

**THE ROLE OF THE ASSESSOR IN THE FRAMEWORK
OF JUDICIAL INTERPOLATION. THE KENYAN
EXPERIENCE.**

A dissertation submitted in partial
fulfilment of the requirements for the
Bachelor of Laws (LL.B.) Degree of the
University of Nairobi.

UNIVERSITY OF NAIROBI by
LIBRARY

MBUVI WA MWANGANGI

JULY, 1982

NAIROBI.

ACKNOWLEDGEMENTS

This modest study is dedicated to those who have always been in the forefront in the struggle for the justice.

I would like to thank in particular my supervisor Mr. E.M. Ndiritu of the Faculty of Law who by his invaluable comments criticism and consultation helped me clarify many ideas and the general structure of this study. Also thanks go to Mr. S.B.O. Gutto who drew my attention to the parallelism between the Assessor and jury.

I wish to acknowledge in particular the valuable assistance given to me by my Dad (John Mwangangi) the Registrars and Assessors whom I interviewed.

Finally I wish to acknowledge the help and most of all the patience of the two Secretaries, Rodah and R. KIUNA who typed this manuscript.

NB: Any shortcomings found in this study are mine and should not in any way be attributed to the aforementioned.

CONTENTS

1. INTRODUCTION AND SCOPE.
2. THE HISTORICAL EVOLUTION OF THE ASSESSOR SYSTEM IN KENYA.
3. THE CONCEPT OF THE ASSESSOR REVISED. AN ANALYTICAL COMPARISON BETWEEN THE ASSESSOR, THE JURY AND CUSTOMARY LAW ASSESSEMENT.
4. THE APPLICATION OF THE ASSESSOR SYSTEM AND ITS CHANGING ROLE.
5. CONCLUSIONS AND RECOMMEDATIONS.

INTRODUCTION AND SCOPE

Although the paper is limited to the role of the Assessor in the criminal trial, (1), a strenuous attempt will be made to discuss the role of the Assessor in civil cases. (2). Various arguments may be advanced to justify my exclusion of the civil part in the paper. But it goes without saying that in Kenya and notwithstanding the provisions in the civil procedure code, the Assessor has no 'business' in adjudicating civil matters. Secondly no study can be completed unless there is adequate data not only to justify its existence by also to evaluate its practical significance within a given superstructure. With respect, the Assessor has not featured prominently in civil matters : that it should be mentioned in obiter in this paper is understandable in the light of the above.

The statutory provisions that provide for trial with the aid of Assessors in Kenya confine the same to the High Court and not the subordinate courts. There are however provisions that require Assessors to sit to assist both the subordinate works and the High Court in civil matters. (3). As explained earlier these are basically discretionary and have very little weight. It is for this reason that I find it unnecessary to pour my scholarly attributes on a topic that is almost obsolete. In all British Colonial Africa the Assessor system was introduced as a substitute to the more vigorous jury system. Whether this system was introduced as a way of administering better justice or as means, a cloak to cheat the natives of Africa that justice will be examined later in this paper. Yet, one thing was clear that the Assessor system applied where a native was charged with a capital offence before a foreign judge.

On the same vein a white perpetrator of crime was tried by the jury. I would not hesitate to say that this discrimination was meant to achieve a definite end.

The Assessor system was largely retained after independence. The pivotal importance of the Assessor is amplified when one realizes that the system, though colonial oriented was retained. Of course it is one thing to say that the Assessor is an important institution in the context of administering justice and it is quite another to say that the Assessor has justified his existence. The importance of the Assessor in any society was enunciated by Lord Alkin in *DHALAMINI VS KING* where he said:-

.....the duty of an assessor is not simply to aid, 'it operates and is no doubt intended to operate as a safeguard to natives accused of a crime and to natives accused of crime and a guarantee to the native population that their own customs and habits were not understood'.

From the above quotation through Lord Alkin was no doubt referring to the natives in India, this is true in all other parts including Britain and its natives.

Earlier on I have intimated that the Assessor was retained after independence; its existence can be likened to Lord Denning's example of the oak tree grown in Africa and the inevitable danger of it withering in the absence of proper tending. (5) In Uganda for example there are statutory provisions for trials with the aid of "Assessors" (6) yet this rarely happens in practice. In Tanzania the law provides that Assessors may sit both in the High Court and at the Magistrates in any proceeding in which any rule of customary law is in issue or relevant (7).

In Kenya, I dare say that the position is no better. They are treated with little respect and the procedure in selecting Assessors is corrupt and the justice that accrues therefrom is dubious.(8)

In all the East African countries the topic of Assessors is dealt with scantily by the various codes, reference to English Law is therefore of little assistance, often unhelpful, it is of its worst confusing, for Assessors are of course unknown in English Criminal Courts. The few cases in which they feature (such as admiralty) are irrelevant because the code directs reference only to the criminal jurisdiction in England. Of course there are exceptions to this statement.(9) This is characteristic of the Common Law and its adaptation in Africa. It is clear that it has lost the distinctive features i.e. the significance of the Assessor System. The author's role in this paper is simply to describe the institution which has taken the place of the Assessor.

A recurrent theme in this paper is the importance of Mass participation in the administration of justice. It is however of interest to examine to what extent the present provisions governing the Assessors have succeeded in their purpose and how far they have failed to bring before the mind of the Court all the elements required for a proper appreciation of the legal and factual position. Mass participation entails the principle that a man is judged with, impartiality by those who belong to the same ethnic group: the somewhat tribe argument that the members of the accused tribe are clearly the proper persons to advise the court on the question of whether the conduct of such person conforms to the customary pattern is not far fetched. Further if it is submitted that selection of Assessor, by virtue may sometime work injustice in that the Assessors cannot determine with accuracy the stimulus - response of the prisoner, then it is equally true that the foreign judge or magistrate cannot authoritatively

advice what spontaneous effect should result from a given cause.

The problem hardly seem to arise in England, where the jury system, coupled with a more generally adopted standard, makes specific legislation of the kind we are considering unnecessary. The ordinary man of the United Kingdom seems to conform to a widespread pattern found not only on the clapham Minibus but also in the more sequestered places of the realm. No one has given the idea a serious consideration. The significance of the assessor is brushed with petty excuses, i.e. Kenya is not homogenous society and that the customary concept of fairness might fail ^{far} below the written law (10); while this might be true it should be realised that the Kenya Courts is to administer its own society: indeed it is paradoxical that the wishes of the society should fall short of the required standards of the law 0 at the same time is submitted that law express the wishes of the society. That we are a heterogenous society is undeniable but the the more reason why we should have the final word from those who are conversant with our normative standards of justice.

At the risk of making this paper somewhat proxy, I sincerely feel that the assessor should occupy a central role not only because whatever he says conforms more to the wishes of the community but also because it is more acceptable justice.

The ambivalence pervading the assessor system has survived the vigours of independence. For example the legislatures of the three East African countries has un consciously or perhaps intentionally left the actual role of an Assessor in Criminal trials undefined. This scantiness of the statutory provisions has left a large area of uncertainty which has been filled [not completely of course] by the rulings of the court over the years. (12)

The paper seeks to answer the following question : Firstly is the role played by the Assessors adequate. If not, should we abandon the whole system and replace it with the jury system. Secondly if we are to retain the Assessor system what role should they play in the Criminal trial and what reforms are necessary to facilitate their role. Should the system be confined to the High Court; or should it be extended to the Subordinate Courts.

The paper is divided into different chapters. In Chap. 2 I will trace the historical evolution of the Assessor system to its present form. Chapter three will touch on the fundamental principles underlying both the jury and the Assessor : the politics and methods of the system will be evaluated in this chapter.

Chapter 4 will basically center on the application of the system in Kenya and its inherent contradictions. The paper, in this chapter will take a wider dimension by examining ~~the~~ both ^{the} system during the colonial rule and in independent Kenya. By so doing the author will expose its inherent contradiction. Chap. 5 will constitute the suggested reforms and conclusions.

CHAPTER TWO

THE HISTORICAL EVOLUTION OF THE ASSESSOR SYSTEM IN KENYA

Towards the end of the 19th C., the European powers meeting at a conference in Berlin and Brussels divided the African continent into what they termed as the spheres of influence. The two conferences also passed General Acts which imposed obligation on the signatory powers to establish a system of justice in their African possessions: they had also stressed the importance of judicial institutions as a courtship influence.

Although the essence of this chapter is to analyse the historical evolution of the Assessor I should perhaps be allowed to state albeit in obiter the overall administration of justice in colonial Africa: Toward the end and even during the colonial era, the proud boast was frequently heard: all imperial Legations Britain had conferred upon her African possessions had the finest and the most articulate rule of Law. It was harped that the object at the very beginning [introducing the English civilization and justice] and at the end tallied. I have deliberately stated the above in order to lay down a premise for my argument: I shall disclose that whatever else the British introduced in Africa two things were clear:- discrimination in the administration of justice and rampant corruption, in the procedure of the Courts.

