. Gordon for

having raised the question ^{in Kenya} and I

request that in returning a suitable

acknowledgment to him you will cause

him to be informed accordingly.

3. In the case of capital

offences, indeed in any case where

the mental condition of the person

accused may become an issue at the

trial or may be called in question

apart from the trial proceedings, it

should, I think, be made a standing

instruction that the prison medical

officer should be directed to pay

particular attention to the mental

condition of the prisoner. In

practice, this will mean that in all

capital charges the state of mind

of the accused requires special

examination

G. O.

Mr.

Mr.

Mr.

Sir C. Parkinson.

Sir G. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Permt. U.S. of S.

Permt. U.S. of S.

Secretary of State

DRAFT.

FURTHER ACTION.

examination, and I understand that

this is the ^{present} practice of at any rate

some Colonial administrations.

4. The question of insanity

in judicial proceedings is extremely

difficult. It is ^{considered - here} generally

^{is generally} recognised that the legal definition

of insanity which has been in force

for many years in this country, and

forms the basis of the law in Colonies,

is not satisfactory in the light of

modern knowledge of the human mind.

At the same time, it remains the law

until it is altered,

and judges and courts have to administer

the law as it stands. It is therefore all the

more necessary to ensure that the quality of the

accused in capital cases should form the

subject of careful enquiry so that genuine

cases of insanity may not be overlooked

(Signed) W. ORMSBY GORE.

Your minute of 2.2.36. I

agree. It is possible to maintain on scientific or medical grounds that the individual is not responsible for any of his social acts - murder, suicide, theft, etc - that it is all a question of mental disorder consequent upon defects in internal secretions and so on. But social acts are punished by the law in the common interest and that is the domain of the law.

I mentioned these cases to Dr. Home the senior mental specialist in Malaya (formerly of Singapore). The Malayan practice is as suggested in your last paragraph.

A. S. Benton

3.2.36

75/20

NOTE REGARDING THE GOVERNOR'S CONFIDENTIAL
DESPATCH OF THE 16th OF OCTOBER.

Dr.H.L.Gordon is Visiting Physician at the Mathlari Mental Hospital and as such receives a salary of £600 from Government funds. It will be recalled that he and Dr.Vint are the authors of the proposals for African brain structure research.

Dr.Gordon states that his examination of three natives convicted of murder has revealed grave shortcomings in medical and police investigations and in the legal conduct of cases. The cases in question are:-

- (1) Juma bin Abdulla. (Criminal Case No.37 of 1936). Convicted of murder and sentenced to death. No reprieve.
- (2) Mwachia wa Mbutia. (Criminal Case No.58 of 1936). Convicted of murder and sentenced to death. No reprieve.

In these two cases Dr.Gordon suggests that clemency should have been exercised.

- (3) Nyarugombe Nyaranga. (Criminal Case No.68 of 1936). Convicted of murder and sentenced to death. Death sentence commuted to imprisonment for life.

In this case, Dr.Gordon suggests that there were no grounds for clemency.

Juma bin Abdulla was tried by Mr.Lucie-Smith assisted by three assessors, on a charge of murder in that on or about the 5th of March in the Coast Province he murdered Mirabu binti Awana. The accused, who was defended by Mr.Anderson, an Advocate of the Supreme Court, pleaded not guilty. He was alleged to have attacked two women with a spear, wounding them both. He then ran away and attacked and killed another woman. Mr.Lucie-Smith found the accused guilty of murder and passed sentence of death. In his Judgment he said "I have no doubt in this

care that the accused was seized with a blood lust and ran amok. I have no recommendations to make."

The Judgment of the Court of Appeal was -

"Although the conduct of the Appellant in killing one person and wounding two others, one of whom subsequently died of pneumonia, would appear to be somewhat abnormal, it is to be noted that in his statutory statement before the Magistrate, he gave a reason for killing the woman, Mirabu binti Awma. There is corroborative evidence of his statement that he killed her, and there was neither a retraction nor a denial of the admission of guilt contained in his statement. The appeal is dismissed."

The case came to Executive Council on the 24th of July when the Governor's Deputy accepted the advice of Council that the law should take its course. On the 22nd of July, Juma bin Abdulla submitted a Petition to the Governor through the Senior Superintendent of Prisons, in which he submitted that he was abnormal at the time he committed the crime and could not be held responsible for his actions. The Petition was considered in Executive Council, and on the Council's advice the Deputy Governor asked Dr. Gordon to investigate the report.

The burden of Dr. Gordon's report was that no medical observations were made on Juma after he was committed to prison, and that no efforts were made to collect medical and other evidence prior to the trial. Dr. Gordon criticized the conduct of the trial, but he was unable to show that Juma was insane when he committed the murder. One special point that Dr. Gordon makes is that Juma stoutly denied that he had petitioned the Governor. Dr. Gordon submitted, as regards the Judgment, that a blood lust and running amok, if they are anything, are insane and irresponsible conditions with a pathological cause. Apparently, on these grounds he considered that clemency might be exercised.

77
He was unable, however, to make any specific recommendation. The Executive Council considered Dr. Gordon's report fully and advised that the law should take its course. *The Council advised that*

Dr. Gordon also submitted that clemency might be exercised in the case of Macharia wa Mbutia. This man was charged with the murder of Wairamu by attacking her in a most savage and cruel manner with a panga. She was pregnant. (See Mr. Justice Lane's report flagged "A"). The judge of the Appeal Court was:

"The killing is not denied in this case and is supported by evidence. The learned judge addressed his mind to the defences of provocation and insanity and rejected both. Even if we were to hold that the deceased used the insulting expression attributed to her by the Appellant, which we do not find to be the case, its use would not, in our opinion, constitute provocation in law for the savage attack the Appellant made on her. There would exist no such proportion between the provocation and the mode of resentment to which the Appellant had recourse as would reduce the evidence from murder to manslaughter. The appeal is dismissed."

