INSANITY AND CRIMINAL LIABILITY IN KENYA

A Dissertation submitted in partial fulfillment of the Requirements for the L.L.B. Degree, University of Nairobi.

BY

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NAIROBI

MAY, 1978

ACKNOWLEDGEMENTS

My sincere gratitude is expressed to the following, who in one way or another helped me in the writing of this paper.

Firstly, to Dr. K.N. Khan, Lecturer, Faculty of Law, who was my supervisor, for the invaluable help in the form of suggestions and corrections that he gave during the preparation of this paper.

Secondly to Miss Mary Mwangi for typing the paper in a professional manner.

Last, but not least, to Mr. C.B.K. Karumi and Miss M. Waithira for the role they played.

C O N T E N T S

ABBREVIATIONS

PERIODICALS

E.A.L.J.	East African Law Journal
Y.L.J.	Yale Law Journal

CASES

A.C.	Appeal Cases
Cr. App. R.	Criminal Appeal Reports
E.A.	Eastern Africa Law Reports
E.A.C.A.	Eastern Africa Court of Appeal Reports
E.A.R.L.	East Africa Law Reports
E.R.	English Reports
K.B.	Kings Bench Reports
K.L.R.	Kenya Law Reports
Q.B.	Queens Bench Reports

STATUTES

P.C.	Penal Code
C.P.C.	Criminal Procedure Code

TABLE OF CASES

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East Africa Order-in-Council 1897

East Africa Order-in-Council 1902

East Africa Order-in-Council 1911

Indian Penal Code

Kenya Criminal Procedure Code, (cap, 75, Laws of Kenya)

Kenya Evidence Act, (cap 80, Laws of Kenya)

Kenya Penal Code, (cap 63, Laws of Kenya)

Native Tribunals Ordinance, 1930

Trial of Lunatics Act of England 1883

Witchcraft Act, (cap 67, Laws of Kenya)

INTRODUCTION

Criminal law takes an individual to be having the ability to choose between a socially acceptable behaviour and a socially unacceptable one. This is what is termed as the concept of Free Will. This concept makes one to be held responsible for any of his conducts which violates the law.[1]

The main purpose of criminal law is to enable the members of the society in which it is applied to lead a good life. To facilitate this, it holds everyone whose conduct is against the law liable to punishment. The punishment may be a fine, imprisonment or corporal. Where the offence is murder or robbery with violence, the offender is punishable with death. The punishment that an offender gets usually depends on the seriousness of the offence with which he is charged.

There are a number of theories that are put forward to justify the punishment of offenders. One such theory is retribution. One who does a wrong to the society ought to be punished to pay for the wrong he has done.

Sometimes offenders are punished so as to deter them and the community at large from engaging in similar conducts. It is argued that fear of being punished stops people from committing crimes.

Where an offender is imprisoned, he is removed from the public and thus he cannot cause troubles to the public at the time he is serving his term.

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Crimes in most cases emerge out of the ills in a society. The offenders are punished so as to reform them. When in prison, the offenders may be taught some trades[2] and they may be introduced to faiths like christianity.[3]

Criminal culpability generally requires two components in a crime. These are Mens rea[4] and Actus reus.[5] This means that even after causing the Actus reus, there may be a defence to the act i.e. if there was no Mens rea. A defence may be either special or general. In our law, there are seven such defences.[6] It is proposed that the following discussion will be confined to the law relating to the defence of insanity in Kenya.

The defence of insanity is a general one but due to its inappropriateness in application,[7] it is usually pleaded in murder cases. It is made effective by the fact that the concept of Free Will, which has been discussed above, can be destroyed by a serious mental condition.

Kenya's criminal law and more so the law relating to the defence of insanity is virtually English law.[8] This law was adopted by Kenya in the codified form.[9] In looking into the law relating to the defence therefore, its background in the English law will be traced. Its importation into Kenya[10] and its development (if it has developed) up to the present day will be discussed.

Criminal law and therefore defences to criminal offences reflect the views of the society to which the law applies. To understand the law therefore, it is necessary to know the society in which it operates.

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This can be done if the history of the people, their social and economic conditions are known. For this reason, an attempt has been made to look at the African society before the English law was imposed on us and also the present day society in which the law applies.

After this it will be possible to determine whether the law relating to the defence of insanity expresses the view of the Kenyan Society.

C H A P T E R I

HISTORICAL BACKGROUND

In this chapter, it is proposed to be discussed as to how the law concerning the defence of insanity has developed. We begin with the development of the law relating to the defence of insanity under the English law and thereafter the changes (if any) that have taken place since the law was imported into this country.

1.1. INSANITY UNDER ENGLISH LAW

English law, even in its harshiest days, has recognised insanity as a defence to a criminal offence.[11] The law on this defence was not at all clear until the decision in the MNaghten's case[12]. In looking at the historical background of the defence, an attempt has been made to divide this development into three stages

(i) Position before the MNaghten's case

(ii) The MNaghten's case

(iii) Court's interpretation of the MNagthen rules.

1.1A. POSITION BEFORE THE MNAGHTEN'S CASE

In the ancient times, mental disorder or insanity was not regarded as having any bearing upon criminal guilt. Before the thirteenth century, the principle of liability in murder cases was that:

> "a man who has killed another by misadventure though he may deserve a pardon is guilty of a crime; the same rule applies .....to a lunatic."[13]

The period between the thirteenth and the fifteenth centuries brought about a number of changes.

The King started granting pardon as a special act of grace to one who committed homicide while being of unsound mind. This led to the development of a special verdict[14] which insured the issuance of pardon. In time pardon came to be granted as a matter of course. This was the beginning of the recognition of insanity as a defence to a criminal offence. By the fifteenth century, absolute madness became a complete defence to a criminal charge.

By the middle of the eighteenth century, there was abundant authority to show that insanity was a defence to a criminal offence.[15] Before this time the position was that weakness of the mind afforded a defence only when the prisoner was:

> ("totally deprived of his understanding ... and doth not know what he is doing no more than an infant; than a brute or a wild beast"[16]

Before the decision in the M'Naghten's Case,[17] the law relating to the defence of insanity was in a stage of flux. The attempt had been to make the test of the existence of insanity concrete. There was no authoritative prouncement on the defence until the said decision was made.