During the years 1887-1895 the IBEA company was charged with the duty of administering justice in what is now Kenyan Courts. The Company the Muslim Courts to continue at the court: the Kadhis were to be nominated by the Sultan, although a company judicial officer also exercised muslim jurisdiction. In 1890 a Counsulor Court was established by the company at Mombasa: this court was to exercise was to exercise jurisdiction in accordance with the

Zanzibar Order in Council 1884. It should perhaps be mentioned that at this time Zanzibar was a district of Bombay hence all appeals from the courts lay to the H.C. at Bombay in Zanzibar.(1)

In the interior the companys' agents were left a great latitude to determine what sorts of judicial powers they should exercise. In theory they were governed by the African order in Council of 1889.

Actually before the promulgation of that order they were not governed even in theory, by any law. Over and above the African order in Council they were also governed by any 'treaties' which they concluded with the chiefs. As per portal's report on a administration of the company in the interior it is doubtful whether the company's agents had any regard to their source of power or whether they had anything which resembled a court. At its best rough and ready justice was always available to those who under the company's agents. As time went by by however, it became apparent that the company was failing in its duties. In 1895 the British Government took over the administration of the territory from the company.

The British Government inherited the unsatisfactory and almost confused administration of the previous regime - [the company]. The Commissioner made it clear that the coastal part was to continue applying the Islamic Law. This was followed by a circular from the commissioner addressed to the administration offices in the interior stating that they should exercise their judicial power in accordance with the Indian Penal Code. Though unnoticed at the time was ultra-vires the commissioner. First and foremost the interior was governed by the African orders in Council of 1889, which require Consuls and judicial officers to apply the law of England. The commissioners administrative actions were confirmed, and amplified and given the force of the law by the East African order in council of 1897.(3) This ordinance established an embryo legal system based on tripartite division of subordinate courts native courts, muslim courts and those named by administrative officers and magistrates.

There was also a dual system of superior Courts, one styled her Majesty's court for East Africa from which appeals lay to her Britannic Majesty's Court at Zanzibar and the privy council; the other was styled the native court from which appeals lay to a High Court.

No significant changes took place between 1897 - 1902 as far as the courts were concerned. The early administrators and policy makers were concerned with administrative convenience and not anthropology in deciding what sort of native courts should these be, and what they observed appeared to be both inefficient and not susceptible to very much control : It was not surprising therefore that the commissioner who had no greater regard for indigenous institutions strove to change the whole system. There was for example a gradual extension of statutory courts at the expense of traditional institutions.

the initial stages for the evolution of the Assessor can
be traced to East African Order in Council 1902. This ordinance inter-alia. Provides that

"in all cases civil and criminal to which natives are parties every court

- a) Shall be guided by a native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any orders in council or ordinance or any regulation or rule made under any order council or ordinance.
- b) And shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay" (4)

The wording of this ordinance left room for the Africans to participate in the administration of justice. The fact that the courts were to be guided by native law meant that few competent Africans would be consulted to give their opinion on the matters in question. Yet whether or not the proviso was utilized adequately is debatable. There is no evidence that the authorities positively encouraged local Africans to participate in the adjudication of justice. In their half-hearted attempts to have Africans to participate in the administration justice the Headman's ordinance was passed in 1902 [no.22]. The ordinance among other things empowered the Commissioner to appoint village Headmen, who were to be responsible for maintaining law and order in the villages. An important feature in this system was that the Headmen were not traditional chiefs, they were bound by the administration and naturally were bound to serve the interest of the administration.

The operation of these new appointees along-side the traditional chiefs caused a pathetic and sulky acquiescence or even hostility among that group. It is probable that during this period of [1902-1907] the seeds of future difficulties were sown. The new system created was put on a firmer base by the courts ordinance 1907 (No. 13). Although this ordinance was replaced by the court ordinance of 1931 the basic framework of colonial subordinate established by this ordinance remained. Indeed as the colonial ^{regime consolidated itself} of justice applying in India were slowly being adopted in Kenya it was always assumed that what was good for one company was good for the other hence the Assessor or system.

Nevertheless the history of the trial with the aid of Assessors can be traced to British India (5). The earliest Legislation which authorized European functionaries presiding in courts of Sessions to constitute two or more respectable natives to assist them as Assessors was Reg. VI of 1832 which applied to Bengal only. By the provisions of Act VII of 1832 the system was extended to the presidency of Madras. Later the system was extended to other parts of British Colonial Africa.

Suffice it to mention that the Assessor system was introduced as in British Colonial Africa a^s substitute for the more vigorous jury system. Following the failure of the jury system in the colonies of British West Africa it was found necessary to introduce a system befitting the Africans. The system had worked in British India and it was meticulously argued that there was no reason why the system could not work among the 'natives' of Africa.

Indeed various arguments have been advanced to justify the introduction of the Assessor system; further equally strong reasons have come to show cause why the jury system could not be let to continue. For example Alexander Gwyn said :

"The English jury system was clearly found to be unsuitable where different races were intimately involved. In England, this system works well fellow^{MEN} country can and do adjudicate justly and fearlessly upon their fellow countrymen and it is probable that the jury system would be an equal success when applied to a homogenous African race but already a Mandingo charged with slave trading would be convicted before a freetown jury whilst a freetown native on the same facts would be acquitted"(6)

There are several things which arise from the above quotation : (1) there is the dangerous assumption that in a homogenous society the jury is not susceptible to corruption (11) there arises the most disturbing question as whether the above quotation is tenable in the light of the fact that the England is no longer homogenous :.

Yet at the time when the colonisers were delirious to achieve their end such reasoning was defensible; the vital point is, whether during the

colonial regime or not an institution be it jury or assessor largely depends on a peoples development of public sence of duty : hence the contention that the jury was unsuited to Africans is not tenable. If it took Britain over hundred years to have their jury system well established, why did they consider it a failure after just a couple of years; what system would start in a new environment without setbacks. Lord Devlin has admitted that in (England the jurist are often corrupt and arrive at decisions which leave the judge highly mesnerised (7)

The truth is that the 19th C. was characterised by a Lavish praise for the jury trials; hence the British intention to extent this civilized motion of administering justice in her colonies. The esteem with which the jury system was held is amplified by the words of the French writer as quoted by Forsyth in this book 'the history of the trial by jury, (8) he said,:

"The jury serves imbue the minds of the Citizen of a country with a par of the qualites and characters of a judge; and this is the best mode i preparing them for freedom. It spreads among all classes a respect for the decision of the law. It teaches them the practice of equitabl dealing. Each man in judging his neighbour thinking that he may be so judged in turn if clothes every citizen with a kind of magisterial office, if makes all feel thay they Take part in goverment; it forces man to occupy themselves with something else other than their own affairs, and this combates that individual selfishness which is, as were, it were, the rust of the community" (9)

Following this appraisal of the jury system the system was introduced in most ot the British Colonies. Several reasons led to eventual shift from the application of the jury to that of the Assessor, owing the eventual decline of the British in her acquisition of colonies, her past influence over these states was of less weight, secondly the British realized the jury system could not be effectively extended to their newly acquitted colonies without endangering their own interests there. It is not debatable that the intial and even in the whole of the British history in Africa and India there was a rampant and almost a delirious attempt to conquer and subdue.

Hence it was not strange that there was often an African or European accused of murdering one another. Thus if a black man were to appear before his fellow natives accused of murdering a white man the chances were that he would be acquitted before a jury, visa-~~v~~ it is evident that all those white men accused of murdering a native escaped the death penalty however brutal and ignominious the act might have been (10) small wonder therefore that it was not until 1960 that a European convicted of murder of an African was sentenced to death. [of course perhaps what writers like Prof. ALLOV and KNOX-MANLEY have failed to deliberately to appreciate is that at this time there were conflicting class interest; that the colonial settlers introduced their own laws to govern their own interests to the exclusion of everyone else is less doubtful when one realizes how desrespectively the local customs and laws were disregarded by the colonial regime. These practices were given the force of the law (12) in that any customs or laws which were repugnant to justice and morality were to be invalid. Undoubtedly one ventures with great difference and with grater respect to suggest that the provisions of this order could be and indeed was manipulated to suit certain purposes. At the risk of making this chapter rather proxy I venture to say that the Assessor system was introduced not because it was suitable to the Africans any more than it was suitable to the British at home because it was an easier instilution to manipulate; the opinion of the Assessors are only of persuasive value, they are not binding on the judge; and as if that was not suspicious enough before the eyes of the Africans the colonial rigime insisted that Assessors would apply to the Africans while the jury would apply to whitemen accused of criminal offences. This system has euphemestically been termed as the dual system of justice; that there was justice for the Africans and justice for the whites is surely suspect in the eyes of the reasonable man. With respect I dare suggest that justice doesn't know colour and this ambivalence in the application of the law was meant to achieve a certain end.