As, however, a defence of insanity had been raised, Dr. Gordon was asked to investigate and report.

Dr. Gordon's points are:-

- (1) that Macharia had been admitted to prison on the 10th of June and into prison hospital on the 12th of June, but that by the 1st of August no reports had been made on any mental or physical examinations in either Nairobi or Nakuru Prisons, and no laboratory reports;
- (2) that as regards the trial, no steps had been taken by the police, the prosecution or the defence to obtain facts which might bear upon
 - (a) the question of insanity;
 - (b) the question of motive.
- (3) that from a psychiatric standpoint, there

is nothing to support the judge when he attributed the crime to "frustrated passion and anger" and not to "loss of self-control due to insulting words spoken" by a married woman.

*Dr. Herbert C. Gordon
Makuru (1900)*

(4) that statements made by Dr. Henderson during the trial ^{frankly} ~~openly~~ misrepresented medical knowledge and opinion, and were of a nature to bring medical evidence into legal and public contempt.

The principal statements in Dr. Henderson's evidence to which Dr. Gordon refers were:

"I have seen the accused several times and have watched him not more than six times since he has been in prison custody. I asked him a few questions. As a result I think he is quite normal and quite fit to stand his trial and to be considered responsible for his actions."

"That it is not possible for a sane man to become suddenly insane and cause a murder such as this and then to revert to sanity."

Dr. Gordon says this can be amply rebutted from medical experience and literature. He adds that the failure to make investigations along the usual psychiatric lines may be attributed to Dr. Henderson's views and prejudices - a failure made all the more lamentable by Dr. Henderson's claim to be a psychiatric authority.

Dr. Gordon elicited from the prisoner that he had suffered from illness, the symptoms of which correspond very closely to minor epilepsy. He found it impossible, however, to assist with an opinion of the prisoner's mental state at the time of the crime.

In Case, this opinion (showing up an) admitted the (un) third (interest) case

The third case with which Dr. Gordon quarrels is that of Nyaragumba Nyaranga. This man was tried by Mr. Justice Lane on a charge of murdering a woman with whom he had previously lived. From her he would seem to have contracted a disease, the symptoms of which caused him to believe that he was being

turned into a woman. The judge considered that there were grounds for treating the case with leniency and recommended that the sentence of death should be commuted to one of imprisonment with hard labour.

Dr. Gordon asserts that there is no record that the Medical Officer (Dr. Henderson) investigated the prisoner with reference to possible insanity. He refers to the statement made by Dr. Henderson that he had known a similar case some years ago when a dresser in a hospital had the same trouble as the accused and committed suicide because of it. Dr. Gordon appears to have elicited from the prisoner that the woman who "bewitched" the dresser was the sister of the woman Wabera, whom the prisoner had murdered. He also obtained medical evidence to show that the prisoner's physical condition was consistent with a self-inflicted injury. On this Dr. ^{Agar} Henderson gives an opinion that the prisoner was ^{Saul} seen at the time of the crime, that the crime was premeditated and was the result of a cunning plan involving the production of blood by artifex. The prisoner wanted to get rid of Wabera, did so, and used all his knowledge of the "dresser" case to prove that he had been bewitched.

I submit that it is possible to say that it was Nyarugumba's knowledge of the "dresser" case which caused him to connect his own illness with bewitchment.

On the advice of the Executive Council, the sentence of death has been commuted to imprisonment for life.

CP

KENYA



GOVERNMENT HOUSE
NAIROBI
KENYA

No 114

RECEIVED

17 NOV 1936

CONFIDENTIAL

11 October, 1936.

Sir,

At the request of Dr. H.L. Gordon, Visiting Physician to Mathari Mental Hospital, I have the honour to transmit for your consideration copies of the following documents:-

- (a) Dr. Gordon's letter of the 27th August, 1936;
- (b) Report by Dr. Gordon on the mental state of Juma bin Abdulla;
- (c) Report by Dr. Gordon on the mental state of Macharia wa Mbuthia;
- (d) Report by Dr. Gordon on the mental state of Nyarugembe Nyaranga;
- (e) Report by Dr. C.V. Braimbridge, Surgical Specialist, on Nyarugembe Nyaranga.

2. The three men referred to were all condemned to death by the Supreme Court of Kenya and their appeals were dismissed by the Court of Appeal. I enclose for your information copies of the judgments in the Supreme Court and Court of Appeal in each case, together with the Reports of the Trial Judges.

3...

THE RIGHT HONOURABLE W. ORMSBY GORE, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W. 1.

3. It will be observed that Dr. Gordon considers that there may have been a miscarriage of justice in all three cases.

In the case of Nyarugembe Nyaranga the alleged miscarriage lies in the exercise of clemency. This action was reported to you in my despatch No. 469 of the 6th September. You will note that the Judge in his report on the case said: "I consider that there are grounds for treating this case with leniency and I would recommend that Your Excellency may see fit to commute the sentence of death to one of imprisonment with hard labour", and that the Judges in the Court of Appeal in their Judgment said: "In our opinion the appellant in his mistaken but honest belief and the fatal consequences that followed, is, as the learned judge found, deserving of some sympathy and we recommend this aspect of the case to the Governor in Council."

Dr. Gordon did not believe the accused's story. Dr. Braimbridge found that the condition of the condemned man was consistent with self-inflicted injury.