1.1B THE MNAGHTEN'S CASE[18]

In this case, Daniel M'Naghten was indicted for the murder of Edward Drummond, Secretary to the Prime Minister, Sir Robert Peel. The defence led evidence of the accused's insanity, particularly his obsession with certain morbid delusions. Lord Chief Justice Tindal instructed the jury as follows:

> "The question to be determined is whether at the time the act was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong and wicked act. If ... the prisoner was not sensible ... that he was violating the laws both of God and man, then he is entitled to a verdict in his favour"[19]

The jurors returned a verdict of "not guilty" on the ground of insanity.

Due to the dissatisfaction generated by the decision, the crown referred the verdict as well as the general problem of the defence of legal insanity to the House of Lords for debate.

The House raised certain questions to which they invited the Law Lords to deliver answers. The Law Lords gave the following answers:

(a) Every person is presumed to be sane until the contrary is satisfactorily proved.

(b) To establish a defence of insanity, it must be clearly proved that at the time of committing the act, the party accused was labouring under such a <u>defect of reason</u>, from a desease of the mind so as not to know the <u>nature and quality of the act</u> he was doing, or if he did know, that he did not know he was doing what was <u>wrong</u>.

(c) If the accused was conscious that the act was one that he ought not to do and if the act was at the same time contrary to the law of the land, he is punishable.

(d) If the accused acted under the influence of delusions which if real would exempt him from liability, then he is not liable.

(e) A medical man may be asked as a matter of science, whether the facts of a case, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.

These replies were a compromise between the crown and the judges who gave them.[20] The crown was seeking an exemplary deterence and the compromise is heavily weighted on this side.[21]

Answers to hypothetical questions cannot strictly speaking be a source of law. All the same, the above answers have now been accepted and acted upon by courts for so long and so consistently that there is no doubt that they represent the law.

1.1C INTERPRETATION OF THE RULES IN M'NAGHTEN'S CASE

Application of the rules has caused much difficulty to the courts as to the meaning of certain words and phrases used in them. The words and phrases are such as disease of the mind, nature and quality of the act and conscious that the act was one that he ought not to do. Let us see now how courts in England have interpreted these words and phrases.

1.1C (i) Disease of the Mind

In law the words "disease of the mind" do not have the same meaning as they would mean to a doctor. The law directs itself to the intellectual capacity to distinguish between right and wrong.

That is, in law, the words have a narrower meaning. A disease of the brain that does not cause a defect of reason is not a disease of the mind. The position was stated in R V. Kemp,[22] where the accused was charged with causing grievous bodily harm to his wife. Evidence was adduced which showed that he suffered a congestion of blood in the brain which caused him a temporary lapse of consciousness in which state the act was committed. This congestion of blood was held to be a "disease of the mind" within the M'Naghten's rules. In this case, Devlin J. (as he then was) observed:

> "The law is not concerned with the brain but with the 'mind' in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding ... condition of the brain is irrelevant. The words "disease of the mind" are not to be construed as if they were put in for the purpose of limiting the effect of the words "defect of reason."[23]

1.1.C (ii) Nature and Quality of the Act

The words "nature and quality" refer to the physical nature of the act. This was stated in R V. Codere,[24] where the appellant had induced a bank to cash cheques for him on a promise that he would bring to it canadian currency. He did not have the necessary currency and he killed the deceased in order to obtain it from him. He was sentenced to death and in his application for leave to appeal against conviction it was stated:

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"The court is of the opinion that in using the language "nature and quality", the judges were only dealing with the physical nature of the act and were not intending to distinguish between the physical and moral aspects of the act."[25]

The standard used in whether according to the ordinary standard adopted by reasonable men, the act was right or wrong.

1.1C (iii) "Conscious That The Act Was One That He Ought Not To Do"

These are the words that have caused much difficulties for the courts while applying them. The question which arises is whether the words refer to the moral or legal standard. The position was well started in R V. Codere[26] where the court observed:

"If it is punishable by law, it is an act that he ought not to do and that is the meaning in which the phrase is used in that case".

1.1C (iv) "Wrong"

The word as used in the M'Naghten rules, means contrary to law and not 'wrong' according to the opinion which the person accused or other people might hold. In R V. Windle[27] the appellant had killed his wife by giving her 100 asprin tablets. He informed the police about the incident and added, "I suppose they will hang me for this?" Lord Goddard C.J. observed:

"A man may be suffering from a defect of reason but if he knows that what he is doing is 'wrong', and by 'wrong' is meant contrary to law, he is responsible."[28]

1.1D THE VERDICT OF "GUILTY BUT INSANE"

Under the common law, if a court finds that an accused has not been proved guilty of the offence he has been charged with, he is acquitted. Prior to the Trial of Lunatics Act 1883, where an accused proved that he was insane at the time he committed the offence, he was taken not to be guilty of the offence and was acquitted. The said Act introduced a qualified form of acquital. It requires that where one is found to have been insane when he committed an offence, the court should enter a verdict of "guilty but insane".[29] The verdict probably means that the accused is guilty of the offence charged but cannot be held to have been responsible for it because he was insane. Under this Act, such an accused is detained in the majesty's pleasure.

1.2 THE DEFENCE OF INSANITY UNDER KENYAN LAW

The Kenyan society is composed of many races. These are the Africans who are the majority, the Asians and the Europeans. The defence of insanity under the Kenyan law will be looked at with the Africans in mind, firstly because they are the majority and secondly because they are the indigenous people of Kenya.

When the British came to colonise Kenya, they met the Africans who had their own laws. The Africans had their own institutions for resolving disputes. These were the Councils of Elders. The disputes which were taken before these Elders were usually known to them before they even sat down to hear them. The Elders in almost all cases sat when there was an issue to be solved.

If a party to a dispute was insane, it was easy for the Elders to know before the issue was raised before them. In cases where an accused was insane, the Elders sat, not to determine his guilt, but to decide what had to be done to him for the interests of the community.