The implications of the dual system have been discribed by Ghai & Mauslan (13) in the following; I quote him verbatim;

13

"Whatever the validity of the reasons given for the use of the Assessors, the assumptions behind them in Kenya were always clearly erroneous, and the contrasts between the two systems of trial as they operated in practice reveals the essentially discriminatory nature of jury trial. The views and opinions of African and Asian Assessors had to be stated and could then be, and often were, dismissed by the trial judge as worthless through bias or prejudice, or as irrelevant for the purposes of ameliorating the vogours of the alien criminal laws : But the views of the European jury did not have to be stated, while their conclusions founded on these views and opinion, often as much on the evidence and the law, had to be accepted by the judge."

Anyhow whatever criticisms we may level against the colonial regime one thing is clear : that the jury and the assessor systems were for the Europeans and the Africans respectively. I have analysed the intial confusion encountered in the introduction of the Assessor system : I will now attempt a sketch of the regulations that gave the Assessor system the required impetus.

The 1887 orders in council which set up the first courts (14), - adopted among other acts, the Indian criminal procedure code 1882 except for chapter XXXIII, the chapter laying down special provisions for trial of Europeans and Americans. Under Section 269 of the code the administrator could however order a trial by jury after all the court was deemed to be a court of Sessions. The 1897 Native Courts regulations sec. 8 provided for the trial with the aid of Assessors.

It read

"The High Court may invite Cooperation of native Assessors with a consulative voice only for the purposes of jury information where required respecting native law and custom".

This provision clearly indicates that appointment to sit and hear of a case where were purely discretionary. In the words of Lord Alkin there was the danger of local custom being misunderstood and hence the ends of justice not being realized

In 1898 the Indian code of 1882 was replaced by the code of India of 1889. Perhaps I should mention here that according the Sec. II (d) of the

Section 11 (d) of the East African order in Council 1897, it was enacted that any act of the governor general of India in Council amending or substituting any law shall apply to Kenya. In Zanzibar this proviso did not affect trial by jury: the Commissioner retained the discretion to order trial by the jury. In 1902 trial with the aid of Assessors was extended to the Subordinate Courts. The ordinance provided that

"The collector may sit in any case where he thinks fit or where it may be prescribed by rules of Court, appoint one or more native assessors to sit with him, but such assessors shall have a consultative voice only". (16)

In regard to trials by jury, the problems remained largely the same until the criminal procedure ordinance was passed in 1906. This act empowered that all Europeans and Americans committed for trial were to be tried by a panel of jurists of English and American origin. The discriminatory nature of the Colonial regime is laid bare when one realises that at this time and whereas the trial by jury was Mandatory trials on the African side continued to be discretionary. Further the Commissioner still retained power under section 269 to order trial by jury even for non - Europeans accused of certain offences. However in 1907 following the inauguration of the Courts ordinance this power was taken away. The ordinance provided inter alia:-

"except where **otherwise** expressly provided by law any person committed for trial to the High Court shall be tried by a judge of the High Court sitting with not less than 3 Assessors".

This was indeed a revolution within the existing legal system: the word shall according to the then interpretation of statutes and General provisions Act meant 'Mandatory'.

The foundations of the Assessor system were being laid down. Though this was a positive development towards the establishment of a vital institution in the society its operation was the more important. As I have already indicated before these there were peacemeal reforms to act as a respectable legal cloak that justice was being done. Of what authoritative value was the Assessor if his opinion was not binding on the judge?

Initially and prior to 1908 the Indian Criminal procedure code Sec. (306) provided that the judge could give a judgement in accordance with the verdict of a bare Majority of the jurors. This was yet another departure from the normal procedure adopted in jury trials. In England the Verdict of the jury must be unanimous, if incase the jurors can't agree then the normal procedure is that that body is dissolved and a new body appointed to try the same case. A recurrent feature in the whole of stretch of the Colonial Legal regime is that strict application of the law was always avoided whenever it could serve their purpose. Justice was glaringly being sacrificed for expediency.

In 1908 this daring departure was exposed to savage criticism, its rationale was questioned both in Indian Parliament and in Britain itself. The criticisms bore fruit: In the same year the Sections of the Indian Code allowing a majority verdict were repealed and replaced by provisions requiring a unanimous verdict from the jury in all cases (18). The importance of unanimous verdict was echoed by Lord Devlin, he said;

"The criminal verdict is based on the absence of reasonable doubt: if there is a dissenting minority of a third or a quarter that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict" (19)

10

The granting of a right to jury trial to one race only was an exception in the history of the jury system in the territories that were under the British rule: Kenya was therefore an exception. In Zanzibar a similar situation was not reached until 1917, while in Southern Rhodesia Africans tried on indictment continued to be tried by a jury, albeit a European jury until 1927. Several factors are held to have been the cause of this ambivalence, it was among other things submitted that the jury system is not fitted to function, even with adaptation in a heterogeneous and largely uneducated Community and Secondly, the demands of the settlers that it is an Englishman's birth right in a British territory to be tried by a jury of his peers. Whereas this argument is not far from the truth the fact that the colonial regime insisted that the whites were to be tried by the jury while their African counterparts were tried with the aid of Assessors made it suspicious, in fact these suspicions have been proved true by history. No European was convicted of murder till 1959 though there were so many cases of murder, some with overwhelming evidence. As it has turned out such acts were a fertile source for racial discrimination.

In 1914 the Indian Criminal Procedure Code of 1898 and its amending ordinances and procedure ordinances were repealed by the Kenya Criminal Procedure Ordinance (20). The power of the Governor to order trial by jury for any offence or class of offences was restored (21) although no use was made of it.

Sec. 351 provided that all Europeans committed to the High Court were to be tried by a jury the size of which was to be fixed by the Governor at a figure not less than five. Sec. 262 provided that only Europeans qualified to serve as ~~gov~~jurors. This proviso is excusable as long as the said ~~gov~~jurors were only made to try English cases. Both jurors and Assessors are layman, they are not conversant with protracted though and intellectual bargaining; their verdict is therefore an expression of the common man; ie. the societies determination of the guilty or innocence of the accused. I hesitate to say that no fears were expressed regarding the administration of Justice in a foreign land by a foreign Judge yet so such fear was expressed in England regarding the trial by jury. Prior to the introduction of the jury it was argued that a judge could not be trusted to dispense acceptable justice because of his learning. Further his learning might elevate him to heights beyond those of the Society from whence the crime arose. A jury was deemed necessary to safeguard the wishes of the society. Was it not strange then that no such arguments were effectively advanced during the introduction of the Assessor system, What guarantee did the Africans have that the white man would handle their ~~hor~~ms of Justice without impunity? and lastly what standards did the colonizers use to determine that they were competent to adjudicate on a society that was economically, politically and social/so diverse from theirs? these are some of the questions which I shall naniply try to grapple with in chapter 3.

The 1914 ordinance was replaced by the criminal procedure ordinance of 1930 which survived till independence without any modifications. Section 222 of the 1930 ordinance provided that all Europeans committed for trial in the Supreme court shall be tried by a jury of Europeans, the number of which shall be twelve where the charges is the murder, treason, rape and five where the charges is of another type. Sec. 223 provided that where a European was charged with a non - European the procedure shall be the same as if the European were tried separately. The discrimination herein was not confined to more of trial if permeated the entire thread of the colonial legal system for example it was wider in the jurisdiction of the Magistrate courts, these courts varied according to the race which was being tried; the Europeans were treated with undesirable leniency (22) Section 316 of the Criminal procedure code of 1930 provided that to be eligible for a junior one had to be a European and between the ages twenty one and Sixty the property qualification which applied in Britain and many of her colonies was not adopted in Kenya. A conspicuous absentee on the provisions of this code was that there was nothing to indicate that those ^{who} were entitled to trial by jury were allowed to elect to be tried with the aid of Assessors instead. The Separation - trial by jury for the Europeans and trial with Assessors for Africans and Asians was rigidly maintained. In all other British colonies the accused were as of right entitled to elect whether to be tried with the aid of Assessors or by the jury.

B 13 19

No changes took place in the overall application of either the Assessor system or the jury system. It was not until 1950's that the colonial authorities began to address themselves to the question of elimination of the Segregated legal system which in varying degrees was a characteristic feature of the British colonial administration in East and Central Africa. Intergration of the courts became official policy, but this was concerned more with the creation of a unified system of appeals to the local High or supreme court, and the elimination of racial distinctions in the Jurisdiction and the procedure of the courts (23) Even in the former two matters integration proceeded very slowly in Kenya and the beginning of 1960's saw no change in the basic racial divisions of the system and very few changed in the other aspects of the segregated system.

In 1963 when Kenya attained her independence the dual system was abolished. All people tried before the High court were to be tried with the aid of Assessor irrespective of race. Section 262 of the priminal procedure code cap 75 1968 provides that "all trials before the High court shall be with the aid of Assessors".