Some of the members of Executive Council were inclined to the view put forward by Dr. Gordon, but none of them felt that the recommendation to mercy made by the Trial Judge and endorsed by the Court of Appeal could be properly disregarded and Council, quite rightly in my

opinion...

opinion, unanimously advised me to exercise mercy and I unhesitatingly accepted that advice.

4. In the cases of Juma bin Abdulla and Macharia wa Mbuthia, the charge is the far more serious one of failing to exercise clemency when, in view of the circumstances, clemency would have been the proper course to adopt.

5. The case of Juma bin Abdulla.

You will note that in his report the Trial Judge said: "I have no recommendations to make", and in his Judgment: "No defence has been put forward and it is difficult to see how that could have been done."

The case came to Executive Council on the 24th July, when the Governor's Deputy accepted the advice of Council that the law should take its course. In view of the fact that there was no defence and no recommendation to mercy, it is difficult to see how any other advice could have been tendered or accepted.

However, on the 27th July a Petition (a copy of which I enclose) was received. As this Petition raised, for the first time, the question of insanity the Governor's Deputy, in order to secure that everything possible that could be done for the condemned man should be done, referred the matter back to Executive Council who, on the 1th August, advised that the decision above recorded should not take effect until an opportunity had been afforded to Council to consider a Medical Report on his mental condition. This advice the Governor's

Deputy...

Deputy accepted, and Dr. Gordon was accordingly asked to investigate and report.

Dr. Gordon in his report, after criticising the conduct of the case and discounting the evidence on which the conviction was based, concludes by saying: "I am unable to assist you with an opinion."

This Report was very carefully and very fully considered in Executive Council. It appeared to Council that, in effect, Dr. Gordon had been asked to see if he could find any grounds for accepting the plea of insanity and had been unable to find any, and that if clemency were extended to the condemned man in this case then every murder of unusual brutality would have to be treated similarly, because it would be argued "This murder is so brutal as to be abnormal and therefore suggests insanity."

Council advised that the law should take its course and I accepted that advice.

6. The case of Macharia wa Mbutia.

In this case the defence of insanity was raised and rejected by the Trial Judge on the evidence of Dr. Henderson, District Surgeon, "who has had considerable experience in lunacy matters and who had the prisoner under observation while on remand...."

The Judge was unable to make any recommendation for mercy.

As, however, the defence of insanity had been raised, Dr. Gordon was asked to investigate...

investigate and report.

After an attack on Dr. Henderson, Dr. Gordon concludes his Report by saying: "I find it impossible to assist you with an opinion."

The case was carefully and fully considered in Executive Council. Council had before them the facts that the defence of insanity had been raised and rejected on the evidence of the Medical Officer on the spot, that the conviction had been upheld by the Court of Appeal, and that Dr. Gordon was unable to give an opinion. The only argument that could be advanced in favour of the condemned man was that he might possibly have been in some way abnormal at the time of the commission of the crime, an argument that could be advanced in favour of any murderer.

Council believed, as the Judge did, that the crime, a particularly brutal one, was due to frustrated passion and advised that the law should take its course.

The advice was accepted by the Governor's Deputy in my absence. I am satisfied that the case was adequately dealt with and that full consideration was given to everything that could have told in the condemned man's favour.

7. Dr. Gordon is perhaps on firmer ground in criticising the character of the medical investigation of cases of this nature before trial. It is, however, not easy to suggest a remedy. That each case should be examined by a mental specialist is a counsel of perfection which it is not feasible to...

to adopt in the circumstances of this Colony. I consider, moreover, that while the ordinary medical practitioner may not have the specialised qualifications required to diagnose obscure mental conditions, he is fully competent to advise whether the sanity of a prisoner is such as to render him capable of making his defence to the charge. The additional safeguards that all prisoners are kept under medical observation in prison and that in capital cases where a defence of insanity has been raised or where there is any doubt as to the sanity of a prisoner the case is referred to Dr. Gordon for special investigation are adequate, in my opinion, to ensure that the possibility of a miscarriage of justice occurring is reduced to a minimum.

8. On this subject, however, I desire to invite reference to Mr. Wade's despatch No. 379 of the 28th July last, relating to the proposal that two medical officers with psychological training and experienced in criminal work should be seconded to this Colony for the purpose of carrying out certain investigations with regard to the prison system in Kenya.

9. In conclusion, I would recommend that you authorise me to inform Dr. Gordon that his letter has been received by you.

I have the honour to be,
Sir,

Your most obedient, humble servant,

Brigadier-General

G O V E R N O R.

COPY.

P.O. Box 950,

NAIROBI.

27th August, 1936.

The Hon. Director of Medical Services,
NAIROBI.

Dear Dr. Paterson,

I have seen recently for you three men condemned to death viz., (1) Macharia C.C. 58, (2) Juma C.C. 37, (3) Nyarugembe C.C. 63.

(2) My object in such cases is to obtain evidence about the man's present mental state and his state at the time of his crime.

(3) In cases (1) and (2) my reports showed serious doubt as to the sanity of these men when their crimes were committed. For many reasons (see paragraph 6 and 7 below) I was prevented from expressing a definite opinion, and these reasons increased the doubt. These men are to be executed. Throughout their cases I find many facts on which clemency might have been based.

(4) In case (3) my report was definite as to the man's sanity and agreed with the judge that the crime was premeditated. I added a new theory, viz that the crime arose out of a cunning scheme by a clever liar, and ultimately obtained the objective evidence necessary to confirm this theory, (see Dr. Brainbridge's surgical report). This man is not to be executed. Throughout the case I find no foundation in fact for clemency.