Under the customary laws, an insane person could not be held responsible of any act whatsoever. Insanity was said to be caused by the anger of the ancestors' spirits or by witchcraft.

Unlike under English law, there was no distinction between the diseases which brought about a defect of reason and those which did not. Any form of insanity could exempt one from liability. An insane person was said to be under the control of some supernatural powers. When the British came, they claimed to be on a mission to civlize the primitive African. This mission was meant to bring the Africans to the standard of the "civilized" white man, mainly the English gentleman. One way of attaining this goal was to make the Africans forget their native law and opt for the so called civilized English law. Under this section an attempt has been made to look at how the criminal law (which contains the defence of insanity) was introduced to Kenya and its history to date.

1.2A RECEPTION OF THE ENGLISH TYPE OF LAW BY KENYA

The first Europeans who came to this country wanted to lead a life that was as similar to that which was led by their fellow country-men back in England as possible. This could not be possible if they were to be governed by a law that was different from that operating in England.

To enable them to enjoy such a life, English law was introduced. This was done by first introducing Indian law instead of the pure[30] English law.

Reception statutes in Kenya therefore introduced the Indian Penal Code[31], the Indian Criminal Procedure Code[32] and the enactments of the Indian Legislature. The reception clause of the 1897 East Africa Order in Council stated as follows:

> "Her Majesty's Criminal Jurisdiction in the protectorate shall so far as circumstances admit be exercised on the principles of and in conformity with the enactments ... of the Governor of India ... and where applicable shall be exercised in accordance with the common law and statutes in force in England on the 12th of August 1897"[33]

This clause did not say anything about the African customary law which was governing the natives. This law was to apply to the East Africa Protectorate which is the present day Kenya. Under the English constitutional law, citizens of a protectorate are not British citizens and the British Crown cannot make law for them.[34] It can therefore be argued that this law was to apply only to the British citizens staying in the protectorate.

The Indian Criminal Law[35] was preferred to the pure English criminal law. This is because India was a British colony and the law was codified to operate under the circumstances obtaining in a colony. This law was stated in the Indian Penal Code.

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1.2B THE INDIAN PENAL CODE

The code was drafted before the M'Naghten's case[36] but it was not passed until after the decision had been made. However, the draft had been revised and M'Naghten rules had been formalised in it. It was a codification of the English common law as it was in 1860. This code was successfully applied to Kenya.

There were two factors that may be said to have contributed to the success in it's application. The Indian Penal Code contained some customary law offences.[37] These offences gave it a native touch and it was acceptable to the Africans. A second factor was the contact that was there between the East African Coast and India. This contact had been there for many years and the Indian law was not all that new to the East Africans.

Although the native touch mentioned above made the code acceptable to Africans, it generated a lot of friction with the settlers. The code introduced some offences which were not crimes in England. This hindered enjoyment by the settlers, of the life back in England. They were not happy about this. They claimed that they could not do with any other law that was different from the criminal law in England.[38] They therefore advocated the enactment of a code to fulfil this purpose.

1.2C THE KENYA PENAL CODE

The Kenya Penal Code was enacted in 1930. It had the Nigerian Penal Code as its base. At this time Kenya was already a British colony. This therefore means that the natives were British citizens. The unfortunate thing about the code was that very many offences recognised by African customary law were left out. This gives an implication that

the views of the Africans, who were the majority in Kenya, were not taken into account in determining what should be made crimes and what should not. To the African, many of the offences included in the code are foreign. A good example of these is bigamy.

This code states the English law as it was in England in 1930[39] and hence the law relating to insanity which it states is as it was in England in this year.

Today, little change has been made to this code and it remains virtually as it was at the time it was enacted.

The objective of the colonial government has been stated to be getting rid of the customary criminal law. This it was unable to do.[40] Despite recommendations by the London Conference On the future of Law in Africa to include some customary law offences in the Penal Code, nothing of the kind has been done. All the same, what the colonial government was reluctant to do came to be done in the independent Kenya. This was when the Kenya Constitution came into effect.[41] Section 77(8) of the Constitution reads as follows:

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

African customary laws are not written and the section gave the final blow to all offences recognised by the customary laws which did not find their way into the Penal Code.

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CHAPTER II

2. INSANITY UNDER KENYA STATUTORY LAW

Under the Kenya Statutory law, law relating to the defence of insanity is stated in both the Penal Code and the Criminal Procedure Code.

2.1 THE KENYAN PENAL CODE

Statutory criminal law in Kenya has been provided by the Kenya Penal Code.[42] The general rule of interpretation of this code is found under section 3 which states as follows:

> "This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith"

This means that while interpreting the provisions of the code, judges can seek help from English decisions. Although it has been argued that the English pronouncements which ought to be referred to are those which had been passed by the time the code was enacted, in practice, present day English decisions are regarded to be persuasive and courts in Kenya quite often do follow them. This tendency of the Kenyan Courts leads to a conclusion that the law on the defence of insanity in Kenya is very much similar to the law on the defence now in force in England.[43]

Under the Kenya Penal Code, an accused person is presumed to be of sound mind, and to have been of sound mind at any time that comes into question, until the contrary is proved.[44]

When it is proved that an accused person was of unsound mind when he committed the offence with which he is charged, section 12 of the Penal Code regards him to be in the following position:

> "A person is not criminally responsible for an act or ommission if at the time of doing the act or making the ommission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the ommission, but a person may be criminally responsible for an act or ommission although his mind is affected by disease, if such disease does not infact produce upon his mind, one or other of the effects above mentioned in reference to that act or ommission."

The words of this section imply that for one to be within its ambit, his mental illness has to be identified with the particular act in question. That is to say, if one suffering from a disease of the mind of type X commits the act A and if one suffering from such a disease cannot know the nature and quality of the act A, or cannot know that it is wrong to do it, he may be treated as insane under the section. On the other hand, if the same person, suffering from the same mental illness of the type X, commits another act B, and if one suffering from the said disease can know the nature and quality of the act B or that doing B is doing what is wrong, he cannot be treated as insane under the same section.