CONCLUSION:

The dramatic change during the 1950's and continuing in the sixties of the colonial powers must not be solely attributed to political pressure brought upon to bear on the colonial regime. The inherent desire that the (colonial regime) were about to leave and were very anxious to secure their stay here also played a significant role: the fact that judges who had served under colonial rule were willing and lavishly anxious to serve

under the new rules in which all people would be tried with the aid of Assessors was not an ordinary act. The judge knew that it would take time before they could be removed from office; at any rate, the constitution granted their tenure of office, hence they hoped to protect the interest of their fellow brothers who had unscrupulously sabotaged the paths of justice and who were likely to appear before the independent government to show cause why they should not be punished.

The fairest summing up that can be made in the colonial regime in its application of the dual system is that the judges and administrators were victims of their own propaganda. They idealized the pictures of their own work which failed to take into account the inherent contradictions in it. Indeed they were prepared to admit for instance they relied / and it was expected anyway / on British conceptions of justice to alter the composition, power, and function of traditional institutions, until they were no longer recognizable as such, and had become wholly a part of the colonial system, yet they purported to rely on African conceptions of justice, or what they conceived them to be.

CHAPTER THREE

THE CONCEPT OF THE ASSESSOR REVISED: AN ANALYTICAL
COMPARISON BETWEEN THE ASSESSOR, THE JURY AND
CUSTOMARY LAW ASSESSMENT

That an assessor in the eyes of the law is the epitome of the reasonable man, the man in the street or to take from a well known judgment a phrase that is archaic 'the man in the 'clapham omnibus' is only a restatement of a renowned colonialist A.E.W. PARK who sanctily stated that an assessor is,

"a person usually an expert in the subject matter under consideration who sits with the judge and assists him from his special knowledge."

This definition has been criticised elsewhere but the critics stand corrected. The definition above doesn't literally mean that a person who serves as an assessor should be an expert / and I use the word loosely, all it means, and I am sure Park would have agreed with me, is that the person who serves as an assessor should stand in such position as to know not through severe intellectual exercise, or by protracted thought but by mere adaptation the matter in question. It is for this reason that assessors (normally) are chosen from the ordinary people. The purpose of the assessor and its parallel, the jury is to invoke mass participation in the administration of justice. Again here, I use the word justice loosely for the justice referred to here is bourgeoisie justice. In any capital state and Kenya is, the bourgeoisie have acquired and appropriated the means of control, the continued

dependence of the government on the banks and capitalist associations, the dependence of every individual work on his employer is an indication that they /the bourgeoisie/ are part and parcel of the ruling class. In real life, the oppressed class have to dance to the whims of the ruling bourgeoisie class. The words of Oliver Goldsmith are not far fetched, he said:-

"Laws grind the poor and rich men rule the law."

The real basis of state structure is characterised by innumerable relationships of mutual dependence i.e. the dependence of the retailer on the wholeseller, the peasant and the land owner, the ruined debtor and his creditor, the proletariat and the capitalist. Featuring prominently in the background of course is the notion of exploitation. One class decides what is fair for the rest and that constitutes justice. On this Pashukanis E.B. has the following to say:-

"The measure of some peoples freedom is solely dependent on the measure of their domination by others. The Acron is determined not by the possibility of co-existence but by the domination of some by others." 3

The above illustrates the justice we are concerned with in this discussion.

I have analysed the evolution of the assessor system in my chapter two. Further I indicated that assessors are unknown in English Criminal Law and the few civil cases in which they may appear in England /such as admiralty/ are irrelevant because the code directs reference to the criminal jurisdiction in England. Thus though the concept of assessing is victorian oriented it was introduced

to serve the British colonies.

During the victorian times, it was widely accepted that the benefits of the English system should be extended whenever feasible to the widely expanding British Empire. The system was favoured in both criminal and civil litigation. However, the nature it adopted was to be determined by the socio-economic and cultural values that existed within a given area. For example while the concept of "mass participation" in the administration of justice was introduced in the form of the jury in the American colonies their counter-parts in India were to be content with the less rigorous system, the assessor.⁴ There were several reasons for this altitude, but the most important and the one which has been ignored by authors on this subject is the fact that at this time the British Government assumed the burden of civilizing benighted of this earth. Thus a system as existed in Britain the jury whose opinion is the verdict would unreservedly serve as an obstacle to their long set goal civilizing the natives. For example in African customary law, a man caught committing adultery with another man's wife can with impunity be executed whereas in English law that will notwithstanding. The defence of provocation constitute manslaughter. Afraid of this obstacle, they appropriated to themselves the upper hand in arriving at the guilty or innocence of the accused. The relationship between the presiding judge and the assessor is that, the opinion of the assessor is not binding on the judge. The function of the assessor

is therefore to assess and advice.

On the other hand, the distinction between the assessor and the jury is obvious. The function of the jury is to assess and give a verdict. In the words of M.D.E. TOCQUEVILLE.

"The jury system serves to imbue the minds of the citizen of a country with part of and the qualities of a judge, and this is the best mode of preparing them for freedom it spreads amongst all classes a respect of the decisions of the law. It teaches the practice of equitable dealing. Each man in judging his neighbour thinks he may be so judged in his turn ..., it clothes every citizen with a kind of magisterial power, it makes all feel they have duties to fulfil towards society and that they take part in its government. It forces men to occupy themselves with something else other than their own affairs and thus combats that individual selfishness, which is as it were the rust of the community." 5

From the above analysis the end result of the two system is the same; that a person may be judged best by his own people. A crime as defined elsewhere⁶ is an offence against society hence since the bulk of the society is composed of people of average intelligence, it is only fair that they /Society/ should be allowed to have the upper hand in determining the guilty or the innocence of the accused. A judge educated to clarity of thought and accustomed to protracted debates can only bring complications. In the words of Sir Thomas More, the role of lawyers is confused the truth, he said:-

"They have no lawyers among them for they consider them as people whose profession is to disguise matters." 7

The absence of this realization especially in Kenya is strange in the light that we have always drawn our wisdom from England where the system of the jury has ~~felongly~~ been guarded. The words of Lord Atkin have have either been forgotten or deliberately ignored; on the function of an assessor he had the following to say:-

"The proviso of a judge sitting with an assessor is not simply to aid, ... It operates and is no doubt intended to operate as a safe guard to natives accused of crime and a guarantee to the nature population that their own customs and habits are not misunderstood." 8

I take the wise words to mean and no doubt are intended to mean that the wishes of the society are best understood by taking seriously the opinion of the assessor. Any law therefore which states to the contrary is not only abstract but also out-dated.

The jury on the other hand is the HOCUS-POCUS of the English administration of justice. Their opinion is not only the verdict, but the system has been described as highly desirable and "only inmates of lunatic assylum would vote for the abolition of the jury". To Quote TRAVER'S HUMPREYS 9. Initially the jury was a body of witnesses but later it changed into a body of persons who had to determine the facts on the evidence placed before them. Gradually there a judicial body invested with judicial attributes, it enjoys judicial immunity. They are protected for anything

Steve
5/12

said or done in the discharge of their duties. Any language which is seemingly abusive directed to jury will be treated as contempt of the court.¹⁰

In short the English legal system has humbly followed the footsteps of two great masters of the common law, the Earl of Halsbury and the late Sir Henry Pollock both of whom repeatedly extolled the value of the jury system in criminal cases. They both publicly and privately declared "the jury is always right." On the other hand in countries where the assessor system is followed it, Kenya, Uganda, and Tanzania have stubbornly stuck to colonial dogma that the opinion of the assessors is not binding on the judge, which in effect has shut out the mass participation in the administration of justice. There are piecemeal reforms especially in Tanzania i.e. assessors are allowed in the Magistrates Courts,¹¹ but the peculiar provision that assessors are there to advise is featuring prominently in that country. In Uganda whereas there are statutory provisions for trial with the aid of assessors they are hardly used in trials.¹²

At this point I should perhaps state that the present legislation was adopted wholesale from the colonial legislation. The Kenyan 'independent' legislature has failed to consider the socio-economic factors under which the laws governing the assessor were passed. The purposes for which the assessor system was introduced are long dead; hence its continued existence in the present form

is not only undesirable but highly useless. The argument that the assessor system as it stands is there to protect the accused is no longer tenable in the light of changing conditions. An English judge sitting to determine the guilty or innocence of an African and fortified with the confidence that he has the final word is a negation of the concept of fair play and civic order; his upbringing and Education surely raises too much doubt as to whether he may be confidently relied on to execute the wishes of the society.

The importance of the assessor in the discharge of acceptable and not adapted justice cannot be overstretched. That the ends of the justice shall only be conveniently and appropriately arrived at if the assessors are taken seriously is only a restatement of Section 262 of the Criminal Procedure Code; It states

"All trials before the High Court shall be with the aid of assessors."

The words 'shall' here makes it mandatory for the High Court to sit with the aid of assessors. A high court sitting without assessors is a nullity. In the case of REX V YOWASI¹³ it was held that a court sitting without assessors would be leaping the jurisdiction to try such cases. The above words were approved and quoted verbatim in the Ugandan case of R V Abdaka Mali¹⁴ where the East African Court of Appeal reiterated their earlier statement that where a court sits without assessors where it should have done so, the trial is a

nulity: Section 269 of the Ugandan criminal procedure code is identical to section 262 CP of Kenya.