(5) Thus in three successive cases the action taken has been opposed to the expert evidence asked for and given, and in one case (3) has been opposed to the evidence given in court and to evidence subsequently obtained from outside sources (see official file of the case) on an important detail.

(6) On 14th August I pointed out to you, as I have frequently done, the great difficulties of arriving at a reliable opinion when seeing the man only after his trial and many months after his crime; and the possible and even probable injustice in such delay.

(7) On the same occasion I pointed out also that in my necessary investigations of these three cases I had revealed grave shortcomings in medical and police investigations and in legal conduct of cases.

I...

I indicated to you the most obvious of these shortcomings and expressed the opinions (a) that such shortcomings must lead to miscarriages of justice, (b) that an erroneous judgment in one or more of these three cases would not be surprising having regard to the facts revealed in my reports.

(8) The matters I have put before you - on 14th August and in this letter - are of urgent importance to the question of justice in Kenya.

(9) I request that this letter along with my three reports and the report of Dr. Braimbridge, should be forwarded with utmost dispatch to the Secretary of State, Downing Street.

Yours faithfully,

(sgd) H.L. Gordon.

COPY.

CRIMINAL CASE NO. 37/1936.

JUMA BIN ABDULLA.

D.M.S.

I have seen this man today as you requested.

1. Court File of trial on 4.5.36.

(a) Crown Case.

Juma murdered a woman (Mirabu) after having appeared two others (1) Johari, who had lived with him, quarrelled with him and left him, (2) Nifathi who was with Johari and was ill in bed. Johari recovered, Nifathi died in hospital but apparently not from her wounds which are said to have healed up. The evidence as to the murder was highly circumstantial. Apart from evidence of arrest and of identification of weapons the material witness was Suliman bin Bakari who stated that Juma had confessed to him and that he had thought him mad for doing so.

(b) Defence

None (as the Judge pointed out).

(c) Statements of Accused.

- (1) Magistrate's Court - a confession to the murder because deceased was the cause of Johari's refusal to return to him.
- (2) Supreme Court - Brief statements (1) denying all knowledge of the crime,
(2) "I have not done it".

(d) Medical...

(d) Medical Evidence.

By an Indian Sub-Assistant Surgeon, only as to the wounds of deceased and the cause of her death.

(e) Judgment.

The Judge pointed out that a defence of insanity had not been raised and stated what he would have said if it had been.

(f) Comments.

(1) The crime was committed on 5.3.36. No medical observation of Juma appears to have been made on or since that date.

(2) The time when insanity is usually suspected and detected is in the period immediately after the crime and medical observation is the means to this.

(3) The Defence is not as a rule concerned with the insanity question until the prosecution hands the medical report to the defence in compliance with the obligation on the prosecution to withhold no legal evidence likely to assist the accused's case.

(4) In this case a defence of insanity was out of the question if no efforts had been made to collect medical and other evidence on the subject - a duty which appears to be especially incumbent upon the prosecution in native cases, with a view to a fair trial.

(5) Hence the inference possible to be drawn from the judgment that there was no possible defence of insanity because no evidence of insanity was given in court may be an error of consequence. His Lordship went the length of saying "no defence has been put forward and it is difficult to see how that could have been done".

2. Physical.

Juma is a strongly built man of excellent muscle. I found no evidence of physical disease. His Kahn reaction had been found "doubtful". Unsheathed microfilariae had been found. I estimated his age at 40 - 45. The Prison Sub-Assistant Surgeon, (Nairobi) had observed no abnormality.

3. History.

I elicited no family history of mental trouble. His father, he stated, had been killed in the war.

(a) Personal. (Juma's own story).

A native of Tanganyika; educated for a year or two at a German mission and became an askari. In the war he rose to be a corporal, but was taken prisoner by the English and sent to Kismayu. He then entered the K.A.R. Mounted Infantry and served in Dar-es-Salaam, Ruvumu Danda and Portuguese East Africa; at end of the war was sent to his home. Afterwards he had several years with an Italian hunter on whose return to Italy he went to Lamu and at first worked as a porter for the District Commissioner on safari and then on shambas.

Note. It is clear from the above that there was ample opportunity to investigate his conduct before the crime.

(b) Medical.

Beyond "fever" and pneumonia (in Lamu) he recorded no illness.

4. Mental.

I was unable to detect any evidence of a psychosis, but his eyes were a little "blood-shot" -

as is often the case in addicts to bhang (which he denies) - his speech was quick and at times quite fierce, giving the impression of easy provocation to anger.

5. The Crime. (Juma's story).

(a) He denied having committed the crime. He did not deny having assaulted the other two women owing to Johari's misconduct towards him. It was only afterwards when he had gone home, that he heard Mirabu had been killed and the askaris came and said he had done it.

(b) He denied any possibility that he might have killed the woman and not known what he was doing. If he had killed anyone he would have gone and told the District Commissioner.

(c) He admitted he had had a quarrel and fight with Suliman bin Bakari. This was over Johari. Suliman wanted Johari, therefore he (Suliman) made up the story that he (Juma) had killed Mirabu, and this was believed because he had been angry and assaulted the two women whom he had no intention of killing.

(d) It was an invention of Suliman and the policeman to say he had hidden in the roof and had been arrested there. He was actually drawing water at the well when the police took him.

(e) Johari was a young and good woman whom Suliman had wanted for a long time.

6. Petition to the Governor.

He did not know he had sent a petition. The Superintendent asked him some questions; he answered and put his thumb to a paper.

He denied one by one having made the statements given in the petition except the last paragraph concerning having been lost for 3 days when

a child. He was particularly emphatic in denial that he had ever been "abnormal" or unhinged".