Considering these possible circumstances, it can be seen that the provision leads to an absurd state of affairs.

Where a person who commits an offence is through intoxication insane, temporarily or otherwise, he can plead intoxication as a defence.[45] Where such is the case, the code states the position to be as follows:

> "Where the defence ... is established ... the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply."[46]

As will be seen when looking at the provisions of the Criminal Procedure Code, this is a very unfair provision. This is so especially when such insanity is of a temporary nature.[47]

The Penal Code places a woman who kills her child, the child being of less than twelve months in a special position. If her mind happens to be out of balance due to the effect of giving birth, she is treated under S210 of the Code which states:

> "Where a woman by any wilful act or ommission causes the death of her child being a child under the age of twelve months, but at the time of the act or ommission the balance of her mind was disturbed by reason of her not being fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then not withstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child."

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This section does not take the mental imbalance of such a woman to amount to insanity as provided under section 12. By taking the woman to be guilty of infanticide, which the section equates with manslaughter, the mental imbalance is regarded to have gone only to the point of making the woman incapable of making the requisite malice aforethought.

Where an accused establishes insanity as required under section 12 of the Penal Code and the insanity is shown to have caused him to act under the influence of delusions, then other sections of the code may come into operation.[48] This does not mean that the accused ceases to be treated as to have been insane for the law on insanity still applies. The procedure followed is as laid down under section 166 of the Criminal Procedure Code.

2.2. THE CRIMINAL PROCEDURE CODE[49]

Under the Criminal Procedure Code, the issue of insanity may arise not only to show that an accused was not responsible for the acts or ommissions with which he is charged, but also in the course of a trial or a Preliminary Investigation. Section 162(1) of the Code states:

> "When in the course of a trial or Preliminary Investigation the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence it shall enquire into the fact of such unsoundness."

Where the court finds the accused to be of unsound mind and incapable of making his defence, the proceedings in the case are postponed.[50]

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If bail is issuable in the particular case, the accused may be released if sufficient security is given that he may not do injury to himself or to any other person.[51] The President may, by order, direct that the person be detained in a mental hospital or any other suitable place of custody. This detention goes on until the President makes a further order or the court orders for the accused to be brought before it again.[52]

Where one is thus detained, the officer in-charge of the place where such a person is detained may inform the Attorney-General if he finds the person capable of making his defence. The Attorney-General then informs the court whether the proceedings against such a person shall proceed or otherwise.[53]

Where an accused is of sound mind at the time of a Preliminary Investigation, the fact that at the time he committed the offence he was insane shall not stop his being committed for trial.[54]

When a person who was insane at the time he committed the offence is committed for trial, provisions of section 166 of the Criminal Procedure Code apply. Section 166(1)(a) states as follows:

> "Where any act or ommission is charged against any person as an offence, and it is given in evidence on the trial of such a person for that offence that he was insane so as not to be responsible for his acts or ommissions, at the time when the act was done or the ommission was made, then if it appears to the court before which such a person is tried that he did the act or made the ommission charged but

was insane as aforesaid at the time he did or made the same, the court shall make a special finding to the effect that the accused was guilty of the act or ommission charged but was insane as aforesaid when he did the act or made the ommission."

This subsection disregards one of the requisite ingredients of a crime.[55] It appears to treat all offences that are committed by insane people as offences of strict liability.[56]

Where the special finding is made, the court reports the case for the order of the President and the accused is kept in custody,[57] and the President may order such a person to be detained in any suitable place.[58]

The officer incharge of the place where such a person is detained is required to make a report for the consideration of the President three years after the order for custody is made. Thereafter, such a report is made after every two years.[59] On the consideration of such a report, the President may order the person to be discharged or otherwise dealt with as he (the President) thinks fit.[60] The President has got wide powers to deal with people who are detained under these circumstances.[61]

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CHAPTER III

3. INSANITY AS INTERPRETED BY THE COURTS IN KENYA

In this chapter an attempt has been made to see as to how the courts in Kenya have interpreted the provisions which were discussed in the last chapter. The procedure which the courts follow in cases where insanity is pleaded and the kind of evidence that is relevant will also be discussed.

An important fact to be borne in mind is that when Kenyan courts are interpreting these provisions, they follow the methods used by the English courts in the interpretation of M'Naghten rules.

3.1. INTERPRETATION OF THE PENAL CODE

The important section in this code is section 12 which states:

> "A person is not criminally responsible for an act or ommission if at the time of doing the act or making the ommission he is through any disease affecting his mind, incapable of understanding what he is doing or of knowing that he ought not to do the act or make the ommission; but a person may be criminally responsible for an act or ommission, although his mind is affected by disease, if such disease does not infact produce upon his mind one or other of the effects above mentioned in reference to that act or ommission."

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The underlined words of the section have been interpreted by the Kenyan courts as follows:

3.1A DISEASE AFFECTING THE MIND

When dealing with these words, courts in Kenya raise the question whether the disease in question caused any of the incapabilities enumerated in the section. In holding Schizophrenia to be a disease affecting the mind, the courts of Appeal for Eastern Africa had this to say:[62]

> "We cannot exclude the possibility ... that when the appellant killed Lucy, he did so at a time when his mind was so affected by the disease of Schizophrenia as to make him incapable of knowing that he ought not to have done the act"[63]

Here the appellant had brutally killed his fiancee in the presence of a witness. He had thereafter tried to commit suicide. There was a history of schizophrenia in his family. The reasoning of the court here was similar to that of the English court in RV. Kemp.[64]

3.1B INCAPABLE OF UNDERSTANDING WHAT HE IS DOING

(Nature and quality of the act)

It appears that a situation has not arisen in courts in Kenya whereby these words could have been interpreted. However, if such a situation arises, the court will probably refer to English decisions where the words have been interpreted. A case likely to be referred to is R V. Codere.[65] The court here held the words to mean the physical nature of the act. The words were said not to have been intended to distinguish between the physical and moral aspects of the act.[66]

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3.1C KNOWING THAT HE OUGHT NOT TO DO THE ACT

(i.e. whether the act is wrong)

An act is taken to be wrong under the section if it is contrary to law. The widest interpretation of the word "wrong" was that given in Rex. V. Kamau s/o Njeroge[67] where the appellant had killed an Indian. There was evidence that for a period of years the appellant had been suffering from epileptic insanity. There was no evidence to show that at the time of the killing he was legally insane. In holding that the defence of legal insanity failed, the court of Appeal for Eastern Africa said:

> "The standard to be applied is whether according to the ordinary standard adopted by a reasonable man, the act was right or wrong or that the act was wrong in law".