The above which seemingly is a positive move towards the right direction i.e. the central role of the assessor in the province of justice is shattered by the provisions of section 322 (2) CPC which provides inter alia that the judge in giving his verdict shall not be bound to conform to the opinion of the assessors. This in effect means that a judge can ignore the opinion of the assessors and proceed on a *frolie* of his own. Sir Henley Consey a prominent colonial judge in Ghana has argued that the ends of justice are adequately catered in that though a judge is not bound to accept the opinions of the assessors, he 'has the duty to sum up to them'¹⁵. With the greatest respect these sentiments betray the intentions of the learned judge. It is no stretch of imagination that since the official language of the court is English only a few will qualify to serve as assessors.

Besides even those who can understand English are faced with an extra problem: They are confronted with what has rightly been termed as ... "The lawyers science of our law, that codeless myriad of precedent, that wilderness of single instance," Thus the legal jargon of the lawyers leaves them more mesmerised than informed. What justice is expected from such man; at any rate why should anyone expect a rational assessment from a set of factors which have^{not} been

understood? I humbly submit that the present system caters for 'spectators' and not assessors as conceived by Lord Atkin.^{161D}

In this chapter, I have already examined the relationship between the jury and the assessor. Further I have also indicated at what levels they interact: Besides I intimated that the assessor system was introduced in British colonial Africa as a supplement the jury system operating in England. I will now examine the relationship if any, between the English way of assessment and the African customary way.

II THE IMPORTED ASSESSOR AS COMPARED TO CUSTOMARY ASSESSMENT

Perhaps the reader will pardon me for attempting a worthless comparison, I term it worthless because customary law has been suppressed beyond recognition by the Judicature Act in 1967 which among other things provides that customary law is subject to written law and that it should conform to justice and morality. However, even at the risk of making the chapter boring I will proceed with the comparison. This rating will reveal that similar or perhaps better system did exist for assessing disputes whenever and wherever they arose in society under customary law. Thus but for their selfish motives the colonial regime have developed these.

Whereas the distinction between a crime and civil case in English law is clearly set out¹⁶ they greatly overlap under customary law. Indeed all disputes under customary law were settled by compensation. There were however serious instances like witchcraft where the offender was literally killed by mob stoning; In any case these were extreme¹⁷ uses and they rarely occurred. On the other hand, the role of the assessor in the English model both in civil and criminal cases is to assess and advice the presiding judge or magistrate on the liability, guilty or innocence of the matter in question. This is done by the use of their special knowledge of the habits, customs and modes of thought and language. To say the last they are peculiarly qualified to judge the probability of the story told by the witness or the offender and may defect in his demeanour what may escape the presiding judge or magistrate. In Tanzania assessor sit in the court of instance unlike in Kenya in cases where a custom is in issue.¹⁸

Among the Kamba and Kikuyu of Kenya, a person who causes injury to another under customary law, may be required to surrender a goat or a cow, or such a number as the Wazees' deem appropriate depending on the seriousness of the injury. Usually the injury or his father selects his won wazee and the offender nominates his own. These wazees should be men of charismatic disposition and of undoubted integrity. The interesting aspect of it is that like the jury they are bound to agree so that the question of disagreement rarely arises.

The decision thereof is final and the aggrieved party is made to swear that he shall not claim anything more than what has been agreed upon; if on the other hand the offender denies categorically that he ~~he~~ did not commit the said offence then he was made to swear a special oath /KITHITU/ seven times after which he would be 'discharged'. This oath entails such grave repercussions that a guilty party would not dare swear it. I need not add that this was a more acceptable way of setting disputes than imposing an alien judge aided by a clique of assessors hardly conversant with the language used in the proceedings.

In what may strictly be termed as a civil dispute under English law i.e. letting cattle to wander and destroy another man's crops, the role of the assessors /Wazees/ was the same as stated above. There were however variations in the procedure. The aggrieved party would choose his ~~own~~ men. Using sticks, the combined group would go to the shamba which had been invaded by the animals and count each and every plant so destroyed. The number of plants the owner of the cattle would pay. As in cases of injury the decision of the wazees would be final and the party aggrieved would be made to swear that he accepts the findings of the wazee.

The sticks, were carefully bound together and kept by a chosen elder to serve as evidence incase the aggrieved party changed his mind afterwards. In

summary all disputes were settled in a like manner, and I dare add that it was a respectable way of settling grievances in a society that was communal before the arrival of the colonisers.

On the ^{other} hand the relationship between a judge and assessors is hardly an equal contest. For example while assessors are under the control of the presiding judge, the only duty he owes to the assessors is to sum up the evidence for the prosecution and the defence. Indeed a judge may fail to sum up of course with impunity. This proposition is founded on the words of the west African judge, KINGDOM C.J. who was heard to say:

"In some cases omission to direct the assessors on some point doesn't necessitate quashing of a conviction, more especially when the decision rests with the judge alone and he has clearly arrived at his finding independently of the assessors views." 19

Yet not withstanding the absurdity pervading the assessor system it has survived even the storm of independence. The Kenyan Legislature for reasons best known to themselves have not bothered to define the role of an assessor in a criminal case. The antipathy expressed in this chapter against the assessor is generated by the fact that 'the very conception of the assessor might be though absurd. Three men with no prior conduct of the courts are chosen at random to listen to evident /sometimes of highly technical nature/ and to decide upon matters affecting the reputation of liberty of those charged with criminal offences.

While the afore mentioned is the position in the three East African countries Kenya Uganda and Tanzania both at pre- and post independence era, Sierra Leone took a radical departure from this system By 1958 Section 48 of the then Jurors and assessors ordinance²⁰ was amended to provide that trials with the aid of assessors would be binding on the judge if the opinion of the three assessors was unanimous. This, as I have noted was a notable departure from the advisory role of the assessors which they are supposed to play. It will be noticed that the role played by assessors in this case was very similar to that of the jury. Whatever may be the reasons for retaining the system in East Africa with its rudimentary attachments, one thing is clear, that our judiciary is still dominated by alien judges [Non-Africans]. This according to me the role of the assessors during the present day may be viewed as a revisitation of the system at colonial times.

In conclusion it is apparent that both the colonial and independent governments have been guided, in their attitude towards the assessor system by the notorious principle "Give with one hand and take away with the other."²¹ Whereas they purport to invoke 'mass participation' in the administration of justice through the opinions of the assessors; The concept of mass participation is rendered a sham by the provision that the opinion of the assessors is not binding on the judge. Further I have also intimated that the importance of

of the assessor system has been under stated and watered down by the British Imperialism.²² I further examined the assessor as compared to the jury and the customary way of assessing injuries and disputes. I went on to show that the colonial regime could have developed the then existing ways of assessing, after all they were more convenient and acceptable than the English pattern. In comparing the assessor and the jury, it was evident that the jury system does truly involve mass participation in the administration, justice in society; and that the scathing attacks on the jury system²³ has successfully been reputed by equally immutable defence.²⁴

In the next chapter I will examine the application of the assessor system both at colonial and independent times; the methods and politics underlying the system will be analysed critically.

CHAPTER FOUR

UNIVERSITY OF NAIROBI
LIBRARYTHE APPLICATION OF THE ASSESSOR SYSTEM AND ITS
CHANGING ROLE.

The assessor system in its embryonic stage sought to operate as a safeguard to the natives of the countries where it applied that their own customs and habits were not misunderstood.¹ However, over the years this role has been modified to suit the changing conditions. Notable among these changes is the fact that customary law has been relegated to the periphery by the wholesale importation of the civil and criminal law of England into the law of Kenya.²

Perhaps it should be noted at this point that Legislation in respect of Assessors has always been scanty, at its worst it has been contradictory and embarrassment to those who view the system as the means of involving mass participation in the administration of justice. In its initial stages it was to say the least a flawless myriad of 'corpus', no one bothered to define what an Assessor was, nor did anyone think it was vital to define his role. It is not surprising therefore that over the years the courts have had to fill the gaps left by this aphasard legislation. Indeed it is correct to say that there is no other branch of

criminal law that has been invaded by judicial legislation than the Assessor.³

(A) Selection of Assessors

The law is that all persons between the ages 21 and 60 are eligible for the Assessor service.⁴ Unlike the jury system the eligibility for Assessorship does not provide for any literacy or property qualifications.⁵ However, the fact that the language of the court is English and that Assessors are supposed to listen and give their opinions from the proceedings naturally means that an Assessor is better placed if he is able to understand the English Language.⁶

The once cherished idea that Assessors should come from the same place as the accused has long been abandoned and for good reasons of course. Given that customary law has been hatched to almost nothing by the Judicature Act sec. 3(2) and that it has been replaced by the English law, the need to have the Assessor coming from the permanent domicile of the accused can be dispensed with. Any one endowed with a reasonable intelligence and possessed of the prerequisites may serve as an Assessor. But the Chief Justice has discretionary power to make rules pertaining to areas within which a person may be summoned to serve as an Assessor; he also has

inherent power to regulate the selection and summoning of Assessors.⁷

That Assessors should be common people is amply demonstrated by provision which exclude certain people from serving as Assessor. These people, the law assumes, are not common. The exceptions include:- the president and the cabinet of ministers, the speaker and the members of the national assembly, the clerk of the national assembly, and the persons appointed to act as official reporters to the national assembly. Also excluded are person actively discharging the duties of priests or ministers of their respective religions, physicians, Surgeons and apothecaries in active practice, legal practitioners in active practice, officers and others in the armed forces, members of the police force, persons exempted from personal appearance in court under the provision of civil procedure Act or any rules made there under, persons disabled by mental or bodily infirmity, and other persons exempted by the attorney general from liability to serve as Assessors.⁸ Thus except for the property qualification the aforementioned bears close semblance to the jury systems in UK.