In connection with the childhood incident I found no grounds to connect this with epilepsy or other nervous disease.

7. Discussion.

Although I found no evidence of mental disorder at present and nothing in the past to suggest it beyond the assaults and murder, this is not sufficient ground for belief that there is actually no mental disorder now and has been none in the past.

Although I found him an intelligent man with a good record (by his own account) his probable tendency towards a quickness to wrath may be a sign of mental disorder. If it is such a sign other signs of insanity should be present but not necessarily especially five months after the crime as it is now.

This instability (quickness to wrath) might account for the assaults, and equally for the murder of either a sane or insane man. The dubious question of motive is merely a question of ifs and ans in this case when Juma's statement to the Magistrate is compared with his statements in the Supreme Court and his statement to me. Moreover - to me - he denied the first statement attributing its appearance in the records to Suliman and the Court interpreter.

These considerations make it desirable to ask how far the evidence supports the suggestion of insanity at the time of the crime, by separating the assaults from the murder.

(1) The assaults - these were amply proved by eye witnesses and do not suggest more than angry assaults by a jealous native without any

surrounding...

surrounding influences at the time to restrain him. The effect of these proved assaults upon the Court is seen in the fact that two of the assessors expressed the opinion that Juma "deliberately got rid of Salim" (before the assaults) and intended to kill, and the Judge expressed "complete agreement" with this opinion. It is difficult to see how getting rid of Salim then showed an intention to kill Mirabu at another time in another place.

(2) The murder. The extent of the wounds of the deceased showed more than an angry and jealous assault. They showed a definite intention to kill gravely raising the question of insanity. The evidence here was

- (a) Suliman's, as already given.
- (b) Police evidence of arrest in the roof } denied by Juma.
- (c) Identification by Suliman of the panga and knife found on Juma as being the property of Juma.
- (d) Statement of Sub-Assistant Surgeon that the above weapons might have caused the wounds he found on deceased which he believed to have caused her death.
- (e) Statement of Sergeant Anyim that "there appeared to be blood on the panga" and the knife "had what appeared to be blood on it".

No doubt the defence had some good reason for not bringing out Juma's denial of (a) and (b) and the fact (?) that the weapons were identified (c) only by Suliman of whom Juma professes to have been (sexually) jealous - jealousy having also been suggested as the motive...

motive by the Judge to the assessors. If we admit jealousy it is obvious we are according belief to Juma's story.

In regard to (d) this evidence is of no more than usual importance but (e) seems another matter, and two essential questions are left unanswered, viz:-

- (1) Was what appeared to be blood actually blood?
- (2) If it was blood was it human blood?
- (3) Was there any evidence of blood on the weapons when they were produced in the Courts?

A further point in the case is that no evidence connecting Juma with the murder appears to have been found with the body of the woman. Is there no possibility that finger or foot prints might have provided the conclusive evidence some may think to be lacking?

However it is important to note that the Judge had "no shadow of doubt"; that he informed the assessors that "the knife and panga had blood on them; and informed His Excellency that he had "no doubt that the accused was seized with a blood lust and ran amok". Concerning this I would submit to you that a blood lust and running amuck if they are anything are insane and irresponsible conditions with a pathological cause. In further emphasis of the important fact that in the eyes of the law the evidence was entirely satisfactory I would draw your attention to the judgment of the Appeal Court which states (1) that Juma killed two persons and wounded a third,

(2) that his confession to the Magistrate was corroborated.

(3) That he neither retracted nor denied his confession.

In...

REPORT OF A DOCTOR.

1. In compliance with your letter of 19th July received on the 21st I saw up the prison on Saturday 2nd August repeatedly from 8 to 8.30 a.m. without obtaining an answer. I then rang up Dr. Drury whom I found was away and then the Native Hospital where I obtained, after great difficulty, the information that no European staff had arrived and that the prison Medical Officer - now Dr. Blomfield - was not on the premises. At 9 a.m. I was able to arrange by telephone from Nakuru with the prison clerks direct and I saw the patient at 9.30. The Sub-assistant Surgeon was at the Courts but during my visit Dr. Blomfield looked in. He had not previously seen Mwacharia.

2. I found that Mwacharia had been admitted to the prisons on 11.4.50 and to the Prison Hospital on 12.6.50. The daily report of the Sub-assistant Surgeon said "eats and sleeps well, no signs normal". There were no reports of any mental or physical examinations in either Nairobi or Nakuru prisons and no laboratory reports. The blood had been taken for a smear test that morning. The Prison Hospital is not on the telephone, therefore I had to go to the Superintendent's office to telephone to Mr. Tomkins with a request to make the same test as urgent matter. On Sunday morning (2nd August) Dr. Tomkins telephoned that the blood sample was too contaminated for examination, and if a fresh sample was sent to his home that day he would test it.

let me have the result the next morning; i.e. on Monday 3rd August. I rang up the prison at once only to find that there was nobody there; on ringing the Native Hospital I learnt that no Medical Officers or Nurses were on duty. I then got Dr. Callahan at his house and he went to great trouble at once to get the specimen as Dr. Fosking wished.

3. I have submitted the above details to you in order to explain the delay over this case marked urgent, and to draw your attention to (1) the frequent delays and waste of time due to the prison hospital having no tele-
phone, (2) the delay, waste of time, and risks, due to there not being any responsible person on constant duty at (a) the Native Hospital (b) the Prison and its hospital.