This is too wide and courts in later decisions have restricted themselves to the last portion of it i.e. whether the act is contrary to law. In Philip Muswi s/o Musole V.R.,[68] the court citing R V. Windle[69] held:

> "The word 'wrong' in the section means 'contrary to law'"[70]

3.1D DELUSIONS

One who is suffering from an insane delusion is not said to be insane in the strict meaning of the word. A good illustration of this is R V. Kibiegon arap Bargutwa,[71] where while the appellant and his father were passing the night together in one hut, the appellant attacked the father and wounded five goats. When being seized by the neighbours he was violent. On being asked why he had done so, he said that his father had attempted to have an unlawful connection with him.

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The deceased denied the accusation before he died. According to medical evidence, the attack was so violent that it suggested appellant not to have been in his right senses. The court stated as follows:

> "Though such incomprehensible acts are not in themselves sufficient to establish insanity in law, nevertheless such acts coupled with the fact that at the moment when he was compelled to cease his attack he made the allegation against the deceased, there was good reason to think that the appellant may at least have been labouring under an insane delusion that the deceased had made an indecent assault upon him."[72]

When existence of such a delusion is proved, the accused is treated as if the facts with respect to which the delusion existed were real. In this case the delusion was taken to constitute sufficient provocation and the conviction for murder was substituted with manslaughter.

Belief in witchcraft, per se, is not insanity, within M'Naghten rules or the Penal Code. In Philip Muswi s/o Musele V.R[73] the court commented as follows on such a belief:

> "Even if he believed that he was justified in killing his wife because she was practicing witchcraft, it is a belief sometimes held by entirely sane Africans."

In the above case, Musele had been convicted for the murder of his wife. A psychiatrist's evidence said that he was depressed and that his belief of what was right or wrong was coloured by the belief that his wife was practising witchcraft on him. The question of whether the accused might have been labouring under an insane delusion was not touched in this case. The accused was required to show that he was legally insane. There was a wrong view of the belief in witchcraft.[74] As was remarked in Rex. V. Kibiegon arap Bargutwa,[75] even where the acts are not themselves sufficient to establish insanity, at times there may be a good reason to think that one has been labouring under an insane delusion.[76] It is very likely that Musele was acting under such a delusion when he killed the wife.

It is unfortunate that although the Kenya legislature recognises witchcraft,[77] the High Court is in doubt as to whether or not witch-doctors exist.[78]

3.2. THE ISSUE OF INSANITY

As a defence to a criminal offence, the issue of insanity arises at the trial for the offence. Section 166(1)(a) of the Criminal Procedure Code states:

> "Where any act or ommission is charged against any person as an offence and it is given in evidence on the trial of such a person for that offence that he was insane so as not to be responsible for his acts or ommissions at the time when the act was done or the ommission made, then if it appears to the court before which such person is tried that he did the act or made the ommission charged but was insane as aforesaid at the time he did or made the same, the Court shall make

a special finding to the effect that the accused was guilty of the act or ommission charged but was insane as aforesaid when he did the act or made the ommission."

3.2A THE PLEA OF INSANITY

As is the case with all other defences, the issue of insanity is raised by the accused. Whether it may be permissible for the prosecution to raise the issue in the course of a trial is not free from doubt.[79]

The courts are also cautious in murder cases. To make sure that an accused was not insane when he did the killing, the magistrates are required[80] to enquire from the authorities at the Mathari Mental Hospital, as soon as possible, whether there is a record of the one being tried for murder having a mental history.[81] This is so as to evade the danger of unknowingly convicting insane people.

3.2B ONUS AND STANDARD OF PROOF

In criminal cases, the onus is on the prosecution to prove the accused's guilt beyond any reasonable doubt.[82] But, when it comes to defences, the onus shifts to the accused. In Rex V. Ross[83], the appellant was convicted of murder in a trial before a judge and jury. His defence at the trial was that he was insane at the time he did the killing. The defence was rejected. On appeal, the court put the standard of proof in both cases to be the same. It said:

"Just as the crown is obliged to prove its case beyond a reasonable doubt, so must an accused person, to exempt himself from criminal responsibility satisfy the jury beyond any reasonable doubt that he was insane in the legal sense at the time of

This decision took the standard too far. The law on the point was stated in Rex V. Kibiro s/o Kariuki[85] where the respondent had been found guilty of arson. He was also found to have been insane so as not to be responsible for his action. On the standard of proof required, the court remarked:

> "It is for an accused person to prove on a balance of all the evidence that he falls within the ambit of section 13 (section 12 of the present Code)"[86]

The argument of the Court in this case was similar to that in Rex V. Noor Mohamed Kanji[87] where the Court of Appeal for Eastern Africa held that the burden is not higher than that which rests on the parties in civil cases.

3.2C EVIDENCE TO PROVE INSANITY

Evidence that is usually adduced to prove insanity is that of the circumstances surrounding the act in question, mental history of the accused and also medical evidence.

3.2D CIRCUMSTANCES SURROUNDING THE ACT

The easiest way of detecting whether an accused was insane at the time he committed the act is to observe what he did, how did it and sometimes the words he uttered at the time. This is the kind of evidence that is mostly relied on by the courts in cases of insanity.

In Nyinge s/o Suwatu V.R[88], the accused had killed a police officer while under a delusion that the officer was planning his death. After the killing he surrendered himself to the police saying, "I have come here to be killed because they wanted my head."[89] The accused did not explain who "they" referred to but most probably, the word here referred the police.