The law requires that the Registrar of the High Court at least seven days before the day which may from time to time be fixed for holding a session of

the High Court to send a letter to a Magistrate holding a subordinate court of the First class, having jurisdiction in the province or district in which such sessions are to be held requesting him to summon as many persons as seem possible to the judge, who is to preside at the sessions to be needed for trials with the aid of Assessors at the said sessions.⁹ It further stipulates that the must select only three out of those who have been summoned to serve at the trial.¹⁰ Every sommons to an Assessor shall be in writing and requit his attendance as an Assessor at a time and place to be therein specified.¹¹ The High Court may for reasonable cause excuse any Assessor from attendance at any particular session and may, if it thinks fit, at the conclusion of any trial, direct that the Assessors who have served at such trial shall not be summoned to serve again as Assessors for a period of twelve months or for such longer period as the court may deem appropriate.¹²

The above words indicate that there is no limitation for the period in which a person may serve as an Assessor. It is possible that one may continually serve as an Assessor for as long as the court wishes. The risks of such provision cannot be over emphasized. By continuing serving as an Assessor the said person ceases to be a common man. By adaptation and out of long stay in the court he becomes showered

with virtues similar to those of the judge. More serious however is the fact that he becomes success susceptible to corruption than ruining the basis of assessing the notion of 'fair play'.

Any person summoned to attend as an Assessor who without lawful excuse fails to attend as required by the summons or who having attended; departs without having obtained permission of the High Court, so fails to attend after adjournment of the court is liable to a fine of not more than four hundred shillings.¹³

Although the Assessors initially offered voluntary aid thus without asking for any payment; with the gradual encroachment of the monetary economy it has become vital to pay them for the time spent in court. Assessors are paid what in the words of the Registrar is a reasonable sum from the court's pocket expenses. However, a recent interview with several Assessors revealed to the contrary. They alleged, and truly so, that the payment is meagre, not worthy wasting time^{for} and so on,¹⁴ further they contented that once they have served even that small amount is hard to be realised. The delays are caused by petty excuses. But this general laxity on the part of the administration is accentuated by the mistaken feeling that Assessors are not as important as the judge.

Actually, not all people summoned to serve as Assessors qualify to serve. There may be preliminary objection on the ground that they know the facts or that they are related to the accused. Indeed there is no express provision in the criminal procedure code requiring that an accused be given the opportunity of objecting to any of the Assessors. But as was stated in NDIRANGU v. R.¹⁵ objection to a particular Assessor on good grounds is clearly sound practice. The Appellant herein was convinced of murder on the evidence of eye-witness. Throughout the trial the Appellant chose to remain mute and took no part whatsoever in his trial. On appeal when called upon, he said that wife of out the Assessors at his trial the sister of the deceased's wife and he complained that this had prejudiced him. The court concerned on grounds to object to an Assessor.¹⁶

In practice a yearly list is made which shows only the names and addresses of the Assessors. When a session of the court is to begin which requires the aid of Assessors, and they should always be there,¹⁷ people from this list are summoned to appear in court for Assessor service. The practice nowadays is that it doesn't matter what race the Assessor belongs to, his tribe, religion, station in life are irrelevant. There is an exception to this rule;

in Kenya past experience indicated that Assessors chosen for trial were of that same ethnic group as the accused. This rule has been relegated to the periphery except in cases of provocation, where the Assessor should come from the same ethnic group as the accused.¹⁸ Further there is no statutory provision that they [Assessors] should know how to read but practice has shown that they should be conversant with the English language. The court also has the discretion to discharge any Assessor who has been objected to, or any Assessor who admits that he is related to the accused, or knows the facts or is in any way connected to the accused. In a recent case¹⁹ of murder before the Hon. Justice Nyarangi it transpired that one of the Assessors in the case had been approached by the parents of the Accused about the case. In the course of ascertaining whether any of the Assessors knew the facts the said Assessors admitted, and the judge had^{to} discharge him.

Admittedly the law on this subject is not adequate. *There* should be penal provision for these Assessors who knowing the facts refuse to disclose so during ~~or~~ prior to the trial.

(B) THE ASSESSOR IN THE PROVINCE OF CRIMINAL TRIALS

The actual nature and extent of the function of the Assessor in criminal trials in Kenya is not defined by the statute. As indicated before the court have had, over the years to fill in the gap left by the legislation. As it were the courts have never failed on their part. In that case of GUSAMBIZI WESONGA²⁰ the court correctly observed that in the exercise of any functions of Assessors the court is always to apply the test of what is fair to an accused person, keeping in mind what is fair to an accused person and considering the principles of natural justice. In other the court further reviewed that the purpose of a judge sitting with an assessor is to consult with them in order to ascertain matters of local custom. The Assessors have to give them opinions, if required to do so, by the judges as to what weight should be attached to the evidence of a particular witness.

As indicated earlier on all trials at the High Court should stand with three Assessors. The absence of one Assessor will not invalidate the trial but the absence of two or more will.²¹ For example, in the case of Assah Sigh²², the appellant was tried for attempted arson and convicted by a judge sitting with 3 Assessors. During the trial one of the Assessors was absent for one day (during which only evidence

of a formal nature was taken), he then resumed his place and was present during the remainder of the trial and gave his opinions with the other Assessors. The court of appeal for Eastern Africa unanimously held that the trial was a nullity because one of the Assessors having been absent during one day's hearing had been allowed to resume and given an opinion. Further the fact that the Assessors instead of giving individual opinions at the close of the summing up, were allowed to retire and consult, was a further ground sufficient to render the trial a nullity. Also if an Assessor has been discharged after the commencement of the trial on grounds of personal interest then the other two assessors should not continue with the case, a fresh trial should be ordered.²³

The Kenya Criminal Procedure Code Section 294 makes reference only to the "physical absence (or perhaps to the physical condition of the Assessor and cannot be extended to cases where the Assessor though physically present and able to act is disqualified from acting as an assessor by reason of special circumstances such as personal interest"

Though the role of the Assessor has been described as 'aiding the court' I would describe it otherwise; their duty strictly speaking is to spectate the flawless myriad termed the law gostled and kicked about by the legal practitioners. Their duty is therefore relegated to chosing between guilty or not guilty depending on

depending on his emotional feeling at the time. Lametubly they can only ask the witnesses specific question with the permission of the court.²⁴ At the end of a hearing and within the ambit of section 322 criminal procedure code (Kenya), a judge may sum up the evidence for the prosecution and for the defence whereupon he should require each of the Assessors to state his own opinion orally, the owrd may make it discretionary on the sätting judge to sum up the evidence, yet it was heard in Washington s/o Odindo v R²⁵ that It is very sound practice which is almost invariably followed by the judges except in very simplest cases.

If the authority of Andrea Kulinga v R²⁶ is anything to go by them the rule is that, if a judge choses to sum up to the Assessors he must sum up both the facts and the law. The court further observed:-

"The opinion of the Assessor can be of great value and assistance to a tiral judge but if only they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the Assessors opinions is correspondingly reduced."

An obvious contradittion which appears in the law here is that failure to sum up is fatal to the conviction. In my opinion, this rule ignores the very essence of the assessor. If indeed they don't understand and supposed duty of aiding is correspondingly thwarted.

For although the Assessors might be conversant with the English language they are likely to be lost in the legal jargon of the lawyers and thereby miss the basis of the trial.

As was envidiated in R.V. Lute s/o Luzala, a judge should make a note of the prints put by him in his summing up to the Assessors and the evidence which he has stated in support or otherwise to each point. This was developed during the earlier periods of the colonial system in order to ensure that Assessors based their opinions on specific evidence.

But in the case in case of R. V. Jeck Jezelani²⁸ has established that an omission to direct Assessors as to the benefit of the doubt is not fatal to the conviction because the decision rests entirely on the judge and he must be presumed to know the relevant law - a dangerous presumption that it can be. Conversely a failure to direct the Assessors as to any aspect of the defence has always been held fatal to a conviction.²⁹

This proposition can be explained on two justification: One, in failing to direct the Assessors fully in the trial the judge will prevent them from giving assistance which the legislature intended that they should, two, the omission to direct the Assessors is strong evidence of an omission to direct himself

on the point in question. The case of Wafula v R³⁰ had further observed that a positive misdirection to the Assessors will lead to a conviction being quashed.