I have repeatedly brought to your notice the importance of the history in such cases. In his forensic medicine Dr. Newbold East says: - "It is of the greatest importance to consider not only the medical and general history but also to ascertain in detail the known facts of the crime and if possible the conduct of the accused before, during, and after its committal". This information would be expected to form part of the report of the medical officer under whose observation Macharia came. The crime was committed on 2nd March. Macharia appears to have been in custody in Nakuru from 2nd March to 10th June. Notwithstanding these facts (and the important fact that the nature of the crime suggested the possibility of/

of insanity) there is no medical report from Nakuru in the file and nothing to show on what grounds Dr. Henderson founded the opinion he gave in Court on 8.3.36 as follows: "I have seen the accused several times and have watched him: not more than 3 times since he has been in prison custody. I asked him a few questions. As a result I think he is quite normal and quite fit to stand his trial and to be considered responsible for his actions". Further, there is no indication in the Court evidence that any steps had been taken by the Police, the Prosecution, or the Defence, to obtain the facts of the history which might bear upon (a) the question of insanity (b) the question of motive - quite apart from the facts ordinarily obtained by the medical officer concerned. Undoubtedly the absence of a history and of a full physical and mental report from the medical officer who had the opportunity to see the accused on the day of the commission of the crime and during the three months before the trial may be said to load the dice against the accused.

5. The trial (8.3.36).

Briefly the case for the Crown was that the accused assaulted and killed a woman and her child because the woman had refused "to lie with him" for the reason that she was pregnant, that he then assaulted but did not kill a woman whom he met on the road, and proceeded to Nakuru police station where he reported the crime and gave himself up. There was no witness to the murder but the circumstantial evidence was strong.

The husband of the murdered woman made the following statements. (a) He was at work at a distance when/

when the crime was committed.

(b) He had not known accused before the day of the crime, except that he had seen him walking about on the farm.

On the day of the crime accused had come to his hut before he went to work, - at about 6 a.m. "He was sitting outside my collection of huts and I left him there". -

(c) (Cross-examination) He had seen Mwachira on Saturday 27th February, i.e. 2 days before the crime. On Monday 29th Feb., i.e. the day of the crime, he had given Mwachira some tobacco but not sent him to work. He did not know where Mwachira went then.

These statements have a bearing on Mwachira's statements as to giving him (para 10)

The case for the prosecution was no more than an effect to obtain evidence of the accused to manslaughter (2) on point insanity (without evidence) in cross-examination of Dr. Mwachira, the only medical witness called.

In their addresses the counsel for the prosecution confined himself to the question of provocation and the defending Counsel said:- "Accused must prove insanity. He can't do it. He must rely on what he can get out of the Crown witnesses". If this statement was meant to inform the Court as to the procedure in cases where insanity is suggested it seems to be one for correction. It is sufficient to ask whether it is not customary in Kenya (a) to proceed as in the Central Criminal Court, (b) to call witnesses for the defence on the question of insanity? I suggest that no effect to appear to have been in either of these directions although insanity was suggested by the circumstances of the crime.

Macharia made a statement in Court to the effect that he asked the woman (whom he murdered) for food, that her answer made him angry and he then attacked her and subsequently went to Nakuru to report his crime.

In his judgment the Judge briefly dismissed the question of insanity and entered into a discussion of the provocation. He attributed the crime to "frustrated passion and anger" and not to "loss of self-control due to insulting words spoken" by the murdered woman. The Judge stated explicitly that remarks such as the woman made are common among natives and "do not normally cause the person addressed to lose his self-control in this way".

The Judgment was briefly upheld by the Appeal Court.

In this connection I must point out from the psychiatric standpoint:-

(1) That in the Court evidence I find no support to the statement of the Judge quoted above and know of no reliable authority for the statement. It has to be remembered that the act of a sane man may be also the act of an insane man.

(2) That if it is correct that such remarks do not normally provoke loss of self-control the question of insanity seems to be thereby forced into the first place.

(3) That the difference between "frustrated passion and anger" and "loss of self-control" seems to be no more than a verbal difference.

(4) That (a) the lack of adequate motive for the man's series of crimes, (b) the fact that Macharia left behind/

Macharia made a statement in court to the effect that he asked the woman (whom he captured) for food, that her answer made him angry and he then attacked her and subsequently went to Samba to report his crime.

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(3) That the difference between "frustrated passion and anger" and "loss of self-control" seems to be no more than a verbal difference.

(4) That (a) the lack of adequate motive for the man's series of crimes, (b) the fact that Macharia left behind

behind his fez and other things thus showing no effort to cover up his tracks, (c) the fact that he did not attempt to conceal himself although he realized at once that he had done wrong, (d) the fact that he promptly gave himself up to the police - these points bearing on the question of insanity do not appear to have been investigated and considered by the Court.

6. The Medical Evidence.

The question of insanity was raised only by the defence in cross-examination of Dr. Henderson whose statement is quoted in paragraph 4. above. None of the Crown witnesses were cross-examined on the question.

The defence also elicited from Dr. Henderson the following unconditional opinion:-

(a) That it is not possible for a sane person to become suddenly insane and cause a murder such as this and then to revert to sanity.

I need scarcely remind you that this statement is in conflict with knowledge and can be amply rebutted from medical experience and literature.

(b) That he (Dr. Henderson) is the only practitioner in Kenya who has experience of institutional lunacy work at home.

This erroneous statement is unworthy of comment. I would point out however that "experience of institutional lunacy work at home" is not necessarily of great value in an African criminal case.

(c) That it is a matter of opinion where the line of difference between a homicidal maniac and a case of this kind/

kind, occurs; not speaking of those who are definitely insane.

I find this statement incomprehensible.

(d) That a person who is capable of committing murder is better out of the way.