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This statement was taken to show that the accused was not insane so as not to know that what he was doing was wrong.

Similarly in Nguyai V. Republic[90], the appellant had been convicted of killing a girl he loved. The killing was brutally done and in the presence of a witness. The appellant was carrying one of the deceased's dresses when he killed her. He had left two letters at the scene of the killing. In one of the letters presumably meant for the deceased, he expressed his love for her and the hope of seeing her in another world. In the other letter directed to his boss, he described the killing as an "incident". The Court of Appeal for Eastern Africa was of the view that these were not the sentiments of a person aware of the appalling nature of his contemplated acts, but more consistent with a thoroughly disturbed personality.

3.2E MENTAL HISTORY

We have seen that magistrates are required to enquire into the mental history of one who is accused of murder before trial commences.[91] In this history, what is of interest is mainly whether the accused has ever suffered from a mental illness and whether any of his relatives has ever suffered from a mental infirmity. In Nguyai V. Republic[92] attacks of schizophrenia in relatives in the mother's side was considered as showing that there was a likelihood of the accused having been under an attack ofthe disease.

Having been treated for a mental sickness is regarded as raising the probability of a re-occurrence of a similar attack.

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3.2F MEDICAL EVIDENCE

In cases of insanity, a psychiatrist's views are reliable[93] but not binding on the court. It is ultimately for the court and not the medical men to determine the issue of insanity.[94] In Nyinge s/o Suwatu V.R[95] Widham J. stated that a court is not obliged to accept medical evidence if there is a good reason, of not doing so. From this it can be argued that where there is no reason for not accepting medical evidence, then the court should accept it.[96]

In Nguyai V. Republic,[97] the trial judge had ignored the medical expert's evidence. He had said that the doctor's view was a mere expression of his opinion. The court of Appeal for Eastern Africa had a different view and in considering the doctor's evidence, it remarked:

> "Dr. Mustafa is a distinguished practitioner in the field of psychiatric medicine and is highly qualified both professionally and through long experience ... his evidence ... was a considered view, arrived at after more than one year's observation of the appellant, with knowledge of the facts of the case and of the appellant's family history of insanity."[98]

The opinion that the appellant was suffering from schizophrenia at the time he committed the offence, which impaired his judgement of right and wrong, was admitted as evidence.

From this decision, it can be deduced that like any other expert opinion evidence, admissibility of medical evidence in cases of insanity is influenced by the qualifications of the doctor and his experience.[99] Knowledge of the facts

C H A P T E R IV

COMMENTS AND CONCLUSION

In the above discussion it has been seen that the law in relation to the defence of insanity has its basis on answers to some hypothetical questions. The questions had been formulated by the House of Lords when the decision in the M'Naghten's case was referred to the House by the crown for debate. The answers were given by a number of judges.

The reason for the crown's involvement in this decision was the fear caused by the attacks on the British sovereign and the members of their circle. There had been two attempts on Queen Victoria's life and all those involved pleaded insanity. There were also riots by the British workers protesting against their conditions of life. With this background, the Queen saw Daniel M'Naghten as an agent of social revolution. She therefore wanted the House of Lords to make the law on the point clear. The Queen was also seeking a very restricted rule to be laid down in the interests of exemplary deterrence.

The resulting M'Naghten rules were a compromise between the judges who gave the answers and the Crown. They were such that they leaned too much to the wishes of the crown and they ma it harder for one pleading the defence of insanity to succeed.

In interpreting these rules judges in England treated them like an Act of Parliament. They brought in the intentions of the judges who gave the answers and the resulting interpretations were narrow ones.

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However, at the time one who successfully pleaded the defence was acquitted. This in a way did not please the Crown as it was against its wishes. This led to the enactment of the Trial of Lunatics Act, 1883. This Act introduced a special verdict which was expressed in the words "guilty but insane". The verdict had to be entered whenever an accused successfully pleaded the defence of insanity. The Act gave the Crown the power to detain these people at his pleasure. They could be restrained anywhere the Crown though fit. In most cases they were restrained in a mental hospital.

After the Trial of Lunatics Act, the law became too unfair to an accused who pleaded the defence of insanity. In addition to it being difficult to establish the defence, one who was successful had to be hospitalised. The defence coupled with hospitalisation after acquital is not consistent with the purposes of criminal law. The law requires that if one establishes a defence to a criminal offence he should be allowed to go free.

The special verdict of "guilty but insane" made the defence of insanity meaningless. Instead of defining an exception to criminal liability, it was designed to define for sanction an exception from among those who would be free of liability. It is a device for triggering indeterminate restraint for these people.

It has also been seen that the law on the defence does not take into account the accused's state of mind at the time of the trial. So long as one was insane when he committed the act charged, he has to be restrained. Also where the commission of an offence requires there to be both the commission of the prohibited act and a criminal intent, one who sucessfully pleads the defence shows that he could not make the requisite intent.

Since this is one component of the offence charged, then the accused did not commit any offence. All the same, such a person is restrained. Considering this last situation, the law allows detention of people who have committed no crime. This shows that the law on the defence can lead to a conclusion that if the society wants to restrain someone, mens rea is not necessary to prove a crime.

This is the law that was imported into Kenya by the British colonialists in the codified form. The powers of the Crown are now held by the President. In the codification law relating to insane delusions was left out. However, judges in interpreting the law have recognised the delusions. One reason for the importation of the English law was that the English law was that the Englishmen living in Kenya wanted to lead a life similar to that which was being led by their brothers back in England. Another reason was that they wanted to use the law as an instrument to civilize the primitive natives.

The law might have succeeded in the former purpose but as far as civilizing the African was concerned, this was impossible as the African had his own legal system and the codified law was foreign and unacceptable. The Africans felt that the foreign law was being imposed on them. This was mainly because the codified law did not take into account their view of crime.

The judges in Kenya are either Englishmen or people with English legal training. When it comes to interpreting the law, they follow the methods used by English courts. When dealing with cases on insanity, they seek help from English prouncements on the defence. They rarely consider the fact that the Kenyan and English societies are different.