The statutory provision is that Assessors are to give their opinions orally and individually. In practice such opinions should be given in open court. Since the credibility of the opinion depends on the reasons behind it. It has been the practice that Assessors should give reasons for their opinions. As was elicited in R V. Paulo Lweuda³¹ the reasons for the opinion becomes more useful if the case goes on appeal.

Although sec. 322(1) of the Kenya Procedure Code provides that the judge shall record each opinion of an Assessor the Court of Appeal in Francis Juma Muzungu V R³² held that the irregularity of a judge in failing to take the opinion of each Assessor separately is curable unless it has occasioned a failure of justice.

Briefly stated the role can be summarised as follows: to determine the guilty or innocence of the accused. They are peculiarly suited in the light of special circumstances such, customs, habits, modes of thought etc. However, the legal status of the Assessor has been challenged. Prof. Allot *Still*

subjected to colonial hangover has wrongfully argued ^{THE ASSESSORS} are analogous to expert witnesses and therefore their opinions should not be admissible per se³³

He tentatively suggest that like all expert witnesses, they should be bound by the provision of the Evidence Act. There are of course circumstances in which they may be regarded as expert witnesses i.e. when talking of matters relating to custom; they cannot however, be regarded so in other cases. Indeed the reasoning in R. V. Mutwiwa³⁴ that an opinion of one Assessor on a custom without colloboration is not admissible is erroneous. A better view is to be found in R V. Ndenbera³⁵ when an Assessor is talking on custom he is an expert he should be cross-examined otherwise the accused may be denied the opportunity to reassert his innocence. At any rate there is the possibility of the judge laying much weight on their opinions. In all fairness therefore they should be cross-examined in such cases.

However, when they give their opinions in general as to the guilty or innocence of the accused they cannot be regarded as expert witnesses. Their opinions should therefore not be contested.

A judge has inherent power to hear additional evidence after the Assessors have given their

opinions. This again is a rule of practice developed by the courts to cater for the failures of the legislation. If this happens then the opinions of the Assessors have to be taken again, following which the judge may deliver his ruling³⁶. In so doing the judge is not bound by the opinions of the Assessors.³⁷ To mitigate this rather absurd (if it was mitigation at all) the East African Court of Appeal as early as 1954 in the case of BALAND SINGH V R³⁸ stated that it is desirable that a judge should record his reasons where he disagrees with the unanimous opinion of the Assessors, particularly where the Assessors have given good grounds for their opinions. The court further stated that such unanimous opinion of the Assessors of not guilty should be taken to be the evidence of the existence of doubt which doubt ought to benefit the accused. But only if this disagreement between the judges and the Assessors has occasioned a failure of justice.

Perhaps it should be noted at this point that the requirement that Assessors should sit throughout the trial does not apply in "a trial within a trial". The rule is that in "a trial within a trial" Assessors must be absent. The rationale behind this is that

Assessors are 'common' men and should only hear that which is strictly necessary complicated arguments can only baffle them and hence the danger of missing the important points. When the question is whether particular evidence is admissible or not the Assessors must take leave: but they ^{are} entitled to know the income of the dispute.³⁹ Further if the statement is admissible counsel for the accused is entitled to cross-examine on it. The above proposition was ~~quoted~~ ^{found} in the case of Kinyori v Kapunduti.⁴⁰ However, though it is a useful practice to read out to the Assessors the evidence taken in a 'trial within a trial', failure to do so does not necessarily fatal a conviction unless such irregularity has occasioned a failure of justice. The above words were quoted and approved in the case of Bampamiyiki v Buhile.⁴¹ the court further stated that the purpose of the Assessors is defeated if some of the evidence is withheld from them.

Finally the theoretical proposition enunciated in this chapter do remit reflect the practice in the courts. Very often the judges disregard the rules laid down and proceed on the basis that after ^{all} the opinion of the Assessors is not binding on them. Besides the procedure of selecting Assessors is almost haphazard. There is a gradual inclination that the concept of English type of justice

is well entrenched here and all people are conversant with it. For example, in a recent case, Paul Nakwale Ekai V. R⁴² two of the Assessors were of the same ethnic group as the accused. The third was an American. Indeed, this was not only ridiculous but a wastage of public funds. The said white man is not only alien to the modes of thought, cushion et of African but he grew up under the jury system. The presiding judge justice H. Muli found the accused guilty of murdering one infamous Joy Adamson the two Turkana Assessors had found him not guilty while the American found him guilty. The judge would have a well quoted thacker in Ogenda v. Omungi⁴³ where the learned judge in this rape case stated as hereunder:-

"Each of the Assessors returns an opinion of not guilty and I suspect that their opinions are based not upon evidence they have heard but upon inter-tribal prejudice ... I deplore their opinions which are either a result of stupidity or pervassiveness..."

The above sentiments cannot be reviewed as utterances of a biased judge. The words are part and parcel of a given economic superstructure where the class accepts to live under the control and influence of another class. It is this type of structure that we inherited and it is the same that we jelously seek to maintain This system insists that all African concepts are

medieval and backward looking and throned gradually be replaced by the higher English Loruns. We have slowly been assimilated to the province of neo-colonialism and the dictum from now on is black skin and white masks.⁴⁴

The prejudices expressed above are not confused to Kenya alone. In fact they are very common in all countries, which have been engulfed by the octopus arms of imperialism. A good illustration is the Ugandan case of Mutwalumbi Bukuli and Others Busoga.⁴⁵ commenting on the opinion of the Assessors the learned judge without fear or prejudice said:

"The reason is not that they did not see the facts but that both assessors are not worthy the name of Assessors as they think in religion than in justice."

Therefore the contradictions underlying the Assessor system is only a reflection inherent in our entire legal system, peacemeal reforms can only suffice for a limited period. The only lasting solution is to overhaul the whole system and replace it with a system that negates exploitation and imperialism.

In this paper I have indicated the the Assessor System is belearguard by contradictions and scepticism as its efficacy. The flaws of the Assessor originated and were cemented during the colonial regime - a regime that was based on legal segregation. The colonial regime in enacting that the role of the Assessor was to ensure that Local Customs were not misunderstood overlooked one factor. i.e. that this position was rendered obsolete by the proviso that their opinions would not be binding on the judge.

However this proposition should be analysed within a given superstructure. Whereas the regime intended that Africans should be left to lead their own way of life. The regime failed to appreciate the fact that they were charged with the duty of spreading the English notions of justice and civil order wherever feasible to the natives of the colony. These two could not almost invariably be compatible. The colonial masters brandishing the 'repugancy clause' slowly replaced the customs of the natives with the abstract notions of English justice and equity. In any case anything that stood on the way to obscure or even ^{obscure had to be} moved whatever the consequences. The system as it was then was perhaps better then it is today. By then the courts were permitted to apply customary law in the courts so that could reluctantly be said that the Assessor appeared to have a role to play.

The position of the law in our independence times is even more precarious : one thing customary has been relegated to the periphery and ~~that~~ Assessors in court nowadays are not there to guard customs but rather notions of English Law -which they might not have knowledge of. In interviewing some of the gentlemen who have served as Assessors, I noted with concern that most of them do not exactly understand why they are summoned to court. In fact some felt that the duty gives them the opportunity to learn some laws in the court: some felt it is an honour reserved for just a few and those who serve should feel privileged. I also discovered that some of those Assessors have served more than five times. with respect I submit that such a person is no longer the epitome of a reasonable man, there is not only the danger of becoming a professional in the process but they become susciptible to corruption since people know they are likely to serve in several sessions.

The failure of the Assessor to appreciate his usefulness in trial is due perhaps to little education the traveller Winwood Reade(1) has the ff following to say on this issue:-

"Such defects are not due to the Mental Constitution of the native but due to the force of circumstances and want of Education!"

I wholly concur with the above and venture to add that the Government should realize that we are no longer administering customary law in our courts- hence all people who serve as assessors should be educated to a certain extent. I was mesmerised to realize that one of the Assessors I interviewed was so handicapped in his expression of the English language that I was forced to speak in my mother tongue: fortunately for him (not me) I happened to come from the same ethnic group as he does:

Further I have shown that other than being little attention by the Legislature the Assessor are usually treated with little respect (2). Their pay is not only little but it hard to come by: Little wonder therefore that most of them care least what happens in the court.

My recommendations are brief. Since it is clear that we have gone too far with adopted Law it would indeed be absurd to revert back to Medieval customary Law. However the whole system should be scraped and be replace with the Jury system. There is no doubt that the Assessor system as it is today serves to imbue the minds of the people that Assessors serve a useful purpose. Of course the jury has its short comings but at least it is a better evil than the Assessors system.