The Court appears to have paid no attention to this unfortunate evidence of strong prejudice against the accused.

(e) That some people of the medical profession at home consider that homicidal maniacs should be locked up. The same people hold that all criminals even petty criminals should be locked up i.e. that any criminal is a subject for a lunatic asylum and not for a prison.

This is a statement too absurd for comment. To regard "locking-up" and a "lunatic asylum" as synonymous terms savours of the early nineteenth century.

The purpose of medical evidence is to assist the Court to a decision out of expert knowledge, careful ascertainment of the facts, careful weighing of the facts, and a wholly unbiased medical judgment and attitude. I submit that the statements made publicly by Dr. Henderson gravely misrepresent medical knowledge and opinion, are erroneous in respect to facts, and being of a nature to bring medical evidence into legal and public contempt should be publicly corrected. It may be possible to over estimate the influence of the statements on the judgment in this case. It is however not possible to exaggerate the influence of the various deficiencies in investigation of the question of insanity referred to in paragraphs/

paragraphs 4 to 6 above. The failure to make investigations along the usual psychiatric lines may be attributed to Dr. Henderson's views and prejudices - a failure made all the more lamentable by Dr. Henderson's claim to be a psychiatric authority.

7. From the foregoing paragraphs it will be understood that I examined the man on 1st August, i.e., five months after the crime, under considerable disadvantages. Not only was all family, personal, and medical history wanting, but also - although suspected of insanity - Macharia had been seen during that period (which included his trial) by one medical man only who had stated in evidence that he saw and watched the man on six occasions, (during three months), posed him "a few questions", and arrived by these means at a definite opinion that the man was sane, and adding that in his opinion the three crimes were the acts of a sane man. Further, the record of the trial made it clear that the defence of insanity had not been made on ascertained facts but rather as a tentative inference from the nature of the acts.

8. Physical.

Macharia is a thick set man of 30 to 35. I found no evidence of organic disease of the nervous and other systems. Dr. Tonking has reported to me today that the Kahn test is positive.

9. Macharia's own story of the crimes.

He had been working for a European (shamba work) and/

and had been ill. On returning to work after his illness he was discharged. He walked over to a friend on another farm who gave him an empty hut to live in and he stayed there for two weeks. (Compare the "friends" evidence as noted in paragraph 5. above). On the morning of the crime he went to his friend's wife and asked for food. She began to abuse him with bad names and said he could eat her inside. This made him angry. He attacked her and the child and was then surprised at what he had done. He ran away and being still angry he attacked another woman. Then he knew he had done wrong and went and told the police.

Questioned.

He did not mean to kill and cannot say why he did kill. However she was a woman. He did not go and tell the husband instead of attacking the woman, because he was angry. If he had done so the husband would have beaten her.

10. History.

His father and mother died when he was about ten. He has one sister who is quite well. He has never been married because he has never had enough property for a purchase. In the past he has worked on many different shambas. His native district is Fort Hall. He has had no mission or other education.

11. Medical History.

He denied having had syphilis but has had connection with many women. He has had "fever" many times.

times.

Question: What was the illness you had before you went to stay with your friend?

Does not know the name. It began with a very bad headache and then everything went round and he went unconscious and after that felt mad. He did not fall down but sat down when he felt it coming. He got pains with the attack; in his sides, head, and ears. In the attack he could hear nothing (very emphatic on this) and everything went dark to his eyes (Kikuyu for the word translated black is ~~black~~). This was his fourth such attack. The first attack was nearly 2 years ago.

12. Mental.

His attention, orientation, and reasoning appear to be normal and his memory good. His outlook is entirely "primitive".

His expression was of depressive type; his conduct and obedience were good; his responses were quick and concise.

His mood throughout was calm except while stating his story of the crime when there was some emotional excitement.

13. Discussion.

I tried repeatedly to detect inconsistency in Macharia's story without success.

If the story is believed - and it was not given in answer to leading questions - the most important part is the description of his illness. The symptoms correspond very closely to minor epilepsy and the positive Kahn

supports this. The statement that he "felt mad" after "feeling senseless" suggests the possibility of epileptic automatism or dream-state in which pathological homicidal impulse of well-recognized uncontrollable nature occurs. The fact that he was "surprised" at what he had done suggests that he actually had at least partial amnesia (loss of memory) for the events, and his neglect to cover up his tracks and to hide, along with his prompt voluntary confession, are consistent with the condition. On the other hand his story gives no evidence of amnesia - an important point; but this again is not unusual. It is not uncommon for an epileptic accused of crime to concoct a story in his defence wholly or partly from what he hears from others, and in so doing to profess a memory he actually has not.

14. I have set out fully the facts as known to me. I regret that owing to the many most important blanks (medical and legal) I find it impossible to assist you with an opinion.

(Sd) H. E. GORDON.

3rd August, 1936.

The Hon. Director of Medical Services,
NAIROBI.

CRIME CASE NO. 63/36.

NYARUGEMBE NYARANGA.

I have seen this man to-day as you requested.

Court file of trial on 8.6.36.

(a) Crown Case.

On 22nd April he killed a woman (webber) and she reported the crime to the police and made a confession to the local magistrate. He stated in the Supreme Court that he had lived with Webber for 10 months and had developed a discharge of blood from his penis. This recurred about the 15th of each month from January onwards. He attributed it to Webber as a result of having asked her for the return of the sh. 36/- he had paid for her. He became angry at being turned into a woman and told her that if she did not cure him he would kill her. The discharge recurred in April so he killed her.