The mission to "civilize" the African to the Englishman's standard did not succeed. The law that was suited to the English society is up to now regarded as foreign law. The criminal law has not undergone any substantial change since its enactment in 1930. After independence, nothing has been done to reform the law to suit the African society.

The M'Naghten rules and therefore the law in Kenya based on them have their basis in obsolete views of insanity. They ignore the modern studies of the mind. They also do not recognise "irresistible impulse" as a defence.

The discussion has also shown that in the African society the insane people are given a fair treatment like any other member of the society. That this is the case even at present cannot be denied. This is one important factor that the law on the defence of insanity in Kenya should take into consideration.

For the defence of insanity to have some meaning, the law should be such that one who successfully pleads it is acquited The law as it stands is too unfair as it appears to do more harm than good. To abolish the defence may be said to be going too far, but, the law as it stands demands it.

If the law has to remain as it is, then some remedy can be done by withdrawing the powers of the President. If this is done, an accused should be released as soon as he regains his mental balance. The doctor's decision should be made final. Irresistible impulse should also be recognised as a defence.

Those people who plead insane delusions or insanity through intoxication should be placed in a different category and where one succeeds in proving his defence he should be acquited. This is because these people are not insane in the real sense.

Those who act under a belief in witchcraft should be treated as if they had insane delusions. This is because in the African society witchcraft is taken to be a reality.

If the suggested reforms are made, then the insane will be treated not as outcasts in our society as is the case under the present law, but, as unfortunate members of the society who deserve sympathy.

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B I B L I O G R A P H Y

BOOKS

Friedman — Cases and Materials on Criminal Law and Procedure (1966)

Holdsworth — History of English Law (Sweet and Maxwell London, 1966)

Articles

Goldestein & Katz — 'Abolish insanity defence' 72 YLJ (1963)

Saikwa, A.K. — 'An Approach to Penal Administration in East Africa' E.A.L.J. Vol. 2 (1966)

F O O T N O T E S

1 The law is administered on the principle that everyone is taken conclusively to know it, without proof that he does not know it. M'Naghten's case 10 CL & Fin 200 at 210.

2 This is due to the assumption that offenders like thieves steal because they cannot support themselves. It is thought that if they can earn their own living, they will stop stealing.

3 See A.K. Saikwa, An approach to Penal Administration in East Africa, (1966) 2 E.A.J. P25, at P28, where he says that those criminals who have been converted into christian faith are making a remarkable success in outside life after the expiration of their sentences.

4 This is defined as the "guilty mind". Not all offences require mens rea. Offences of strict liability and those of vicarious liability are exceptions.

5 This is the act that is prohibited by the law.

6 These are infancy, insanity, mistake of fact, intoxication, duress and coercion, self defence (or defence of property) and necessity. There is no settled law on the defence of necessity. The

English rule seems to be that the person must satisfy the court.

7 See Goldstein and Katz, Abolish insanity defence, (1963) 72 Y.L.J. 853 at Page 865, where the writers argue that the defence is not designed to define an exception to criminal liability but rather to define for sanction an exception from among those who would be free of liability.

8 See the Kenya Penal Code (cap 63 of the Laws of Kenya) section 3 where interpretation of the code is said to be in accordance with the principles obtaining in England and expressions used with the meaning attaching to them. See also, R V. Ross (1932) 14 K.L.R. 148, R.V. Muna s/o Mubaba (1939) 18 K.L.R. 141 and Jonathan Michael Nguyai v. Republic, Infra 62, where the law on insanity in Kenya was said to be the same with that in England. Similarly in R v. Magata (1957) E.A. 330, 331 the court said "section 12 must be read and construed together with the rules in M'Naughten case and decisions following that case".

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9 This law was applied by the 1897 East Africa Order in council. It stated that the Indian P.C. and C.P.C. were to apply to the East Africa Protectorate (The present day Kenya)

10 The law was received in 12th August, 1897.

11 Friedman, 'Cases and Materials on Criminal Law and Procedure', at Page 611, says that the first recorded acquital in English law occurred about 1,000 years ago.

12 (1843) 10 CL and Fin 200, 8E.R. 718 (H.L.)

13 Holdsworth, History of English Law, volume 3, 1966 at page 371.

14 The verdict was that the offender "committed the crime while mad."

15 See Berveley's case (1603), R V. Arnord (1724) 16 St Tr 765, R V. Ferrers (1760) 19St Tr 886, Hadsfield's Case (1800) 27 St Tr 1282 and Bellingham's case (1812)

16 R V. Arnord and R V. Ferrers ibid.

17 Supra 12.

18 Supra 11.

20 In 1843 there had been a recent history of physical attacks upon the British sovereign and members of its circle. Hadsfield had unsuccessfully attempted to assassinate George III in 1800. He successfully pleaded insanity. Bellingham in 1812 had killed the Chancellor of the exchequer. Two attempts had been made on Queen Victoria's life in 1842. In neither case was the perpetrator sentenced to death probably in view of suggestion of insanity. Also in 1842 there were severe riots by the British workmen protesting their inhuman conditions of life.
Under these conditions, Queen Victoria saw M'Naghten as an agent of a social revolution and she urged a very restricted rule in the interests of exemplary deterrence. The judges on the other hand could hardly ignore their humane feelings.

21 This is due to the heavy political pressure (mentioned above) and the limited psychiatry theory.

22 (1957) 1 Q.B. 397.

23 ibid.

24 (1916) Cr. App R. 21

25 ibid.

Supra 24

(1952) 2 Q.B. 826

ibid P. 832

This verdict was probably given because the crown was not satisfied with the position as stated in MNaghten rules and probably could not stand such people being set free.

The settlers regarded the Indian type of Criminal Law as adulterated English law.

East Africa Order-in-Council 1902. Article 15(2) stated that criminal law was to be exercised in conformity with the Indian Penal Code.

Both the Indian Penal Code and the Criminal Procedure Code were applied by the 1911 East Africa Order-in-Council, article 2(2).

Article 11.