Secondly civil cases should be put at par with criminal cases so that the jury should sit in both civil and Criminal cases. The Tanzanian example of Assessors [in our case it will be the jury] sitting at the lower courts is worth emulating because it is in these courts where most of the cases are determined. Perhaps I should point out that in India where the Assessor system originated it has been enacted that Assessors are no longer necessary. There is equally greater need to do away with the system in Kenya.

FOOT NOTES:

- 1). THE AFRICAN SKETCH BOOK VOL II LONDON 1893.
- 2)i) MUTWALUMBI AND OTHERS V BUSOGA 1964 EA(713).
ii) OGENDA V OMUNGI 1941 19 KLR 25.

REFERENCE :

Chapter

1

1. CRIMINAL PROCEDURE CODE ^{ACT} AAPTIS SEC. 62.
2. CAP 21 [civil procedure code]. SEC 87
- 3.. CAP 21 [civil procedure Code]
4. 1942 AC 583 .
5. NYALI BRIDGE LTD V A.G. 1956 EA
6. MAGISTRATES COURTS ACT SEC. [UGANDA].
7. TANZANIA MAGISTRATES COURTS ACT 1963 SEC. 8
8. ?
9. R.V. SENTAMO [1951] ULR [281]
10. J.H. JEARSY, TRIAL BY JURY AND
WITH THE AID OF ASSESSORS.
1961 J.A.L. p36
11. THE THREE COUNTRIES [KENYA, UGANDA, TANZANIA] HAVE NOT
SPECIFICALLY ^{defined} THE RULE OF THE ASSESSOR IN CRIMINAL
TRIALS.
12. CASE LAW: statement that have been adopted are treated
as law.

Foot Notes.

1. MUNGEAM, OP CT. pp55 [Hamilton] introduction to [1897-1905]
1 "AIR IV.
2. OLIVER AND MATHEW [History of East Africa. vol. 1 p. 416-17.
3.
3. SRO 1897 no. 52
4. East Afr. order in Council 1902 No.31.
5. As stated by Anyanga J in King Emperor V Tirumal Reddi
(1901) IIR 24 MADR. 523.
6. As quoted by Knox-Mawer in jury system in British Colonial Africa
1958 2 JAL p. 262.
7. HAMLYN Lectures 8th series.
8. M. de Tocquéville, De la Democratic en Amerique.
9. Ibil as Qouted by Knox-Mawer -
"the trial by jury in British Colonial
Africa 1958 2 J.A.L. pp. 160
10. N. Leys Chenya (London, Horgath Press) 1924
chp. 7and Ross [Kenya from within] p178, 434].
11. Poole V.R. 1960 EA 62 [EACE] p. 644] JCP
12. E.A. Order in council 1902 no. 31.
13. 'Public Law & Political change in Kenya.
14. SRO No. 575 of 1897.
15. DHALAMINI
'SWAZLAND HC PROCLAMATION 1938.
16. The E.A. Native amendment ordinance
No. 30 of 1902 : Sec. 6.
17. No. 13 1907 32
18. Criminal procedure ordinance No. 16 of (1908)
Sec. 2.
19. Trial by jury (Hamlyn Lectures)1956
20. Cap. 7 in the 1926 Revision of the Laws ordinance
21. Sec. 223 (1)
22. JPC 1930 Sec 218 - 220 and 226.
23. Ghai & MACAUSLAN. 9(171).

CHAPTER THREE

1. A.E.W. Park in his treatise 'Sources of Nigerian Law.'
p. (8a).
2. Fundamental principle underlying the assessor system
AFR, FKM C.5 Chap. 3.
3. Law and Marxism 'A General Theory by Evgeny B Pashukanis.
4. The Function of Assessors in British Colonial Africa.
/An article/ 1957 Modern Review p (244).
5. As quoted by Forsyth in his 'history of trial by jury,
he was quoting with freedom the words of french writer
M DE Tocqueville from his book 'De la Democratie'
En Amerique.
6. Smith and Hogan on Criminal Law.
7. Law and Lawyers in their social setting.
8. His Lordship was commenting on the Dhalamini Case, 1942.
AC 583 and the parallel statute 'The Swaziland High Court
Proclamation, 1938.'
9. An article entitled 'Do we need the jury Criminal Law
Review, 1956.
10. The juries Act Section 10.
11. The Tanzania Magistrate Courts Act 1963 cap. 537,
Sections 8, 23(4).
12. H. F. Morris and J.S. Read 'Uganda the Development of
Its Laws and Constitution, pages (267 - 270).
13. Reported in 1939 EACA (6) 126.
14. Reported in 1921 3 Uganda Law Reports p (51).
15. The Argument was part of his submission in RENKIEVR
West Africa Court of Appeal /14/ 1954, 501.
IBD words of Lords Atkin in Dhalamine case.

CHAPTER 3 CONT.

16. A crime under English Law is an offence against society. See 'The notion of mens rea is vital in crimes. In civil case Negligent Acts will will often give 'use' to a civil suit. Whereas the aggrieved party may unilaterally withdraw in case in civil disputes, he cannot do so in criminal cases. Perhaps the state may withdraw a case but not the aggrieved party.
17. A book by Prof. Mutungi of Faculty of Law, University of Nairobi, entitled "The Legal Aspects of Witchcraft in East Africa."
18. In Kenya Assessors are confined in the HC whether a custom is in issue or not. Section 262 criminal procedure code /Kenya/. In Tanzania assessors sit even at the lower courts Tanzania cap 537 Section 8.
19. The Case of R V BIC is reported in 1945 West African Court of Appeal p. (46).
20. The position before 1958 was the same as in East Africa Today. Assessors and Jurors were later merged.
21. 'A Law and Marxism by Eugeny B Pashukanis in the chapter 'Law and the State'.
- 22.
23. For example oppenheimer was quoted in R V Brimali 1945 II W.A.C.A. 49 by Harragni to have said the following
"We commonly strive to assemble 12 persons collosally ignorant of all practical matters,

CHAPTER 3 cont.

file their vacans heads with law which they are incompetent to analyse or unable to remember, permit parties and lawyers to bewilder them with their meaningless sophistry, then look them up until the most obstinate of their number coerce - these others unto submission or drive them into open revolt."

24. Blackstone the famous common law scholar on the defensive had the following to say:

"... ever has been, and I trust ever will be, looked upon as the glory of English law
....the liberties of England cannot but subsist so long as this palladium remains sacred and violate."

BIBLIOGRAPH

CHAPTER FOUR

1. Lord Atkin - Dhalamini v King, 1942 A.C. 538.
2. The Penal Code
The Criminal Procedure Code Cap. 75 [Kenya]
The Law of Contract Cap. 23 [Kenya].
3. The judges have greatly been guided by the rules governing the jury system.
4. Cap. 75 Law of Kenya Section 269.
5. Under the Jury, One should own some property.
6. If they can't understand the English Language, their role is reduced to that one of a spectator.
7. Cap. 75, Laws of Kenya Section 265 (2).
8. Cap. 75, Laws of Kenya Section 266.
9. Cap. 75 , Laws of Kenya Section 269.
10. Cap. 75, Laws of Kenya, Section 263.
11. Cap. 75, Laws of Kenya, Section 270.
12. Cap. 75, Laws of Kenya, Section 271.
13. Cap. 75, Laws of Kenya, Section 273.
14. Assessor's Interviewd included Mr. G.G.W. Nthenge.
City Market, Muindi Mbingu, NBI.
Mr. Peter Mwanja, Wamunyu Commercial Store,
Biashara Street NBI.

CHAPTER FOUR: BIBLIOGRAPHY.

15. 1959, E.A. 875.
16. Per Forbes UP East African Court of Appeal.
17. Cap.,75, Laws of Kenya, Section 262.
18. R v Wilkin (June 1964) per Ausley,
C.J. unreported.
19. Daily Nation.
20. 1948 E.A.C.A. 65.
21. Section 294 CPC Cap. 75 (Kenya).
22. 1937 E.A.C.A. 4, 41.
23. Laurenti Busolo s/o Makumbi.
24. 1954 21 E.A.C.A. 392.
26. 1958 E.A. 684.
27. 1934, IE.A.C.A. (106).
28. 1947 11 E.A.C.A. 70.
29. Wafula v Wanimira 1957 E.A. 498.
30. 1957 E.A. 498.
31. 10 E.A.C.A. [1941], p. 63.
32. 1958 E.A. 813.
33. Prof. Allet Essays in African Law.
34. 1935 2 E.A.C.A 66.
35. 1947 14 E.A.C.A. 85
36. Mulamba Mageni v R 1964 E.A.(518).

CHAPTER FOUR CONT.

37. Cap. 75 (Kenya) Section 322 (2).
38. 1954 E.A.C.A. 209.
39. 1938, 5 E.A.C.A. 154 [Mathenge v Mariemo].
40. 1956 E.A.C.A. (23) 480.
41. 1948 E.A.C.A. 398.
42. (Rim Appeal No. 115 of 1981).
43. 1941 19 K.LF 25.
44. Fanon.
45. 1964 E.A. (713).