The crime was witnessed by two Indians who were "easily in view". A policeman said accused was very excited after the crime: "his eyes were very wild, he was not frothing at the mouth" (!) The magistrate to whom he confessed said he "fully understood" the official caution given to him before confessing. The magistrate was not questioned otherwise as to the man's mental condition at the time. Another policeman said that when the man gave himself up "his face was like that of a man who had killed a man, his eyes were

fieree/

fierce, and his face wrinkled; he was excited".

(b) Medical Evidence.

The Medical Officer who testified to p.m. examination of the deceased stated in cross-examination that he "asked to see the accused" and found him "troubled" about the alleged bloody discharge, and about having been turned into a woman. He had examined smears from the woman's body and from the man for gonorrhoea; the results were negative. He had known a similar case "some years" ago when a dresser in hospital had the same trouble and committed suicide because of it.

There is no record that this Medical Officer (Dr. Henderson) investigated the man in reference to possible insanity, although the accused had been in custody for 12 days when the trial took place; and there is no record of any medical examination at that time into the physical source of the alleged blood.

(c) Defence.

The counsel for the defence raised the question of insanity in his address but no evidence had been called to support the plea, and there was no cross-examination of any importance.

(d) Judgment.

The Judge dismissed the insanity plea and pointed out that the crime was premeditated and that the man was "actuated partly by a mistaken idea and partly by anger". He added that "it would be a miracle for a man to be turned into a woman". He dismissed also the plea of provocation holding/

holding that the facts showed no legal provocation. The assessors (three natives of a tribe "contiguous to accused's tribe in Tanganyika") agreed that by tribal custom a man who had been turned into a woman by a woman was entitled to kill that woman. In reporting the case to His Excellency the Judge recommended the man to mercy without accepting the assessors' statements as "an authoritative statement of native custom or as one which could receive official approval".

(e) Appeal.

The Appeal Court agreed that the accused's belief that he had been turned into a woman was honest, and dismissed the appeal with a recommendation of "sympathy" to His Excellency.

(f) Petition.

The man made a petition stating that he fulfilled a tribal custom in killing the woman.

(g) Inquiries.

These have been from natives in various directions including the man's own district. The custom appears to have been to establish the fact of witchcraft and to hand the culprit to the uncircumcised youth to be beaten to death. The victim of the witchcraft is "absolutely forbidden" to take part in the killing. The passing of blood in the urine appears to be unknown as a result of witchcraft.

(h) Medical investigations since the trial.

Hence, beyond laboratory examinations of one specimen of urine taken on 16th July. Blood cells were found in it.

2. Summary.

It is necessary to point out the blanks in this case as summarized above.

3. Examination. (13.3.34)

(a) Physical

I found no physical abnormality except a slight accentuation of the second cardiac sound in the aortic area. My examination had in mind the many possible causes of haematuria. You will agree that much further examination - medical, surgical, X rays, etc., is required in reference to the alleged haematuria.

(b) Mental

Briefly, I found no present evidence of either mental disorder or mental deficiency. On the contrary I found him a sharp and intelligent native. He has had no education but has a record of service as cook or houseboy for a good many years. He is able to give the names of English his former employers (English) and to use a number of English words, numerals, etc. He gave his age as 29.

(c) Hyaragombe's own story to me. This was given with only a few questions to assist him.

He has nothing wrong with him except that since 15th January he has passed blood with his urine once a month on about the 15th. He did not so pass blood in May and thinks this exception is because he killed Wabera in April. There is no pain at all any where in connection/

connection with this haematuria or at any other time anywhere and the blood lasts always only one day. He has never had any illness to require a visit to a doctor (native or European), and never any injury of any kind. The blood causes him no inconvenience, and he has never passed any in other ways.

He attributes the haematuria to witchcraft by Wabera. He had paid 360/- for her last year, about the middle of the year. All went well until about the end of the year when they began to quarrel, and finally he got tired of her and wanted his money back. This she refused and threatened witchcraft. On the 10th of December 1935 (he is very precise as to this date) she put juwa into his tea and he drank it. He saw her put it in. It was herbs powdered up in her hands. She told him what it would do - viz., make him menstruate like a woman. He does not know why, (knowing it was witchcraft and what it would do), he nevertheless drank it. On 15th January 36 he menstruated like a woman, i.e., he passed blood in his urine as recorded above. This made him very angry - to be a woman. He told Wabera in April that if she did not make him right again he would kill her if the blood recurred in April. It did so recur and he killed her. He was acting in accordance with the customs of his tribe.

4. First Discussion.

From my examination and the summary of the trial it was evident that the chief problem before me was to determine the nature of his beliefs.

The questions were two, viz:-

(A) was the belief that he had a bloody discharge

once a month a true belief or was it a false belief amounting to an insane delusion?

(B) Was the belief, arising out of (a), that he had been turned into a woman a true belief or was it a false belief amounting to an insane delusion?

5. Question A.

His evidence on this point was given in Court. The Court did not call for investigation of this essential point. Dr. Henderson had taken a smear for gonorrhoea - possible but very unusual cause of blood in the urine. He had not investigated other and more likely causes. He had not even looked for blood in the urine. The recent laboratory examination of the urine is no help without essential information not supplied in the report.

It is therefore quite impossible for me to be sure on this question.

6. Question B.

Assuming the answer to A. to be that the belief was a true belief founded on fact, the belief B. might very well appear to a native to be founded on fact, having regard to the alleged periodicity of the bloody discharge.

Questioned on this point he was unable to advance any other reason for considering himself a woman - as he says he does; with one exception, viz., that his nocturnal (8 a.m. he said) genital tumescence is now quite inadequate for coitus. This may be a psychological effect of fear in prison. He was firmly of opinion that

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