See Ole Njogo & others v. A-G for East Africa Protectorate (1914) E.A.L.R. 70, Nyali Ltd V.A-G (1914) K.B. 1.

The term "Indian Criminal Law" may be misleading for the law was virtually English law.

36 This was in 1837

37 The Bill was passed in 1860

38 Offences like adultery and enticement which were known to native law were found in the code.

39 See debates on the Kenya Penal Code Bill Legco debates, 1929 at Page 448, where the then A-G stated the purpose of the Code as; "to substitute the existing criminal law of the colony which is the Indian Penal Code with an English terminology and English principles of Criminal law and jurisprudence."

40 Article 51 of the 1897 East Africa Order-in-Council empowered a native court to hear every criminal charge against a native and determine it in accordance with the native custom, Article 20 of the 1902 East Africa Order-in-Council required courts to be guided by native law where it was not repugnant to justice and morality, section 3 of the 1930 Native tribunals ordinance gave a native tribunal power to hear cases in which any native was accused of having committed an offence under native law. But this did not change the fact that the Penal Code was the Criminal law of the territory with native law

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41 This was on 1st June, 1966.

42 Cap 63, Laws of Kenya

43 Supra 8

44 Section 11. (P.C.)

45 Section 13(2)(b). (P.C.)

46 Section 13(3). (P.C.)

47 As a matter of fact, mostly insanity deriving from intoxication is of temporary nature and there is no point in detaining such a person indefinitely as section 166 of the Criminal Procedure Code requires.

48 For example, if the delusion is that a person is about to kill him, then section 17 of the Penal Code may come into operation. If the delusion brings about a mistake of fact, then section 10 of the Penal Code comes into operation.

49 Cap 75, Laws of Kenya.

50 Section 162(3). (C.P.C.)

51 Section 162(4). (C.P.C.)

52 Section 162(5). (C.P.C.)

53 Section 163. (C.P.C.).

54 Section 165. (C.P.C.)

55 See notes 4 & 5 Supra.

56 This is the only explanation of holding one guilty when he did not exercise his Free Will.

57 Section 166 (1) (b) (C.P.C.).

58 Section 166 (1) (c) (C.P.C.)

59 Section 166(2) (C.P.C.).

60 Section 166(3) (C.P.C.).

61 Section 166(5) (C.P.C.), gives him the power to order transfer of the person from any place in which he may be detained to either a mental hospital or a prison or to be transferred between these two institutions.

62 Nguyai V. Republic, Unreported, Court of Appeal for Eastern Africa, criminal Appeal no 75 of 1975, at Page 10.

52 Section 162(5). (C.P.C.)

53 Section 163. (C.P.C.).

54 Section 165. (C.P.C.)

55 See notes 4 & 5 Supra.

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62 Nguyai V. Republic, Unreported, Court of Appeal for Eastern Africa, criminal Appeal no 75 of 1975, at Page 10.

63 See also Suwatu V. R. Infra 88 where the court commented, "To relieve from criminal responsibility however, insanity must be such that either the accused did not know what he was doing or did not know that what he was doing was wrong" at Page 976.

64 Supra 23. High grade mental deficiency has been held to be a disease of the mind in a Ugandan case. (Duru v.R (1959) E.A. 407).

65 Supra 24.

66 ibid P 21.

67 (1939) 6 E.A.C.A. 133 (135)

68 (1956) 23 E.A.C.A. 622.

69 36 Cr. App R. 85.

70 At page 624

71 (1939) 6 E.A.C.A. 142.

72 In Tanganyika the position was clearly spelt out in Rex V. Gerevazi s/o Lutabigwa (1942) 9 E.A.C.A. 56 where the court said: "A person who under an insane delusion as to existing facts commits an offence in consequence thereof

on the assumption that he labours under such partial delusion only and is not in other respects insane must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."

73 (1956) 23 E.A.C.A. 622, (625).

74 See R V. Magata s/o Kachebakana (1957) E.A. 330 (Uganda), where the court was of the opinion that an African living far away in the bush may become so obsessed of the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as a disease of the mind.

75 In this case there was the medical evidence that the accused was depressed.

76 (1939) 6 E.A.C.A. 142.

77 See section 11, Kenya Witchcraft Act, Cap 67 which states: "Nothing in this Act shall affect the liability to the death penalty of any person who by use of witchcraft commits wilful murder."

78 See Athumani V. Republic (1967) E.A. 401. In this case the court was of the opinion that witches are not human beings but things. But, using the words "falsely pretending to be a witch" implies the existence of a genuine witch.

79 See Republic V. Mandi s/o Ngonda (1963) E.A. 153 (Tanganyika) at Page 154, the judge remarked: "the matters is not free from doubt, but it appears to me to be at least questionable whether, even if it be permissible for the prosecution to raise the issue of insanity in the course of a trial, it is proper for the case to be presented at the outset as one in which the only verdict asked for is that of 'guilty but insane'". Here the accused was prepared to plead guilty to a charge of manslaughter.

80 See circular to magistrates, no.2 of 1937, 17 K.L.R. 130.

81 The circular says that simply giving a natives name is useless. It requires fingerprints of all persons committed for trial on a charge of murder to be taken and sent together with any other particulars with regard to the identity of the person to be

sent to the superintendent of the hospital. It says that the information of the superintendent will be reliable. The trouble entered into in obtaining the information suggests its value.

See the much celebrated case of Woolmington V. D.P.P. (1935) A.C. 462.

(1932) 14 K.L.R. 148.

Supra, at Page 151.

(1951) 25 K.L.R. 164.

Ibid. Page 165.

(1937) 4 E.A.C.A. 34

(1959) E.A. 974.

Ibid. at Page 976.

Supra 62.

See notes 75 & 76 above.

Supra 62.

See circular to magistrates no, 2 of 1937, supra.

94 See Rex V. Kibiro s/o Kariuki, Supra

95 Supra, 88.

96 The circular to magistrates (supra, 75) directs that medical evidence should be enquired for. This shows that it is important.

97 Supra, 88.

98 Supra, 62, at Page 8.

99 See section 48, Evidence Act, Cap 80. Laws of Kenya.